



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

~~PROPERTY~~ ~~LAR~~



HARVARD LAW SCHOOL
LIBRARY

•

National Reporter System.—State Series.

THE
NORTHEASTERN REPORTER,
VOLUME 72,

CONTAINING ALL THE CURRENT DECISIONS OF THE

SUPREME COURTS OF MASSACHUSETTS, OHIO, ILLINOIS, INDIANA,
APPELLATE COURT OF INDIANA, AND THE COURT
OF APPEALS OF NEW YORK

PERMANENT EDITION.

DECEMBER 2, 1904—MARCH 8, 1905.

WITH TABLE OF NORTHEASTERN CASES IN WHICH REHEARINGS HAVE BEEN DENIED.

KF
135
.N6
N62

ST. PAUL:
WEST PUBLISHING CO.
1905.

COPYRIGHT, 1905,
BY
WEST PUBLISHING COMPANY.

NORTHEASTERN REPORTER, VOLUME 72

JUDGES

OF THE

COURTS REPORTED DURING THE PERIOD COVERED BY THIS VOLUME.

ILLINOIS—Supreme Court.

JAMES B. RICKS, CHIEF JUSTICE.

JUSTICES.

**JAMES H. CARTWRIGHT.
CARROLL C. BOGGS.
JACOB W. WILKIN.**

**BENJAMIN D. MAGRUDER.
GUY C. SCOTT.
JOHN P. HAND.**

INDIANA—Supreme Court.¹

JOHN V. HADLEY, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

**LEANDER J. MONKS.
JOHN H. GILLETT.**

**JAMES H. JORDAN.
OSCAR H. MONTGOMERY.**

INDIANA—Appellate Court.¹

DANIEL W. COMSTOCK, CHIEF JUDGE.

ASSOCIATE JUDGES.

**ULRIC Z. WILEY.
FRANK S. ROBY.**

**WOODFIN D. ROBINSON.
DAVID A. MYERS.
JAMES B. BLACK.**

Division No. 1.¹

WOODFIN D. ROBINSON, CHIEF JUDGE.

ASSOCIATE JUDGES.

DAVID A. MYERS.

JAMES B. BLACK.

Division No. 2.¹

DANIEL W. COMSTOCK, PRESIDING JUDGE.

ASSOCIATE JUDGES.

ULRIC Z. WILEY.

FRANK S. ROBY.

MASSACHUSETTS—Supreme Judicial Court.

MARCUS P. KNOWLTON, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

**JAMES M. MORTON.
JOHN LATHROP.
JAMES M. BARKER.**

**JOHN WILKES HAMMOND.
WILLIAM CALEB LORING.
HENRY K. BRALEY.**

¹ Beginning January Term, 1905.

NEW YORK—Court of Appeals.

ALTON B. PARKER, CHIEF JUDGE.²
 EDGAR M. CULLEN, CHIEF JUDGE.³

ASSOCIATE JUDGES.

JOHN C. GRAY.	CELORA E. MARTIN. ⁴
DENIS O'BRIEN.	IRVING G. VANN.
EDWARD T. BARTLETT.	EDGAR M. CULLEN. ³
ALBERT HAIGHT.	WILLIAM E. WERNER.

OHIO—Supreme Court.

WILLIAM T. SPEAR, CHIEF JUSTICE.

JUDGES.

WILLIAM Z. DAVIS.	JOHN A. SHAUCK.
JAMES L. PRICE.	WILLIAM B. CREW.
AUGUSTUS N. SUMMERS.	

² Resigned August 5, 1904.

³ Became Chief Judge November 8, 1904.

⁴ Term expired December 31, 1904.

CASES REPORTED.

	Page		Page
Abbott v. Inman (Ind. App.).....	284	Baltimore & O. R. Co. v. Stewart (Ohio)...	1154
Acme Fertilizer Co. v. State (Ind. App.)...	1087	Baltimore & O. R. Co., Doyle v. (Ohio)...	1157
Adams v. Board of Com'rs of Whitley County (Ind. Sup.).....	1029	Baltimore & O. S. W. R. Co. v. Quillen (Ind. App.).....	661
Adams v. Dollinger (Ohio).....	1154	Bank v. Akron St. R. Co. (Ohio).....	1154
Ætna Life Ins. Co. v. Hanner (Ohio).....	1154	Bank of Piqua, Robertson v. (Ohio).....	1164
Ætna Life Ins. Co., Appel v. (N. Y.).....	1139	Barber v. Allen (Ill.).....	33
Ætna Life Ins. Co., Roberts v. (Ill.).....	363	Barber, Hutson Coal Co. v. (Ohio).....	1160
Ætna Life Ins. Co. of Hartford, Haugh- ton v. (Ind. App.).....	652	Barnes v. Shelburne Falls Sav. Bank (Mass.).....	85
Akron St. R. Co., Bank v. (Ohio).....	1154	Barrett v. Simons (Ohio).....	1154
Albert, Westfall v. (Ill.).....	4	Barricklow v. Stewart (Ind. Sup.).....	128
Aldrich v. Bay State Const. Co. (Mass.)	53	Barron v. Boston (Mass.).....	951
Alexander v. Kearsley (Ohio).....	1164	Barry v. Port Jervis (N. Y.).....	1139
Allen, Barber v. (Ill.).....	33	Bartelme, Town of Cicero v. (Ill.).....	437
Allen, Mutual Life Ins. Co. of New York v. (Ill.).....	200	Bartholomew v. Lowell (Ind. Sup.).....	1030
Allison Ditch Dist. No. 2 of Lawrence County, Pinkstaff v. (Ill.).....	715	Bartles & Co., Woodrow v. (Ohio).....	1167
Allison Ditch Dist. No. 2 of Lawrence County, Wathen v. (Ill.).....	781	Bartzen, Village of Huron v. (Ohio).....	1166
Alsten, Fisher v. (Mass.).....	78	Bates v. Boston Elevated R. Co. (Mass.)...	1017
American Electrical Works v. New Eng- land Electric R. Const. Co. (Mass.).....	64	Bates, Cole v. (Mass.).....	333
American Service Union, Spear v. (N. Y.).....	1151	Bay State Const. Co., Aldrich v. (Mass.)...	53
American Telephone & Telegraph Co., Dunbar v. (Ill.).....	904	Beach, First Nat. Bank v. (Ind. App.)...	287
American Thread Co., Gregory v. (Mass.)	962	Beall, Dingman v. (Ill.).....	729
American Washboard Co., Novak v. (Ohio).....	1163	Beals, Galvin v. (Mass.).....	969
American Writing Paper Co., Thompson v. (Mass.).....	843	Beasey v. High (Ind. App.).....	181
Anderson v. Indianapolis Drop Forging Co. (Ind. App.).....	277	Beck, Commonwealth v. (Mass.).....	357
Anderson, Hamlet of Arlington Heights v. (Ohio).....	1158	Beck, Shickle-Harrison & Howard Iron Co. v. (Ill.).....	423
Anderton Fruit Co. v. Thacker Fruit Co. (Ohio).....	1154	Beckwith v. New York, C. & St. L. R. Co. (N. Y.).....	1139
Andis, Indianapolis & G. Rapid Transit Co. v. (Ind. App.).....	145	Beebe, Crossin v. (Mass.).....	65
Andrews v. Kingsbury (Ill.).....	11	Beehler, People v. (N. Y.).....	1146
Appel v. Ætna Life Ins. Co. (N. Y.).....	1139	Bell, Citizens' Electric R., etc., Co. v. (Ohio).....	1155
Arbaugh v. Shockney (Ind. App.).....	668	Bender, Board of School Com'rs of City of Indianapolis v. (Ind. App.).....	154
Aschoff v. Evansville (Ind. App.).....	279	Bennett v. Roys (Ill.).....	380
Ashley, King v. (N. Y.).....	106	Bennett, Cleveland & M. R. Co. v. (Ohio)...	1156
Astoria Heights Land Co. v. New York (N. Y.).....	1139	Bente v. Metropolitan St. R. Co. (N. Y.)...	1139
Atlas Tack Co., Cunningham v. (Mass.)	325	Berberich, State v. (Ohio).....	1164
Attorney General, McQuستن v. (Mass.)	965	Bertholet v. J. W. Bishop Co. (Mass.)...	342
Atwater, Jones v. (Ohio).....	1160	Bevitt v. Diehl (Ohio).....	1154
Augsbury v. Shurtliff (N. Y.).....	927	Biddison v. Luchs (Ohio).....	1154
Austin, Coppock v. (Ind. App.).....	657	Big Vein Coal Co. v. Williams (Ohio).....	1154
Austin, Welch v. (Mass.).....	972	Billings, Wabash R. Co. v. (Ill.).....	2
Austin State Bank, Morrison v. (Ill.)...	1109	Bird Transfer Co. v. Morrow (Ind. App.)...	189
Axtell, Kessler v. (Ohio).....	1160	Bishop Co., Bertholet v. (Mass.).....	342
Ayer, Indiana Baptist Pub. Co. v. (Ind. App.).....	151	Black v. Boston Elevated R. Co. (Mass.)...	970
Ayers, City of Chicago v. (Ill.).....	32	Blair-Baker Horse Co. v. First Nat. Bank (Ind. Sup.).....	1027
Bach v. Goff (Ohio).....	1154	Blakesley v. Shafer (Ohio).....	1154
Bacharach, De Montague v. (Mass.).....	938	Blanchard v. Holyoke St. R. Co. (Mass.)...	94
Backus, In re (N. Y.).....	1139	Blanchard, Scaplen v. (Mass.).....	346
Bailey, Scherer v. (Ind. App.).....	472	Blickley, Milner & Co. v. (Ohio).....	1162
Baker v. Fall River (Mass.).....	338	Blinc, Board of Com'rs of Harrison County v. (Ind. App.).....	1034
Baker, Knoll v. (Ind. App.).....	480	Block v. Worcester (Mass.).....	77
Baldwin, Eureka Fire, etc., Ins. Co. v. (Ohio).....	1157	Board of Com'rs of Decatur County, Dav- ern v. (Ind. App.).....	268
Baltes v. Union Trust Co. of New York (N. Y.).....	1005	Board of Com'rs of Harrison County v. Blinc (Ind. App.).....	1034
Baltimore & O. R. Co. v. Hottman (Ohio)...	1154	Board of Com'rs of Jackson County, Huske v. (Ohio).....	1160
Baltimore & O. R. Co. v. Jolly Bros. & Co. (Ohio).....	888	Board of Com'rs of Laporte County v. Wolff (Ind. Sup.).....	860

	Page		Page
Board of Education of Chester Tp., Harlan v. (Ohio).....	1159	Brudi, Mondamin Meadows Dairy Co. v. (Ind. Sup.).....	643
Board of Education of Village of Newcomerstown. Ellis v. (Ohio).....	1157	Bruesch, People v. (N. Y.).....	1146
Board of School Com'rs of City of Indianapolis v. Bender (Ind. App.).....	154	Brumfield v. Strong (Ohio).....	1155
Bode v. Ruehrwein (Ohio).....	1154	Brusseau v. New York, N. H. & H. R. Co. (Mass.).....	348
Bode v. Ruehrwein (Ohio).....	1155	Buckeye Stave Co. v. Smith (Ohio).....	1155
Bodine, In re (N. Y.).....	1139	Buckland, Union Traction Co. of Indiana v. (Ind. App.).....	158
Boggiano, People v. (N. Y.).....	101	Buckles v. Cincinnati, etc., R. Co. (Ohio).....	1155
Bolster, Connolly v. (Mass.).....	981	Buffalo Sav. Bank, Kelley v. (N. Y.).....	995
Bond, Toledo, St. L. & W. R. Co. v. (Ind. App.).....	647	Bullock v. Boston & H. Dispatch Co. (Mass.).....	256
Bonfield, O'Brien v. (Ill.).....	1090	Bundy, Village of Norwood v. (Ohio).....	1166
Bonier, People v. (N. Y.).....	226	Burke v. Haverhill (Mass.).....	256
Bootman, People v. (N. Y.).....	505	Burns, People v. (Ill.).....	374
Borden v. Fall River, two cases (Mass.).....	338	Butman v. Butman (Ill.).....	821
Borger, State v. (Ohio).....	1165	Buzis, Spring Valley Coal Co. v. (Ill.).....	1060
Boruszewski v. Middlesex Mut. Assur. Co. (Mass.).....	250	Byram, Indiana Trust Co. v. (Ind. App.).....	670
Boston, Barron v. (Mass.).....	951	Callender, McAuslan & Troup Co. v. Flint (Mass.).....	345
Boston, Jordan v. (Mass.).....	1022	Cameron, Gage v. (Ill.).....	204
Boston, Rosen v. (Mass.).....	992	Cameron, Heintz v. (Ohio).....	1159
Boston, Townsend v. (Mass.).....	991	Cameron, Village of Doylestown v. (Ohio).....	1166
Boston, Upham v. (Mass.).....	946	Camfield v. Plummer (Ill.).....	787
Boston, Warren v. (Mass.).....	1022	Campbell, Field v. (Ind. Sup.).....	260
Boston, Westcott v. (Mass.).....	89	Canal Com'rs of Illinois & M. Canal, Mer-rifield v. (Ill.).....	405, 587
Boston Elevated R. Co., Bates v. (Mass.).....	1017	Cantine, People v. (N. Y.).....	1147
Boston Elevated R. Co., Black v. (Mass.).....	970	Capital Nat. Bank v. Wilkerson (Ind. App.).....	247
Boston Elevated R. Co., Saltman v. (Mass.).....	950	Cardeza, Osborn v. (N. Y.).....	625
Boston Elevated R. Co., Welch v. (Mass.).....	500	Carey, Cleveland, C., C. & St. L. R. Co. v. (Ohio).....	1156
Boston & H. Dispatch Co., Bullock v. (Mass.).....	256	Carithers, Sisson v. (Ind. App.).....	267
Boston & M. R. R., Faulkner v. (Mass.).....	976	Carter v. Carter (Ind. App.).....	187
Boston & M. R. R., Flaherty v. (Mass.).....	66	Cashman v. London Guarantee & Accident Ins. Co. (Mass.).....	957
Boston & M. R. R., Rogers v. (Mass.).....	945	Cassell v. Lowry (Ind. Sup.).....	640
Boston & N. St. R. Co., Donahue v. (Mass.).....	341	Caxton Co., White River School Tp. of Johnson County v. (Ind. App.).....	185
Boston & N. St. R. Co., Hooe v. (Mass.).....	341	Central Union Bldg. Co. v. Kolander (Ill.).....	50
Boston & N. St. R. Co., Lane v. (Mass.).....	341	Chamberlain v. Olean St. R. Co. (N. Y.).....	1140
Boston & N. St. R. Co., Pierce v., two cases (Mass.).....	971	Charles v. Fawley (Ohio).....	294
Boston & N. St. R. Co., Seele v. (Mass.).....	971	Charles, Garst v. (Mass.).....	839
Boston & N. St. R. Co., Welch v. (Mass.).....	341	Cheek v. Preston (Ind. App.).....	1048
Bosworth v. Kinghorn (N. Y.).....	1139	Cherry v. Sprague (Mass.).....	456
Bounties to Veterans, In re (Mass.).....	95	Chicago, Doremus v. (Ill.).....	403
Bowen v. Woodfield (Ind. App.).....	162	Chicago, Fisher v. (Ill.).....	680
Bowers v. State (Ohio).....	1155	Chicago, Holden v. (Ill.).....	435
Bowker, Cullinan v. (N. Y.).....	911	Chicago, Hulbert v. (Ill.).....	1097
Brackett, Keyes v. (Mass.).....	986	Chicago, Jones v. (Ill.).....	798
Bradley v. Prudential Ins. Co. of America (Mass.).....	989	Chicago, Lanphere v. (Ill.).....	426
Brandenburg, Snodgrass v. (Ind. Sup.).....	1030	Chicago, Lingle v. (Ill.).....	677
Bratten v. Sewall (Ohio).....	1155	Chicago, McNeill v. (Ill.).....	450
Breed v. Gardner (Mass.).....	983	Chicago, Saunders v. (Ill.).....	13
Brenneman v. Schell (Ill.).....	412	Chicago, Winkelman v. (Ill.).....	1066
Bressler v. Kelly (Ind. App.).....	613	Chicago, Zeigler v. (Ill.).....	719
Bridgeman v. New York (N. Y.).....	1139	Chicago, B. & Q. R. Co. v. People (Ill.).....	219
Brigham, Codman v. (Mass.).....	1008	Chicago, B. & Q. R. Co. v. People (Ill.).....	1105
Bright v. Cronin (Ohio).....	1155	Chicago, B. & Q. R. Co., People v. (Ill.).....	778
Bright, Travelers' Ins. Co. of Hartford, Conn., v. (Ohio).....	1166	Chicago City R. Co. v. Lannon (Ill.).....	585
Brightson v. H. B. Claffin Co. (N. Y.).....	920	Chicago City R. Co. v. Matthieson (Ill.).....	443
Brobst, Village of Canfield v. (Ohio).....	459	Chicago City R. Co. v. Saxby (Ill.).....	755
Brock, Graham v. (Ill.).....	825	Chicago City R. Co. v. Uhter (Ill.).....	195
Brock, Pittsburg, etc., R. Co. v. (Ohio).....	1163	Chicago Daily News Co. v. Siegel (Ill.).....	810
Brooklyn Heights R. Co., McClellan v. (N. Y.).....	1145	Chicago, I. & L. R. Co. v. Crawfordsville (Ind. Sup.).....	1025
Brooklyn Heights R. Co., O'Reilly v. (N. Y.).....	517	Chicago, I. & L. R. Co. v. Wicker (Ind. App.).....	614
Brookman, State v. (Ohio).....	1165	Chicago, I. & L. R. Co. v. Woodward (Ind. Sup.).....	558
Brooks, Davies v. (Ill.).....	724	Chicago North Shore St. R. Co. v. Strathmann (Ill.).....	800
Brooks, Hahl v. (Ill.).....	727	Chicago Tel. Co., Sweeney v. (Ill.).....	677
Brown v. Clark (Ohio).....	1155	Chicago Terminal Transfer Co. v. Walton (Ind. Sup.).....	646
Brown v. Fulton (N. Y.).....	1140	Chicago Terminal Transfer R. Co. v. O'Donnell (Ill.).....	1133
Brown, City of New York v. (N. Y.).....	114	Chicago Union Traction Co. v. Miller (Ill.).....	25
Brown, Clow v. (Ind. App.).....	534	Chicago & A. R. Co. v. Vipond (Ill.).....	22
Brown, Persons v. (N. Y.).....	1149	Chicago & E. I. R. Co. v. Coggins (Ill.).....	376
Browne v. New York Cent. & H. R. R. Co. (N. Y.).....	1140	Chicago & E. I. R. Co. v. People (Ill.).....	1118
Brownlee, Hall v. (Ind. Sup.).....	131		
Bruce, Wixon v., two cases (Mass.).....	978		
Brucker, Cincinnati & E. Electric R. Co. v. (Ohio).....	1155		

	Page		Page
Chicago & E. I. R. Co. v. Reilly (Ill.).....	454	Cleveland, C., C. & St. L. R. Co., Dillier v. (Ind. App.).....	271
Chicago & E. I. R. Co. v. Lain (Ind. App.)...	539	Cleveland Electric R. Co., Wadsworth v. (Ohio).....	1166
Chicago & J. Electric R. Co. v. Spence (Ill.).....	796	Cleveland, etc., R. Co. v. Wenz (Ohio).....	1156
Chicago & M. Electric R. Co. v. Diver (Ill.)	758	Cleveland, etc., R. Co., State v. (Ohio).....	1165
Chicago & M. Electric R. Co. v. Ullrich (Ill.).....	815	Cleveland & M. R. Co. v. Bennett (Ohio).....	1156
Chicago & S. E. R. Co. v. Potts (Ind. App.)	168	Clark v. Knowles (Mass.).....	352
Chicago & W. I. R. Co. v. Newell (Ill.)....	416	Clotts, Porter v. (Ohio).....	1163
Chick, Greenstein v. (Mass.).....	935	Clow v. Brown (Ind. App.).....	534
Chicopee, Young v. (Mass.).....	63	Clupper v. Clupper (Ind. Sup.).....	125
Childs, Hardin County Treasurer v. (Ohio).....	1158	Clyde, Hopkins v. (Ohio).....	846
Chipman v. Wells (Ind. App.).....	172	Codman v. Brigham (Mass.).....	1008
Chippewa Co. v. Townsend (Ohio).....	1155	Coggins, Chicago & E. I. R. Co. v. (Ill.)..	376
Cincinnati, Werner v. (Ohio).....	1166	Cole v. Bates (Mass.).....	333
Cincinnati, etc., R. Co., Buckles v. (Ohio).....	1155	Cole v. Killam (Mass.).....	947
Cincinnati, I. & W. R. Co. v. People (Ill.)	783	Cole, Johnson v. (N. Y.).....	1143
Cincinnati, I. & W. R. Co. v. People (Ill.)	770	Columbus, Linthwaite v. (Ohio).....	1161
Cincinnati, I. & W. R. Co. v. People (Ill.)	774	Columbus Hotel Co. v. Saiter (Ohio).....	1156
Cincinnati, I. & W. R. Co., People v. (Ill.).....	1119	Comesky v. Suffern (N. Y.).....	320
Cincinnati Leaf Tobacco Warehouse v. London (Ohio).....	1155	Commercial Nat. Bank v. Wheeler (Ohio).....	1156
Cincinnati, R. & M. R. Co. v. Crowl (Ind. App.).....	1153	Commissioners of Miami County, Village of Pleasant Hill v. (Ohio).....	896
Cincinnati, R. & M. R. Co. v. Miller (Ind. App.).....	827	Commons, Hoff v. (Ohio).....	1159
Cincinnati St. R. Co. v. Wichmann (Ohio).....	1155	Commonwealth v. Beck (Mass.).....	357
Cincinnati & E. Electric R. Co. v. Brucker (Ohio).....	1155	Commonwealth v. Clancy (Mass.).....	842
Citizens' Electric R., etc., Co. v. Bell (Ohio).....	1155	Commonwealth v. Crowninshield (Mass.)..	963
Citizens' Nat. Bank, Midland Steel Co. v. (Ind. App.).....	290	Commonwealth v. Lobel (Mass.).....	977
Citizens' Permanent Savings & Loan Ass'n v. Hampe (N. Y.).....	1140	Commonwealth v. Murphy (Mass.).....	357
City of Chicago v. Ayers (Ill.).....	32	Commonwealth v. Oakes (Mass.).....	323
City of Chicago v. Murdoch (Ill.).....	46	Comptroller of State v. Hoople (N. Y.).....	229
City of Chicago v. Richardson (Ill.).....	791	Congregation Beth Israel v. O'Connell (Mass.).....	1011
City of Chicago v. Rothschild & Co. (Ill.)..	698	Conkey v. Rex (Ill.).....	370
City of Chicago v. Sherman (Ill.).....	396	Conley, Fillinger v. (Ind. Sup.).....	597
City of Cincinnati v. Herrmann (Ohio).....	1155	Connolly v. Bolster (Mass.).....	981
City of Cincinnati v. Trustees of Cincinnati Southern Ry., two cases (Ohio).....	1156	Connors v. Great Northern Elevator Co. (N. Y.).....	1140
City of Dayton v. Null (Ohio).....	1156	Conrad v. Cleveland, C., C. & St. L. R. Co. (Ind. App.).....	489
City of Dayton v. State (Ohio).....	1156	Consumers' Gas Trust Co. v. Moore (Ind. Sup.).....	1153
City of Elgin v. Nofs (Ill.).....	43	Coolidge, Mead v. (N. Y.).....	314
City of Findlay v. Findlay Home Tel. Co. (Ohio).....	1156	Coolman v. State (Ind. Sup.).....	568
City of Frankfort v. Irvin (Ind. App.).....	652	Cooper v. Manhattan R. Co. (N. Y.).....	1140
City of Haverhill v. Marlborough (Mass.)..	943	Cooper v. Murphy (Ind. App.).....	664
City of New Albany v. Stirr (Ind. App.)...	275	Cooper v. New York, O. & W. R. Co. (N. Y.)	518
City of New York, In re (N. Y.).....	522	Cooper, Galbreath v. (Ohio).....	1157
City of New York, In re (N. Y.).....	1140	Coppock v. Austin (Ind. App.).....	657
City of New York v. Brown (N. Y.).....	114	Cornell v. Geesaman (Ohio).....	1156
City of New York v. Matthews (N. Y.).....	629	Court of General Sessions of Peace in and for New York County, People v. (N. Y.).....	1148
City of New York v. Streeter (N. Y.).....	631	Covault v. Sanders (Ind. App.).....	163
City of New York v. Trustees of Sailors' Snug Harbor in City of New York (N. Y.).....	1140	Cowan, Whistler v. (Ohio).....	1167
City of Norwalk v. Gilson (Ohio).....	1156	Cowley v. Innis (Ohio).....	1157
City of Vincennes v. Spees (Ind. App.).....	531	Coyer, Pennsylvania Co. v. (Ind. Sup.)..	875
City of Youngstown v. McNally (Ohio).....	1156	Coyle, Palmer v. (Mass.).....	844
City R. Co. of Dayton v. Enslin (Ohio).....	1156	Crapo v. Peirce (Mass.).....	935
Cladin Co., Brighton v. (N. Y.).....	920	Crawfordsville, Chicago, I. & L. R. Co. v. (Ind. Sup.).....	1025
Clancy, Commonwealth v. (Mass.).....	842	Crocker v. People (Ill.).....	743
Clark, Brown v. (Ohio).....	1155	Cronin, Bright v. (Ohio).....	1155
Clark, Solari v. (Mass.).....	958	Crosby v. Security Mut. Life Ins. Co. (N. Y.).....	1140
Cleveland, C., C. & St. L. R. Co. v. Carey (Ohio).....	1156	Crossin v. Beebe (Mass.).....	65
Cleveland, C., C. & St. L. R. Co. v. Nowlin (Ind. Sup.).....	257	Crowl, Cincinnati, R. & M. R. R. v. (Ind. App.).....	1153
Cleveland, C., C. & St. L. R. Co. v. People (Ill.).....	725	Crowninshield, Commonwealth v. (Mass.)	963
Cleveland, C., C. & St. L. R. Co. v. People (Ill.).....	790	Crum v. North Vernon Pump & Lumber Co. (Ind. App.).....	193
Cleveland, C., C. & St. L. R. Co. v. Polecat Drainage Dist. (Ill.).....	684	Crum v. North Vernon Pump & Lumber Co. (Ind. Sup.).....	587
Cleveland, C., C. & St. L. R. Co. v. Pierce (Ind. App.).....	604	Cudlip v. New York Evening Journal Pub. Co. (N. Y.).....	925
Cleveland, C., C. & St. L. R. Co., Conrad v. (Ind. App.).....	489	Cudlip v. New York Evening Journal Pub. Co. (N. Y.).....	1141
		Culler, General Synod of Evangelical Lutheran Church v. (Ohio).....	1158
		Cullinan v. Bowker (N. Y.).....	911
		Cullop v. Vincennes (Ind. App.).....	166
		Culver v. Yonkers (N. Y.).....	1141
		Cummings v. People (Ill.).....	1094
		Cumner, Hoague v. (Mass.).....	956
		Cunningham v. Atlas Tack Co. (Mass.)..	825

	Page		Page
Current v. Luther (Ind. Sup.).....	556	E. T. Kenney Co. v. Ruff (Ind. App.)....	622
Curtis, Harris v. (Ind. App.).....	1102	Eureka Fire, etc., Ins. Co. v. Baldwin	
Cury v. Grand Lodge A. O. U. W. (Ohio).....	1157	(Ohio)	1157
Daehler, Holcomb v. (Ohio).....	1159	Eustace v. People (Ill.).....	1089
Dages, Andrews & Co. v. Grove (Ohio).....	1157	Evans v. Woodsworth (Ill.).....	1082
Daily v. Washington Nat. Bank (Ind. Sup.)	260	Evans, Noblesville Hydraulic Co. v. (Ind.	
Daily v. Washington Nat. Bank (Ind. Sup.).....	1153	Sup.)	126
Daniels, Steagall v. (Ohio).....	1165	Evans, Peck-Hammond Co. v. (Ohio).....	1163
Davenport v. Globe Iron Works Co. (Ohio).....	1157	Evansville, Aschoff v. (Ind. App.).....	279
Davern v. Board of Com'rs of Decatur		Evansville, Jourdan v. (Ind. Sup.).....	544
County (Ind. App.).....	268	Evensen v. Lexington & B. St. R. Co.	
Davey, People v. (N. Y.).....	244	(Mass.)	355
Davidson v. Young (Ohio).....	1157	Fall River, Baker v. (Mass.).....	336
Davies v. Brooks (Ill.).....	724	Fall River, Borden v., two cases (Mass.)..	338
Davis v. Pfeiffer (Ill.).....	718	Fall River, Keogh v., two cases (Mass.)..	338
Davis, Day v. (Ill.).....	682	Fall River, Providence, F. R. & N. Steam-	
Davis, Southern R. Co. v. (Ind. App.).....	1053	boat Co. v., two cases (Mass.).....	338
Day v. Davis (Ill.).....	682	Farmers' Loan & Trust Co. v. New York	
Dee v. Dee (Ill.).....	429	& N. B. Co. (N. Y.)	1141
Delahoyde v. People (Ill.).....	732	Farmers' Loan & Trust Co. v. Pendleton	
Delaney v. Shipp (Ind. App.).....	1033	(N. Y.)	508
De Montague v. Bacharach (Mass.).....	938	Farmers' Milling, etc., Co. v. Osborn Bank	
Devitt, Wolf v. (N. Y.).....	1152	(Ohio)	1157
Diamond Plate Glass Co., Hancock v.		Farnsworth, Lent v. (N. Y.).....	1144
(Ind. App.)	1153	Farrelly v. Emigrant Industrial Sav. Bank	
Dibble v. Roberts (Ind. App.).....	1136	(N. Y.)	1141
Dick, Moore v. (Mass.).....	967	Fatic v. Myer (Ind. Sup.).....	142
Dickerson, Strayer v. (Ill.).....	1085	Faulkner v. Boston & M. R. R. (Mass.)..	976
Dickey & Baker v. People (Ill.).....	791	Fawley, Charles v. (Ohio).....	294
Dickinson, Torrey v. (Ill.).....	703	Fearns v. New York Cent. & H. R. R. Co.	
Diehl, Bevitt v. (Ohio).....	1154	(Mass.)	68
Dillier v. Cleveland, O., C. & St. L. R.		Featherngill v. State (Ind. App.).....	181
Co. (Ind. App.).....	271	Feltner, People v. (N. Y.).....	1148
Dillon, National Council of Knights and		Fenstermaker, Toledo, St. L. & W. R. Co.	
Ladies of Security v. (Ill.).....	367	v. (Ind. Sup.)	561
Dingman v. Beall (Ill.).....	729	Ferguson v. Union Mut. Life Ins. Co.	
Diver, Chicago & M. Electric R. Co. v.		(Mass.)	358
(Ill.)	758	Ferguson, Moore v. (Ind. Sup.).....	126
Doerr, Kurz v. (N. Y.).....	928	Field v. Campbell (Ind. Sup.).....	260
Dollinger, Adams v. (Ohio).....	1154	Fillingier v. Conley (Ind. Sup.).....	597
Donahue v. Boston & N. St. R. Co. (Mass.)	341	Findlay Home Tel. Co., City of Findlay	
Donogh v. Williams (Ohio).....	1157	v. (Ohio)	1156
Donovan, Newark Pub. Co. v. (Ohio).....	1162	Fine, Southern Indiana R. Co. v. (Ind.	
Doremus v. Chicago (Ill.).....	403	Sup.)	589
Doremus, Zartman & Willis v. (Ohio).....	1167	Fire Ass'n of Philadelphia v. Yeagley	
Dorsett, In re (N. Y.).....	522	(Ind. App.)	1035
Doyle v. Baltimore & O. R. Co. (Ohio).....	1157	First Nat. Bank v. Beach (Ind. App.)....	287
Drake v. State (Ohio).....	1157	First Nat. Bank, Blair-Baker Horse Co. v.	
Drott v. Koch (Ohio).....	1157	(Ind. Sup.)	1027
Duling v. Duling (Ohio).....	1157	First Nat. Bank, Thomas v. (Ill.).....	801
Dunbar v. American Telephone & Te-		First Nat. Bank, Wabash Valley Coal Co.	
graph Co. (Ill.).....	904	v. (Ind. App.)	1153
Dunker, McCormick v. (Ohio).....	1161	Fisher v. Alsten (Mass.).....	78
Dunlap, Metzgar v. (Ohio).....	1162	Fisher v. Chicago (Ill.).....	680
Duquet v. Gardner (Mass.).....	983	Fisher, Wendall v. (Mass.).....	322
Durbin, Lohmeyer v. (Ill.).....	1118	Fisk, Flagg v., two cases (N. Y.).....	1141
Dyer, Reich v. (N. Y.).....	922	Flagg v. Fisk, two cases (N. Y.).....	1141
East Buffalo Live Stock Ass'n, People v.		Flaherty v. Boston & M. R. R. (Mass.)....	66
(N. Y.)	1148	Fleming v. Morrison (Mass.).....	499
Easthampton Spinning Co., Williston Sem-		Flint, Callender, McAuslan & Troup Co.	
inary v. (Mass.).....	67	v. (Mass.)	345
Edelson, Jacobs v. (N. Y.).....	1143	Floto v. Floto (Ill.).....	1092
Edison Electric Illuminating Co. of New		Flour City Nat. Bank v. Shire (N. Y.)....	1141
York, Pritchard v. (N. Y.).....	243	Ft. Wayne Traction Co. v. Hardendorf	
Ehrenfried v. Lackawanna Iron & Steel Co.		(Ind. Sup.)	593
(N. Y.)	1141	Ft. Wayne Trust Co. v. Sihler (Ind. App.)	494
Elliott, People v. (N. Y.).....	1146	Fossick, Wenom v. (Ill.).....	732
Ellis v. Board of Education of Village of		Foster v. Leininger (Ind. App.).....	164
Newcomerstown (Ohio)	1157	Foster v. New York, N. H. & H. R. Co.	
Ellis, Espenlaub v. (Ind. App.).....	527	(Mass.)	331
Ellison v. Towne (Ind. App.).....	270	Fournier, Tetrault v. (Mass.).....	351
Emigrant Industrial Sav. Bank, Farrelly		Frank Bird Transfer Co. v. Morrow (Ind.	
v. (N. Y.).....	1141	App.)	189
Emmett, Rich Grove Tp., Pulaski County,		French, Lyon v. (Ohio).....	1161
v. (Ind. Sup.).....	543	French Lick Springs Hotel Co., Gagnon	
Enos v. Harkins (Mass.).....	253	v. (Ind. Sup.).....	849
Enslin, City R. Co. of Dayton v. (Ohio).....	1156	Fridman, Village of Norwood v. (Ohio).....	1166
Erie R. Co., Tremper v. (N. Y.).....	1152	Fudge v. Marquell (Ind. Sup.).....	565
Ernest v. Grand Trunk Western R. Co.		Fulton, Brown v. (N. Y.).....	1140
(Ind. App.)	1136	Fulton Co., Ready v. (N. Y.).....	817
Ernst v. Belger (Ohio).....	1157	Gabbert, Hall v. (Ill.).....	806
Espenlaub v. Ellis (Ind. App.).....	527	Gage v. Cameron (Ill.).....	204
Espy, Shanley v. (Ohio).....	1164	Gage v. People (Ill.).....	1062

	Page		Page
Gage v. People (Ill.).....	1084	Groves v. O'Brien (Ohio).....	1158
Gage v. People (Ill.).....	1099	Groves v. Selsor, two cases (Ohio).....	1158
Gage v. People (Ill.).....	1108	Groves, Keller v. (Ohio).....	1160
Gagnon v. French Lick Springs Hotel Co. (Ind. Sup.).....	849	Gunning System v. Lapointe (Ill.).....	393
Galbreath v. Cooper (Ohio).....	1157	Hahl v. Brooks (Ill.).....	727
Gallagher, Powell v. (Ohio).....	1163	Hall v. Brownlee (Ind. Sup.).....	131
Gallenkamp v. Garvin Mach. Co. (N. Y.).....	1142	Hall v. Gabbert (Ill.).....	806
Galvin v. Beals (Mass.).....	969	Hall, Mitchelltree School Tp. of Martin County v. (Ind. Sup.).....	641
Galvin v. Winchendon Sav. Bank (Mass.).....	969	Halladay v. State (Ohio).....	1158
Gardner, Breed v. (Mass.).....	983	Hallett v. Reed (Ohio).....	1158
Gardner, Duquet v. (Mass.).....	983	Halley v. Hengstler (Ohio).....	1158
Garry v. Garry (Mass.).....	335	Hamblin v. Horton (Ohio).....	1158
Garst v. Charles (Mass.).....	830	Hamlet of Arlington Heights v. Anderson (Ohio).....	1158
Garvin Mach. Co., Gallenkamp v. (N. Y.).....	1142	Hampden Trust Co. v. Leary (Mass.).....	88
Gates, Newman v. (Ind. Sup.).....	638	Hancock v. Diamond Plate Glass Co. (Ind. App.).....	1153
Geesaman, Cornell v. (Ohio).....	1156	Hanford, Glos v. (Ill.).....	439
Gendron, Raymer v. (Ohio).....	1163	Hanner, Aetna Life Ins. Co. v. (Ohio).....	1154
General Electric Co., Gillette v. (Mass.).....	255	Hanner, National Life Ins. Co. v. (Ohio).....	1162
General Synod of Evangelical Lutheran Church v. Culler (Ohio).....	1158	Hannum v. McGaffick (Ohio).....	1158
Gentsch v. State (Ohio).....	900	Hanrahan v. Knickerbocker (Ind. App.).....	1137
German Mut. Ins. Co. v. Gibson (Ohio).....	1158	Hardendorf, Ft. Wayne Traction Co. v. (Ind. Sup.).....	593
Gibson v. International Trust Co. (Mass.).....	70	Hardin County Treasurer v. Childs (Ohio).....	1158
Gibson, German Mut. Ins. Co. v. (Ohio).....	1158	Hardin County Treasurer v. Gill (Ohio).....	1159
Gibson, Shields v. (Ohio).....	1164	Hardin County Treasurer v. Pugsley (Ohio).....	1159
Gibson, State v. (Ohio).....	1165	Harkins, Enos v. (Mass.).....	253
Gilbert Knitting Co., Hemstreet v. (N. Y.).....	1142	Harlan v. Board of Education of Chester Tp. (Ohio).....	1159
Gill, Hardin County Treasurer v. (Ohio).....	1159	Harrington v. Worcester (Mass.).....	326
Gillespie v. Rump (Ind. Sup.).....	138	Harris v. Curtis (Ind. App.).....	1102
Gillespie, Hedekin v. (Ind. App.).....	143	Harris v. Macomb (Ill.).....	762
Gillette v. General Electric Co. (Mass.).....	253	Hart v. Woodland Ave. Savings & Loan Co. (Ohio).....	1159
Gilmore, Wayne International Building & Loan Ass'n v. (Ind. App.).....	190	Hastings v. Lawson (Mass.).....	252
Gilson, City of Norwalk v. (Ohio).....	1156	Haughton v. Aetna Life Ins. Co. of Hart- ford (Ind. App.).....	652
Gingery, Hinde & Dauch Paper Co. v. (Ohio).....	1159	Haverhill, Burke v. (Mass.).....	256
Ginn, Shaw v. (Ohio).....	1164	Haverhill & A. St. R. Co., Tozier v., two cases (Mass.).....	953
Globe Iron Works Co., Davenport v. (Ohio).....	1157	Hayes v. New York, N. H. & H. R. Co. (Mass.).....	841
Glos v. Hanford (Ill.).....	439	Hayes, Sellers v. (Ind. Sup.).....	119
Glos v. Hoban (Ill.).....	1	Hayes, Toledo R. & Terminal Co. v. (Ohio).....	1165
Glos v. Kelly (Ill.).....	378	Hayner v. People (Ill.).....	792
Glos v. McKerlie (Ill.).....	700	Hayward, Rettagliata v. (N. Y.).....	1150
Glos v. Miller (Ill.).....	714	H. B. Olafin Co., Brightson v. (N. Y.).....	920
Glos v. Stern (Ill.).....	1057	Healy v. Protection Mut. Fire Ins. Co. (Ill.).....	678
Glos v. Talcott (Ill.).....	707	Hedekin v. Gillespie (Ind. App.).....	143
Goddard, Joslin v. (Mass.).....	948	Heider, Lake Shore & M. S. R. Co. v. (Ohio).....	1161
Goff, Bach v. (Ohio).....	1154	Heints v. Cameron (Ohio).....	1159
Goldberg v. Markowitz (N. Y.).....	316	Hellwarth v. Le Blond (Ohio).....	1159
Gomes v. New Bedford Cordage Co. (Mass.).....	840	Hemstreet v. Gilbert Knitting Co. (N. Y.).....	1142
Gompf v. Wolfinger (Ohio).....	1158	Hengstler, Halley v. (Ohio).....	1158
Goodrich, People v. (N. Y.).....	1148	Henline v. Jackson (Ohio).....	1159
Gordon, J. Weller Co. v. (Ohio).....	1160	Henry, Lewisohn v. (N. Y.).....	239
Goslin, In re (N. Y.).....	1142	Herbert v. Musical Courier Co., two cases (N. Y.).....	1142
Graff v. Megrue (Ohio).....	1158	Herrick v. Kinsey (Ohio).....	1159
Graham v. Brock (Ill.).....	825	Herrmann, City of Cincinnati v. (Ohio).....	1155
Granat v. Kruse (Ill.).....	744	Herter v. Smith (Ohio).....	1159
Grand Lodge A. O. U. W., Cury v. (Ohio).....	1157	Herzog v. Municipal Electric Light Co. (N. Y.).....	1142
Grand Trunk Western R. Co., Ernest v. (Ind. App.).....	1136	Hibbe, People v. (N. Y.).....	1146
Grant Land Ass'n v. People (Ill.).....	804	High, Beasey v. (Ind. App.).....	181
Gray, Knickerbocker Ice Co. v. (Ind. Sup.).....	869	High School Board of Education of School Dist. No. 131, Russell v. (Ill.).....	441
Great Northern Elevator Co., Connors v. (N. Y.).....	1140	Hill, Rubens v. (Ill.).....	1127
Green v. McGrew (Ind. App.).....	1049	Hillier v. Le Roy (N. Y.).....	237
Green, State v. (Ohio).....	1165	Hilton, Johnston v., two cases (N. Y.).....	1144
Greenberg v. Stevens (Ill.).....	722	Hinchliff v. Rudnik (Ill.).....	691
Greencastle School Tp. of Putnam County, Oppenheimer v. (Ind. Sup.).....	1100	Hincks, Pomroy v. (N. Y.).....	628
Greene, People v. (N. Y.).....	99	Hinde & Dauch Paper Co. v. Gingery (Ohio).....	1159
Greene, People v. (N. Y.).....	1147	Hitchcock v. Hitchcock (Ohio).....	1159
Greene, People v. (N. Y.).....	1148	Hoagland, Royal Baking Powder Co. v. (N. Y.).....	634
Greene, People v. (N. Y.).....	1149	Hoague v. Cumner (Mass.).....	956
Greene, People v. (N. Y.).....	955		
Gregory v. American Thread Co. (Mass.).....	962		
Griffin v. Interurban St. R. Co. (N. Y.).....	513		
Griffin v. Interurban St. R. Co. (N. Y.).....	1142		
Griffiths v. State (Ind. Sup.).....	563		
Gross, Shelby County Com'rs v. (Ohio).....	1164		
Grout, People v. (N. Y.).....	464		
Grove, Dages, Andrews & Co. v. (Ohio).....	1157		
Grove Mills Paper Co., Levy v. (N. Y.).....	1144		
Grover v. Grover (Ohio).....	1158		

	Page		Page
Hoban, Glos v. (Ill.)	1	Inman, Abbott v. (Ind. App.)	234
Hoff v. Commons (Ohio)	1159	Innis, Cowley v. (Ohio)	1157
Hoffart v. West Turin (N. Y.)	1143	International Packing Co., Wenham v. (Ill.)	1079
Hoffman v. Holt (Mass.)	87	International Trust Co., Gibson v. (Mass.)	70
Hoffman v. New England Trust Co. (Mass.)	952	Interurban St. R. Co., Griffin v. (N. Y.)	513
Hohn v. Shideler (Ind. Sup.)	575	Interurban St. R. Co., Griffin v. (N. Y.)	1142
Holcomb v. Daehler (Ohio)	1159	Interurban St. R. Co., Scudder v. (N. Y.)	513
Holden v. Chicago (Ill.)	435	Interurban St. R. Co., Scudder v. (N. Y.)	1142
Holliday, Tuthill Spring Co. v. (Ind. Sup.)	872	Irvin, City of Frankfort v. (Ind. App.)	652
Hollister, In re (N. Y.)	1143	Irwin v. Sample (Ill.)	687
Holt, Hoffman v. (Mass.)	87	Ithaca St. R. Co., Sammons v. (N. Y.)	1150
Holyoke Envelope Co. v. United States Envelope Co. (Mass.)	58	Jackson, Henline v. (Ohio)	1159
Holyoke St. R. Co., Blanchard v. (Mass.)	94	Jacobs v. Edelson (N. Y.)	1143
Holyoke St. R. Co., Meehan v. (Mass.)	61	Jacoby, Pennsylvania, etc., R. Co. v. (Ohio)	1163
Hood Rubber Co., McRea v. (Mass.)	1015	Jakubovsky, Rice v. (Ohio)	1163
Hoe v. Boston & N. St. R. Co. (Mass.)	341	Jespersen v. Mech (Ill.)	1114
Hoople, Comptroller of State v. (N. Y.)	229	J. L. Fulton Co., Ready v. (N. Y.)	317
Hoople's Estate, In re (N. Y.)	229	John, People v. (Ill.)	789
Hoosier Const. Co. v. National Bank of Commerce (Ind. App.)	473	Johnson v. Cole (N. Y.)	1143
Hopkins v. Clyde (Ohio)	846	Johnson, Humphrey Pop Corn Co. v. (Ohio)	1160
Hopkins' Will, In re (N. Y.)	1143	Johnson, Indianapolis St. R. Co. v. (Ind. Sup.)	571
Horton, Hamblin v. (Ohio)	1158	Johnston v. Hilton, two cases (N. Y.)	1144
Hoskins v. West (Ohio)	1159	Johnston, Paltzer v. (Ill.)	702
Hottman, Baltimore & O. R. Co. v. (Ohio)	1154	Johnston Glass Co. v. Lucas (Ind. App.)	1102
Householder v. Householder (Ohio)	1160	Jolly Bros. & Co., Baltimore & O. R. Co. v. (Ohio)	888
Howard v. Umstead (Ohio)	1160	Jones v. Atwater (Ohio)	1160
Howe v. State (Ohio)	1160	Jones v. Chicago (Ill.)	798
Huber v. Sahn (Ohio)	1160	Jones v. Jones (Ill.)	695
Huddleston v. Long (Ohio)	1160	Jones, Williams v. (Ohio)	1167
Hulbert v. Chicago (Ill.)	1097	Jordan v. Boston (Mass.)	1022
Humphrey Pop Corn Co. v. Johnson (Ohio)	1160	Joslin v. Goddard (Mass.)	948
Hunt, In re (N. Y.)	1143	Jourdan v. Evansville (Ind. Sup.)	544
Hunt v. Osborn (N. Y.)	1143	Joyce, United States Exp. Co. v. (Ind. Sup.)	865
Hunt v. Vanniman (Ohio)	1160	Julian, Miller v. (Ind. Sup.)	588
Hursen v. Hursen (Ill.)	391	J. W. Bishop Co., Bertholet v. (Mass.)	342
Huske v. Board of Com'rs of Jackson County (Ohio)	1160	J. Weller Co. v. Gordon (Ohio)	1160
Hutchinson v. Nay (Mass.)	974	Kanage v. Norris (Ohio)	1160
Hutson Coal Co. v. Barber (Ohio)	1160	Keach, Livingston County Building & Loan Ass'n v. (Ill.)	769
Illinois Cent. R. Co. v. People (Ill.)	1006	Kearsley, Alexander v. (Ohio)	1154
Illinois Cent. R. Co. v. Swift (Ill.)	737	Kehoe, In re (N. Y.)	1144
Illinois Cent. R. Co. v. Trustees of Schools of Tp. 9 S., R. 2 W. Third P. M., Jackson County (Ill.)	39	Keller v. Groves (Ohio)	1160
Illinois Cent. R. Co., People v. (Ill.)	1069	Kelley v. Buffalo Sav. Bank (N. Y.)	995
Illinois, I. & M. R. Co. v. Powers (Ill.)	723	Kelley, Stirling v. (N. Y.)	1151
Illinois Trust & Savings Bank v. Pontiac (Ill.)	411	Kellogg, In re (N. Y.)	1144
Indiana Baptist Pub. Co. v. Ayer (Ind. App.)	151	Kelly v. New York (N. Y.)	1144
Indiana, I. & I. R. Co. v. Otstot (Ill.)	387	Kelly, Bressler v. (Ind. App.)	613
Indiana Natural Gas & Oil Co. v. Lee (Ind. App.)	492	Kelly, Glos v. (Ill.)	378
Indiana Natural Gas & Oil Co. v. Leer (Ind. App.)	283	Kelly, Richmond v. (Ohio)	1164
Indiana Nitroglycerin & Torpedo Co. v. Lippincott Glass Co. (Ind. App.)	183	Kelsey, People v. (N. Y.)	524
Indianapolis Drop Forging Co., Anderson v. (Ind. App.)	277	Kenney Co. v. Ruff (Ind. App.)	622
Indianapolis St. R. Co. v. Johnson (Ind. Sup.)	571	Keogh v. Fall River, two cases (Mass.)	338
Indianapolis St. R. Co. v. Schmidt (Ind. App.)	478	Kessler v. Axtell (Ohio)	1160
Indianapolis St. R. Co. v. Schomberg (Ind. Sup.)	1041	Keyes v. Brackett (Mass.)	986
Indianapolis St. R. Co. v. Seerley (Ind. App.)	169	Kiely, Terre Haute Electric Co. v. (Ind. App.)	658
Indianapolis St. R. Co. v. Seerley (Ind. App.)	1034	Killam, Cole v. (Mass.)	947
Indianapolis St. R. Co. v. Slifer (Ind. App.)	1055	King v. Ashley (N. Y.)	106
Indianapolis St. R. Co. v. Taylor (Ind. Sup.)	1045	King v. Board of Com'rs of Martin County (Ind. App.)	616
Indianapolis & G. Rapid Transit Co. v. Andis (Ind. App.)	145	King v. Sun Printing & Publishing Co. (N. Y.)	1144
Indiana State Board of Education, Silver Burdett & Co. v. (Ind. App.)	829	Kinghorn, Bosworth v. (N. Y.)	1139
Indiana Trust Co. v. Byram (Ind. App.)	670	Kingsbury, Andrews v. (Ill.)	11
Inhabitants of Brookfield v. West Brookfield (Mass.)	86	Kinsey, Herrick v. (Ohio)	1159
		Kinsloe v. Pogue (Ill.)	906
		Kirk v. Sturdy (Mass.)	349
		Kirkbride v. Kirkbride (Ohio)	1160
		Kirkwood v. Smith (Ill.)	427
		Kittredge, Watkins v. (Ohio)	1166
		Knapp, Sherck v. (Ohio)	1164
		Knickerbocker, Hanrahan v. (Ind. App.)	1137
		Knickerbocker Ice Co. v. Gray (Ind. Sup.)	869
		Knoll v. Baker (Ind. App.)	480
		Knowles, Clark v. (Mass.)	352
		Knox, Slack v. (Ill.)	746
		Koch, Drott v. (Ohio)	1157
		Koehnken, Wulfekoetter v. (Ohio)	1167

	Page		Page
Koenig, People v. (N. Y.).....	993	McClellan v. Brooklyn Heights R. Co. (N. Y.).....	1145
Kolander, Central Union Bldg. Co. v. (Ill.).....	50	McClure & Smyser, Thomas v. (Ohio).....	1165
Kruse, Granat v. (Ill.).....	744	McClymonds, Taylor v. (N. Y.).....	1152
Kuhn, Spengler v. (Ill.).....	214	McCormick v. Dunker (Ohio).....	1161
Kulneke v. P. R. Mitchell Co. (Ohio).....	1161	McCurdy v. McCallum (Mass.).....	75
Kundtz, Van De Boe, Hager & Co. v. (Ohio).....	1166	McDaniel v. Osborn (Ind. App.).....	601
Kurz v. Doerr (N. Y.).....	926	McDonald v. New York Cent. & H. R. R. Co. (Mass.).....	55
Lackawanna Iron & Steel Co., Ehrenfried v. (N. Y.).....	1141	Mace v. Smith (Ind. Sup.).....	1135
Lain, Chicago & E. R. Co. v. (Ind. App.).....	539	McElroy, Pennsylvania Co. v. (Ohio).....	1163
Lake Erie & W. R. Co. v. McFall (Ind. Sup.).....	552	McFall, Lake Erie & W. R. Co. v. (Ind. Sup.).....	552
Lake Shore & M. S. R. Co. v. Helder (Ohio).....	1161	McGaffie, Hannum v. (Ohio).....	1158
Lake Shore & M. S. R. Co. v. Toledo (Ohio).....	1161	McGrew, Green v. (Ind. App.).....	1049
Lakeside Mfg. Co. v. Worcester (Mass.).....	81	McHugh v. Manhattan R. Co. (N. Y.).....	312
Landau v. New York (N. Y.).....	631	McKee, Nigh Lumber Co. v. (Ohio).....	1162
Lane v. Boston & N. St. R. Co. (Mass.).....	341	McKerlie, Glos v. (Ill.).....	700
Langlois v. People (Ill.).....	28	McKinster v. Sager (Ind. Sup.).....	854
Lannon, Chicago City R. Co. v. (Ill.).....	585	McManus v. McManus (N. Y.).....	235
Lanphere v. Chicago (Ill.).....	426	McNally, City of Youngstown v. (Ohio).....	1156
Lapointe, Gunning System v. (Ill.).....	393	McNeill v. Chicago (Ill.).....	450
Larkin, Tobin v. (Mass.).....	985	McNulty v. Mt. Morris Electric Light Co. (N. Y.).....	1145
Lawrence, Morrison v. (Mass.).....	91	Macomb, Harris v. (Ill.).....	762
Lawson, Hastings v. (Mass.).....	252	Macomber, Tripp v. (Mass.).....	361
Leary, Hampden Trust Co. v. (Mass.).....	88	McQuesten v. Attorney General (Mass.).....	965
Le Blond, Hellwarth v. (Ohio).....	1159	McRea v. Hood Rubber Co. (Mass.).....	1015
Lee, Indiana Natural Gas & Oil Co. v. (Ind. App.).....	492	Magerstadt v. Schaefer (Ill.).....	1063
Leer, Indiana Natural Gas & Oil Co. v. (Ind. App.).....	283	Mahoney v. State (Ind. App.).....	151
Lehman v. Sibley (Ohio).....	1161	Mahoning Val. R. Co. v. Van Alstine (Ohio).....	1161
Leininger, Foster v. (Ind. App.).....	164	Manhattan R. Co., Cooper v. (N. Y.).....	1140
Lent v. Farnsworth (N. Y.).....	1144	Manhattan R. Co., McHugh v. (N. Y.).....	312
Leonard v. Whetstone (Ind. Sup.).....	1045	Mann v. Mann (Ohio).....	1161
Le Roy, Hillier v. (N. Y.).....	237	Maplewood Coal Co., In re (Ill.).....	786
Levy, In re, two cases (N. Y.).....	1144	Marcellus Electric R. Co., Stevens v. (N. Y.).....	1151
Levy v. Grove Mills Paper Co. (N. Y.).....	1144	March, Otis v. (Mass.).....	961
Lewis, Paddock v. (N. Y.).....	1146	Markowitz, Goldberg v. (N. Y.).....	316
Lewisohn v. Henry (N. Y.).....	239	Marlborough, City of Haverhill v. (Mass.).....	943
Lexington & B. St. R. Co., Evensen v. (Mass.).....	355	Marquell, Fudge v. (Ind. Sup.).....	565
L'Hote v. Milford (Ill.).....	399	Marshall v. United States Trust Co. of New York (N. Y.).....	1145
Liebmann's Sons' Brewing Co., Long Island Bottlers' Union v. (N. Y.).....	1145	Martin v. Martin (Ill.).....	418
Lima Electric R. Co. v. Sherman (Ohio).....	1161	Martin, Muncie Pulp Co. v. (Ind. Sup.).....	882
Lingle v. Chicago (Ill.).....	677	Martin, New York, C. & St. L. R. Co. v. (Ind. App.).....	654
Linthwaite v. Columbus (Ohio).....	1161	Marvin v. Trout (Ohio).....	1161
Lippincott Glass Co., Indiana Nitroglycerin & Torpedo Co. v. (Ind. App.).....	183	Marvin v. Trout (Ohio).....	1162
Lipschitz v. State (Ind. App.).....	145	Massachusetts Nat. Bank v. Snow (Mass.).....	959
Livingston County Building & Loan Ass'n v. Keach (Ill.).....	769	Mather, Turner v. (N. Y.).....	1152
Livingstone v. Murphy (Mass.).....	1012	Matthews, City of New York v. (N. Y.).....	629
Lobdell, Ray v. (Ill.).....	1076	Matthews, City Sol. v. Southern Ohio Traction Co. (Ohio).....	1162
Lobel, Commonwealth v. (Mass.).....	977	Matthews Land Co., Sargent Glass Co. v. (Ind. App.).....	474
Loder, Parr v. (N. Y.).....	1146	Matthies, People v. (N. Y.).....	103
Logee, Norfolk & W. R. Co. v. (Ohio).....	1162	Matthieson, Chicago City R. Co. v. (Ill.).....	443
Lohmeyer v. Durbin (Ill.).....	1118	Mattinger, People v. (Ill.).....	906
London Guarantee & Accident Co., Root v. (N. Y.).....	1150	Mayer v. Schneider (Ill.).....	436
London Guarantee & Accident Ins. Co., Cashman v. (Mass.).....	957	Meehan v. Holyoke St. R. Co. (Mass.).....	61
Long, Huddleston v. (Ohio).....	1160	Mead v. Coolidge (N. Y.).....	314
Long Island Bottlers' Union v. S. Liebmann's Sons' Brewing Co. (N. Y.).....	1145	Mech, Jespersen v. (Ill.).....	1114
Loudon, Cincinnati Leaf Tobacco Warehouse v. (Ohio).....	1155	Megrue, Graff v. (Ohio).....	1158
Loveland v. State (Ohio).....	1161	Meier, Rickman v. (Ill.).....	1121
Lowell, Bartholomee v. (Ind. Sup.).....	1030	Memorial Church, Worcester City Missionary Soc. v. (Mass.).....	71
Lowman, In re (N. Y.).....	1145	Merchants' Nat. Bank, Pinney v. (Ohio).....	884
Lowry, Cassell v. (Ind. Sup.).....	640	Merki v. Merki (Ill.).....	9
Lucas, Johnston Glass Co. v. (Ind. App.).....	1102	Merrifield v. Canal Com'rs of Illinois & M. Canal (Ill.).....	405, 587
Luchs, Biddison v. (Ohio).....	1154	Merrifield's Estate v. People (Ill.).....	446
Luther, Current v. (Ind. Sup.).....	556	Merrill v. Preston (Mass.).....	941
Lyman v. State Bank of Randolph (N. Y.).....	1145	Metropolitan St. R. Co., Bente v. (N. Y.).....	1139
Lyon v. French (Ohio).....	1161	Metropolitan St. R. Co., Robinson v. (N. Y.).....	1150
McArthur v. Williams, two cases (Ohio).....	1161	Metzgar v. Dunlap (Ohio).....	1162
McBeth v. Nen (Ohio).....	1161	Middlesex Mut. Assur. Co., Boruszewski v. (Mass.).....	250
McCallum, McCurdy v. (Mass.).....	75	Midland Steel Co. v. Citizens' Nat. Bank (Ind. App.).....	290
McCaslin, Morgan & Wright v. (Ill.).....	1066	Milbank, Siebert v. (N. Y.).....	1151
McCaullif, Shea v. (Mass.).....	69	Milford, L'Hote v. (Ill.).....	399
		Miller v. Board of Directors (Ohio).....	1162
		Miller v. Julian (Ind. Sup.).....	588

	Page		Page
Miller v. Quincy (N. Y.).....	116	New York, Bridgeman v. (N. Y.).....	1139
Miller v. Quincy (N. Y.).....	1145	New York, Kelly v. (N. Y.).....	1144
Miller, Chicago Union Traction Co. v. (Ill.)	25	New York, Landau v. (N. Y.).....	631
Miller, Cincinnati, R. & M. R. Co. v. (Ind. App.).....	827	New York, Redmond v. (N. Y.).....	1149
Miller, Glos v. (Ill.).....	714	New York, Sauer v. (N. Y.).....	579
Miller, People v. (N. Y.).....	525	New York, Stemmler v. (N. Y.).....	581
Miller, People v. (N. Y.).....	931	New York, Whitson v. (N. Y.).....	1152
Millner v. Plunkett (Mass.).....	354	New York, Wolff v. (N. Y.).....	1153
Miner & Co. v. Blickley (Ohio).....	1162	New York Cent. & H. R. R. Co., Browne v. (N. Y.).....	1140
Minshull v. Washburn, two cases (N. Y.).....	1145	New York Cent. & H. R. R. Co., Fearn v. (Mass.).....	68
Mitchell Co., Kulueke v. (Ohio).....	1161	New York Cent. & H. R. R. Co., McDonald v. (Mass.).....	55
Mitchellree School Tp. of Martin County v. Hall (Ind. Sup.).....	641	New York Cent. & H. R. R. Co., Rice v. (Mass.).....	79
Moeschen, Tenement House Department of City of New York v., two cases (N. Y.).....	281	New York Cent. & H. R. R. Co., Sutter v. (N. Y.).....	1151
Mondamin Meadows Dairy Co. v. Brudi (Ind. Sup.).....	643	New York, C. & St. L. R. Co. v. Martin (Ind. App.).....	654
Montesi v. Press Pub. Co. (N. Y.).....	1145	New York, C. & St. L. R. Co., Beckwith v. (N. Y.).....	1139
Moore v. Dick (Mass.).....	967	New York Evening Journal Pub. Co., Cudlip v. (N. Y.).....	925
Moore v. Ferguson (Ind. Sup.).....	126	New York Evening Journal Pub. Co., Cudlip v. (N. Y.).....	1141
Moore, Consumers' Gas Trust Co. v. (Ind. Sup.).....	1153	New York, N. H. & H. R. Co., Brusseau v. (Mass.).....	348
Moore, Southern Indiana R. Co v. (Ind. App.).....	479	New York, N. H. & H. R. Co., Foster v. (Mass.).....	331
Moore, United States Board & Paper Co. v. (Ind. App.).....	487	New York, N. H. & H. R. Co., Hayes v. (Mass.).....	841
Morgan & Wright v. McCaslin (Ill.).....	1066	New York, N. H. & H. R. Co., Murphy v. (Mass.).....	330
Morrison v. Austin State Bank (Ill.).....	1109	New York, N. H. & H. R. Co., O'Connell v. (Mass.).....	979
Morrison v. Lawrence (Mass.).....	91	New York, N. H. & H. R. Co., Pratt v. (Mass.).....	328
Morrison, Fleming v. (Mass.).....	499	New York, O. & W. R. Co., Cooper v. (N. Y.).....	518
Morris & Guild Co. v. Touvelle (Ohio).....	1162	New York & N. R. Co., Farmers' Loan & Trust Co. v. (N. Y.).....	1141
Morrow, Frank Bird Transfer Co. v. (Ind. App.).....	189	Nicola Bros. Co. v. Queen City Box Co. (Ohio).....	1162
Mortgage Loan Co. v. Ratterman (Ohio).....	1162	Nigh Lumber Co. v. McKee (Ohio).....	1162
Mortimer v. Potter (Ill.).....	817	Noblesville Hydraulic Co. v. Evans (Ind. Sup.).....	126
Mt. Morris Electric Light Co., McNulty v. (N. Y.).....	1145	Nofs, City of Elgin v. (Ill.).....	43
Mowry v. Reed (Mass.).....	936	Norcross v. Wyman (Mass.).....	347
Mullanny v. Nangle (Ill.).....	385	Norcross, Penn Mut. Life Ins. Co. of Philadelphia v. (Ind. Sup.).....	132
Muncie Pulp Co. v. Martin (Ind. Sup.).....	882	Norfolk & W. R. Co. v. Logee (Ohio).....	1162
Municipal Electric Light Co., Herzog v. (N. Y.).....	1142	Norris, Kanage v. (Ohio).....	1160
Murdoch, City of Chicago v. (Ill.).....	46	North Vernon Pump & Lumber Co., Crum v. (Ind. App.).....	103
Murphy v. New York, N. H. & H. R. Co. (Mass.).....	330	North Vernon Pump & Lumber Co., Crum v. (Ind. Sup.).....	587
Murphy v. People (Ill.).....	779	Novak v. American Washboard Co. (Ohio).....	1163
Murphy, Commonwealth v. (Mass.).....	357	Norwich Gas & Electric Co., Welsbach Co. v. (N. Y.).....	1152
Murphy, Cooper v. (Ind. App.).....	664	Nowlin, Cleveland, C., C. & St. L. R. Co. v. (Ind. Sup.).....	257
Murphy, Livingstone v. (Mass.).....	1012	Null, City of Dayton v. (Ohio).....	1156
Murphy, People v. (Ill.).....	902	Oakes, Commonwealth v. (Mass.).....	323
Murphy, People v. (Ill.).....	905	O'Berry, In re (N. Y.).....	109
Murphy, People v. (N. Y.).....	1146	O'Brien v. Bonfield (Ill.).....	1090
Musical Courier Co., Herbert, two cases v. (N. Y.).....	1142	O'Brien, Groves v. (Ohio).....	1158
Mutual Life Ins. Co. of New York v. Allen (Ill.).....	200	O'Connell v. New York, N. H. & H. R. R. (Mass.).....	979
Myer, Fatic v. (Ind. Sup.).....	142	O'Connell, Congregation Beth Israel v. (Mass.).....	1011
Nangle, Mullanny v. (Ill.).....	385	O'Dell v. Strader (Ohio).....	1163
National Bank of Commerce, Hoosier Const. Co. v. (Ind. App.).....	473	O'Donnell, Chicago Terminal Transfer R. Co. v. (Ill.).....	1133
National Council of Knights and Ladies of Security v. Dillon (Ill.).....	367	Olcott v. Tope (Ill.).....	751
National Life Ins. Co. v. Hanner (Ohio).....	1162	Olean St. R. Co., Chamberlain v. (N. Y.).....	1140
Nay, Hutchinson v. (Mass.).....	974	Onasch v. Zinkel (Ill.).....	716
Needham v. Stone (Mass.).....	80	Oppenheimer v. Greencastle School Tp. of Putnam County (Ind. Sup.).....	1100
Nelson v. Nelson (Ind. App.).....	482	O'Reilly v. Brooklyn Heights R. Co. (N. Y.).....	517
Nelson v. Young (N. Y.).....	1146	Osborn v. Cardesa (N. Y.).....	625
Neu, McBeth v. (Ohio).....	1161	Osborn, Hunt v. (N. Y.).....	1143
Newark Pub. Co. v. Donovan (Ohio).....	1162	Osborn, McDaniel v. (Ind. App.).....	601
New Bedford Cordage Co., Gomes v. (Mass.).....	840		
Newby, Pennsylvania Co. v. (Ind. Sup.).....	1043		
Newell, Chicago & W. I. R. Co. v. (Ill.).....	416		
New England Electric R. Const. Co., American Electrical Works v. (Mass.).....	64		
New England Trust Co., Hoffman v. (Mass.).....	852		
New Kanawha Coal & Mining Co. v. Wright (Ind. Sup.).....	550		
Newman v. Gates (Ind. Sup.).....	638		
New York, Astoria Heights Land Co. v. (N. Y.).....	1139		

	Page		Page
Osborn Bank, Farmers' Milling, etc., Co. v. (Ohio).....	1157	People, Cincinnati, I. & W. R. Co. v. (Ill.)	770
Otis v. March (Mass.).....	961	People, Cincinnati, I. & W. R. Co. v. (Ill.)	774
Ostot, Indiana, I. & I. R. Co. v. (Ill.)..	387	People, Cleveland, O., C. & St. L. R. Co. v. (Ill.)	725
Pabst Brewing Co., Walker v. (Ohio).....	1166	People, Cleveland, C., C. & St. L. R. Co. v. (Ill.)	790
Paddock v. Lewis (N. Y.).....	1146	People, Crocker v. (Ill.).....	743
Page, Turner v., two cases (Mass.).....	329	People, Cummings v. (Ill.).....	1094
Palmer v. Coyle (Mass.).....	844	People, Delahoyde v. (Ill.).....	732
Paltzer v. Johnston (Ill.).....	702	People, Dickey & Baker v. (Ill.).....	791
Parker, State v. (Ohio).....	1165	People, Eustace v. (Ill.).....	1069
Parkinson v. Parkinson (Ohio).....	1163	People, Gage v. (Ill.).....	1062
Parks, Toledo, St. L. & W. R. Co. v. (Ind. Sup.)	636	People, Gage v. (Ill.).....	1084
Parr v. Loder (N. Y.).....	1146	People, Gage v. (Ill.).....	1099
Peck-Hammond Co. v. Evans (Ohio).....	1163	People, Gage v. (Ill.).....	1108
Peddecord v. Vennigarhols (Ill.).....	819	People, Grant Land Ass'n v. (Ill.).....	804
Peirce, Crapo v. (Mass.).....	935	People, Hayner v. (Ill.).....	792
Pendleton, Farmers' Loan & Trust Co. v. (N. Y.)	508	People, Illinois Cent. R. Co. v. (Ill.).....	1006
Penn Mut. Life Ins. Co. of Philadelphia v. Norcross (Ind. Sup.)	132	People, Langlois v. (Ill.).....	28
Pennsylvania Co. v. Coyer (Ind. Sup.).....	875	People, Merrifield's Estate v. (Ill.).....	446
Pennsylvania Co. v. McElroy (Ohio).....	1163	People, Murphy v. (Ill.).....	779
Pennsylvania Co. v. Newby (Ind. Sup.).....	1043	People, Sanitary Laundry Co. v. (Ill.).....	434
Pennsylvania, etc., R. Co. v. Jacoby (Ohio).....	1163	People, Sokel v. (Ill.).....	382
People v. Beebler (N. Y.).....	1146	People, Wabash R. Co. v. (Ill.).....	1127
People v. Boggiano (N. Y.).....	101	People, Wistrand v. (Ill.).....	748
People v. Bonier (N. Y.).....	226	People, Zuckerman v. (Ill.).....	741
People v. Bootman (N. Y.).....	505	Perkins v. Rice (Mass.).....	323
People v. Bruesch (N. Y.).....	1146	Perrin Nat. Bank, Zaring v. (Ind. App.)..	247
People v. Burns (Ill.).....	374	Persons v. Brown (N. Y.).....	1149
People v. Cantine (N. Y.).....	1147	Peters, Smith v. (Ind. App.).....	1103
People v. Chicago, B. & Q. R. Co. (Ill.)..	778	Peters, Strong v. (Ill.).....	369
People v. Cincinnati, I. & W. R. Co. (Ill.)..	1119	Pfeifer v. Supreme Lodge of Bohemian Slavonian Benev. Soc. of United States (N. Y.)	1149
People v. Court of General Sessions of Peace in and for New York County (N. Y.)	1148	Pfeiffer, Davis v. (Ill.).....	718
People v. Davey (N. Y.).....	244	Philips v. Philips (N. Y.).....	1149
People v. East Buffalo Live Stock Ass'n (N. Y.)	1148	Phoenix v. Trustees of Columbia College in City of New York (N. Y.)	1149
People v. Elliott (N. Y.).....	1146	Pierce v. Boston & N. St. R. Co., two cases (Mass.)	971
People v. Feitner (N. Y.).....	1148	Pierce, Cleveland, C., C. & St. L. R. Co. v. (Ind. App.).....	604
People v. Goodrich (N. Y.).....	1148	Pinkstaff v. Allison Ditch Dist. No. 2 of Lawrence County (Ill.).....	715
People v. Greene (N. Y.).....	99	Pinney v. Merchants' Nat. Bank (Ohio)...	884
People v. Greene (N. Y.).....	1147	Pittman, Rusche v. (Ind. App.).....	473
People v. Greene (N. Y.).....	1148	Pittsburg, O., C. & St. L. R. Co. v. Wilson (Ind. App.)	666
People v. Greene (N. Y.).....	1149	Pittsburg, etc., R. Co. v. Brock (Ohio)...	1163
People v. Grout (N. Y.).....	464	Pittsburg & C. Packet Line v. Wall (Ohio)...	1163
People v. Hibbe (N. Y.).....	1146	Plummer, Oamfield v. (Ill.).....	787
People v. Illinois Cent. R. Co. (Ill.).....	1069	Plunkett, Millerick v. (Mass.).....	354
People v. John (Ill.).....	789	Pogue, Kinsloe v. (Ill.).....	906
People v. Kelsey (N. Y.).....	524	Polecat Drainage Dist., Cleveland, C., C. & St. L. R. Co. v. (Ill.)	684
People v. Koenig (N. Y.).....	993	Policemen's Benev. Ass'n of Chicago v. Ryce (Ill.)	764
People v. Matthias (N. Y.).....	103	Pomroy v. Hincks (N. Y.).....	628
People v. Mattinger (Ill.).....	906	Pontiac, Illinois Trust & Savings Bank v. (Ill.)	411
People v. Miller (N. Y.).....	525	Porter v. Clotts (Ohio).....	1163
People v. Miller (N. Y.).....	931	Porter, Terhune v. (Ill.).....	820
People v. Murphy (Ill.).....	902	Port Jarvis, Barry v. (N. Y.).....	1139
People v. Murphy (Ill.).....	905	Portsmouth St. R., etc., Co. v. Russell (Ohio)	1163
People v. Murphy (N. Y.).....	1146	Potter, Mortimer v. (Ill.).....	817
People v. Priest (N. Y.).....	1149	Potts, Chicago & S. E. R. Co. v. (Ind. App.)	168
People v. Record (Ill.).....	7	Powell v. Gallagher (Ohio).....	1163
People v. Rimieri (N. Y.).....	1002	Powers, Illinois, I. & M. R. Co. v. (Ill.)...	723
People v. Rothstein (N. Y.).....	999	Powers, Weber v. (Ill.).....	1070
People v. St. Clair (N. Y.).....	1147	Pratt v. New York, N. H. & H. R. Co. (Mass.)	328
People v. Scholer (N. Y.).....	1148	Press Pub. Co., Montesi v. (N. Y.).....	1145
People v. Slauson (N. Y.).....	1147	Preston, Cheek v. (Ind. App.).....	1048
People v. Smith (N. Y.).....	931	Preston, Merrill v. (Mass.).....	941
People v. Spencer (N. Y.).....	461	Priest, People v. (N. Y.).....	1149
People v. Stearns (Ill.).....	728	Pritchard v. Edison Electric Illuminating Co. of New York (N. Y.)	243
People v. Sturgis (N. Y.).....	1148	P. R. Mitchell Co., Kulueke v. (Ohio)...	1161
People v. Summerfield (N. Y.).....	1147	Protection Mut. Fire Ins. Co., Healy v. (Ill.)	678
People v. Valentine (N. Y.).....	1147	Providence, F. R. & N. Steamboat Co. v. Fall River, two cases (Mass.)	338
People v. Wagner (N. Y.).....	577	Providence Washington Ins. Co. v. Wolf (Ind. App.)	606
People v. Waite (Ill.).....	1087		
People v. Wells (N. Y.).....	626		
People v. Wells, two cases (N. Y.).....	1147		
People v. Wells (N. Y.).....	1148		
People v. Wiechers (N. Y.).....	501		
People, Chicago, B. & Q. R. Co. v. (Ill.)...	219		
People, Chicago, B. & Q. R. Co. v. (Ill.)...	1105		
People, Chicago & E. I. R. Co. v. (Ill.)...	1118		
People, Cincinnati, I. & W. R. Co. v. (Ill.)	763		

	Page		Page
Prudential Ins. Co. of America, Bradley v. (Mass.).....	989	Russell, Richcreek v. (Ind. App.).....	617
Pugsley, Hardin County Treasurer v. (Ohio).....	1159	Ryce, Policemen's Benev. Ass'n of Chicago v. (Ill.).....	764
Purtill, State v. (Ohio).....	1165	Ryer, In re (N. Y.).....	1150
Queen City Box Co., Nicola Bros. Co. v. (Ohio).....	1162	Sager, McKinster v. (Ind. Sup.).....	854
Quick, In re (N. Y.).....	1149	Sahn, Huber v. (Ohio).....	1160
Quillen, Baltimore & O. S. W. R. Co. v. (Ind. App.).....	661	St. Clair, People v. (N. Y.).....	1147
Quincy, Miller v. (N. Y.).....	116	Saiter, Columbus Hotel Co. v. (Ohio).....	1156
Quincy, Miller v. (N. Y.).....	1145	Saltman v. Boston Elevated R. Co. (Mass.).....	950
Radovsky v. Sperling (Mass.).....	949	Sammons v. Ithaca St. R. Co. (N. Y.).....	1150
Rampe, Citizens' Permanent Savings & Loan Ass'n v. (N. Y.).....	1140	Sample, Irwin v. (Ill.).....	687
Randall, In re (N. Y.).....	1149	Sanders, Covault v. (Ind. App.).....	163
Ratterman, Mortgage Loan Co. v. (Ohio).....	1162	Sangamon County, Watts v. (Ill.).....	11
Ray v. Lobdell (Ill.).....	1076	Sanitary Laundry Co. v. People (Ill.).....	434
Raymer v. Gendron (Ohio).....	1163	Sargent Glass Co. v. Matthews Land Co. (Ind. App.).....	474
Ready v. J. L. Fulton Co. (N. Y.).....	317	Sauer v. New York (N. Y.).....	579
Record, People v. (Ill.).....	7	Saunders v. Chicago (Ill.).....	13
Rector, Reinhard v. (Ohio).....	1163	Saunders v. State (Ohio).....	1164
Redfield, Rhinehart v. (N. Y.).....	1150	Saxby, Chicago City R. Co. v. (Ill.).....	755
Redmond v. New York (N. Y.).....	1149	Scaplen v. Blanchard (Mass.).....	846
Reed, Hallett v. (Ohio).....	1158	Schaefer, Magerstadt v. (Ill.).....	1063
Reed, Mowry v. (Mass.).....	936	Schell, Brennaman v. (Ill.).....	412
Reed Smokeless Furnace Co. v. State (Ind. App.).....	615	Scherer v. Bailey (Ind. App.).....	472
Reich v. Dyer (N. Y.).....	922	Schmidt, Indianapolis St. R. Co. v. (Ind. App.).....	478
Reiger, Ernst v. (Ohio).....	1157	Schneider v. Sulzer (Ill.).....	19
Reilly, Chicago & E. I. R. Co. v. (Ill.).....	454	Schneider, Mayer v. (Ill.).....	436
Reinhard v. Rector (Ohio).....	1163	Scholer, People v. (N. Y.).....	1148
Rennett v. Shirk (Ind. Sup.).....	546	Schomberg, Indianapolis St. R. Co. v. (Ind. Sup.).....	1041
Rettagliata v. Hayward (N. Y.).....	1150	School Town of Petersburg, Taylor v. (Ind. App.).....	159
Rex, Conkey v. (Ill.).....	370	Schradin v. Schradin (Ohio).....	1164
Reynolds, Wilkie v. (Ind. App.).....	179	Schreiber v. Worm (Ind. Sup.).....	852
Rhinehart v. Redfield (N. Y.).....	1150	Schuknecht v. Schultz (Ill.).....	37
Rice v. Jakubovsky (Ohio).....	1163	Schultz, Schuknecht v. (Ill.).....	37
Rice v. New York Cent. & H. R. R. Co. (Mass.).....	79	Scott v. Scott (Ill.).....	706
Rice, Perkins v. (Mass.).....	923	Scudder v. Interurban St. R. Co. (N. Y.).....	513
Richardson, City of Chicago v. (Ill.).....	791	Scudder v. Interurban St. R. Co. (N. Y.).....	1142
Richcreek v. Russell (Ind. App.).....	617	Security Mut. Life Ins. Co., Crosby v. (N. Y.).....	1140
Richmond v. Kelly (Ohio).....	1164	Seale v. Boston & N. St. R. Co. (Mass.).....	971
Rickman v. Meier (Ill.).....	1121	Seerley, Indianapolis St. R. Co. v. (Ind. App.).....	160
Rich Grove Tp., Pulaski County, v. Emmett (Ind. Sup.).....	543	Seerley, Indianapolis St. R. Co. v. (Ind. App.).....	1034
Rimieri, People v. (N. Y.).....	1002	Sellers v. Hayes (Ind. Sup.).....	119
Rippeth, State v. (Ohio).....	293	Selsor, Groves v., two cases (Ohio).....	1158
Roberts v. Aetna Life Ins. Co. (Ill.).....	363	Sewall, Braffen v. (Ohio).....	1156
Roberts, Dibble v. (Ind. App.).....	1136	Shafer, Blakesley v. (Ohio).....	1154
Robertson v. Bank of Piqua (Ohio).....	1164	Shaffner v. Shaffner (Ill.).....	447
Robinson v. Metropolitan St. R. Co. (N. Y.).....	1150	Shanley v. Espy (Ohio).....	1164
Rockwell, State v. (Ohio).....	1163	Sharp v. Sharp (Ill.).....	1056
Rogers v. Boston & M. B. R. (Mass.).....	945	Shaw v. Ginn (Ohio).....	1164
Root v. London Guarantee & Accident Co. (N. Y.).....	1150	Shea v. McCauliff (Mass.).....	60
Rosen v. Boston (Mass.).....	992	Shelburne Falls Sav. Bank, Barnes v. (Mass.).....	85
Roshniakorski v. Roshniakorski (Ind. App.).....	435	Shelby County Com'rs v. Gross (Ohio).....	1164
Rousseau v. Rouss (N. Y.).....	916	Sherck v. Knapp (Ohio).....	1164
Rousseau v. Rouss (N. Y.).....	1150	Sherman, City of Chicago v. (Ill.).....	396
Rothschild, Steefel v. (N. Y.).....	112	Sherman, Lima Electric R. Co. v. (Ohio).....	1161
Rothschild, Steefel v. (N. Y.).....	1151	Shickle-Harrison & Howard Iron Co. v. Beck (Ill.).....	423
Rothschild & Co., City of Chicago v. (Ill.).....	698	Shideler, Hohn v. (Ind. Sup.).....	575
Rothstein, People v. (N. Y.).....	999	Shields v. Gibson (Ohio).....	1164
Rouss, Rousseau v. (N. Y.).....	916	Shipp, Delaney v. (Ind. App.).....	1038
Rouss, Rousseau v. (N. Y.).....	1150	Shire, Flour City Nat. Bank v. (N. Y.).....	1141
Rowe v. Taylorville Electric Co. (Ill.).....	711	Shire, Traders' Nat. Bank v. (N. Y.).....	1152
Royal Baking Powder Co. v. Hoagland (N. Y.).....	634	Shirk, Rennert v. (Ind. Sup.).....	546
Roy, Bennett v. (Ill.).....	880	Shockney, Arbaugh v. (Ind. App.).....	666
Rubens v. Hill (Ill.).....	1127	Shurtliff, Augsburg v. (N. Y.).....	927
Rudnik, Hinchliff v. (Ill.).....	691	Sibley, Lehman v. (Ohio).....	1161
Ruff, E. T. Kenney Co. v. (Ind. App.).....	622	Sibson v. Williams (Ohio).....	1164
Ruehrwein, Bode v. (Ohio).....	1154	Siceloff, Union Traction Co. v. (Ind. App.).....	266
Ruehrwein, Bode v. (Ohio).....	1155	Sicking, State v. (Ohio).....	1166
Rump, Gillespie v. (Ind. Sup.).....	138	Siebert v. Milbank (N. Y.).....	1151
Rusche v. Pittman (Ind. App.).....	473	Siegel, Chicago Daily News Co. v. (Ill.).....	810
Russell v. High School Board of Education of School Dist. No. 131 (Ill.).....	441	Sihler, Ft. Wayne Trust Co. v. (Ind. App.).....	494
Russell, Portsmouth St. R., etc., Co. v. (Ohio).....	1163	Silver, Burdett & Co. v. Indiana State Board of Education (Ind. App.).....	820
		Simons, Barrett v. (Ohio).....	1154
		Sisson v. Carithers (Ind. App.).....	267
		Skinner, In re (N. Y.).....	1151

Page	Page		
Slack v. Knox (Ill.).....	746	State, Stifel v. (Ind. Sup.).....	600
Slack v. Smith (Ohio).....	1164	State, Trustees of Williamsburg Tp. v. (Ohio).....	1168
Slack, West Muncie Strawboard Co. v. (Ind. Sup.).....	879	State, Wade v., two cases (Ohio).....	1166
Slauason, People v. (N. Y.).....	1147	State, Welch v. (Ind. Sup.).....	1043
S. Liebmann's Sons Brewing Co., Long Island Bottlers' Union v. (N. Y.).....	1145	State Bank of Randolph, Lyman v. (N. Y.).....	1145
Slifer, Indianapolis St. R. Co. v. (Ind. App.).....	1055	Steagall v. Daniels (Ohio).....	1165
Smith v. Peters (Ind. App.).....	1103	Stearns, People v. (Ill.).....	728
Smith v. Smith (N. Y.).....	1151	Steefel v. Rothschild (N. Y.).....	112
Smith v. Taylor (Ind. App.).....	651	Steefel v. Rothschild (N. Y.).....	1151
Smith v. Utica Knitting Co. (N. Y.).....	1151	Stemmler v. New York (N. Y.).....	581
Smith v. Wood (Mass.).....	988	Stephens, Taylor v. (Ind. App.).....	609
Smith, Buckeye State Co. v. (Ohio).....	1155	Stern, Glos v. (Ill.).....	1057
Smith, Herter v. (Ohio).....	1159	Stevens v. Marcellus Electric R. Co. (N. Y.).....	1151
Smith, Kirkwood v. (Ill.).....	427	Stevens, Greenberg v. (Ill.).....	722
Smith, Mace v. (Ind. Sup.).....	1185	Stewart, Baltimore & O. R. Co. v. (Ohio).....	1154
Smith, People v. (N. Y.).....	931	Stewart, Barricklow v. (Ind. Sup.).....	128
Smith, Slack v. (Ohio).....	1164	Stewart, State v. (Ohio).....	307
Smith, State v. (Ohio).....	800	Stifel v. State (Ind. Sup.).....	600
Snodgrass v. Brandenburg (Ind. Sup.).....	1030	Stirling v. Kelley (N. Y.).....	1151
Snow, Massachusetts Nat. Bank v. (Mass.).....	959	Stirr, City of New Albany v. (Ind. App.).....	275
Sokol v. People (Ill.).....	832	Stone, Needham v. (Mass.).....	80
Solari v. Clark (Mass.).....	958	Stone, Southard v. (Ohio).....	1164
Southard v. Stone (Ohio).....	1164	Strader, O'Dell v. (Ohio).....	1163
Southern Indiana R. Co. v. Fine (Ind. Sup.).....	589	Strathmann, Chicago North Shore St. R. Co. v. (Ill.).....	800
Southern Indiana R. Co. v. Moore (Ind. App.).....	479	Strayer v. Dickerson (Ill.).....	1085
Southern Indiana R. Co. v. Wallace (Ind. Sup.).....	1153	Streeter, City of New York v. (N. Y.).....	631
Southern Ohio Traction Co., Matthews City Sol. v. (Ohio).....	1162	Strong v. Peters (Ill.).....	869
Southern Ohio Traction Co., State v. (Ohio).....	1165	Strong, Brumfield v. (Ohio).....	1155
Southern R. Co. v. Davis (Ind. App.).....	1053	Sturdy, Kirk v. (Mass.).....	349
Southern R. Co. v. State (Ind. App.).....	174	Sturgis, People v. (N. Y.).....	1148
Sowers, Zanesville Coal Co. v. (Ohio).....	1167	Sufern, Comesky v. (N. Y.).....	320
Spear v. American Service Union (N. Y.).....	1151	Suhrwar, Wheeling & L. E. R. Co. v. (Ohio).....	1167
Spees, City of Vincennes v. (Ind. App.).....	531	Sulzer, Schneider v. (Ill.).....	19
Spence, Chicago & J. Electric R. Co. v. (Ill.).....	796	Summerfield, People v. (N. Y.).....	1147
Spencer, People v. (N. Y.).....	461	Sun Printing & Publishing Co., King v. (N. Y.).....	1144
Spengler v. Kuhn (Ill.).....	214	Supreme Lodge of Bohemian Slavonian Benev. Soc. of United States, Pfeifer v. (N. Y.).....	1149
Sperling, Radovsky v. (Mass.).....	949	Supreme Ruling of Fraternal Mystic Circle, Wood v. (Ill.).....	788
Sprague, Cherry v. (Mass.).....	456	Sutter v. New York Cent. & H. R. R. Co. (N. Y.).....	1151
Springfield Pub. Co., Young v. (Ohio).....	1167	Sweeney v. Chicago Tel. Co. (Ill.).....	677
Spring Valley Coal Co. v. Buzis (Ill.).....	1060	Swift, Illinois Cent. R. Co. v. (Ill.).....	737
Stalker v. Stalker (Ohio).....	1164	Tabler, State v. (Ind. App.).....	1039
State v. Berberich (Ohio).....	1164	Talcott, Glos v. (Ill.).....	707
State v. Borger (Ohio).....	1165	Taylor v. McClymonds (N. Y.).....	1152
State v. Brookman (Ohio).....	1165	Taylor v. School Town of Petersburg (Ind. App.).....	159
State v. Cleveland, etc., R. Co. (Ohio).....	1165	Taylor v. Stephens (Ind. App.).....	609
State v. Gibson (Ohio).....	1165	Taylor, Indianapolis St. R. Co. v. (Ind. Sup.).....	1045
State v. Green (Ohio).....	1165	Taylor, Smith v. (Ind. App.).....	651
State v. Parker (Ohio).....	1165	Taylorville Electric Co., Rowe v. (Ill.).....	711
State v. Purtil (Ohio).....	1165	Teasel v. West Huron Sporting Club (Ohio).....	1165
State v. Rippeth (Ohio).....	298	Tenement House Department of City of New York v. Moeschel, two cases (N. Y.).....	231
State v. Rockwell (Ohio).....	1165	Terhune v. Porter (Ill.).....	820
State v. Sicking (Ohio).....	1165	Terre Haute Electric Co. v. Kiely (Ind. App.).....	658
State v. Smith (Ohio).....	800	Tetrault v. Fournier (Mass.).....	351
State v. Southern Ohio Traction Co. (Ohio).....	1165	Teufel, Weston v. (Ill.).....	908
State v. Stewart (Ohio).....	307	Thacker Fruit Co., Anderton Fruit Co. v. (Ohio).....	1154
State v. Tabler (Ind. App.).....	1039	Thomas v. First Nat. Bank (Ill.).....	801
State v. Thompson (Ohio).....	296	Thomas v. McClure & Smyser (Ohio).....	1105
State v. Wyman (Ohio).....	457	Thomas v. Waters (Ill.).....	820
State, Acme Fertilizer Co. v. (Ind. App.).....	1037	Thompson v. American Writing Paper Co. (Mass.).....	348
State, Bowers v. (Ohio).....	1155	Thompson, State v. (Ohio).....	296
State, City of Dayton v. (Ohio).....	1158	Tiffany, In re (N. Y.).....	512
State, Coohman v. (Ind. Sup.).....	568	Tobin v. Larkin (Mass.).....	969
State, Drake v. (Ohio).....	1157	Toledo, Lake Shore & M. E. R. Co. v. (Ohio).....	1167
State, Feathergill v. (Ind. App.).....	181	Toledo R. & Terminal Co. v. Hayes (Ohio).....	1165
State, Gentsch v. (Ohio).....	900	Toledo, St. L. & W. R. Co. v. Bond (Ind. App.).....	647
State, Griffiths v. (Ind. Sup.).....	563		
State, Halladay v. (Ohio).....	1158		
State, Howe v. (Ohio).....	1160		
State, Lipschitz v. (Ind. App.).....	145		
State, Loyeland v. (Ohio).....	1161		
State, Mahoney v. (Ind. App.).....	151		
State, Read Smokeless Furnace Co. v. (Ind. App.).....	615		
State, Saunders v. (Ohio).....	1164		
State, Southern R. Co. v. (Ind. App.).....	174		

Page	Page
Toledo, St. L. & W. R. Co. v. Fenstermaker (Ind. Sup.)	561
Toledo, St. L. & W. R. Co. v. Parks (Ind. Sup.)	636
Tope, Olcott v. (Ill.)	751
Torrey v. Dickinson (Ill.)	703
Touville, Morris & Guild Co. v. (Ohio)	1162
Towne, Ellison v. (Ind. App.)	270
Town of Cicero v. Bartelme (Ill.)	437
Townsend v. Boston (Mass.)	991
Townsend, Chippewa Co. v. (Ohio)	1155
Tozier v. Haverhill & A. St. R. Co., two cases (Mass.)	953
Tracy, In re (N. Y.)	519
Tracy, In re (N. Y.)	1152
Traders' Nat. Bank v. Shire (N. Y.)	1152
Travelers' Ins. Co. of Hartford, Conn., v. Bright (Ohio)	1166
Tremper v. Erie R. Co. (N. Y.)	1152
Tripp v. Macomber (Mass.)	361
Trout, Marvin v. (Ohio)	1161
Trout, Marvin v. (Ohio)	1162
Trustees of Cincinnati Southern Ry., City of Cincinnati v., two cases (Ohio)	1156
Trustees of Columbia College in City of New York, Phoenix v. (N. Y.)	1149
Trustees of Sailors' Snug Harbor in City of New York, City of New York v. (N. Y.)	1140
Trustees of Schools of Tp. 9 S., R. 2 W. Third P. M., Jackson County, Illinois Cent. R. Co. v. (Ill.)	39
Trustees of Williamsburg Tp. v. State (Ohio)	1166
Turner v. Mather (N. Y.)	1152
Turner v. Page, two cases (Mass.)	329
Tuthill Spring Co. v. Holliday (Ind. Sup.)	872
Uhter, Chicago City R. Co. v. (Ill.)	195
Ulrich, Chicago & M. Electric R. Co. v. (Ill.)	815
Umstead, Howard v. (Ohio)	1160
Uncapher v. Uncapher (Ohio)	1166
Union Mut. Life Ins. Co., Ferguson v. (Mass.)	358
Union Traction Co. v. Buckland (Ind. App.)	158
Union Traction Co. v. Siceloff (Ind. App.)	266
Union Trust Co., In re (N. Y.)	107
Union Trust Co. of New York, Baltus v. (N. Y.)	1005
United States Board & Paper Co. v. Moore (Ind. App.)	487
United States Envelope Co., Holyoke Envelope Co. v. (Mass.)	58
United States Exp. Co. v. Joyce (Ind. Sup.)	865
United States Trust Co. of New York, Marshall v. (N. Y.)	1145
Upham v. Boston (Mass.)	946
Utica Knitting Co., Smith v. (N. Y.)	1151
Valentine, People v. (N. Y.)	1147
Van Alstine, Mahoning Val. R. Co. v. (Ohio)	1161
Van De Boe, Hager & Co. v. Kundtz (Ohio)	1166
Vanniman, Hunt v. (Ohio)	1160
Van Tuyl, Young v. (Ohio)	1167
Vennigarholz, Peddecord v. (Ill.)	819
Viemeister v. White (N. Y.)	97
Village of Canfield v. Brobst (Ohio)	459
Village of Doylestown v. Cameron (Ohio)	1166
Village of Huron v. Bartzten (Ohio)	1166
Village of Norwood v. Bundy (Ohio)	1166
Village of Norwood v. Fridman (Ohio)	1166
Village of Pleasant Hill v. Commissioners of Miami County (Ohio)	896
Vincennes, Cullup v. (Ind. App.)	166
Vipond, Chicago & A. R. Co. v. (Ill.)	22
Wabash R. Co. v. Billings (Ill.)	2
Wabash R. Co. v. People (Ill.)	1127
Wabash Valley Coal Co. v. First Nat. Bank (Ind. App.)	1153
Wade v. State, two cases (Ohio)	1166
Wadsworth v. Cleveland Electric R. Co. (Ohio)	1166
Wagner, People v. (N. Y.)	577
Waite, People v. (Ill.)	1087
Walker v. Pabst Brewing Co. (Ohio)	1166
Walker, Board of Education of Canton v. (Ohio)	898
Wall, Pittsburg & C. Packet Line v. (Ohio)	1163
Wallace, Southern Indiana R. Co. v. (Ind. Sup.)	1153
Walton, Chicago Terminal Transfer Co. v. (Ind. Sup.)	646
Ward, Welty v. (Ind. Sup.)	596
Warren v. Boston (Mass.)	1022
Washburn, Minshull v., two cases (N. Y.)	1145
Washington Nat. Bank, Daily v. (Ind. Sup.)	260
Washington Nat. Bank, Daily v. (Ind. Sup.)	1153
Waters, Thomas v. (Ill.)	820
Wathen v. Allison Ditch Dist. No. 2 (Ill.)	781
Watkins v. Kittredge (Ohio)	1166
Watts v. Sangamon County (Ill.)	11
Wayne International Building & Loan Ass'n v. Gilmore (Ind. App.)	190
Weber v. Powers (Ill.)	1070
Welch v. Austin (Mass.)	972
Welch v. Boston Elevated R. Co. (Mass.)	500
Welch v. Boston & N. St. R. Co. (Mass.)	341
Welch v. State (Ind. Sup.)	1043
Weller Co. v. Gordon (Ohio)	1160
Wells, Chipman v. (Ind. App.)	172
Wells, People v. (N. Y.)	626
Wells, People v., two cases (N. Y.)	1147
Wells, People v. (N. Y.)	1148
Welsbach Co. v. Norwich Gas & Electric Co. (N. Y.)	1152
Welty v. Ward (Ind. Sup.)	596
Wendall v. Fisher (Mass.)	322
Wenham v. International Packing Co. (Ill.)	1079
Wenon v. Fossick (Ill.)	732
Wenz, Cleveland, etc., R. Co. v. (Ohio)	1156
Werner v. Cincinnati (Ohio)	1166
West, Hoskins v. (Ohio)	1159
West Brookfield, Inhabitants of Brookfield v. (Mass.)	86
Westcott v. Boston (Mass.)	89
Westfall v. Albert (Ill.)	4
West Huron Sporting Club, Teasel v. (Ohio)	1165
West Muncie Strawboard Co. v. Slack (Ind. Sup.)	879
Weston v. Teufel (Ill.)	908
West Turin, Hoffart v. (N. Y.)	1143
Wheeler, Commercial Nat. Bank v. (Ohio)	1156
Wheeling & L. E. R. Co. v. Suhrwiar (Ohio)	1167
Whetstone, Leonard v. (Ind. Sup.)	1045
Whistler v. Cowan (Ohio)	1167
White, Viemeister v. (N. Y.)	97
White River School Tp. of Johnson County v. Caxton Co. (Ind. App.)	185
Whitson v. New York (N. Y.)	1152
Wichmann, Cincinnati St. R. Co. v. (Ohio)	1155
Wicker, Chicago, I. & L. R. Co. v. (Ind. App.)	614
Wiechers, People v. (N. Y.)	501
Wilkerson, Capital Nat. Bank v. (Ind. App.)	247
Wilkie v. Reynolds (Ind. App.)	179
Williams v. Jones (Ohio)	1167
Williams, Big Vein Coal Co. v. (Ohio)	1154
Williams, Donogh v. (Ohio)	1157
Williams, McArtor v., two cases (Ohio)	1161
Williams, Sibson v. (Ohio)	1164
Williston Seminary v. Easthampton Spinning Co. (Mass.)	67
Wilson, Pittsburg, C., O. & St. L. R. Co. v. (Ind. App.)	666
Winchendon Sav. Bank, Galvin v. (Mass.)	969
Winkelman v. Chicago (Ill.)	1066

	Page		Page
Wistrand v. People (Ill.).....	748	Worcester City Missionary Soc. v. Memorial Church (Mass.).....	71
Wixon v. Bruce, two cases (Mass.).....	978	Worm, Schreiber v. (Ind. Sup.).....	852
Wolf v. Devitt (N. Y.).....	1152	Wright, New Kanawha Coal & Mining Co. v. (Ind. Sup.).....	550
Wolf, Providence Washington Ins. Co. v. (Ind. App.).....	606	Wulfekoetter v. Koehnken (Ohio).....	1167
Wolfe's Estate, In re (N. Y.).....	1152	Wyman, Norcross v. (Mass.).....	347
Wolff v. New York (N. Y.).....	1153	Wyman, State v. (Ohio).....	457
Wolff, Board of Com'rs of Laporte County v. (Ind. Sup.).....	860		
Wolfinger, Gompf v. (Ohio).....	1158	Yeagley, Fire Ass'n of Philadelphia v. (Ind. App.).....	1035
Wood v. Supreme Ruling of Fraternal Mystic Circle (Ill.).....	783	Yonkers, Culver v. (N. Y.).....	1141
Wood, Smith v. (Mass.).....	988	Young v. Chicopee (Mass.).....	63
Woodfield, Bowen v. (Ind. App.).....	162	Young v. Springfield Pub. Co. (Ohio).....	1167
Woodland Ave. Savings & Loan Co., Hart v. (Ohio).....	1159	Young v. Van Tuyl (Ohio).....	1167
Woodrow v. Bartles & Co. (Ohio).....	1167	Young, Davidson v. (Ohio).....	1157
Woodsworth, Evans v. (Ill.).....	1082	Young, Nelson v. (N. Y.).....	1146
Woodward, Chicago, I. & L. R. Co. v. (Ind. Sup.).....	558	Zanesville Coal Co. v. Sowers (Ohio).....	1167
Worcester, Block v. (Mass.).....	77	Zaring v. Perrin Nat. Bank (Ind. App.)..	247
Worcester, Harrington v. (Mass.).....	326	Zartman & Willis v. Doremus (Ohio).....	1167
Worcester, Lakeside Mfg. Co. v. (Mass.)...	81	Zeigler v. Chicago (Ill.).....	719
		Zinkel, Onasch v. (Ill.).....	716
		Zuckerman v. People (Ill.).....	741

REHEARINGS DENIED.

[Cases in which rehearings have been denied, without the rendition of a written opinion, since the publication of the original opinions in previous volumes of this reporter.]

Buck v. Beach (Ind. Sup.) 71 N. E. 963.	La Porte Carriage Co. v. Sullender (Ind. App.) 71 N. E. 922.
Chicago & S. E. R. Co. v. McEwen (Ind. App.) 71 N. E. 926.	Myers v. Manlove (Ind. Sup.) 71 N. E. 898.
Crown Oil Co. v. Ward (Ind. App.) 71 N. E. 1143.	Pittsburgh, C., C. & St. L. R. Co. v. Collins (Ind. Sup.) 71 N. E. 661.
German-American Ins. Co. v. Yeagley (Ind. Sup.) 71 N. E. 897.	Risser v. Dungan (Ind. App.) 71 N. E. 974.
Godfrey v. White (Ind. App.) 69 N. E. 688.	Voris v. Pittsburg Plate Glass Co. (Ind. Sup.) 70 N. E. 249.
Harbaugh v. Tanner (Ind. Sup.) 71 N. E. 145.	Wabash R. Co. v. Keister (Ind. Sup.) 67 N. E. 521.
Kisling v. Barrett (Ind. App.) 71 N. E. 507.	Wagner v. Weyhe (Ind. App.) 71 N. E. 915.

†

THE
NORTHEASTERN REPORTER.
VOLUME 72.

(112 Ill. 222)

GLOS v. HOBAN.

(Supreme Court of Illinois. Oct. 24, 1904.)

**REFERENCE — APPEAL — OBJECTIONS — TITLE—
REGISTRATION—BURDEN OF PROOF.**

1. Objections to the admission of evidence on a hearing before an examiner of titles for registration cannot be reviewed on appeal unless incorporated in exceptions to the master's report and renewed in the trial court.

2. An exception to an examiner's report in that the examiner erred in finding that plaintiff was seized of title in fee to the lots in question was insufficient to raise an objection that the examiner erred in admitting certain secondary evidence without a sufficient foundation having been first laid therefor.

3. Where, in a proceeding for the registration of plaintiff's title to certain real estate, plaintiff produced evidence establishing title in him, the burden was on a party claiming title under a tax deed to establish the validity of such deed.

Error to Circuit Court, Cook County; M. F. Tuley, Judge.

Proceedings by William Hoban against Jacob Glos to register title to certain real estate. From a decree in favor of complainant, defendant brings error. Affirmed.

Jacob Glos (John R. O'Connor, of counsel), for plaintiff in error. John J. Swenle and T. F. Monahan, for defendant in error.

BOGGS, J. This is a writ of error to reverse a decree entered in a proceeding in the circuit court of Cook county declaring the defendant in error, William Hoban, to be the owner in fee of lots Nos. 21 to 25, inclusive, in block 1, Noonan's subdivision of the east half of the north half of the southwest quarter of the southeast quarter of section 3, town 39 north, range 13 east, of the third principal meridian; that a tax deed thereto held by the plaintiff in error is null and void; and ordering that such title in fee be registered in said defendant in error on condition that he make payment of a designated sum to the plaintiff in error for taxes, etc., disbursed in procuring the tax deed, and interest thereon.

The complaint that the examiner of titles received in evidence certain abstracts of title without the requisite proof that the original deeds purporting to be shown by the abstract

had been lost and the records thereof had been destroyed by fire, or that it was not in the power of the defendant in error to produce the original deeds, or that the abstracts of title had been made in the ordinary course of business, etc., as required by sections 23 and 24 of chapter 116 (3 Starr & C. Ann. St. 1896, p. 3360), cannot be investigated in this court, for the reason this ground of complaint was not specifically made in the objections filed to the report of the examiner of titles, and in the exceptions to such report filed in the circuit court. The same rules apply with reference to the mode of preserving for review the rulings as to objections and exceptions presented to the report of the examiner as are applicable to the review of objections and exceptions to the reports of masters in chancery. *Gage v. Consumers' Electric Light Co.*, 194 Ill. 30, 64 N. E. 353.

All authorities agree that in order to save the question of the admissibility of evidence for review it is requisite that the objection thereto shall be made before the master, but there seems to be some contrariety of opinion as to the necessity of incorporating the complaint into the objections filed before the master to his report, and of renewing the complaint in the exceptions filed to the report before the chancellor. The rule in this jurisdiction is very clearly stated in *Hurd v. Goodrich*, 59 Ill. 450. We there said (page 455, 59 Ill.): "Consistently with the convenience of courts of equity in this respect, their mode of procedure requires the party who may desire to have the court revise the rulings of the master as to the admission or rejection of evidence, or the principle upon which an account is stated, to file objections to the master's report before it is returned into court, pointing out the grounds with reasonable certainty; then, if the master still adheres to his rulings and report and returns it into court, the party objecting may then file his exceptions to the report, corresponding with the objections made before the master, upon the hearing of which the whole or such part of the evidence as may be material will be brought forward and be subject to review by the court." This statement of the rule was quoted with approval in *Prince*

v. Cutler, 69 Ill. 267. And in *Cheltenham Improvement Co. v. Whitehead*, 128 Ill. 279, 21 N. E. 569, we said (page 284, 128 Ill., page 570, 21 N. E.): "If, in the opinion of the plaintiff in error, the evidence offered before the master was incompetent or insufficient to establish the claim, he was required to file exceptions before the master, and, if overruled there, renew the exceptions in the circuit court." In *Gehrke v. Gehrke*, 190 Ill. 166, 60 N. E. 59, it was said (page 175, 190 Ill., page 62, 60 N. E.): "If, in the opinion of the appellant, the evidence offered before the master in regard to these items was incompetent or insufficient to establish them, she was required to file objections before the master, and, if overruled, to renew such objections as exceptions in the trial court." In footnote 1, on page 285, of 8 Ency. of Pl. & Pr., it is said: "According to the weight of authority, exceptions to the rulings of a master or referee on evidence should be taken at the time they are made, and are not available on appeal unless renewed before the trial court when it passes on the report."

The objections filed to the report of the examiner of titles in the case at bar, which also stood as exceptions to the report in the circuit court, did not complain, either generally or specifically, that the examiner received the abstracts in evidence without sufficient preliminary foundation to justify such reception. It was objected that the examiner erred in finding that the defendant in error was seised of the title in fee to the lots, and plaintiff in error insists that this objection includes the objection that the abstracts were received without the requisite preliminary proof. The objection referred to would direct the attention of the court to the question whether the evidence received and considered by the examiner was sufficient to establish the finding that the title in fee was in the applicant, but was not sufficiently definite to raise the question whether the examiner erred in holding the preliminary proof offered for the purpose was sufficient to authorize the reception in evidence of the abstracts. An objection to the examiner's report is in the nature of a special demurrer, and must point out the grounds of objection with such clearness and certainty as to call the attention of the court to the particular alleged error which it is desired to have reviewed.

The insistence of the plaintiff in error that it was incumbent on the defendant in error to affirmatively establish the invalidity of his (plaintiff in error's) tax deed is not well taken. In a bill in chancery to remove a tax deed as a cloud on the title of the complainant, the invalidity of the tax deed must be averred and proved. But this was an application, under the statute, for the registration of the title of the defendant in error, and, as explained in *Glos v. Kingman & Co.*, 207 Ill. 26, 69 N. E. 632, the applicant is not required to establish the invalidity of oppos-

ing claims to the title. In the case cited we said (page 31, 207 Ill., page 633, 69 N. E.): "If the applicant, in a proceeding under the statute for the registration of his title, produces evidence establishing title in him, then those who have been brought in under the application as holders of claims to the title may be required to produce proof to establish the validity of their claims to the title, or to a lien on the title, as the case may be." It is not contended in this court that the proof which was received and considered by the examiner was insufficient to justify the finding that the title to the fee in the lots was in the defendant in error, and in such state of case it devolved on the plaintiff in error to produce the proof necessary to establish the validity of his tax deed. The decree must be and is affirmed.

Decree affirmed.

(213 Ill. 37.)

WABASH R. CO. v. BILLINGS.

(Supreme Court of Illinois. Oct. 24, 1904.)

NEGLIGENCE—PLEADING — VARIANCE—EXCESSIVE DAMAGES—ARGUMENT OF COUNSEL—REMITTITUR.

1. The declaration alleged that, while plaintiff was driving over defendant's crossing, an engine struck plaintiff's vehicle, whereby plaintiff was thrown out and injured. The evidence tended to prove that a car struck the vehicle, but that he was not then thrown out, but the horse ran away and plaintiff was thrown out and injured. *Held*, that there was a clear variance.

2. The variance might have been cured by an amendment on application.

3. An objection because of a variance between the complaint and evidence is one that must be taken in the trial court, so as to permit the opposite party to obviate the variance by amendment.

4. Where plaintiff's vehicle, when crossing a railroad track, was struck by an engine, and the horse ran away, and in passing over a curb plaintiff was thrown out and injured, if the collision was the efficient cause of the accident the mere incidental cause of the vehicle dropping into a gutter so as to throw plaintiff from it without contributory negligence on his part, would not make the striking of the vehicle the remote cause.

5. In an action for injuries at a crossing accident, counsel for plaintiff, in arguing to the jury, said, "These powerful railroad corporations ignore the rights of citizens, maim or kill them at pleasure, and then bring in their employes to swear them through," and that most of the witnesses for the defense were employes of the defendant and had to swear the way they did or lose their jobs, and that they ought not to be believed for that reason. *Held*, that such statement by counsel was error.

6. In an action for injuries in a crossing accident, the evidence for defendant tended to show plaintiff guilty of contributory negligence. Plaintiff's counsel stated that powerful railroad corporations ignore the rights of citizens, maim or kill them at pleasure, and then bring in servants to swear them through. The jury returned a verdict for \$5,000. Plaintiff's injuries consisted of a fracture of his arm, a scalp wound, and a sprained foot, and plaintiff remitted \$2,000 from the verdict. *Held*, that, although the trial court instructed the jury to disregard the remarks of counsel, the remarks were cause for a reversal, notwithstanding the

remittitur, as the prejudice shown by the excessive verdict might have entered into the determination of other issues.

Appeal from Appellate Court, Third District.

Action by Thomas Billings against the Wabash Railroad Company. From a judgment of the Appellate Court (105 Ill. App. 111) affirming a judgment in favor of plaintiff, defendant appeals. Reversed.

C. N. Travous, for appellant. S. H. Cummins, for appellee.

CARTWRIGHT, J. The Appellate Court for the Third District affirmed a judgment recovered by appellee in the circuit court of Sangamon county against the appellant in an action on the case for personal injuries, and this appeal was prosecuted from the judgment of the Appellate Court.

At the trial the defendant presented a motion in writing that the court should exclude the evidence and direct a verdict of not guilty, assigning different grounds for the motion, among which was the following: "Second. It is alleged in the declaration that plaintiff's buggy in which he was riding across defendant's track was struck by defendant's car or train, and plaintiff then and there thrown out and injured, whereas the testimony shows that plaintiff's injuries resulted from his falling from said buggy when some distance from the defendant's track or crossing." The motion was overruled, and defendant excepted. The declaration contained several counts in which the language varied slightly, but it was alleged in each count, in practically the same words, that while the plaintiff was riding in a buggy on Adams street, in Springfield, over the railroad crossing, the defendant's engine and train struck said buggy with great force and violence, and the plaintiff was then and there thrown out of said buggy with great force and violence upon the ground there, and was thereby injured. There are three tracks of the defendant crossing Adams street, and the evidence on the part of the defendant tended to prove that he approached the crossing from the east, and as he was going over the east track, when the hind wheels of the buggy were between the rails, an engine headed south pushed a baggage car ahead of it against the buggy, shoving it to the south; that, just before the car struck the buggy, plaintiff slapped the horse with the lines, and the horse started at a faster gait; that, when the buggy was struck, plaintiff lost his balance and was thrown to the north edge of the seat; that he let go of the lines, and grabbed hold of the seat with his left hand; that he was not hurt or thrown out at that place, but the collision threw him off his balance, and the horse ran away; that the horse ran upon a grass plot between the sidewalk and curbing west of the crossing, and ran back into the driveway 80 or 100 feet west of defendant's tracks; and

that in passing over the curb the buggy dropped 16 or 18 inches into the gutter, and plaintiff was thrown out upon the brick pavement, causing a fracture of his arm, a scalp wound, and a sprained foot.

It is a well-known rule that allegations and proofs must correspond, both for the purpose of specifically advising the opposite party of what he is called upon to answer, and also of preserving a record of the cause of action as a protection against another suit based upon the same cause. A pleading is intended to disclose a cause of action or defense, and a party has a right to know what he is charged with, to enable him to properly make out his case, and to prevent his being taken by surprise by the evidence at the trial. The author of the article on "variance," in the *Encyclopedia of Pleading and Practice*, says (volume 22, p. 527): "It is a general rule in actions at law that, in order to enable a plaintiff to recover or a defendant to succeed in his defense, what is proved or that of which proof is offered by the party on whom lies the onus probandi, must not vary from what he has previously alleged in his pleading; and this is not a mere arbitrary rule, but is one founded on good sense as well as good law." Every allegation which is descriptive of the cause of action must be proved as alleged in the pleading, and any variance therefrom is fatal, unless it is waived by not calling it to the attention of the trial court, or is cured by an amendment of the pleading. Even if there are unnecessary allegations descriptive of what is material, they must be proved. *Bell v. Senneff*, 83 Ill. 122; *City of Bloomington v. Goodrich*, 88 Ill. 558; *Chicago, Burlington & Quincy Railroad Co. v. Dickson*, 143 Ill. 368, 32 N. E. 380; *Wabash Western Railway Co. v. Friedman*, 146 Ill. 583, 30 N. E. 353, 34 N. E. 1111; *Wisconsin Central Railroad Co. v. Wiczorek*, 151 Ill. 579, 38 N. E. 678; *Chicago & Alton Railroad Co. v. Rayburn*, 153 Ill. 290, 38 N. E. 558. An objection for variance is one which must be taken in the trial court, so as to permit the opposite party to obviate the variance by amendment; but in this case the objection was specifically made, and no amendment was made to meet it, although the objection was curable by that means. Instead of proving that the buggy was struck by the baggage car, and plaintiff was thereby then and there thrown out of the buggy upon the ground and injured there, plaintiff introduced evidence that he was neither thrown out nor injured there, but that he lost his balance and the horse ran away, and, in coming back over the curb and dropping into the gutter, he was thrown out and injured on the street. It is true that torts are divisible, and that proof of a part of the allegations, if sufficient to establish a cause of action, will sustain a judgment; but there is no question of that kind in this case, in which the evidence went beyond the allegations and proved a different

tort. There was a clear variance, which was brought to the attention of the trial court and the plaintiff, and it was not cured by an amendment, as it might have been.

It is argued that there was no error in the ruling because the striking of the buggy by the car was the proximate cause of the injury. But that is only saying that plaintiff proved a good cause of action, while the question was whether the tort described in the declaration was the one proved upon the trial. If by the exercise of reasonable care the defendant might have foreseen that an injury would result from backing the baggage car against the buggy, and that was the last negligent act contributing to the injury, without which it would not have occurred, it would be the proximate cause. If that was the efficient cause, the merely incidental cause of dropping into the gutter, without contributory negligence on the part of the plaintiff, would not make the striking of the buggy a remote cause. In such a case the proximate cause need not be the nearest in point of time or sequence of events. But that was not the question raised by the motion.

Counsel for plaintiff, in arguing the case to the jury, said to them: "These powerful railroad corporations ignore the rights of citizens, maim or kill them at pleasure, and then bring in their employes to swear them through; that most of the witnesses for the defense were employes of the defendant and had to swear the way they did or lose their jobs, and that they ought not to be believed for that reason." Counsel for defendant interposed an objection to such a course of argument, and the court sustained it, and said to the jury that the remarks were improper, and that they should disregard them and decide the case upon the merits, and according to the law as the court should give it in the instructions. Such a statement by counsel is wholly indefensible, and, unless it can be seen that it did not result in injury to the defendant, the judgment ought to be reversed on account of it. The effects of such an attack may be obliterated by the action of the court in some cases, while in others it may be effective in arousing passion and prejudice notwithstanding the direction of the court. In this case the jury returned a verdict for \$5,000, and on a motion for a new trial the plaintiff confessed that the damages awarded were grossly excessive by remitting \$2,000 from the verdict. In the case of *Loewenthal v. Streng*, 90 Ill. 74, where there was a verdict against defendant for \$10,000, and plaintiff entered a remittitur of \$4,000—the same proportion as in this case—it was held that, where the damages allowed are so excessive that they can only be accounted for on the ground of prejudice, passion, or misconception, a remittitur will not obliterate the error, because these elements may have entered, and probably did enter, into the finding of other facts important to the issue, if

not the issue itself. We have frequently held, where there has been a fair and impartial trial, that a merely excessive allowance of damages may be cured by a remittitur, and the Legislature, by section 81 of the practice act (Hurd's Rev. St. 1903, p. 1411, c. 110), have approved the allowance of remittiturs in the Appellate Court and this court; but a remittitur will not cure an error which influenced the finding of the jury on issues of fact. The evidence for the defendant was that the plaintiff came upon the crossing without observing any of the usual and ordinary precautions in such places, that his horse was on a run, and that the car did not strike the buggy at all. On those questions the defendant was entitled to the judgment of the jury after a fair and impartial trial, and, as it does not appear that the ill effects of the statement objected to were obliterated by the ruling of the court, the same influence may have affected the verdict on those questions. In considering a motion for a new trial on the ground that the damages are excessive, the court must determine that question, and if a party, by remitting a part of the verdict, removes the objection, the opposite party will have no cause for complaint on that ground; but if the verdict on the questions of fact involving the liability of the defendant has been improperly influenced, a remittitur will not cure the error. We do not think that it appears from the record that the remarks were not prejudicial, notwithstanding what was said by the court, and they related to the merits and the veracity of the defendant's witnesses.

Objection is made to an instruction given at the request of plaintiff, but we do not think it would mislead the jury. For the errors indicated, the judgments of the Appellate Court and the circuit court are reversed, and the cause is remanded to the circuit court.

Reversed and remanded.

(212 Ill. 68)

WESTFALL v. ALBERT et al.

(Supreme Court of Illinois. Oct. 24, 1904.)

BONDS—BREACH—ACTION—PLEA OF NON DAMNIFICATUS.

1. A bond given to plaintiff by defendants was conditioned that the obligor, who was the lessee of certain premises, would remove from the premises all improvements that he might erect before the expiration of the term of his lease and restore the premises to the same condition. The bond was in the sum of \$5,000, and in an action on it defendants set up in a plea of non damnificatus that the bond was given in pursuance of the order of a court of chancery "to execute a penal bond." Held, that the bond was not such an obligation for the absolute payment of a penalty of \$5,000 as to preclude defendants from raising the question by their plea whether or not it was intended merely as a contract of indemnity and not for the payment of a liquidated sum.

2. Where the conditions of a bond are merely to indemnify the obligee, a plea of non damnificatus

catus is good; but if the bond is not one to indemnify against damages, but is an affirmative covenant to do a specific thing, liability must be adjudged, notwithstanding no loss results from the nonperformance.

Appeal from Appellate Court, First District.

Suit by Peter R. Westfall against John A. Albert and another. From a judgment of the Appellate Court (107 Ill. App. 51) affirming a judgment in favor of defendants, plaintiff appeals. Affirmed.

The Appellate Court for the First District affirmed a judgment of the circuit court of Cook county for the costs of suit in an action by appellant against appellees. The action was in debt, on the following bond:

"Know all men by these presents, that we, John A. Albert and Charles O. Heisen, both of the city of Chicago, county of Cook and State of Illinois, are holden and bound unto Peter R. Westfall, in the city of Chicago, county of Cook and State of Illinois, aforesaid, in the sum of \$5000, to the payment of which to said Westfall, his executors, administrators and assigns, we hereby jointly and severally bind ourselves, our heirs, executors, administrators and assigns.

"The condition of this obligation is such, that whereas said Albert has leased from the first day of June, 1895, to the first day of May, 1896, the following described premises, to-wit: (description;) and whereas, he is desirous of erecting thereon a bathing establishment, driving certain piles into the ground therefor, and making other alterations and improvements in furtherance of the promotion of said bathing establishment; and whereas, said Peter R. Westfall claims to own or hold some right, title or interest in said premises:

"Now, therefore, said Albert covenants and agrees that he will remove, or cause to be removed, off and from said premises hereinbefore described, all erections, piling or improvements of all kinds that he shall hereafter erect upon said premises, before or by the expiration of the term of his said lease of said premises, and will restore said premises to the same condition they were in at the date of said lease, the same to be done at his own cost and expense. That in such case this obligation shall be void and of no effect, otherwise shall remain in full force.

"In witness whereof, we, the said John A. Albert and Charles O. Heisen, have hereunto set our hands and seals this 7th day of June, A. D. 1895.

"John A. Albert. [Seal.]

"Charles O. Heisen. [Seal.]"

The first count of the declaration set out the legal effect of the bond and averred a breach of the same by Albert. The second set out the bond in *hæc verba*, and alleged the termination of the lease and noncompliance by defendant Albert with its conditions. A general demurrer to the declaration being overruled, the defendants filed several pleas, to each of which demurrers were

sustained. They elected to stand by their pleas, and judgment was entered against them for the full amount of the penalty named in the bond. That judgment was reversed by the Branch Appellate Court for the First District, which held the first and fourth additional pleas good, and remanded the cause to the circuit court (86 Ill. App. 576), where it was redocketed and the demurrer to those pleas overruled. Plaintiff thereupon elected to stand by his demurrer to said first and fourth additional pleas, and judgment was rendered against him for costs. On his appeal to the Appellate Court for the First District the judgment of the circuit court was affirmed by the principal court, on the ground that the judgment of the Branch Appellate Court was *res judicata* on the question presented by the latter appeal. From that judgment of affirmance the present appeal is taken.

Gage & Deming and S. A. & W. G. French, for appellant. Pence & Carpenter, for appellees.

WILKIN, J. (after stating the facts). The only question presented for our decision is whether or not the circuit court erred in overruling the demurrer to the said first and fourth additional pleas. The first sets out the bond in *hæc verba*, and avers that the plaintiff has not been damaged. The fourth alleges that the bond was given in obedience to an order of court in a chancery suit between the plaintiff, Westfall, and one Huntington and the defendants, by which it was ordered that the injunction theretofore issued in that case be dissolved on condition that "said Albert give bond, with security to be approved by the court, in the penal sum of \$5,000, that he will remove, or cause to be removed, off and from the premises described in the lease, in his answer herein filed and referred to, all erections, piling, or improvements of all kinds that have been or may be placed thereon by him, and to restore said premises to the same condition they were in at the time of said lease, within the term of said lease, at his own cost and expense," etc.; that said bond was a penal bond for the indemnifying of the plaintiff, Westfall, concluding with *non damnificatus*. The only ground of demurrer to these pleas is that they are not good as a defense to the action.

The rule is that, where the conditions of a bond are merely to indemnify the obligee, a plea of *non damnificatus* is good, but if the bond is not one to indemnify him against damages, but is an affirmative covenant to do a specific thing, liability must be adjudged notwithstanding no loss results from the nonperformance, and hence the plea of no damage is bad. 3 Ency. of Pl. & Pr. 663, and cases cited in note 1. The decision, therefore, in this case, must turn upon the question, to which class does the bond sued on belong? It must be conceded the question

cannot be determined from the face of the bond itself, it being strictly neither a penal bond nor one for the payment of liquidated damages. It is the duty of the court, in such case, to place itself, as nearly as it can from all the facts and circumstances of the case, in the position of the parties, and by construction of the bond determine what the intention of the parties thereto was. The same general rule applies to the construction of a bond as to other contracts, in which the intention of the parties, "to be ascertained from the words employed, the connection in which they are used, and the subject-matter in reference to which the parties are contracting, must control; and courts are powerless to interpolate terms and conditions into the contract to which the minds of the parties have not given assent. Courts will, however, look to the entire instrument, and, if possible, give such construction that each clause shall have some effect and perform some office, and for this purpose will, so far as practicable, view the contract from the position of the parties at the time it was made, in order to understand their language in the sense in which it was used. Such construction will be adopted, if it can consistently and reasonably be done, as will render the whole contract operative." *Hayes v. O'Brien*, 149 Ill. 403, 37 N. E. 73, 23 L. R. A. 555, and authorities cited. In order that extraneous evidence be admitted under this rule, it is necessary that there should be a plea upon which to base it, and for this reason, if no other, the first and fourth additional pleas were proper.

The controlling question, however, in the case must be whether the sum named in the bond is to be regarded as a penalty or as stipulated damages for the failure of the defendants to perform its conditions. Courts have encountered much difficulty in determining similar questions in the various cases which have arisen in this country and in England. In *Sedgwick on Measure of Damages* (6th Ed.) p. 505, the author says: "Our courts will be found generally inclined to treat a fixed sum as a penalty and to hold the real damages are to be inquired into." And, after citing numerous cases and commenting upon the same, he says (page 514): "On a review of the cases the following principles seem deducible from them as those which are to govern whenever a question of the kind considered in this chapter is presented: First, that the language of the agreement is not conclusive, and that the effort of the tribunal will be to get at the true intent of the parties and to do justice between them; second, that when the agreement is in the alternative to do some particular thing or pay a given sum of money, the court will hold the party failing to have had his election and compel him to pay the money; third, that in case of an agreement to do some act, and upon failure to pay a sum of money, the court will look into the

intent of the parties; that no particular phraseology will be held to govern absolutely, but that, although the term 'liquidated damages' will not be conclusive, the phrase 'penalty' is generally so, unless controlled by some other very strong consideration; fourth, that if the sum be evidently fixed to evade the usury laws or any other statutory provision, etc., it will always be held a penalty; and fifth, that where, independently of the stipulation, the damages would be wholly uncertain and incapable or very difficult of being ascertained except by mere conjecture, there the damages will be usually considered liquidated if they are so denominated in the instrument." The third of the foregoing rules would seem to be applicable to the present case.

In *Peine v. Weber*, 47 Ill. 41, the language of the contract was, "and in case the said parties of the second part fail to deliver possession of the premises hereby demised to the said Weber, or his legal representatives, on the second day of June, 1863, then they hereby agree to pay to said Weber, or his legal representatives, the sum of \$500 as fixed, settled, computed, and liquidated damages," and in holding the stipulated amount reasonable as liquidated damages we said (page 46, 47 Ill.): "The appellant admits the authorities are conflicting as to how such words are to be regarded in a contract as are here used—whether they are to be held strictly as liquidated damages, to be recovered at all events, or as merely a penalty, and the damages to be graduated within the penalty."

* * * These and all other authorities show that each case must depend on its own peculiar and attendant circumstances. It is not denied it is entirely competent so to contract, and the facts proved in this case show it was one peculiarly fitted for such a stipulation. * * * The intention of the parties in such as in all other cases of contract must govern as to its construction. Courts have considered a stipulated sum as a penalty, merely, for the reason that, from the whole contract, it appeared such must have been the real meaning of the contracting parties, as where a specific pecuniary payment is secured by a larger sum. But when such a provision has reference only to uncertain damages, and the case shows serious damages might have been incurred, as in this case, and no fraud has been used in procuring the stipulation to be inserted in the contract, it becomes a matter with which courts cannot interfere and furnishes the only measure of damages. *Lowe v. Peers*, 4 Burrow, 2225. Unless there is good ground for it, a court cannot declare a stipulated sum, which the parties themselves have said shall be the amount of damages, to be a penalty merely." See, also, *Gobble v. Linder*, 76 Ill. 157.

Referring to the principles announced by *Sedgwick*, supra, we held in *Scofield v. Tompkins*, 95 Ill. 190, 35 Am. Rep. 160, that the fact that the parties to a contract fix a

sum to be paid, and call it liquidated damages, does not always control the question as to the measure of recovery for a breach; that the courts will look to see the nature and purpose of fixing the amount of damage to be paid, and if it appears to have been inserted to secure the prompt performance of the agreement it would be treated as a penalty, and no more than the actual damages proved can be recovered. The same doctrine is recognized in *Poppers v. Meagher*, 148 Ill. 192, 35 N. E. 805; *Goodyear Co. v. Selz, Schwab & Co.*, 157 Ill. 186, 41 N. E. 625; *Iroquois Furnace Co. v. Wilkin Mfg. Co.*, 181 Ill. 582, 54 N. E. 987; and *Radloff v. Haase*, 196 Ill. 365, 63 N. E. 729.

The theory of the law is, generally, that in cases of this class compensation shall be the rule for the assessment of damages, for the reason that its application works justice between the parties. The bond sued on in this case, as we have said, does not expressly stipulate for the payment of the \$5,000 as liquidated and ascertained damages, and in view of the allegation that it was given in pursuance of the order of the court of chancery to "execute a penal bond," and of the fact that the several things which the obligors covenanted to perform were of such a character as that any damages which the obligee might sustain by the breach were capable of easy ascertainment, we think it should be construed merely as a contract of indemnity. Certainly, it is not such an obligation for the absolute payment of the large penalty of \$5,000 as ought to preclude the defendants from raising the question, by their pleas of non damnificatus, whether or not it was intended merely as a contract of indemnity, and not for the payment of a liquidated sum. The bond being open to construction, they had the right to insist upon its being treated as a penal bond, under which only the actual damages sustained could be recovered.

We are of the opinion that the circuit court committed no error in overruling the demurrer to the defendants' first and fourth additional pleas, and the judgment of the Appellate Court will accordingly be affirmed. Judgment affirmed.

(212 Ill. 62.)

PEOPLE ex rel. JEFFRIES v. RECORD.

(Supreme Court of Illinois. Oct. 24, 1904.)

PUBLIC IMPROVEMENTS—SIDEWALKS—SPECIAL TAXES—TAX LISTS—IRREGULARITIES—AMENDMENTS.

1. Where a city ordinance for the construction of a sidewalk to be paid for by special tax provides for the preparation of a special tax list and the filing of the same with the city clerk, it is necessary for the city, on an application for judgment, to prove the existence of the special tax list and the filing thereof.

2. Act 1875, § 8 (1 Starr & C. Ann. St. 1896 [2d Ed.] p. 858, c. 24), provides that the city clerk, after preparing the special tax list for a public improvement, shall issue warrants for the collection of the tax. A city ordinance for

the construction of a sidewalk provided that the clerk should issue warrants for the collection of the special tax to the city marshal. The clerk gave him the bill of costs for collection, but there was no evidence that any warrants were given to the marshal as required by statute. The marshal demanded payment, which was refused. *Held*, on application for judgment, that the court properly refused leave to amend the bill of costs by adding the words, "To the city marshal: * * * You are hereby directed to collect the amount set forth," etc., Revenue Act, § 191 (3 Starr & C. Ann. St. 1896 [2d Ed.] p. 3470, c. 120), which provides that no special taxes shall be illegal for irregularity in the tax lists, and which allows amendments, not authorizing the court to levy a tax where none has been levied.

3. Where a city marshal, attempting to collect a special tax, merely handed back the bill of costs to the clerk with the oral statement that he had made a demand for the amount of the tax and had been unable to collect it, it did not constitute a return, and the court, on application for judgment, properly refused to allow it to be amended so as to show a return to the clerk within 60 days as required by law.

Error to Coles County Court; T. N. Cofer, Judge.

Application by the people, on the relation of Ralph Jeffries, county collector of Coles county, for judgment against the lots of S. H. Record in Charleston for a sidewalk special assessment. The court sustained the objections filed by defendant, and plaintiff brings error. Affirmed.

This is an application by the county collector of Coles county to the county court for judgment against lot 8 in Owen's Addition to Charleston, conceded to be owned by the defendant in error, for a special sidewalk tax of \$138.60 for the construction of a sidewalk three feet in width on North Division street between the north line of Railroad street and the north line of Walnut street, on the west side thereof, in said city of Charleston, and for an order of sale of said premises to satisfy the same. The defendant in error appeared, and filed three objections to the entry of judgment against his lot. On June 9, 1903, the county court sustained the objections, and refused judgment against the lot for the said sidewalk tax, to which the plaintiff in error excepted. The present writ of error is prosecuted from such judgment.

H. P. Cofer, City Atty., and John F. Voigt, Jr., State's Atty., for appellant. A. C. Anderson, for appellee.

MAGRUDER, J. First. The first objection made by defendant in error upon the trial below is that no special tax was ever made out against his lot, and that no special tax list against the same was ever filed with the city clerk of the city of Charleston. The sidewalk was constructed under the provisions of the act of April 15, 1875, "to provide additional means for the construction of sidewalks in cities, towns and villages." 1 Starr & C. Ann. St. 1896 (2d Ed.) p. 857, c. 24. Section 3 of that act provides that the ordinance for the construction of the sidewalk

may provide that a bill of the cost thereof, showing in separate items the cost of grading, materials, laying down, and supervision, shall be filed in the office of the clerk of such city, town, or village, certified to by the officer or board designated by said ordinance to take charge of the construction of such sidewalk, together with a list of the lots or parcels of land touching upon the line of such sidewalk, the names of the owners thereof, and the frontage, superficial area, or assessed value, according as such ordinance may provide for the levy of said costs by frontage, superficial area, or assessed value; and that thereupon the clerk shall proceed to prepare a special tax list against said lots or parcels and the owners thereof, ascertaining by computation the amount of special tax to be charged against each of such lots or parcels, and the owners thereof, on account of the construction of such sidewalk, etc. The ordinance passed by the city council of Charleston for the construction of the sidewalk here in question provides that the cost, and all expenses therefor, shall be paid for by special tax on the lots, etc., contiguous to and abutting upon said street, etc., and levies the cost against each and every lot touching upon said sidewalk, according to its frontage. Section 4 of the ordinance provides that the construction of the sidewalk shall be under the supervision of, and the material furnished for the same shall be subject to the approval of, the street and alley committee of the city council, and of the superintendent of streets of said city. Section 5 of the ordinance provides in substance that, when any of such sidewalk is to be constructed by the city, the superintendent of streets shall, within 15 days after its completion, file a certified bill of the cost of such sidewalk in the office of the city clerk, showing the items above mentioned. Section 6 of the ordinance provides in substance that, on the filing of the aforesaid bill of costs, the city clerk shall at once prepare a special tax list in book form against such lot, lots, or parcels of land, and the owners thereof, on account of such sidewalk, according to the frontage, for the levy of such special tax, which list or book shall be kept on file in his office, etc. The testimony shows that the bill of costs of the sidewalk, dated January 13, 1903, signed by the city clerk, was made out and delivered to the clerk. This bill of costs shows the items, required by the statute and by the ordinance, and contains a description of the lot, and is made out in the form of a bill of so much money due from the defendant in error to the city of Charleston. This paper, being a bill of the cost of the sidewalk, was the only paper the city clerk ever had in relation to this tax. A search was made for a tax list, and none was found. No special tax list was ever filed with the clerk. Only the ordinance, or minutes of the ordinance, were filed. The city did not prove the existence of any special

tax list, and only proved the existence of said bill of costs, and of said ordinance, or the minutes thereof. It was incumbent upon the city to show that the ordinance in question had been complied with in the matter of filing with the city clerk such tax list. *Hoover v. People*, 171 Ill. 182, 49 N. E. 367; *Jeffris v. Cash*, 207 Ill. 405, 69 N. E. 904. The making and filing of such a special tax list is jurisdictional. *Biggins' Estate v. People*, 193 Ill. 601, 61 N. E. 1124; *Craig v. People*, 193 Ill. 199, 61 N. E. 1072; *Holland v. People*, 189 Ill. 348, 59 N. E. 753.

Second. The second objection made by the defendant in error to the entry of judgment against his lot was that no warrant was ever issued by the city clerk of Charleston to the city marshal of said city to collect said sidewalk tax. Section 3 of the act of 1875 provides that the city clerk, after preparing the special tax list, shall thereupon issue warrants, directed to such officer as may be designated in such ordinance, for the collection of the amount of special tax so ascertained and appearing from said special tax list to be due from the respective owners of the lots or parcels of land touching upon the line of such sidewalk, and such officer shall proceed to collect such warrants, and make return thereof, together with the moneys collected, to the clerk of such city, town, or village, within 60 days of the date of their issue, etc. Section 6 of the ordinance in question provided that the clerk should issue warrants for the collection of the tax to the city marshal, who was made collector of such special tax, and he was required thereby to proceed to collect such warrants, and make final return thereof within 60 days, etc. There is no evidence whatever in the record that any warrants, such as are required both by the statute and by the ordinance, were ever issued to the city marshal. The only evidence upon that subject is the statement by the city clerk that he handed the bill of costs above described to the marshal to collect the same from the defendant in error. Clearly, the bill of costs was not a warrant, and the handing of it by the city clerk to the city marshal was not the issuance of a warrant. The proof shows that the city marshal went to the defendant in error and demanded from him the payment of the tax, but the city marshal made no return to the city clerk that he had made such demand and had been unable to collect the tax. Upon the trial, the plaintiff in error made a motion before the county court for leave to have the city clerk amend the warrant by inserting therein in the presence of the court the following words: "To the City Marshal of Charleston—You are hereby directed to collect the amount set forth below from S. H. Record, as set forth in said bill, and this shall be your warrant therefor." The court refused to grant leave to thus amend the bill of costs. It is claimed by the plaintiff in error that the court erred in refusing to grant this motion,

upon the ground that, under section 191 of the revenue act, the court had the power to permit such amendment to be made. *Starr & C. Ann. St. 1893, p. 8470, c. 120.* But while it is true that the revenue law is liberal in allowing irregularities, informalities, or omissions not affecting the substantial justice of the tax to be corrected or supplied upon application for judgment, it does not authorize the court to levy a tax where none has been levied by the proper officers. If any warrant had been issued, a question might arise whether plaintiff in error had a right to amend it in the respect indicated in the presence of the court. But here there was no warrant to amend, as none had been issued. *Biggins' Estate, v. People, supra.* The court committed no error in sustaining the second objection.

Third. The third objection made by the defendant in error is that no return was ever made by the city collector, who was the city marshal, within 60 days upon said warrant, as required by the statute and the ordinance. The evidence shows that no return was ever made by the city marshal, but that he merely handed back the bill of costs to the city clerk with the statement, made orally, that he had made a demand for the amount of the tax and had been unable to collect it. This was not a return, and, not being a return, the court committed no error in refusing to allow it to be amended. There having been no return, there was nothing to amend by. The case of *Biggins' Estate v. People, supra*, is decisive of the question here involved. In the latter case it was objected that the city clerk failed to prepare a special tax list and file the same in his office, or issue a warrant to the officer designated in the ordinance for the collection of the tax, and that the city collector failed to make a return of said warrant to the city clerk; and it there appeared that the only attempt made by the city officials to comply with the statute was that the city engineer made out a return of the cost of constructing the sidewalk, and gave it to the city clerk, and the city clerk, after making a list of the estimates, gave the original estimates to the city collector, who held them for some time, when he returned part of them to the city clerk, with a verbal statement that he had been unable to collect the same; and we there said (page 606, 193 Ill., and page 1126, 61 N. E.): "No special tax list was prepared by the clerk and filed in his office; no warrant for the collection of the tax was issued by the city clerk to the city collector; no return was made by the city collector to the city clerk. * * * We think, therefore, there was a total failure on the part of the officials of said city to comply with the provisions of the statute and ordinance, and that, by reason of such failure, the county court was without jurisdiction to render a judgment against said lot or parcel of land for the amount of said special tax. * * * Here nothing had been filed

which, by the most liberal construction of the statute, could be held to be a report. There was here, therefore, nothing to amend, as there was no report on file, and the court had no power to allow a report to be filed for the first time at the hearing, and then render judgment thereon against said lot or parcel of land for said special tax. * * * To hold this special tax to be valid would be to hold that the provisions of the statute, pointing out the necessary steps to be taken by the city officials in the levy of a special tax, may be entirely disregarded and the property of the citizen taken to satisfy such tax."

It is also to be observed that, when the court refused the motion for leave to make these amendments, no exception was taken by the people to the ruling. It furthermore appears that counsel for the people did not prepare or submit any amendments, so far as the return of any alleged warrant was concerned.

For the reasons above stated, we are of the opinion that the objections made by the defendant in error were properly sustained by the county court. Accordingly, the judgment of the county court is affirmed.

Judgment affirmed.

(113 Ill. 121.)

MERKI v. MERKI.

(Supreme Court of Illinois. Oct. 24, 1904.)

**FORCIBLE ENTRY AND DETAINER—DEFENSE—
HOMESTEAD—RES JUDICATA—HUSBAND AND
WIFE—EVIDENCE—ADMISSIBILITY.**

1. In forcible entry and detainer, the defendant claimed the premises as a homestead through her deceased husband. It appeared that a decree had previously been rendered adjudicating adversely to the defendant on her claim to a homestead, but adjudging her entitled to a certain sum of money in lieu thereof, which defendant had accepted. *Held*, that the decree was a bar to her right to the homestead.

2. It is competent for a husband and wife by agreement to bar the dower of the wife and relinquish the interest of the wife in the homestead estate, where there are no minor children interested.

3. In forcible entry and detainer defendant cannot show that the plaintiff had executed a deed of the premises to a third person, and that it had been lost or destroyed.

4. In forcible entry and detainer defendant cannot show a mistake in the deed under which plaintiff claimed in the name of the grantee.

Error to Appellate Court, First District.

Action by John Merki, Jr., against Susanna Merki. The Branch Appellate Court affirmed a judgment for plaintiff, and defendant brings error. Affirmed.

James A. Peterson, for plaintiff in error.
Arnold Tripp, for defendant in error.

BOGGS, J. The defendant in error brought this, an action of forcible detainer, before a justice of the peace in Cook county, against the plaintiff in error, to recover the possession of lot 20, in block 4, Lake View High-

¶ 2. See Dower, vol. 17, Cent. Dig. §§ 123, 124.

School Subdivision, etc., in said county. The case came by appeal into the circuit court of Cook county, and the parties proceeded to trial before the court and a jury. After the parties had presented the evidence in their behalf, respectively, the court, on motion of the defendant in error, instructed the jury to return as their verdict that the plaintiff in error was guilty of unlawfully withholding the possession of the premises. In obedience to this direction of the court, the peremptory verdict was returned in favor of the plaintiff below, and judgment was entered thereon. The record was brought into the Appellate Court for the First District by writ of error, and the cause was assigned to the Branch Appellate Court for decision. The judgment of the circuit court was affirmed. This writ of error challenges the correctness of the judgment of affirmance.

The errors assigned are that the trial court erred in excluding testimony offered in behalf of the plaintiff in error and in directing a peremptory verdict in favor of the defendant in error. It appeared from the proof produced in behalf of the defendant in error (plaintiff below) that he, as the owner of the premises in question, entered into a verbal agreement with his father (who bore the same name as himself) that his father might occupy the residence which stood upon the premises as his home, and use and possess the premises so long as he should live; that in pursuance of the agreement the father and the plaintiff in error (his wife and the step-mother of the defendant in error) entered into the possession of and lived on said premises from thence during the lifetime of the father; that the father died December 5, 1900; that the plaintiff in error was thus left in the possession and occupancy of the premises, and claimed she was entitled to an estate of homestead therein, and refused to surrender the possession thereof to the defendant in error after lawful demand in writing had been made therefor. The defendant in error also produced in evidence the bill, answer, exhibits, and the decree entered in the circuit court of Cook county in a cause in chancery wherein one William C. Fricke, as trustee, was complainant, and Louis Merki, Jr., executor of the last will of said John Merki, Sr., the plaintiff in error, and others, were defendants. It appeared from the record in this proceeding that said plaintiff in error and her husband had, by a written contract entered into between them, agreed that the husband should put the sum of \$2,000 in the custody of the said William C. Fricke, as trustee, to be invested by him during the lifetime of the said husband, and, in the event of the death of the husband before that of the wife, said fund should be paid to the wife, the plaintiff in error, in full satisfaction of all of her rights and interest in the estate of her husband, including her right to a widow's award, and all rights and interest, by way of dower or homestead, in any of the

real estate of the husband; that after the death of the husband the plaintiff in error insisted upon the fulfillment of the agreement, and that the court found she was entitled thereto, and ordered and decreed payment of the said trust fund to be made to her in accordance with the terms and conditions of the said agreement and the fulfillment thereof.

The plaintiff in error sought to prove that her husband had paid the purchase price for the title to the lot in controversy, and had paid the cost of constructing the dwelling house thereon; that there was at one time among his papers a deed, or an instrument in writing in the nature of a deed, purporting to convey the title to the premises from the defendant in error to the father, and that the instrument had been lost or destroyed. The theory upon which it was urged this evidence was admissible was that the plaintiff in error, as widow of the father, was entitled to an estate of homestead in the premises, and that she was therefore entitled to retain the possession thereof during her lifetime. The court excluded this proffered testimony.

The action of the court may be sustained for either of two reasons. The right of the plaintiff in error to an interest, by way of an estate of homestead, in the property of her husband was adjudicated adversely to her contention in the chancery proceeding hereinbefore mentioned. She did not appeal from that decree, but accepted the said sum of \$2,000 in pursuance of its provisions. There were no minor children interested in the estate of homestead, and it was therefore competent for the husband and wife, by agreement, to bar the dower of the wife and relinquish the interest of the wife in the homestead estate. *Zachmann v. Zachmann*, 201 Ill. 380, 66 N. E. 256, 94 Am. St. Rep. 180. Even, therefore, if the husband had had title to the premises, the plaintiff in error had no homestead interest therein. But it was not competent to enter into an investigation of the contention that the defendant in error had executed a deed of the premises to his father and that the same had been lost or destroyed. Such evidence might have been availed of in a proceeding in chancery had one been instituted for the purpose of establishing the execution of the deed, but not in a statutory proceeding in forcible detainer. Nor could the plaintiff in error, in such a proceeding as this, be permitted to show that the name of John Merki, Jr., as grantee in the deed for the premises, should have been John Merki, Sr. The correction of such an error is within the jurisdiction of courts of chancery only. *Duggan v. Uppendahl*, 197 Ill. 179, 64 N. E. 289; 24 Am. & Eng. Ency. of Law (2d Ed.) 647, 648.

We need not pause to consider whether the prior institution and the then pendency of a suit in ejectment would abate a subsequent action of forcible detainer between the same parties to recover possession of the same

premises, for the reason that it appears that the action of forcible detainer was instituted before the action of ejectment, which it is urged should operate to abate it.

The evidence in behalf of defendant in error warranted a judgment in his favor, and there was no competent evidence tending to establish a defense; hence the court properly directed a peremptory verdict.

The judgment of the Appellate Court is affirmed. Judgment affirmed.

(212 Ill. 84.)

WATTS v. SANGAMON COUNTY.

(Supreme Court of Illinois. Oct. 24, 1904.)

MANDAMUS—JURISDICTION OF APPEALS.

1. Under Hurd's Rev. St. 1899, c. 87, § 10, relating to mandamus, and providing that "appeals and writs of error may be taken and prosecuted in the same manner, upon the same terms, and with like effect as other civil cases," an appeal in such proceedings lies to the Appellate Court rather than to the Supreme Court, where the validity of no statutory or constitutional provision is involved.

Appeal from Circuit Court, Sangamon County; Jas. A. Oreghton, Judge.

Petition by Thomas Watts for mandamus to Sangamon county. A demurrer to the petition having been sustained, petitioner appeals. Dismissed.

George A. Sanders, for appellant. W. E. Shutt, Jr., State's Atty., for appellee.

RIKKS, C. J. Appellant, Thomas Watts, presented his petition to the circuit court of Sangamon county for a writ of mandamus against Sangamon county praying for an order on the county treasurer to pay his bill of costs incurred in a certain criminal proceeding wherein appellant was convicted and sentenced to the penitentiary from said county, setting up in the petition that the Supreme Court of the state of Illinois reversed and remanded said cause, alleging that the judgment entered by said Supreme Court provided that said appellant should have and recover from said defendant in error his costs by him in his behalf expended, etc. A demurrer having been filed and sustained to the petition, appellant appeals direct to this court.

A writ of mandamus being nothing more than an action at law, an appeal should be taken in the same manner and to the same court as other actions at law. Section 10 of chapter 87 (Hurd's Rev. St. 1899), under the head of "Mandamus," provides: "Appeals and writs of error may be taken and prosecuted in the same manner, upon the same terms, and with like effect as in other civil cases." Under this statute we think the appeal should have been taken to the Appellate Court.

While appellant, in his brief, has discussed and directed the attention of the court to certain provisions of the Constitution of 1870 and to prior Constitutions, which he asserts

have some application to this case, and also discusses certain statutory enactments in reference to the payment of costs in criminal cases, we are unable to see that any question that might call for the construction of the Constitution is raised that has not already been passed upon in *Carpenter v. People*, 3 Gillman, 147; *Wells v. McCulloch*, 18 Ill. 606; *McArthur v. Artz*, 129 Ill. 352, 21 N. E. 802; and *Anderson v. Schubert*, 158 Ill. 75, 41 N. E. 853. The validity of no statute is questioned, and one or the other of such questions must be involved to give this court jurisdiction. The appeal will therefore be dismissed, and appellant will be permitted to withdraw his record filed in this court.

Appeal dismissed.

(212 Ill. 97.)

ANDREWS v. KINGSBURY.

(Supreme Court of Illinois. Oct. 24, 1904.)

CONTRACTS IN RESTRAINT OF TRADE—VALIDITY—VIOLATION—INJUNCTION.

1. In a suit to restrain defendant from engaging in the newspaper business in a certain town in violation of a contract not to do so made upon the sale of another paper to plaintiff, defendant contended that the paper sold belonged to his wife, and that his agreement was without consideration. All negotiations for the sale were made with defendant. Nothing was said as to his wife's ownership, and the bill of sale was signed by defendant, expressly warranting his title to the property, and the purchase money and notes and mortgage securing an unpaid balance were paid and delivered to him. Held to show that as between the parties the property belonged to defendant, so that his agreement was binding.

2. A contract not to engage in the newspaper business in a certain town for a period of five years is reasonable and valid.

3. In a suit to enjoin the violation of a contract not to engage in the newspaper business in any way whatever, evidence that a newspaper operated by defendant is not of the same character as that sold by defendant to plaintiff, and does not draw its patronage from the same source, is immaterial.

4. The rule that an injunction will only issue where irreparable injury will be suffered and there is no adequate remedy at law has no application to a suit for injunction to restrain the violation of a contract not to engage in a certain business; but in such case injunction will issue, though the violation of the contract will occasion no substantial injury, and though there be an adequate remedy at law.

Appeal from Appellate Court, Fourth District.

Suit by Edwin C. Kingsbury against Harry B. Andrews. From a decree of the Appellate Court (112 Ill. App. 518), affirming a decree for plaintiff, defendant appeals. Affirmed.

At the April term, 1903, of the circuit court of Richland county the appellee, Edwin C. Kingsbury, filed his bill to restrain the appellant, Harry B. Andrews, from engaging in the newspaper business in the city of Olney, either as proprietor, editor, man-

¶ 2. See *Contracts*, vol. 11, Cent. Dig. § 555.

ager, or in any way whatever, either for himself or any one else, for a period of five years, as provided in a certain alleged contract executed between the parties. A temporary injunction was issued as prayed, and upon a hearing it was made perpetual for the period of five years from November 2, 1901. An appeal was prayed to the Appellate Court for the Fourth District, where the decree of the circuit court was affirmed, and a further appeal has been prosecuted to this court.

On November 2, 1901, the appellant made a bill of sale of the printing plant of a certain newspaper known as the Olney Advocate to appellee, and on the 6th of the same month executed the following instrument: "I, Harry B. Andrews, having sold the Olney Advocate, a weekly newspaper published at Olney, Illinois, and transferred all my right, title, and interest to the same, including good will, to E. C. Kingsbury, I hereby agree not to engage in the newspaper business in the city of Olney, either as proprietor, editor, manager, or in any way whatever, either for myself or any one else, for the period of five years from the date of this agreement, provided that E. C. Kingsbury remains in the newspaper business in Olney for that length of time." Until about December 2, 1902, Andrews kept the terms of said contract, but on that date purchased an interest in a newspaper in the city of Olney known as the Olney Times, and shortly thereafter an article appeared in that paper stating that "with this issue of the Olney Times the business and editorial management of the Times Printing Company will be under the direction and control of H. B. Andrews."

Immediately after the appearance of that article, and after Andrews had taken charge of the Olney Times, this bill for an injunction was filed. Appellant, in his answer to the bill, set up that he was not the proprietor or owner of the Olney Advocate at the time of the sale to the complainant, but that it was owned by his wife, and that he was merely the manager for her; that the sale of the paper was negotiated by one H. H. Kingsbury, acting as complainant's agent, and that after the completion of the sale and transfer of the property the said agent wrote the contract above set forth and appellant signed it; that it was not part of the sale of the property, and was signed by the defendant without the knowledge of his wife; that the newspaper known as the Olney Times occupied a different field from the Olney Advocate, and they were in no sense competitors.

John Lynch, Jr., H. G. Morris, and W. F. Foster, for appellant. Allen & Fritchey and S. J. Gee, for appellee.

WILKIN, J. (after stating the facts). The first ground of reversal insisted upon is that at the time of the sale the Olney Advocate belonged to the wife of appellant, and his

agreement not to engage in the newspaper business had nothing to do with the sale, and was therefore without consideration. It is not denied that the bill of sale was signed by him, and by it he expressly warranted his title to the property. The name of his wife does not appear in the instrument. The money paid for the plant was paid to him, and the notes and mortgage executed to secure the deferred payments were made to and delivered to him. The appellee testified that about the 28th day of August, 1901, he had a conversation with appellant, in which he proposed, for the consideration of \$4,000, to sell his paper and agree not to go into the newspaper business again in the city of Olney, and that on the following day he made the same proposition, and again in the latter part of October submitted a written proposition to appellee making a similar offer. He also testifies that the same negotiations continued from the 29th day of August, 1901, to the final consummation of the sale and purchase, and that it was the distinct understanding between the parties that appellant would not engage in the newspaper business in Olney for a period of five years; that when asked to sign the agreement he did so promptly, without any conditions or objections. This testimony is not overcome by any counter proof. It clearly sustains the allegations of the bill, and proves beyond all question that as between these parties the property belonged to the appellant, and that the agreement was executed as a part of the consideration for the sale of the same, and is binding upon appellant.

It is next insisted that the contract is invalid because it is an unreasonable restraint of trade and against public policy. The law is well settled that contracts in total restraint of trade are void, for the reason that they are injurious to the public, depriving it of the industry of the party restrained, and also because of the injury to the party himself by being deprived of the opportunity to pursue his avocation for the support of himself and family; but a contract which is only in partial restraint of trade, and is reasonable in its provisions as to time and place, and supported by a sufficient consideration, is valid, and the restraint is held to be reasonable whenever it is such, only, as affords a fair protection to the interests of the one in whose favor it is made. 3 Am. & Eng. Ency. of Law, 882; Hursen v. Gavin, 162 Ill. 377, 44 N. E. 735; Union Strawboard Co. v. Bonfield, 193 Ill. 420, 61 N. E. 1038, 86 Am. St. Rep. 346; Consolidated Coal Co. v. Schmisser, 135 Ill. 371, 25 N. E. 795. In this case the contract provided that the appellant would not engage in the newspaper business in the city of Olney for a period of five years. It was thus limited as to time and place, and appears to be reasonable in all its terms and conditions. We see no sufficient reason for holding it unreasonable.

It is next urged that the court erred in re-

fusing to admit competent testimony offered by appellant. It is said that on the hearing he offered to prove the distinctive characters of the Olney Advocate and the Olney Times to their respective classes of business and sources of patronage, and therefore no financial injury would result to appellee, which evidence the court refused to admit. The record does not sustain the contention, except as to an offer to prove the politics of the papers. But, in any view, the evidence was wholly immaterial. Appellant entered into a contract not to engage in the newspaper business in the city of Olney for five years. The Olney Times was a newspaper published in the city of Olney, and the management of that paper by appellant was therefore in open violation of the terms of the contract, which was the only material issue in the case. The testimony was therefore properly excluded.

The general rule that a writ of injunction should only issue where there is an unquestionable right, and where irreparable injury will be suffered, and there is no adequate remedy at law, either on account of the insolvency of the defendant or for some other cause, is not applicable to this case. Courts of equity will, and frequently do, interpose by injunction, thereby indirectly enforcing the performance of negative covenants by prohibiting their breach; and where there is an express negative covenant, courts of equity will entertain bills for injunctions to prevent their violation, even though the same will occasion no substantial injury, or though the remedy be adequate at law. *Consolidated Coal Co. v. Schmisser*, supra; *Hursen v. Gavin*, supra. Nor is the position that the decree below is broader than the terms of the contract, for the reason that appellant is enjoined from engaging in the newspaper publishing or printing business in the city of Olney, while the appellant only agreed not to engage in the "newspaper business" in the city of Olney, sustained by the abstract of the record. The terms of the injunction are that "the injunction in the above entitled cause be, and the same is hereby, decreed to be in full force, etc., as prayed in complainant's bill." The abstract as presented to this court does not show that the injunction ordered is in its terms broader than the contract. If that fact appears from the record, counsel for appellant should have shown it by the abstract.

It is finally insisted that the decree continues the injunction in force for one year longer than the terms of the agreement authorized. In the decree there is a manifest clerical error; the injunction being continued until the expiration of five years from November 2, 1902, instead of 1901. This is made manifest by the recital of the decree, "date of sale," immediately following the figures 1902, and the language, "as prayed in complainant's bill." The decree may be modified by simply changing the date "1902"

to "1901," thus making the injunction continue until November 2, 1906.

There is no reversible error in this record, and the decree of the circuit court will be affirmed, with the above slight modification.
Decree affirmed.

(213 Ill. 303.)

SAUNDERS v. CITY OF CHICAGO.

(Supreme Court of Illinois. Oct. 24, 1904.)

MUNICIPAL CORPORATIONS—PLATS—VACATION—VALIDITY.

1. Laws 1847, pp. 166, 167, provided in section 1 that where persons had laid out towns or additions thereto, and the plats had been recorded, they, at any time before making sale of any lot, by executing and recording a writing might declare such plat to be vacated, and that, where any lots had been sold, the plat might be vacated by all the owners of lots joining in the execution of the writing; and section 3 authorized the vacation of a part or parts of a plat under the provisions and subject to the conditions contained in section 1. *Held*, that while such statute was in force the proprietor of a plat who had not invested other persons with title to lots therein had power to vacate the plat, or any portion thereof, as he might desire, and, after he had sold lots in the plat, the power to vacate the whole, or any part thereof, rested in the proprietor of the plat and the owners of all the platted property.

Ricks, C. J., and Wilkin and Cartwright, JJ dissenting.

Appeal from Cook County Court; R. A. Russell, Judge.

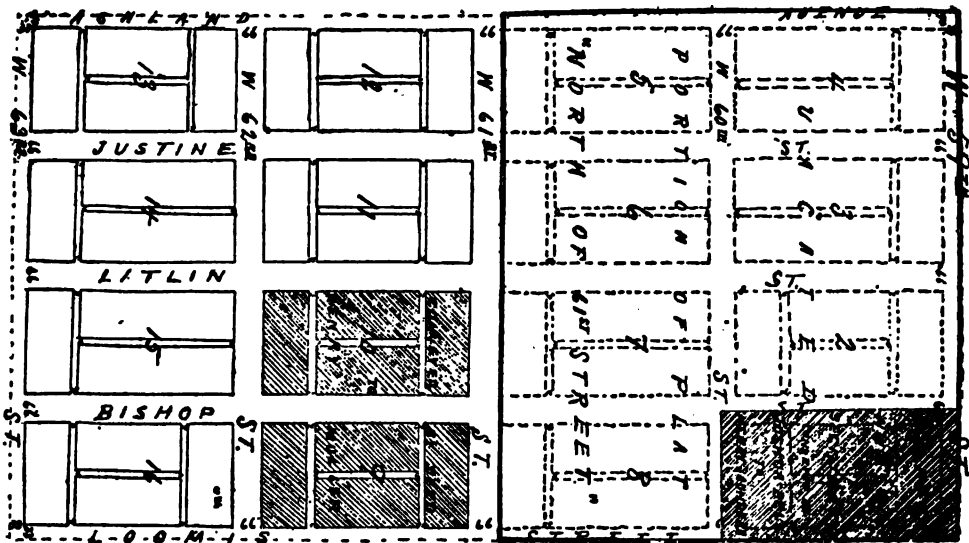
Proceedings by the city of Chicago for the confirmation of a special assessment on the property of Ella A. Saunders. From a judgment confirming the assessment, Ella A. Saunders appeals. Affirmed.

Robert E. Pendarvis, for appellant. Robert Redfield and Frank Johnston, Jr. (Edgar Bronson Tolman, Corp. Counsel, of counsel), for appellee.

BOGGS, J. This was a proceeding in the county court of Cook county to confirm a special assessment for paving Loomis street, from Garfield Boulevard to Sixty-Third street, in the city of Chicago. The appellant, whose land was sought to be assessed, appeared and filed objections to the confirmation of the assessment. The objections were overruled, the assessment was confirmed, and appellant has prosecuted an appeal to this court.

On the 8th day of April, 1870, one Joshua Bell subdivided the west half of the southwest quarter of section 17, town 38 north, range 14 east, of which he was the owner, into lots, blocks, streets, and alleys, and executed and acknowledged a plat thereof, and on May 2, 1870, caused the plat, with the certificate of the surveyor, to be recorded in the office of recorder of deeds in and for Cook county. On the 20th day of February, 1871, said Bell sold and conveyed blocks 1 and 10 of said subdivision or addition to the city of Chicago to one Henry Mueller. On March 5, 1871, Bell executed, acknowledged,

and filed for record an instrument purporting to vacate all that part of the plat north of Sixty-First street. On the 6th day of August, 1872, Bell executed a deed purporting to convey to one Henry Saunders the east half of the northeast quarter of the northwest quarter of the southwest quarter of section 17, being a part of that portion of the said subdivision described in the instrument which purported to be a deed of vacation of a portion of the plat. Said Henry Saunders, by his last will and testament, devised the same tract conveyed to him by said Bell to the appellant. The following map shows the subdivision as originally platted (except that the lots into which the blocks were subdivided are not shown), the blocks (9 and 10) which were sold by Bell to Mueller, and the portion of the plat attempted to be vacated:



The ordinance provided that the roadway of Loomis street should be paved with blast-furnace slag and crushed limestone and be curbed with sandstone curbstones, and that the cost of the improvement should be paid by special assessments on the property benefited by the improvement.

The premises, as described in the conveyance from Bell to Saunders and in the devise in the will of Saunders to the appellant, includes block No. 1 on the plat, that part of Loomis and Fifty-Ninth streets on which block 1 abutted, and the east half of that part of Bishop street and the north half of that part of West Sixtieth street on which the block abutted. The appellant insisted the deed of vacation was effectual to divest all rights that had been created by the execution and recording of the plat, and that she was the owner of the territory alleged to constitute all that part of Loomis street from the northern limits of West Fifty-Ninth street to the center line of West Sixtieth street, and that the city of Chicago had no power to improve this territory as one of the public

streets of the city. It is conceded by the appellant that Loomis street, throughout its length and breadth, is one of the public streets of the city, unless the instrument executed and filed for record by said Bell, the proprietor of the plat, had legal operation to divest the municipality of the right and title thereto which had passed from him to it by the execution and recording of the plat.

Neither the whole nor any portion of a statutory plat can be vacated except in compliance with the provisions of the statute authorizing plats, or portions of plats, to be vacated. This plat was executed in 1870, and the instrument relied upon to vacate the portion of it which is here involved was executed and recorded in 1871. The right to vacate a plat, or a portion thereof, was then governed by the act of the General Assem-

bly approved February 16, 1847 (Laws 1847, pp. 166, 167), which reads as follows:

"Section 1. That in all cases where persons have heretofore, or may hereafter, lay out towns, or additions to towns, or subdivisions of town lots, and the plats or maps thereof shall have been recorded, they, their heirs, assigns or grantees may, at any time before making sale of any single lot or lots, by executing a writing and causing the same to be recorded in the office in which the plat or map was recorded, declare such map or plat to be vacated; and the execution and recording of such writing shall operate to destroy the force and effect of the recording of the plat or map so vacated, and to divest all public rights in the streets, alleys, commons and public grounds laid down or described in such plat or map; and in cases where any single lot or lots have been sold, the plat or map may be vacated as herein provided, by all the owners of lots joining in the execution of the writing aforesaid: Provided, that no such writing shall be recorded until the execution thereof shall have been

acknowledged or proved as is or may be required in respect to deeds."

Section 2 has no relation to the question at issue in this cause.

"Sec. 3. Any part of a plat or map of a town, addition or subdivision may be vacated under the provisions and subject to the conditions herein contained."

Section 1 applies, by its express terms, to the vacation of the entire plat, and grants to the proprietor of the plat absolute power to vacate the plat and divest all public rights in the streets or alleys at any time before any "single lot or lots" in the plat have been sold, and, after a lot or lots have been sold, grants to the proprietor and the owners of such lots as have been sold the power to vacate the plat. The proprietor of a plat has therefore no sole power of vacation after he has invested others, as owners of lots, with an interest in the plat. Section 3 authorizes the vacation of a part or parts of a plat, and provides that a part of a plat may be vacated under the provisions of and subject to the conditions contained in section 1 of the act. The provisions and conditions of section 1 are that a deed of vacation may be made by the proprietor alone when no lots have been sold in the plat, but, if lots have been sold, the deed of vacation must be made by the proprietor and the owner or owners of such lot or lots as have been sold. Applying these provisions and conditions to the vacation of a portion of a plat, the proprietor of the plat possessed the power to vacate any portion of the plat at any time before he had invested others with an interest in a lot or lots shown on the plat, and, after any lot or lots had been sold, then the power of vacation resided jointly in the proprietor and the owners of any lot or lots in the subdivision. This construction not only gives to the language employed its natural meaning, but is the only construction which can be given, in justice, to all the persons who are interested in the proposed vacation of parts of a plat.

It is contended that the enactment should be construed to authorize the proprietor of a plat in which others were owners of lots to vacate any part of the plat in which the proprietor remained the owner of all the lots. This would be to give to the proprietor of the plat the sole right to vacate and close up all streets and alleys in any part of the plat in which he owned all of the lots, without regard to the effect of such closing of the streets and alleys on the property of those who had bought lots from the proprietor in view of and on the faith of the arrangement or system of streets and alleys as set forth on the plat. The true construction recognizes the interest and right of every lot owner in the vacation of any of the streets or alleys on the plat, and requires that the vacation of a part of the plat can only be accomplished by the joint action of the proprietor and all of the owners of lots

in the plat. Lots are sold by the proprietor of the plat, and bought by the purchaser, in view of the system of streets and alleys shown on the plat. The value of a lot depends not only on the fact that it abuts on a street, but also on the fact that such street connects with other streets, and such other streets with still other streets. A lot has its value, in the eyes of the proprietor as seller and an intending purchaser, in a substantial degree, on the plan and system of streets and alleys. No one would purchase a lot in a plat if the proprietor retained the right to vacate all the plat but the lot and the street in front of it. Section 1 of the act of 1847 denies to the proprietor the individual right to vacate the entire plat after he has sold a lot thereon, and makes it necessary to a valid vacation that all owners of lots shall join in the proposed vacation. If the owner who has sold lots may at his own pleasure select the parts of a plat in which no lots have been sold and vacate such parts of the plat, he may vacate all parts except what he has sold, and that would be to hold he possessed power to vacate the whole of the plat except the portion he had sold—a power which section 1 expressly denies to him. The vacation of a part of a plat must, as section 3 declares, be under the provisions and subject to the conditions of section 1, and, under section 1, whenever a single lot has been sold, the power of vacation no longer abides in the proprietor alone. One who purchases a lot has an interest in every part of the plat of which his lot is a part, and, aside from the plain meaning of the act, it is clear it could not have been the legislative intent that the proprietor should be allowed to make a plat of his land showing thereon portions of the land set apart for the use of the purchaser of the lot and the public as public streets and alleys, and to sell lots with reference to such plat and with reference to the advantages of the streets and alleys shown on the plat for the use of the purchasers of lots and the general public, and afterwards, at solely his own pleasure, and without the assent of the persons to whom he had so sold lots, vacate all parts of the plat in which he had sold no lots, together with all streets and alleys on such parts to be vacated, and thereby become the private owner of streets and alleys which he represented by his plat were to be kept open for the public use and for the convenience and benefit of the owners of the lots in the plat.

In *Leech v. Waugh*, 24 Ill. 229, we said: "The statute [referring to the act of 1847] authorizes the vacation of a town plat before a sale of any of the lots has taken place, but not afterwards. When others become the owners of lots within the addition, they are by that means invested with the right to enjoy the use of its streets and alleys as an incident to their property, and cannot be deprived of it in this mode."

Mr. Elliott, in his work on *Roads and*

Streets (section 120), states: "The plan or scheme indicated on the map or plat is regarded as a unity, and it is presumed, as it well may be, that the public ways add value to all the lots embraced in the general scheme or plan. Certainly, as every one knows, lots with convenient cross-streets are of more value than those without, and it is fair to presume that the original owner would not have donated land for public ways unless it gave value to the lots. So, too, it is just to presume that the purchasers paid the added value, and the donor ought not, therefore, to be permitted to take it from them by revoking part of his dedication." The author notes, however, that the doctrine announced by him is apparently denied, or accepted only in a modified sense, in some jurisdictions, and cites cases in which it is held that the purchaser of a lot is only entitled to insist upon an outlet to another public street, and other authorities which hold that a purchaser can ask no more than that the street upon which his lot abuts shall be kept open to the first cross-street in each direction. We are unable to understand upon what principle a court could declare that one who had purchased a lot with reference to all the streets and alleys shown on a plat, and paid an enhanced value therefor because of the establishment of such public ways, to and from his lot, should be compelled to submit to the closing up of all the streets and alleys except such as give him an outlet to the first cross-street from his property, except where the street has been vacated by the General Assembly, or an incorporated city or village acting as the representative of the general public.

The rule declared in this state when land is subdivided and platted into lots, blocks, streets, and alleys as an addition to a city or village, and the plat is recorded but has not been acknowledged in the manner required by the statute, or otherwise fails to comply with the statute, is that there is no statutory dedication, but a common-law dedication is effected; and, if lots so platted are sold, the dedication of streets and alleys shown on the plat is irrevocable by the proprietor of the plat alone. In *Zearing v. Raber*, 74 Ill. 409, speaking of the effect of a common-law dedication, we said (page 411): "If one owning land exhibit a map of it on which a street is defined, though not as yet opened, and building lots be sold by him with reference to a front or rear on that street, or lots he conveyed being described as by streets (*Schenley v. Commonwealth*, 36 Pa. 62, and 36 Pa. 29, 78 Am. Dec. 359), this is an immediate dedication of that street, and the purchasers of lots have a right to have that street thrown open forever (*Wyman v. Mayor*, 11 Wend. 487; *Livingston v. Mayor*, 8 Wend. 85, 22 Am. Dec. 622; and see *Matter of Twenty-Ninth and Thirty-Ninth Streets*, 1 Hill [N. Y.] 189, 192). And this principle is not limited in its application

to the single street on which such lots may be situated. If the owner of land lays out and establishes a town, and makes and exhibits a plan of the town, with various plats of spare ground, such as streets, alleys, quays, etc., and sells the lots with clear reference to that plan, the purchasers of the lots acquire, as appurtenant to their lots, every easement, privilege, and advantage which the plan represents as belonging to them as a part of the town, or to their owners as citizens of the town. And the right thus passing to the purchasers is not the mere right that such purchasers may use these streets or other public places according to their appropriate purposes, but a right vesting in the purchasers that all persons whatever, as their occasion may require or invite, may so use them. In other words, the sale and conveyance of lots in the town, and according to its plan, imply a grant or covenant to the purchasers that the streets and other public places indicated as such upon the plan shall be forever open to the use of the public, free from all claim or interference of the proprietor inconsistent with such use."

In *Earl v. City of Chicago*, 136 Ill. 277, 28 N. E. 370, the true doctrine was declared to be (page 285, 136 Ill., and page 372, 28 N. E.): "That if the owner of land exhibits a map or plan of a town, or addition platted thereon, and on which a street is defined, and sells lots abutting on such street, and with clear reference to the plat exhibited, then the purchasers of such lots have a right to have that street remain open forever; and such right is not a mere right that the purchaser may use that street, but is a right vesting in the purchasers that all persons may use it—that the sale and conveyance of lots according to the plat imply a grant or covenant to the purchasers of lots and their grantees that the public street indicated upon the plat shall be forever open to the use of the public as a public highway, free from all claim or interference of the proprietor, or those claiming under him, inconsistent with such use, and that the owner, and all claiming under him, will be perpetually estopped from denying the existence of the street."

In *Russell v. City of Lincoln*, 200 Ill. 511, 65 N. E. 720, we held that a plat of an addition to a town signed by the agent of the owner was not a good statutory dedication, but that after lots were sold in such plat by reference to the plat, and possession given to the purchasers, a common-law dedication was effected, and that the proprietor was without power to withdraw the dedication of any streets or vacate the plat.

If the plat is executed and acknowledged in conformity with the provisions of the statute, the fee in the streets and alleys passes from the proprietor of the plat and becomes vested in the municipality in trust for the public. Primarily, it is within the power of the Legislature to determine whether a street

or public highway shall be kept open and maintained as a public way or shall be vacated. This plenary power as to streets and alleys has been by the General Assembly delegated to the incorporated cities and villages by paragraph 7 of section 1 of article 5 of the City and Village Act (Hurd's Rev. St. 1903, c. 24). The General Assembly were not, however, unmindful of the rights and interests of the owners of lots to be affected by such vacation. Section 1 of an act entitled "An act to revise the law in relation to the vacation of streets and alleys" (3 Starr & C. Ann. St. 1896, c. 145, § 1, p. 3977) provides that no city council of any city, or board of trustees of any village, shall have power to vacate or close any street or alley, or any portion thereof, except upon a three-fourths majority of all the aldermen of the city or trustees of the village board, and that the vote thereon shall be taken by the ayes and noes and entered on the record, and that, when property is damaged by the vacation or closing of any street or alley, the damages shall be ascertained and paid as provided by law. The private rights which are protected by this statute are only such as are other and different from that of other lot owners. *City of East St. Louis v. O'Flynn*, 119 Ill. 200, 10 N. E. 395, 59 Am. Rep. 795; *City of Chicago v. Union Building Ass'n*, 102 Ill. 379, 40 Am. Rep. 598. If the vacation of a street by a city council closes a street adjacent to the property of a citizen, or one that directly affords access thereto or egress therefrom, it is then regarded that the property of such citizen has been damaged for a public use, and that he is entitled to be paid therefor. But if his injury is no different or greater than that of the public, it is *damnum absque injuria*, the maintenance or vacation of the street being a question which the municipality may, as the representative of the public, determine in view of what is regarded to be the general interest of the public. The municipality represents the citizen so far as his general interests are concerned, and acts for and binds him, and he must submit to what is deemed the most beneficial to the general public. But this principle is not involved in the construction of the statute relating to the vacation of the streets of a city or village by the proprietor of a plat. He is acting in his individual right, and not as the representative of the owners of lots whose interests are to be affected by his acts.

The question here presented is whether, under the proper construction of the act of 1847, hereinbefore set forth, the proprietor of a plat, who had sold a portion of the plat property with reference to the plat, and at prices enhanced by the advantages to be derived from a system of streets and alleys shown on the plat, possesses sole power to vacate such part or parts of the plat as may best serve his private interests, or whether

the power to vacate any of such parts of the plat is given by the statute to all those who own lots on the plat. The extent to which the right of a lot owner is restricted where lawful authorities, acting as the representatives of the general public, including the owners of the lots, have determined, in furtherance of the interests of the public, to vacate a street or alley, cannot be regarded as a standard wherewith to measure his right when the owners of a part of a platted subdivision desire to vacate such part of the plat, and thereby close streets and alleys therein, for their own private advantage or gain. The principle that every citizen must submit to that which has been determined by the constituted authorities to be for the best interest of all, unless he is affected differently than are other citizens, does not properly enter into consideration in construing the statute of 1847 in order to determine whether, under such statute, the proprietor of a plat, or the owners of all the lots in a part of the plat, have sole power to vacate such part of the plat and thereby close up and destroy the streets and alleys in such portions of the plat. All owners of lots are interested in the proposed vacation of any part of the plat by a proprietor thereof, and, when construing the statute, their rights and interests, as against the private rights of the proprietor, must be kept in view in determining whether the statute denies such lot owners any voice in the matter and vests sole power of vacation in the proprietor. The true construction of the statute then is that the proprietor of a plat who has not invested other persons with title to lots therein has power to vacate the plat, or any portion thereof, as he may desire, and that, after he has sold lots in the plat, the power to vacate the whole or any part of the plat rests in all those who are interested in the plat, namely, the proprietor of the plat and the owners of all the platted property.

Counsel are in error in the insistence that the cases of *Littler v. City of Lincoln*, 106 Ill. 353, and *Chicago Pressed Brick Co. v. City of Chicago*, 138 Ill. 628, 28 N. E. 756, construe the statute under which the proprietor of the plat in this case attempted to vacate a portion of such plat. The statute of 1847, hereinbefore quoted, was in force and controlled the right of the proprietor of a plat to vacate the whole, or any part thereof, at the time the attempted vacation of a part of the plat involved in this case was made. That statute was repealed by the general repealing act approved March 21, 1874, in force July 1, 1874. 3 Starr & C. Ann. St. 1896, pp. 3838, 3842. Chapter 106 of the statutes enacted and revised in 1874 is devoted to the subject of plats, and sections 6 and 7 of the chapter relate to the vacation of plats and parts of plats. These two sections were in force when the plats were

made, the vacation of a portion whereof came before this court for consideration in the cases of *Littler v. City of Lincoln*, supra, and *Chicago Pressed Brick Co. v. City of Chicago*, supra. In those cases sections 6 and 7 were construed to authorize any part of a plat to be vacated by the owner of the plat, if such owner was the proprietor of all of the lots in the part of the plat so proposed to be vacated. The phraseology of said sections 6 and 7 of the act of 1874 and of sections 1 and 3 of the act of 1847 is not the same. The right of a proprietor to vacate a part of a plat under the provisions of the act of 1847 was not involved in those cases or either of them.

Our conclusion is that the act of 1847 did not empower the said Bell to vacate a portion of said plat, and that the instrument purporting to effect such vacation was ineffectual to accomplish that purpose. Loomis street, as shown on the plat executed, acknowledged, and recorded by said Bell, is therefore one of the public streets of the city of Chicago. The judgment of the county court is therefore affirmed.

Judgment affirmed.

RICKS, C. J., and WILKIN and CARTWRIGHT, JJ. (dissenting). In the case of *Littler v. City of Lincoln*, 106 Ill. 353, it was decided that any part of a statutory plat might be vacated by the owner before the sale of any lot in the part vacated, and without the concurrence or joint action of the municipal authorities, subject only to the restrictions mentioned in the statute then in force. That decision was followed and affirmed in the case of *Chicago Pressed Brick Co. v. City of Chicago*, 138 Ill. 628, 28 N. E. 756, and is the established law. As we understand it, the opinion of the court in this case does not question the correctness of those decisions, but takes a contrary position on the ground that the phraseology of the act of 1874 is not the same as that of the act of 1847. No difference whatever is pointed out, and clearly there is none which would justify a different interpretation of the two acts. It is true that precisely the same words are not used in each, but the only difference is that under the act of 1874 the right of the proprietor is more limited than in the previous act. Each provides for the vacation of a part of the plat, and the only difference is that the act of 1874 restricts, to some extent, the right of the owner to make the vacation, by two provisos. Instead of enlarging the right of the owner to vacate a part of the plat before the sale of any lot in such part, the act of 1874 purports to limit such right by provisions that the vacation shall not abridge or destroy any of the rights or privileges of other proprietors in the plat, and that the act shall not authorize the closing or obstructing of any highway laid out according to law. The only difference, therefore, between the two acts is

against the conclusion reached in this case. It seems to us that the plain meaning of the act of 1874 is that the owner of the premises may vacate the whole plat at any time before making sale of any lot therein, and may vacate any part of the plat before making any sale of a lot in the part vacated, and that such interpretation is the only one permissible under the above decisions.

The first of the provisos to the act of 1874 merely expresses what was the law before its enactment—that the rights of other proprietors in the plat cannot be destroyed or abridged by a vacation—and therefore, so far as this case is concerned, there is no legal difference between the two acts. The rights of other proprietors so secured, whether by the law or by the act of 1874, are personal and individual rights and privileges, which such proprietors may waive or enforce at their own pleasure. There is no right in the vacated streets vested in the municipality, but the vacation operates “to divest all public rights in the streets, alleys, commons and public grounds” in the vacated portion. We think the holding that the municipality represents any proprietor in another portion of the plat, and may enforce his individual right, is clearly wrong. The individual may be barred by statute of limitation, by laches, or acquiescence, none of which affect the municipality; and certainly the municipality could not enforce a right which had been so barred or lost. He may waive his right or prefer not to enforce it. In this case the vacation was 33 years ago, and, so far as appears, was never questioned by any proprietor in any other portion of the plat. If the vacation could not become effectual without the consent of some other proprietor, there is no evidence in the record that such consent was wanting; and, if it were not obtained, the private right was apparently lost long ago. We see no ground for holding that the city of Chicago can now interpose to assert a supposed right of some individual not even claimed by him. The city certainly does not assume any trust with respect to a purely individual and personal right. It does not appear in this case that there is any private right which could be enforced even by an individual. The public right was extinguished by the deed of vacation of 1871 in the manner provided by law, and no individual is claiming any private right in the alleged street. The only question in this case is whether, as between the owner of the premises and the city of Chicago, the deed of vacation was a valid exercise of the power conferred by the statute to vacate part of a plat. That question, we think, must be answered in the affirmative. Decisions relating to the rights of municipalities in streets, or the right to open the same in cases of common-law dedications, or offers to dedicate which have not been withdrawn or cannot be legally withdrawn, we do not regard as at all relevant to the ques-

said second party agreed to pay \$3,588 therefor as follows, to wit, \$100 in cash, \$100 on or before January 1, 1892, and the balance in semiannual payments of \$180 or more, together with interest at 6 per cent. By the terms of the written contract, in case of failure to make said payments, the contract, at the option of the first party, was to be forfeited, and all payments retained by the first party; and by the terms thereof the first party agreed to pay the sum of \$2,200 for the erection of a residence on said lot. By the terms thereof, also, the time of payment was to be of the essence of the contract, and the agreements thereof were to be obligatory upon the heirs, executors, etc., of the respective parties.

Thereafter, and on April 3, 1899, in pursuance of said written contract, the defendants in error, in consideration of \$4,038, conveyed to plaintiff in error, Julia Schneider, "the west 15.2 feet of lot 8, and the east 14.8 feet of lot 9, in F. Sulzer's addition to Belle Plaine," etc., describing the same according to the above description, by warranty deed dated April 3, 1899, and acknowledged by said widow and heirs as grantors therein on April 5, 8, and 10, 1899, and recorded on April 19, 1899. Said deed contained the following recitation: "This deed is executed pursuant to a certain contract made and entered into on the 7th day of December, A. D. 1891, and bearing date the said 7th day of December, A. D. 1891, between Frederick Sulzer, late of the city of Chicago aforesaid, and the said grantee, Julia Schneider, in and by which said contract the said Frederick Sulzer covenanted and agreed to convey said premises to the said grantee for the consideration aforesaid."

About the same time Jessie W. Schumaker (then Beckett) purchased the west 13.2 feet of lot 10, and the east 16.8 feet of lot 11, in said Sulzer's Addition. The parts of said lots 8 and 9 purchased by Mrs. Schneider, and the parts of lots 10 and 11 purchased by Mrs. Schumaker, were each about 30 feet wide, and fronted 30 feet each upon Berteau avenue. Between the parcels thus purchased, 30 feet by Mrs. Schneider and 30 feet by Mrs. Schumaker, lay the east 31.8 feet of lot 10 and the west 30.2 feet of lot 9. It is admitted that the title to these 62 feet lying between the two parcels thus purchased is in one or more of the defendants in error, heirs of Frederick Sulzer, deceased.

The ground north of the lots thus purchased was, at the time of the contract in question, unsubdivided, but was afterwards, in October, 1900, subdivided and known as "Albert Sulzer's Subdivision," etc.

On June 20, 1901, the heirs of one Henry Sulzer, deceased, executed a quitclaim deed, conveying to defendants in error the property north of the lots in question, extending from Cullom avenue south to the north line of lot A, and from the west line of Clark street to the east line of Ashland avenue.

The strip of land which the bill seeks to have conveyed and dedicated to the city of Chicago as a street is the strip above described as being 62 feet in width, and certain lots lying north of it in Albert Sulzer's Subdivision, and between said strip on the south and Cullom avenue on the north.

Gallagher, Fiske & Messner, for plaintiff in error. Arnold Tripp, for defendants in error.

MAGRUDER, J. (after stating the facts). The contention of the plaintiff in error in this case is that, when she purchased the west 15.2 feet of lot 8 and the east 14.8 feet of lot 9, being a lot 30 feet wide, from Frederick Sulzer in his lifetime, Frederick Sulzer agreed to convey and dedicate the east 31.8 feet of lot 10 and the west 30.2 feet of lot 9, being a strip of ground 62 feet wide, to the city of Chicago as a street, and to extend such street north as far as Cullom avenue through the property then unsubdivided. It is not claimed that the agreement thus alleged to have been made was a written agreement. It is admitted that it was a mere verbal agreement, said to have been made between Frederick Sulzer and plaintiff in error some ten days or two weeks, or thereabouts, prior to the execution of the written contract executed between said parties on December 7, 1891.

It is well settled "that a written contract, unambiguous in its terms, cannot be varied, contradicted, or modified by parol evidence of anything that occurred at or prior to the time when such written contract was executed." 11 Am. & Eng. Ency. of Law (2d Ed.) p. 548.

In *Telluride Power Co. v. Crane Co.*, 208 Ill. 218, 70 N. E. 319, we said (page 226, 208 Ill., page 322, 70 N. E.): "The rule is that when the writings show, upon inspection, a complete legal obligation, without any uncertainty or ambiguity as to the object and extent of the engagement, it is conclusively presumed that the whole agreement of the parties was included in the writings."

"A written contract, if unambiguous in its terms, cannot be varied, contradicted, or modified by parol evidence of conversations, relating to the subject-matter of the contract, which occurred between the contracting parties before the execution of the contract." *Town of Kane v. Farrelly*, 192 Ill. 521, 61 N. E. 648. Nor can a sealed executory contract be altered, changed, or modified by parol agreement. *Alschuler v. Schiff*, 164 Ill. 298, 45 N. E. 424.

The written contract executed between plaintiff in error and Frederick Sulzer on December 7, 1891, is presumed to have embodied the whole of their agreement, and all previous verbal arrangements, if any there were, were merged into such written contract. The written contract of December 7, 1891, is silent as to the conveyance or dedication of

any parts of lots 9 and 10, or of the ground lying north thereof, for street purposes. The contention of the plaintiff in error is that there was a verbal contract between her and Frederick Sulzer for the purchase of the 80 feet bought by her, and that, as a part of that verbal contract, Frederick Sulzer agreed to open a street west of the 80 feet purchased by her; and it is said that, in consideration of the agreement so to open said street, plaintiff in error was to pave the part of Berteau avenue lying south of the part so to be dedicated as a street, but there is nothing in the written contract as to the agreement so alleged to have been verbally made between the parties. As plaintiff in error and Frederick Sulzer put their contract in writing, the writing must control. Parol evidence was inadmissible to change its terms in the manner stated. The testimony as to the alleged oral contract was admitted subject to objection, and it is evident that the chancellor below properly regarded it as incompetent and refused to consider it in making his decree.

The plat of Frederick Sulzer's addition, upon which are noted lots 8 and 9, parts of which plaintiff in error purchased, was introduced in evidence by plaintiff in error upon the hearing below, and its introduction was not objected to by the defendants in error. The plat of the addition, therefore, must be regarded as a valid map or plat of the property in question, as it is so treated by both parties. This plat shows upon its face lots 8, 9, 10, and 11, each being 45 feet wide, as having been laid off by Frederick Sulzer, the maker of the plat, and the owner of the property sold to plaintiff in error. In the written contract of December, 1891, signed by Frederick Sulzer and the plaintiff in error, and also in the deed of April 8, 1899, signed by the defendants in error and accepted by plaintiff in error, the property conveyed is described as being certain designated parts of lots 8 and 9 in said Sulzer's addition, as described in the statement preceding this opinion. "Where a deed refers to a plat or subdivision, the particulars shown upon such plat or subdivision are as much a part of the deed as though they were recited in it." *Henderson v. Hatterman*, 146 Ill. 553, 34 N. E. 1041; *Smith v. Young*, 160 Ill. 163, 43 N. E. 486; *Louisville & Nashville Railroad Co. v. Koelle*, 104 Ill. 455; *Simpson v. Mikkelsen*, 196 Ill. 575, 63 N. E. 1036; *Thompson v. Maloney*, 199 Ill. 276, 65 N. E. 236, 93 Am. St. Rep. 133. It thus appears that the contract signed by plaintiff in error, and the deed made to her and accepted by her, refer to lot 9 as the same is indicated upon the plat to Sulzer's addition. Upon that plat lot 9 is a lot 45 feet wide, and contains not only the east 14.8 feet conveyed to plaintiff in error, but also the west 30.2 feet. Therefore plaintiff in error is estopped from claiming that the west 30.2 feet of lot 9 is part of a street agreed to be dedicated, when, by the

description in her deed, she recognizes it as a part of lot 9, as designated upon the plat of Sulzer's Addition, to wit, a lot 45 feet wide, not abutting upon a street, and not connected in any way with a street.

Counsel for plaintiff in error refer to many cases which hold that a dedication may be evidenced by acts and declarations, as well as by grant or other written instrument, and they also refer to several cases which state that a map is not essential to the validity of the dedication. Relying upon these cases, plaintiff in error insists that, when Frederick Sulzer took the plat of Sulzer's Addition and indicated thereon with his finger the parts of lots 9 and 10 which he would dedicate as a street, and when he stepped off upon the ground the space 62 feet wide to be dedicated as a street, such acts on his part amounted to a dedication. The cases referred to, however, do not sustain the contention of the plaintiff in error. In most of the cases it was shown that sales were made according to some plat, which, though not valid as a statutory plat, yet was of such a character as to make the act of selling lots designated upon the same and abutting upon streets amount to a common-law dedication of such lots. Even in cases where no map was shown to have been made, it will appear from an examination that a survey of the ground had been made, and that lots were sold in reference to such survey.

In *Godfrey v. City of Alton*, 12 Ill. 29, 52 Am. Dec. 476, it appeared that a survey had been made and ground had been laid off for public use as a street or landing, and that sales had been made in reference thereto, and, in view of these circumstances, it was there held that there was a dedication of such ground to the public. So, in *Zearing v. Raber*, 74 Ill. 409, it appeared that the owner of lots had the same platted showing a street, and sold a part of the same with reference to such street. In *Alden Coal Co. v. Challis*, 200 Ill. 222, 65 N. E. 663, while it appeared that no plat had been made, yet the proof showed that a town site had been staked out, and people had been invited to locate thereon, and houses had been built and streets improved, and residences and business sites had been leased; and, under such circumstances, it was held that the owner of the ground was estopped from denying the dedication of the streets to the public, and that the making of a map of the town site was not necessary to the validity of the dedication. But in the case at bar no map or plat was made showing a street at the point where the land is said to have been dedicated, nor was any survey made of the ground for the purpose of laying out a street. On the contrary, the oral testimony introduced contradicts the showing upon the face of the map. The map of Sulzer's Addition, upon its face, shows that lots 8, 9, 10 and 11 were inside lots and did not abut upon any street. The parol testimony introduced by plaintiff in error had a tenden-

cy to contradict the showing of the very map which plaintiff in error herself introduced in evidence, and was therefore incompetent.

In addition to what has been said, the main witnesses by whom it was sought to prove the verbal agreement in question were plaintiff in error, the complainant in the suit, and her sister-in-law, Mrs. Schumaker. Plaintiff in error filed a bill against the defendants in error as heirs at law of Frederick Sulzer, deceased. She was therefore an incompetent witness under section 2 of chapter 51 of the Revised Statutes (Hurd's Rev. St. 1903) in regard to evidence, which provides that no party to any civil action, suit, or proceeding shall be allowed to testify therein of his own motion, or in his own behalf, when any adverse party sues or defends as heir, legatee, or devisee of any deceased person, etc. 2 Starr & C. Ann. St. 1896 (2d Ed.) p. 1824.

Mrs. Schumaker was also an incompetent witness, because she was interested in having the street opened or dedicated, as the strip 62 feet wide lay just east of the 80 feet purchased by her, and, if the same was dedicated as a street, it would inure to her benefit, as it would make her lot a corner lot. Said section 2 of the act in regard to evidence provides that no "person directly interested in the event" of any civil action, suit, or proceeding shall be allowed to testify when the adverse party defends as heir. Mrs. Schumaker being incompetent as a witness because of her interest, her husband, Joseph W. Schumaker, was incompetent. *Treleaven v. Dixon*, 119 Ill. 543, 9 N. E. 189; *Way v. Harriman*, 126 Ill. 132, 18 N. E. 206; *Stodder v. Hoffman*, 158 Ill. 493, 41 N. E. 1082; *Craig v. Miller*, 133 Ill. 300, 24 N. E. 431; *Crane v. Crane*, 81 Ill. 165; *Warrick v. Hull*, 102 Ill. 280; *Best v. Davis*, 44 Ill. App. 624. The plaintiff in error, and Mrs. Schumaker and her husband, are the only witnesses who testified to the verbal arrangement said to have been made with Frederick Sulzer in his lifetime, and, their testimony being incompetent, there was no competent evidence establishing the verbal agreement alleged to have been made.

It also appears from the evidence that, at the time when the verbal agreement in question is alleged to have been made, Frederick Sulzer did not own the land lying north of the lots 8 and 9 here in controversy, and south of Cullom avenue. A verbal agreement by him to extend a street through land which did not belong to him, and dedicate the same to the city, could not have been valid. The proof shows that the land lying north of lots 8 and 9 was not conveyed to the defendants in error until long after the death of Frederick Sulzer.

It is also contended by plaintiff in error that a certain indorsement upon a duplicate copy of the original agreement of December 7, 1891, was improperly admitted. This indorsement bears date April 19, 1899, and is as follows: "This contract performed by delivery of deed dated April 3, 1899, and mistake

in description herein corrected by deed.— Julia Schneider, by Henry P. Kranz, her agent." It is not necessary to discuss the question whether this indorsement was properly or improperly admitted, for the reason that the plaintiff in error could have suffered no injury from its admission. This is so for the reason that the deed of April 3, 1899, recites upon its face that it was executed in pursuance of the contract of December 7, 1891. The statute of frauds was pleaded. The statute of frauds was properly pleaded by the defendants in error in their answer to the bill, and, in view of what has already been said, we think that the statute was applicable to the present case.

For the reasons above stated, we are of the opinion that the decree of the circuit court in dismissing the bill was correct. Accordingly, the decree of the circuit court is affirmed.

Decree affirmed.

(213 Ill. 120.)

CHICAGO & A. R. CO. v. VIPOND.

(Supreme Court of Illinois. Oct. 24, 1904.)

RAILROADS — CROSSINGS — INJURIES — NEGLIGENCE — EVIDENCE — ADMISSIBILITY — INSTRUCTIONS — ARGUMENT OF COUNSEL.

1. Where, in an action for the death of a fireman in a collision at a crossing of another railroad by the negligence of employes in charge of a train on the latter road, the declaration alleged that there was in use by the companies a semaphore to indicate whether it was safe to pass over the crossing, but there was no charge of negligence in the management of the semaphore, or that the injury resulted from any negligence of the person in charge of it, the question whose servant such person was, was immaterial.

2. In an action for the death of a fireman in a collision at a crossing of another railroad, due to the negligence of those in charge of a train on the latter road, the declaration alleged that, while decedent was using due care on his part, defendant negligently drove its train over the crossing when the signal indicated that it was dangerous to cross. A semaphore was in use, and at the time of the accident a white light, a signal of safety, was shown on the track on which decedent was operating an engine. There was evidence that a red light, a signal of danger, was displayed on the track of defendant, but the employes of defendant, in charge of the train which collided with decedent at the crossing, testified that the white light was shown on defendant's track. *Held*, that the question whether a red light was shown on defendant's track was for the jury.

3. In an action for the death of a fireman in a collision at a crossing of another road, the negligence of the engineer in charge of the locomotive on which the fireman was employed in relying on the semaphore lights which showed a signal of safety on the track over which he was moving, without watching for a train on defendant's track, did not affect the right to recover.

4. Where a witness testified that he had been over a railroad crossing many times prior to a collision at the crossing, his statement that the semaphore was in good working order was not objectionable as the conclusion of the witness.

5. The tracks of two railroad companies were parallel. They were crossed by a track at about right angles. Two semaphores, working in unison by the same lever and wire, were used at the crossings. It was shown that when

a red light was shown on one of the parallel tracks it was also displayed on the other. *Held* that, on the issue whether a red light was shown on one of the tracks, evidence that it was shown on the adjacent track was admissible.

6. In an action for the death of a fireman in a collision at a crossing of the track of another road, an ordinance limiting the speed of trains is inadmissible for the purpose of showing that the train on which decedent was employed was run at a negligent rate of speed, barring a recovery, the decedent not controlling the train nor being affected by the negligence of the engineer.

7. Where an engine was started 645 feet from a crossing of another railroad, so that a jury could not have found that it did not stop within 300 feet, as required by the statute, an instruction, in an action for the death of a fireman on the engine in a collision at the crossing with a train on the other road, which stated that if there was a failure to stop the engine within 300 feet of the crossing there could be no recovery, was properly refused.

8. In an action for negligent killing of a person, the counsel for plaintiff stated that the income from \$5,000, especially when something was deducted for the expenses of litigation, would not be a fair substitute, when the statement was objected to. Plaintiff's counsel expressed a willingness to have it struck out if improper, and the court said it was proper to discuss the question of damages. The sentence was not completed. *Held* that, though expenses of litigation could not be taken into consideration in awarding damages, the incomplete statement was not reversible error.

Appeal from Appellate Court, Second District.

Action by Nicholas Vipond, administrator of Henry Dirkes, deceased, against the Chicago & Alton Railroad Company. From a judgment of the Appellate Court (112 Ill. App. 558) affirming a judgment for plaintiff, defendant appeals. Affirmed.

C. W. Brown and A. H. Shay, for appellant.
H. H. Dicus and McDougall & Chapman, for appellee.

CARTWRIGHT, J. The tracks of the Chicago & Alton Railroad Company and of the Indiana, Illinois & Iowa Railroad Company, called the "Three I," run parallel with each other in the city of Streator, and about 75 feet apart. Said tracks are crossed by the double tracks of the Atchison, Topeka & Santa Fé Railroad Company nearly at right angles. There is a semaphore at the crossing of the Chicago & Alton, and another at the crossing of the Three I, by which the use of the crossings is regulated. At night there are two lamps in each semaphore, and both semaphores are operated by the same lever by means of a wire running near the ground. When the semaphores are in one position, the lamps show white lights on the tracks of the Santa Fé and red lights on the tracks of the Chicago & Alton and Three I. When placed in the other position by means of the lever, they show red lights on the Santa Fé and white lights on the other roads. A red light is a signal of danger, and shows that the crossing cannot be used by the road on which it is displayed, and, when shown, it is the duty of the engineer to stop before reaching

the crossing. A white light is a signal of safety, showing that trains approaching on the road where it is displayed have the right of way. When the safety signal is displayed on the Santa Fé, danger signals are necessarily shown on the other roads. These signals had regulated the use of the crossings for eight or nine years before December 27, 1899, and at night had stood with the white light for the Santa Fé, unless the crossing was called for by an engineer on one of the other roads, when the position was changed, showing the red light on the Santa Fé, and after the train had passed the lights were restored to their former position. On the morning of that day, at about 1:40 a. m., a switch engine on the Santa Fé, backing and hauling freight cars, and a passenger train of appellant, came in collision on the crossing, and Henry Dirkes, fireman on the Santa Fé engine, received injuries from which he died. The passenger train was a regular one, and was on time. Appellee was appointed administrator of the estate of Henry Dirkes, and brought this suit in the circuit court of La Salle county to recover damages for his death. There were three counts in the declaration, the second and third of which were withdrawn on the trial, and the first alleged the use of the semaphore at the crossing to indicate to those in charge of locomotives and trains safety or danger in passing the crossing; that the white light indicated safety, and the red danger; that the semaphore showed a white light on the Santa Fé and a red light on the Alton; and that the train on the Alton was carelessly and improperly driven over the crossing without stopping, causing the collision and injuries from which Dirkes died. Upon the trial there was a verdict for \$5,000, on which judgment was entered, and the judgment was affirmed by the Appellate Court for the Second District.

At the close of the evidence the defendant moved the court to direct a verdict of not guilty, and the court denied the motion. It is insisted that there was manifest error in this ruling for several reasons. The declaration alleged that the semaphore was under the care and operated by servants of the railroads, while the evidence showed that it was in the charge of an employé of one of them—the Santa Fé Company. It was a material averment that there had been erected and was in use by the companies a semaphore to indicate whether it was safe to pass over the crossing, and this averment was proved; but there was no charge of negligence in the management of the semaphore, or that the injury resulted from any fault or neglect of the person in charge of it, so that the question whether such person was the servant of one or both was wholly immaterial. The averment being immaterial, it was not necessary to prove it.

The declaration also averred that, while Dirkes was using due care on his part, the servants of the defendant carelessly and im

properly drove and ran its train over the crossing when the red light indicated that it was dangerous to cross. It is insisted that the record is barren of any evidence to support the declaration that the red light was shown on the Alton track. The semaphore had been in use for many years, controlling the movement of trains over the crossing, and its construction was such that whenever a white light was displayed on the Santa Fé a red light was necessarily shown on the Alton, and a number of witnesses testified that such was the fact in its operation. There was considerable testimony, wholly uncontradicted, that the white light was shown on the Santa Fé before and at the time of the collision. Furthermore, the semaphores at the Alton crossing and the Three I crossing were operated by the same lever, and showed the lights at the two crossings in the same way at the same time. It was proved that at the time of the collision a red light was shown on the Three I by the semaphore at that crossing. The only ground for saying that there was no evidence that there was a red light displayed on the Alton is the fact that the engineer, fireman, conductor, and brakeman on the Alton train testified that while at the depot, and before starting toward the crossing, the light at the semaphore was white, and the engineer and fireman testified that it continued white up to the collision. It cannot be said as a matter of law that, because these witnesses so testified, the evidence for the plaintiff did not tend to prove the contrary. Indeed, it is quite clear that unless something had recently happened to the semaphore a red light was shown on the Alton track. There was no evidence tending to show that the condition of the semaphore had changed, or that it was not in working order, as it had been up to that time. On the contrary, there was evidence that it was in its usual working order. The question whether a red light was shown on the Alton track was one of fact, which was properly submitted, in the first instance, to the jury.

It is also urged that Dirkes, being a fireman on the Santa Fé engine, was guilty of negligence in not being on the lookout for the Alton train; that the engineer was negligent in relying entirely on the semaphore light, and not also watching for a train on the Alton; and that if the engineer was negligent the plaintiff could not recover. The evidence does not show exactly what Dirkes did in the way of watching for a train on the Alton track, but the view was obstructed to some extent, although to what extent was a controverted question on the trial. The evidence would not warrant the court in saying, as a matter of law, that Dirkes was guilty of negligence. The testimony of the engineer shows that his reliance was on the semaphore lights which regulated the use of the crossings; but, if he ought to have been watching the Alton track as well as the semaphore lights, Dirkes was not responsible in any way for his negli-

gence, and the right to recover would not be affected by it. There was no error in refusing to direct a verdict.

It is next argued that the court erred in permitting witnesses for the plaintiff, who said they had been over the crossing frequently that night, to testify that the semaphore was in good working order and working all right. The semaphore at the Alton crossing was torn down in the collision, and its condition could not be proved except as it was found after the accident, when the nine-inch red glass in the arm was unbroken. The objection is that the witnesses stated conclusions, and not facts; that they ought to have explained the mechanism of the semaphores, the condition of the mechanical contrivances, and what they did in the way of observing or examining them that night. We do not regard the testimony as mere conclusions, but rather as statements of fact that the semaphores were in their usual condition and working as usual. What the witnesses knew about the subject was made plain on the cross-examination.

The court admitted evidence that a red light was shown on the Three I track at the time of the accident, and it is insisted that this was error. It was proved that the two semaphores worked in unison by the same lever and wire, and when a red light was shown on the Three I a red light was displayed on the Alton at the same time. The fact that a red light was shown on the Three I, therefore, tended to prove that the semaphore was in such position that the red light was also shown on the Alton. Unless the semaphore at the Alton crossing had become out of order—of which there was no presumption—the red lights were necessarily shown on the two roads at the same time.

The court refused to admit in evidence an ordinance of the city of Streator limiting the speed of an engine or car, other than a passenger train, to six miles per hour. The Santa Fé engineer testified that he was running seven or eight miles an hour at the time of the collision, and it is insisted that the rate of speed was negligence which would bar a recovery, and therefore the court erred in not admitting the ordinance. Dirkes, the fireman, was not in charge of the engine nor controlling its speed, and if there was negligence in that respect it was that of the engineer. If such negligence caused or contributed to the accident, it would not excuse the Alton for an injury to one who was without fault or negligence. Counsel refer to the case of *City of Joliet v. Seward*, 86 Ill. 402, 29 Am. Rep. 35, as sustaining the claim that one who has put himself in the care of another is responsible for the negligence of such other person, and cannot recover for an injury to which the negligence of that person has contributed. In this case Dirkes had not put himself under the care of the engineer to be carried over the crossing, and, if he had, a different rule was laid down in the later cas-

es of Wabash, St. Louis & Pacific Railway Co. v. Shacklet, 105 Ill. 864, 44 Am. Rep. 791, Consolidated Ice Machine Co. v. Keifer, 134 Ill. 481, 25 N. E. 790, 10 L. R. A. 693, 23 Am. St. Rep. 688, and Chicago City Railway Co. v. Wilcox, 138 Ill. 370, 27 N. E. 899, 21 L. R. A. 76.

Next, it is urged that the court erred in giving and refusing instructions, and it is said that the instruction given at the instance of the plaintiff assumed the fact that Dirkes was exercising ordinary care for his own safety. The instruction did not assume the existence of such fact.

The court refused instructions, based on the statute requiring an engine to come to a full stop within 800 feet of the crossing of another railway, which stated that if there was a failure to stop the Santa F6 engine within that distance plaintiff could not recover. The evidence was undisputed that the Santa F6 engine was started 645 feet from the crossing, so that the jury could not have found that it did not stop within 800 feet, and it was not error to refuse those instructions.

Instruction No. 19 tendered by the defendant stated that negligence of the engineer on the switch engine would be attributable to Dirkes as his negligence. We have already alluded to that question, but the court gave the second and third instructions asked by the defendant stating a rule exactly as contended for by counsel, and prohibiting a recovery if the engineer was guilty of negligence contributing to bring about the collision. Certainly the defendant had no ground of complaint on that question.

In the argument to the jury counsel for plaintiff commenced a statement that the income from \$5,000, especially when something was deducted for the expenses of litigation, would not be a fair substitute, when the statement was objected to by counsel for defendant. The counsel making the argument expressed a willingness to have it struck out if not proper, and the court said he thought it proper to discuss the question of damages. The sentence was never completed, and, while the expenses of litigation could not be taken into consideration in awarding damages, there was no further argument on that basis, and we do not think the judgment should be reversed on account of what was said in the incomplete statement. The judgment of the Appellate Court is affirmed.

Judgment affirmed.

(212 Ill. 49.)

CHICAGO UNION TRACTION CO. v. MILLER.

(Supreme Court of Illinois. Oct. 24, 1904.)

CARRIERS—INJURIES TO PASSENGERS—DAMAGES—WITNESSES—CROSS-EXAMINATION—CURING ERROR—INSTRUCTIONS.

1. Where, in an action for injuries, each of three instructions given at defendant's request advised the jury that plaintiff could only recover

such damages as were the result of the accident complained of, a former instruction on the question of damages was not prejudicially erroneous for failure to confine the jury to such damages.

2. Where the evidence on the issue of damages in an action for injuries was very conflicting, and it was doubtful whether plaintiff's present physical condition, which was emphasized in the presence of the jury by an ocular demonstration, was the result of the accident complained of, an instruction permitting the jury, in estimating plaintiff's damages, to take into consideration plaintiff's present physical condition, as shown by the evidence, was error.

3. Where the extent of plaintiff's injuries, as claimed by her, was strenuously denied, plaintiff's denial, on cross-examination, that she helped take care of her mistress, who was the keeper of a boarding house, during an illness, did not so cover a subsequent interrogatory as to whether she did not carry her mistress' meals to her from the basement as to preclude defendant from being entitled to an answer thereto.

4. Error of the court in sustaining an objection to such question was not cured by subsequent testimony given by a witness who was in defendant's employ that plaintiff did perform the service inquired about for her mistress under the circumstances specified.

Appeal from Appellate Court, First District.

Action by Lodavine Miller against the Chicago Union Traction Company. From a judgment in favor of plaintiff, affirmed after remittitur by the Appellate Court, defendant appeals. Reversed.

John A. Rose (W. W. Gurley, of counsel), for appellant. J. Marion Miller, Wm. Elmore Foster, and John C. Stetson, for appellee.

SCOTT, J. Appellee recovered a judgment on January 31, 1903, in the circuit court of Cook county for \$12,500 against appellant in a suit of trespass on the case, brought to recover damages resulting from a personal injury received while a passenger on the street railway of appellant in the city of Chicago. On appeal the Appellate Court for the First District required the appellee to enter a remittitur of \$4,500, and upon her compliance with that requirement affirmed the judgment for \$8,000, and the case comes here by further appeal.

The errors assigned question the action of the court in giving the first instruction asked by appellee and in refusing to allow appellee to answer a question propounded to her on cross-examination. The principal question in the case is as to the character and extent of the injuries received by appellee. Appellant sought to show that her health was not good prior to the accident, that the injury received by her was much less serious than claimed by her, and that she had entirely recovered from the effects thereof. On the evening of July 15, 1901, appellee was riding in an open car on the street railway of appellant. While traveling at a very high rate of speed, the car was stopped suddenly, and she was dashed violently forward, and contends that she received an injury to her spine and spinal cord, from which she has never recovered. She was taken from the

car to a nearby drug store, from there to the office of Dr. Clemens Venn, and from his office, on the same evening, she was taken home in a carriage. At the time of the injury she was 32 years of age, and was employed as a stenographer in Kinsley's restaurant, in Chicago, and received \$11 per week and her meals for her services. She testified that prior to this time her health had always been good, except that on one occasion, several years before, she was in a hospital for a short time taking treatment for what she described as "a run-down condition"; that at the time she was in the hospital she was residing in a building known as the "Potomac Apartment Building," with her husband, Charles S. Kueter; that later she obtained a divorce from him, and resumed her maiden name; that after the accident she suffered great pain in the abdomen, in the spine, and in the small of the back; that she was confined to her bed for about three weeks, and then left the city, and went to Neoga, Ill., a distance of about 150 miles, where she remained about three weeks visiting, and then returned to Chicago; that a few days after receiving the injury she discharged Dr. Venn and employed Dr. Edwin Cross, who fitted her with appliances to brace and strengthen her back; that these consisted of a splint, a so-called jury mast, and straps for the shoulders, and a bandage around the body. She testified that she has worn the bandage continuously since, but that she dispensed with the other appliances a few weeks after receiving the injury; that in February, 1902, she went to her brother's home in the city of Chicago to take care of his little child, about 10 months old; on that day she had removed the bandage, and she strained her back in carrying the baby around, and succeeding this she was quite ill, and was confined to her bed for about two weeks; that since the accident in July, 1901, she has had very little strength, and cannot walk any distance on account of her back being weak; that she cannot reach down, and cannot walk without support, is troubled with sleeplessness, cannot sit very long at a time without twitching, and cannot lie on her back at all; she is startled by unusual sounds, suffers great pain in the back and side, and walking about makes her nervous; that she cannot bear anything touching the spine, and when any one touches her it almost throws her into a spasm; and that she has not been able to hold a child in her arms since February, 1902.

It appears from the testimony of Dr. Cross that he had been treating Miss Miller since about three days after the accident; that he regarded her difficulty as resulting from an injury to the spinal column and spinal cord; that, in addition to the trouble with her back, she had some stomach and bowel trouble also, incident to the injury to the spinal cord. He diagnosed her case as a congestion and contusion or bruise of the spinal cord.

Dr. Venn, who first treated her, testified, in substance, that during the few days he treated her he found no indications of bruises or contusions or injuries of any kind to the spinal column or spinal cord, and that there was no indication at that time of any spinal or nervous trouble; that the injury of which she complained principally at that time was severe tenderness of the abdomen and lower part of the lungs and stomach; that she sat up in bed, propped up with pillows, on the second or third day after the accident.

Bessie Gray testified that she was employed at Kinsley's as assistant bookkeeper with Miss Miller prior to the accident; that Miss Miller then complained of her physical condition, and especially that she had a weak back.

John Stream testified that he was janitor of the Potomac Apartment Building, in Chicago, when Miss Miller lived there with her husband, Charles S. Kueter, several years prior to the accident; that she appeared to be delicate; that she walked around the house very slowly; and when he would inquire in reference to her health she would usually express herself as not feeling very well.

Ida Peterson testified that she worked for appellee as a domestic when she resided in the Potomac Building, and that appellee was always complaining about her back, and sometimes felt very bad; that at such times she got about the house slower than at other times, but without any help.

Ellen G. Roberts, an attorney at law, testified that some time in May, 1901, she had a conversation with Miss Miller in which the latter stated that she was feeling better than she had for some time, but that she had never been strong; that on the 3d day of August, 1901, which would be 19 days after the accident, she saw appellee getting out of a carriage at the entrance of the Lakeside Building in Chicago; that Miss Miller took what the witness thought were straps from her shoulders, and left them on the seat of the carriage; that appellee got out of the carriage and went into the building unassisted; that later the witness was in the office of a physician in that building, and saw Miss Miller there, and heard a portion of a conversation that passed between her and the physician while they were in another room than that in which the witness was; that Miss Miller stated to the physician that she was very well, and never felt better in her life, and wanted him to see a man by the name of Weaver for the purpose of assisting her in getting her position back; that if she could get the position again she would go to work right away; that she had left her braces in the carriage, and said, "The detectives from the company are watching me, and you know I must get big damages. I must keep up appearances;" that Miss Miller stated that she was going to Neely or Neoga for a visit, and wanted her whereabouts

kept secret, because she didn't want to be watched or didn't want to be bothered or annoyed by people following her; that witness saw her and had a conversation with her after her return to the city, and Miss Miller then said that she had gained about 10 pounds and felt very well.

Ever since the accident, and for some time prior thereto, appellee has lived at a boarding house kept by Miss Cora Gee. Laura Olson, a domestic, testified that she was employed at the Gee house from May until October in the year 1902; that Miss Miller assisted during that time in the performance of household duties; that among other things she helped in canning fruit; that there were from 12 to 15 boarders in the house, and that Miss Miller "generally baked the pies and cakes and made the pastry," and usually prepared the noon lunch for the family, none of the boarders other than Miss Miller being at the house for that meal.

Caroline Stofft and her daughter, Lillian Stofft, testified that they had occasionally called on Mrs. Willis, who also boarded at Miss Gee's, and had seen appellee there; that she appeared to be in good health, had good color in her cheeks, stood erect, stepped quickly, and walked without assistance; that particularly on the evening before the evidence of these two women was taken they saw her come up a long flight of stairs at the Gee house and walk down the hallway without assistance.

Helen Schram testified that she had called at the Gee home occasionally during the year 1902, and usually saw Miss Miller, who frequently opened the door to admit her when she came; that, while appellee appeared delicate, she walked erect, without assistance, and went up the stairway unassisted.

Carrie Willis testified that she was employed by appellant to go to the Gee house and board there for the purpose of observing the movements and mode of living of appellee. She testified that appellee did many things which the latter, on her examination, stated she was unable to do. It is unnecessary to set her testimony out in detail, but, among other things, she recounted a tiresome shopping excursion taken by herself and Miss Miller in June, 1902. They left home at 11 a. m. and returned about 5 p. m., and visited five different stores in Chicago. During the time they were visiting the stores they were on their feet almost continually. Miss Miller walked from store to store without assistance, and seemed like a well person. Mrs. Willis also testified that during the months of July and August, 1902, she took five photographs of Miss Miller, which were offered in evidence. In one of these she is shown standing erect, unsupported, and holding a child in her arms. This infant was several months of age, and the child of the witness Laura Olson.

At the close of the case for the defendant

the plaintiff was called in rebuttal. She testified that she had never seen Mrs. Stofft or her daughter. She was then asked if she had ever been introduced to either of them, upon which, as we understand the record, she screamed and collapsed, and at the direction of the trial judge was carried into his chambers, whereupon her counsel rested her case, and no further evidence was introduced on either side.

It is apparent that there is great contrariety in the evidence in regard to the condition of appellee's health prior to the accident and in regard to the effect of the accident upon her physical condition. On this subject the Appellate Court said: "There is a strong conflict in the evidence as to the state of her health and nervous condition for a number of years prior to the time of the accident, as well as since that time, but from a careful reading and consideration thereof, in the light of the arguments of counsel for the respective parties, we are of opinion that the clear preponderance of the evidence is that the appellee's ailments and condition of health since the accident were not altogether caused by the injuries she then received. * * * The evidence on behalf of appellant, as we think, shows by a clear preponderance that appellee's nervous condition and the state of her health are not by any means so serious as claimed by her, nor were they caused solely by the injuries she received." It will be observed that the testimony of the witnesses Olson, Willis, Schram, and Roberts, as above set forth, was wholly undenied. It is true that it seems that appellee was physically unable to go on with her testimony when she was testifying in rebuttal, but no application was made for a continuance or postponement of the cause until such time as she would be able to proceed with her testimony.

The first instruction given the jury on the part of appellee is as follows: "The court instructs the jury that if they believe from the evidence that the defendant company was guilty of the negligence charged in the declaration, and that the plaintiff has suffered injury by reason thereof, then in estimating the damages of the plaintiff in this case you are to take into consideration the physical pain and suffering of the plaintiff, if any has been shown by the evidence, the amount expended in her efforts to be cured, if any has been shown, the loss of time and value thereof, if any has been shown, the impairment of her ability to earn money in the future, if any has been shown, and the present physical condition of the plaintiff, as shown by the evidence, as well as the probability or improbability of her future recovery, as you may believe from the evidence, and from the evidence of these several matters; and from your own knowledge of the common affairs of life arrive at a fair estimate of her damages, if any." It is urged that this instruction is erroneous, in that it

fails to confine the jury to such damages as resulted from the accident. So far as this criticism is concerned, we think it is obviated by instructions 8, 14, and 16 given on the part of the defendant, within the rule followed by this court in *Wenona Coal Co. v. Holmquist*, 152 Ill. 581, 38 N. E. 946, and *Beidler v. King*, 209 Ill. 802, 70 N. E. 763. By each of these three instructions last mentioned the jury were advised that she could only recover such damages as were the result of the accident complained of, and these instructions, when read in connection with said instruction No. 1, clearly advised the jury as to the law in that regard.

It is to be observed, however, that the first instruction informed the jury that in estimating the damages of the plaintiff in this case they are to take into consideration "the present physical condition of the plaintiff as shown by the evidence." If, as contended by the plaintiff, she was in a diseased and disabled condition, it was improper for the jury to take that condition into consideration, unless that condition was shown by the evidence to have resulted from this accident. If such a condition was shown to exist, the jury was authorized by this instruction to consider it in estimating the damages, while under the law they should not have considered such condition unless the evidence went further and showed that such condition resulted from the accident; and while it is true that other instructions advised them that she could recover no damages except such damages as resulted from the accident, still this instruction directed them, in estimating the amount of such damages, to consider her present physical condition, as shown by the evidence, from which the jury could only conclude that they were authorized to consider her present physical condition as resulting from the accident. Under the proof in this cause, there must be grave doubt whether such a conclusion is correct. In cases sounding purely in damages, where the evidence is conflicting, and especially where the facts are calculated to touch upon the feelings and the sympathies, the instructions to the jury should be clear, accurate, and concise. *Chicago, Burlington & Quincy Railroad Co. v. Van Patten*, 64 Ill. 510; *West Chicago Street Railroad Co. v. Dougherty*, 170 Ill. 379, 48 N. E. 1000. In this case the plaintiff's physical condition, according to her contention, was deplorable. Her evidence had been emphasized by an ocular demonstration taking place in the presence of the jury, but, as we have pointed out, it is extremely doubtful whether this condition was the result of the accident complained of. Under these circumstances we feel that this error in this instruction contributed materially to fixing the amount of the verdict at a figure which the Appellate Court considered was more than 50 per cent. above a sum that would be adequate remuneration for the wrong done appellee.

During the cross-examination of the plaintiff, when she testified in making her case in chief, she stated that Miss Gee, the keeper of the boarding house where she lived, had been an invalid for three years, but that she (appellee) did not help take care of her, and did not help lift her in and out of bed. She was then asked by counsel for appellant, "Didn't you carry her meals up to her sometimes?" whereupon the following colloquy ensued: "The Court: She says she did not help tend her or care for her. Counsel: I am asking her now if she did not carry her meals from the basement. The Court: I said she did answer that in the other question, and you can't ask it again. Counsel: I except to it. The Court: That is the proper thing to do, and not try to evade my ruling." We think the court was in error in saying that this question was included in the former. The witness was not apt to regard carrying meals upstairs for the patient as being a part of the work of helping take care of her, especially at a time when it appeared to the witness to be against her interest to admit that she had helped take care of the sick woman. If she had engaged in carrying meals up to the patient from the basement, that fact was inconsistent with her direct testimony. Where, in a case of this character, the extent of the plaintiff's disabilities are in dispute, and especially where, as here, they are of such a character that the symptoms may be feigned, wide latitude should be allowed the counsel cross-examining the plaintiff. We think the objection made by the court was not well taken, and that the witness should have been permitted to answer the question. Afterwards counsel for appellant proved by another witness—Mrs. Willis—that appellee did perform this service for Miss Gee while she was sick; but this does not meet the difficulty. In the first place, Mrs. Willis was in the employ of the appellant, and the jury may have discredited her testimony on that account. In the second place, the defense was engaged in making an attack upon the truthfulness of appellee, and if this fact, inconsistent with her direct testimony, existed, appellant had the right to elicit that fact from her on cross-examination, that her testimony might thereby be weakened.

The judgments of the Appellate Court and the circuit court will be reversed, and the cause will be remanded to the circuit court. Reversed and remanded.

(213 Ill. 75.)

LANGLOIS v. PEOPLE.

(Supreme Court of Illinois. Oct. 24, 1904.)

TAXATION—TAX LIEN—BILL TO FORECLOSE—SUPPLEMENTAL BILL—DEPARTURE—REMOVAL OF CLOUD FROM TITLE—TAX DEED—INVALIDITY.

1. Revenue Act, § 253 (3 Starr & C. Ann. St. 1896, p. 3507, c. 120), provides that taxes on real property shall be a first lien thereon, which

may be foreclosed in equity, and the land sold under the order of court, with the notice and right of redemption provided by Const. art. 9, §§ 4, 5, which declare that the right of redemption shall exist for not less than two years. A bill by the state alleged that taxes for two years remained unpaid and were a first lien, and sought foreclosure of the lien, and afterwards an amended bill was filed to foreclose for the unpaid taxes of other years. Thereafter a supplemental bill was filed, alleging that judgments had been recovered against defendants for the unpaid taxes; that executions thereunder had been returned unsatisfied, with a certificate that defendants had no personal property; and that on the filing of transcripts the sheriff had levied upon the real estate in question. It was further alleged that the property had been offered for sale, and forfeited to the state for want of bidders, and that defendants claimed some interest therein, which beclouded the title of the judgment debtor and rendered the land unsalable; and it was prayed that the interests of defendants be ascertained, and decreed subject to the lien for taxes, and the sheriff authorized to sell the land free of all claims of defendants. *Held*, that the supplemental bill was not germane to the original and amended bills; the object of the latter being to enforce the tax lien by a proceeding in rem, while that of the former was to remove obstacles to the enforcement of the judgments in personam.

2. A decree under the supplemental bill foreclosing a tax lien, and providing for a sale by the county collector, with right of redemption for two years, did not conform to the allegations of the supplemental bill, and was improper, although the supplemental bill contained a prayer for general relief.

3. In a bill to remove a tax deed as a cloud on title, an allegation that the deed is invalid is insufficient; complainant being required to allege and prove in what respect the deed is invalid.

Appeal from Circuit Court, Cook County; John Gibbons, Judge.

Bill by the people of the state of Illinois against Henry N. Cooper and others. From a decree for complainant, Walter Langlois, defendant, appeals. Reversed.

The original bill in this case was filed on August 5, 1901, by the people to foreclose liens against real estate forfeited to the state for the nonpayment of the taxes of two or more years, by virtue of section 253 of chapter 120 of the Revised Statutes, being the revenue act (8 Starr & C. Ann. St. 1898 [2d Ed.] p. 3507). The original bill sought to foreclose alleged liens for delinquent taxes on a large number of lots, amounting in the aggregate to 150, and on which it was charged that the taxes sought to be foreclosed amounted to the sum of \$3,750. The bill alleged that the taxes levied for 1898 and 1899, and the taxes, penalties, interest, and costs which had accrued thereon, remained due and unpaid on said lots, and, as shown in the collector's book, were then a first lien on the property for the several sums set opposite them, respectively, and that each of said pieces of land was forfeited to the state for taxes of 1898 and 1899, etc. The bill alleged that Henry N. Cooper and Albert C. McLaughlin, individually and as trustees of the Shawmut Avenue Land Association, William H. Johnson, Walter Langlois, the Shawmut Avenue Land Association

(a corporation), Otis S. Lyman, David B. Lyman, and the unknown owners of certain tracts of land had or claimed an interest in said tracts of land as owners or otherwise. The prayer of the bill was that the defendant owner or owners of the lots should be decreed to pay whatever should be due and the costs by a short day, and in default thereof that the lots, and each of them, should be sold under the order of the court by the county collector, as provided by law, etc.

On October 21, 1901, the appellant, Walter Langlois, one of the defendants below, entered his appearance, and on November 8, 1901, filed a general demurrer to the bill. This demurrer does not appear to have been acted upon or disposed of, but on the same day, to wit, November 8, 1901, the people filed an amended bill to foreclose for the nonpayment of the taxes for 1898, 1899, and 1900, and the tax penalties and costs, etc. It alleged that the lots were forfeited for the same description for taxes of two or more years, to wit, 1899 and 1900. It also alleged that the amount of taxes, penalties, interest, etc., due on said tracts of land, forfeited to the state for the years as aforesaid, was for the year 1900 \$3,750, and the full amount then due upon said lots, as shown by collector's books, for taxes, penalties, interest, etc., for 1899 and 1900, and accrued taxes levied for 1900, was \$3,750, "which amount was and is a lien upon each of said lots, as shown by collector's books and tax judgment, etc., opposite to each lot separately." Here follows same description as is in original bill, excepting that two lots are added. The amended bill represented that certain persons—namely, in addition to those mentioned in original bill, Lilla M. Breed, David B. Lyman, trustee, the unknown owners and legal holders of twenty promissory notes for the sum of \$1,500 each, etc., the unknown owners of Lyman's Addition to La Grange, and the unknown owners of the tracts of land therein described—all of whom were made defendants, had or claimed some interest in said lots as owner or otherwise. The amended bill prayed that an account might be taken, and the defendant owners decreed to pay whatever sums should be due upon taking such account, and the costs, and, in default of such payment, that the lots, and each of them, might be sold under the order of the court as provided by law, etc. General demurrers were filed to the amended bill, but do not appear to have been acted upon or disposed of.

Subsequent to the commencement of this foreclosure suit, and in May, 1902, 29 suits were begun before W. D. Wilcox, a justice of the peace in Cook county, by the people, against Henry N. Cooper and Albert C. McLaughlin, trustees of the Shawmut Avenue Land Association, as defendants, and 29 judgments were therein entered in favor of the people against said defendants, aggre-

gating \$5,179.72, upon which executions were issued and returned by a constable wholly unsatisfied, with a certificate that the defendants had no personal property within the county sufficient to satisfy said judgments. Transcripts were issued by the justice of the peace and lodged with the clerk of the circuit court, together with copies of the summons and process, and the return of the officer, and the judgments thereon, and executions issued thereon, with the returns thereon, and a copy of the docket in each of said cases, and the same were by said clerk recorded and filed with all other papers named by the statute; and thereafter the clerk issued executions upon each of said judgments, records, and transcripts, as provided by statute, to the sheriff, which the sheriff levied upon said real estate, and which executions and levies aggregated \$5,271.88.

On October 25, 1902, the appellee filed an amended and supplemental bill in the foreclosure suit, stating that during the last five years, and in each of them, taxes were assessed and levied upon the lots therein described, and became delinquent, and judgment was rendered thereon in the county court, and thereupon said real estate was in each of said years for taxes, penalties, costs, etc., duly offered for sale at regular tax sale, and, for want of bidders, was forfeited to the state, and that said taxes and accrued forfeitures, penalties, costs, etc., now aggregate \$5,271.88, which sum is due and not paid, and a valid first and prior lien upon all said real estate, which was described in the bill. The amended and supplemental bill alleged that the defendants above named, including the appellant, claim some interest in the said real estate subject to the complainant's lien. The amended and supplemental bill also set up the recovery of said judgments before the justice of the peace, and that transcripts were taken from the justice in each of the suits, and lodged with the circuit court, and executions taken out thereon and placed in the hands of the sheriff, who levied upon all the land described in the original bill as the property of the judgment debtors. The supplemental bill, after setting out all the proceedings before the justice of the peace and the circuit court in said suits, claimed that there was due the aggregate sum of \$5,271.88. The amended and supplemental bill also alleged that the title of the said judgment debtors to the said real estate was beclouded and uncertain by reason of divers claims of the defendants, and thereby rendered unsalable by said sheriff, and that the said judgment debtors had no other property from which said executions, or any part thereof, could be made, and that complainant was without any remedy but in a court of equity. The bill also alleged that all the defendants, except Langlois, Johnson, and the village of La Grange, claim some lien upon the real

estate, subject to and dependent upon the title of said judgment debtors thereto, but that said judgment debtors were the real owners of said property; that Langlois, Johnson, and the village of La Grange claimed liens upon said real estate for reimbursement from said judgment debtors for invalid tax titles thereto; that all titles and claims of the defendants were subject to the demand aforesaid, for which said judgments were rendered.

The prayer of the amended and supplemental bill was that the interests of the defendants in the real estate described should be ascertained and declared and decreed to be subordinate and subject to the lien of said taxes evidenced by said judgments and executions thereon, and that the sheriff of the county be authorized and directed to advertise, sell, and convey said real estate under said executions, as in the statute provided, free and clear of all claims, liens, etc., in defendants, except the statutory right of redemption. On November 3, 1902, the appellant filed a special demurrer to the amended and supplemental bill, and also a general demurrer thereto. The village of La Grange also entered its appearance and filed a demurrer.

The demurrers to the amended and supplemental bill were overruled. The appellant, Langlois, elected to stand by his demurrer, and refused to answer the amended and supplemental bill, which was thereby taken as confessed against him, and all the defendants served with process. The cause was thereupon referred to a master in chancery, whose report was approved, but is not set out in the record.

On March 25, 1904, the court rendered a final decree, finding that the lots had been forfeited as stated in the bill, and that there were due for taxes, forfeitures, penalties, interest, and costs, in addition to the taxes of 1903, certain amounts, set opposite each lot, aggregating the sum of \$5,229.99, to which there was to be added in each instance 20 per cent. as costs, interests, and penalties, making an aggregate sum of \$6,017.99 due the complainant. The decree also sets up the beginning of the suits before the justice, the rendition of judgments therein, the filing of transcripts with the circuit court, and the issuance of executions thereon, and the levy of the same upon all of the lots described in the bill. The decree then ordered and adjudged that the defendants, within three days, should pay to Hanberg, county treasurer and ex officio collector, said sums, aggregating \$6,017.99, and in default thereof that said real estate be sold by said treasurer and ex officio collector at public vendue for cash to the highest and best bidder at the east front door of the courthouse in Cook county, and that the county clerk of Cook county should attend the sale and keep a record thereof, and, on the sale being made, the collector and county clerk should execute

and deliver a certificate of purchase to the purchaser or purchasers, signed by the county treasurer and ex officio collector and the county clerk, and should record a duplicate in the recorder's office. The decree also provided that, on the expiration of two years from sale, if the premises were not redeemed according to law, defendants should be barred and foreclosed of all right of redemption, and that the county clerk and county collector should execute to the legal holder of the certificate a deed of said premises, and that the grantees in such deed, their legal representatives and assigns, should be let into possession of the premises, etc. The present appeal is prosecuted from the decree so rendered on March 25, 1904.

Gage & Deming, for appellant. Robert S. Iles, R. Delos Martin, Stillman B. Jamieson, and A. M. McConoughey, for the People.

MAGRUDER, J. (after stating the facts). The original and amended bills in this case were filed under and in pursuance of section 253 of the revenue act (3 Starr & C. Ann. St. 1896 (2d Ed.) p. 3507, c. 120). That section, after providing that the taxes upon real property, together with all penalties, interest, and costs that may accrue thereon, shall be a prior and first lien upon such property, superior to all other liens and incumbrances, from and including the 1st day of May of each year in which the taxes are levied until the same are paid, further provides that such "lien may be foreclosed in equity in any court of competent jurisdiction, in the name of the people of the state of Illinois, whenever taxes for two or more years, upon the same description of property, shall have been forfeited to the state, and may be sold under the order of the court by the person having authority to receive state and county taxes, with the same notice to interested parties and right of redemption from said sale as is now provided by law, and in conformity with sections 4 and 5 of article 9 of the Constitution of this state." Section 4 of article 9 of the Constitution provides as follows: "The General Assembly shall provide, in all cases where it may be necessary to sell real estate for the non-payment of taxes or special assessments for state, county, municipal or other purposes, that a return of such unpaid taxes or assessments shall be made to some general officer of the county, having authority to receive state and county taxes; and there shall be no sale of said property for any of said taxes or assessments but by said officer, upon the order or judgment of some court of record." Section 5 of article 9 provides that the right of redemption from all sales of real estate for the nonpayment of taxes or special assessments shall exist in favor of the owners of such real estate for a period of not less than two years. 1 Starr & C. Ann. St. 1896 (2d Ed.) p. 173.

The prayer of the original and amended bills was that, in default of payment, the

property should be sold by the county collector, the officer contemplated by section 253 of the revenue act, and by sections 4 and 5 of article 9 of the Constitution. The original and amended bills were strictly bills for the foreclosure of the lien provided for in section 253 of the revenue act, and were proceedings in rem against the land itself.

The amended and supplemental bill subsequently filed proceeded upon a new and entirely different theory, and, in our opinion, was not germane to the original and amended bills. The supplemental bill set up the recovery of 29 judgments for delinquent taxes against the owners of the property before a justice of the peace, and, after the issuance of executions thereon, and the return of the same unsatisfied by a constable, the filing of transcripts in the circuit court, and the issuance of executions, and the levy of the same upon the real estate. The supplemental bill does not state how these levies were disposed of, or that they were disposed of at all. The theory of the supplemental bill is that the appellant, who is the only one of the defendants below prosecuting this appeal, claimed a lien upon said premises growing out of an invalid tax title thereto, and that his title and claim were subject to the demand for which said judgments were rendered. The supplemental bill also averred that, by reason of appellant's claim, the property was rendered unsalable by the sheriff; and the object of the bill was to remove the cloud created by appellant's tax title, in order that the sheriff might sell the land levied upon under the executions issued upon the judgments already mentioned. The prayer of the supplemental bill was that the sale of the property should be made by the sheriff subject to the statutory right of redemption.

It is clear that the supplemental bill was an entirely different bill from the original and amended bills. The judgments rendered before the justice of the peace were judgments in personam, and the object of the supplemental bill was to remove certain clouds or obstacles out of the way, so that the executions levied under such judgments in personam could be enforced by the sheriff.

In *Douthett v. Kettle*, 104 Ill. 356, we held that sections 4 and 5 of article 9 of the Constitution had no reference whatever to a sale of land upon an execution where a personal judgment had been rendered in an action brought to recover delinquent taxes. The procedure provided in sections 4 and 5 of article 9 of the Constitution, and in section 253 of the revenue act, contemplates, not a personal judgment, but a judgment or decree in rem. Where the proceeding is to enforce a decree or judgment in rem, or against the land itself, the officer authorized to sell the property is the treasurer or ex officio county collector, and the time of redemption is a period of two years. But where a judgment is against the owner of land for de-

linquent taxes, which is a judgment in personam, the right of redemption is that fixed by the statute in case of ordinary sales under judgments, and the officer who has authority to make the sale is the sheriff of the county. In *Douthett v. Kettle*, supra, we said (page 359): "The right of redemption provided for in section 5 was intended to embrace such sales as were mentioned in section 4, and none others, and as section 4 had no reference to a personal judgment, but only to a judgment against the land, or an ordinary proceeding to sell lands for the nonpayment of taxes, it follows that section 5 could not have any bearing upon a sale of land upon an execution directed to a sheriff, although the judgment was rendered, in the action upon which the execution issued, for delinquent taxes. Again, the land in this case was not sold for the nonpayment of taxes, in the ordinary acceptance of that term. It was sold upon a judgment rendered after personal service of summons in an action of debt. Whether the subject-matter of the suit was taxes or a promissory note, can make no difference. The same rule which would control the sale and redemption of the land in the one case would govern in the other."

It follows from what has been said that the demurrer of the appellant to the amended and supplemental bill should have been sustained. The amended and supplemental bill was not germane to the original and amended bills, because it sought to remove out of the way an alleged obstruction to the enforcement of judgments in personam against the owners of the property, and prayed for a sale of the property by the sheriff, and for a deed to the purchaser after the expiration of the statutory period of 15 months, while the original and amended bill sought to enforce a lien against the land itself, and contemplated a sale of the land by the county collector, and a redemption from the sale by the purchaser within a period of 2 years, instead of 15 months. Not only was the relief prayed for by the original and amended bills different from that asked for by the amended and supplemental bill, but the latter bill was defective in another respect. It merely alleged that the tax title of the appellant was invalid, but did not state in what respect such tax deed was invalid. It is incumbent upon the complainant in a bill to remove a tax deed as a cloud upon title to allege and prove the invalidity of the tax deed. *Hyde v. Heath*, 75 Ill. 381; *Gage v. Curtis*, 122 Ill. 520, 14 N. E. 30; *Glos v. Carlin*, 207 Ill. 192, 69 N. E. 928.

The decree rendered in the case was based upon the allegations of the original and amended bills, and was in pursuance of the relief asked for in those bills. The cause went to hearing before the court upon the amended and supplemental bill. The original and amended bills had been abandoned by the appellee when the amended and supplemental bill was filed. The relief granted

by the decree is the relief of foreclosure against the land, enforced by a sale to be made by the county collector, and the decree provided for a redemption of two years. Therefore the relief granted by the decree rendered did not conform either to the allegations or the prayer of the amended and supplemental bill. "The rule is that the complainant must stand or fall by the case he makes in his bill. * * * And the decree must conform to the prayer of the bill." *Gage v. Curtis*, 122 Ill. 520, 14 N. E. 30. It is true that in the case at bar the amended and supplemental bill contains a prayer for general relief, but the relief to be granted under the general prayer must be such relief as the complaint may be found entitled to have under the allegations of fact made in the bill, and the proof in support thereof. *Gibbs v. Davies*, 168 Ill. 203, 48 N. E. 120. In *Fuller v. Davis' Sons*, 184 Ill. 505, 56 N. E. 791, we said (page 510, 184 Ill., and page 793, 56 N. E.): "Manifestly, the decree of the circuit court cannot be sustained. It is clearly beyond the scope of the bill and the prayer for relief. Neither is it supported by the evidence. The only attempt to justify the finding and decree is under the general prayer. But a general prayer for relief will only sustain a decree when the facts alleged justify such decree. A decree can never rest upon the prayer alone, whether it be for specific or general relief."

We are of the opinion that the amended and supplemental bill was demurrable, and that the decree entered is erroneous, for the reason that it is beyond the scope of the amended and supplemental bill and the prayer of the latter bill for relief. Accordingly the decree of the circuit court of Cook county is reversed, and the cause is remanded to that court for further proceedings in accordance with the views herein expressed.

Reversed and remanded.

(212 Ill. 59)

CITY OF CHICAGO v. AYERS et al.

(Supreme Court of Illinois. Oct. 24, 1904.)

STREET IMPROVEMENTS—IDENTITY OF IMPROVEMENT WITH THAT PROVIDED BY ORDINANCE—LIABILITY OF ASSESSMENT.

1. The improvement of a street by paving it with a roadway 64 feet wide is not the same improvement contemplated by an ordinance providing for paving it with a roadway 50 feet wide, though a street railway company had agreed to pay for paving the 16 feet in the middle of the street, so that property owners are not liable for an assessment for making the improvement.

Appeal from Cook County Court; O. N. Carter, Judge.

Application by the city of Chicago for confirmation of an assessment. Objection of David Ayers and others was sustained, and the city appeals. Affirmed.

This was an application for the confirmation of a special assessment, made under a supplemental petition filed on December 24,

1901, in the county court of Cook county, for the purpose of securing the necessary funds to satisfy the unpaid balance of the cost of making an improvement of State street, in the city of Chicago, under the local improvement act. The county court sustained an objection filed by appellees, and the city appeals.

In January, 1895, an ordinance was passed for paving State street from Sixty-Eighth street to Seventy-Fifth street, the roadway to be 50 feet in width. On November 2, 1895, a contract was entered into for the construction of the improvement. After this contract was made, it was found that the Englewood & Chicago Street Railway Company was willing to pay for the paving of the central 16 feet on State street between Sixty-Eighth street and Seventy-Fifth street. Thereupon, on February 3, 1896, an ordinance was passed widening the roadway between the points designated from 50 feet to 64 feet, and the street was then paved, by an arrangement made with the contractor, with a roadway 64 feet in width. After the confirmation of the original assessment, a writ of error was sued out of the Supreme Court by a portion of the property owners to reverse the judgment of confirmation, and that judgment was reversed on the ground that certain flat stones, specified in the ordinance providing for the improvement, were not properly described. The result was that sufficient money was not collected under the original assessment to pay for that portion of the improvement which was not paid for by the street railway company. The purpose of the present proceeding was to collect money to meet this deficiency. The county court sustained an objection which was to the effect that the improvement which was constructed by the city was not the improvement contemplated by the original ordinance, and this presents the only question for determination here.

William M. Pindell (Edgar Bronson Tolman, Corp. Counsel, and Robert Redfield, of counsel), for appellant. George W. Wilbur, for appellees.

SCOTT, J. (after stating the facts). The original ordinance provided for paving the street with a roadway 50 feet in width. The roadway actually constructed is 64 feet in width; otherwise the improvement is in conformity with the ordinance. If the improvement be deemed substantially the one described in the ordinance, then the objection should have been overruled. *People v. Whidden*, 191 Ill. 374, 61 N. E. 133, 56 L. R. A. 905; *People v. Church*, 192 Ill. 302, 61 N. E. 496. On the other hand, if the deviations are of such a character that the improvement cannot be denominated as one of the same character and description prescribed by the ordinance, the objection was properly sustained. *Pells v. People*, 159 Ill. 580, 42 N. E. 784; *Gage v. People*, 200 Ill. 432, 65 N. E. 1084.

72 N.E.—3

Appellant urged that, as the street railway company was to pay for a strip of the paving 16 feet in width in the middle of the street, the property owners have to pay for no more paving than they would have been required to pay for had the improvement been constructed as originally designed, and in this proceeding offered evidence to show that the improvement as constructed was as beneficial to the property owners as though it had been constructed with a roadway 50 feet in width instead of 64 feet in width. The fact that the property owners were not to pay the increased cost makes no difference at all in determining whether the improvement be the same improvement contemplated by the original ordinance, and if, upon increasing the width of the roadway 28 per cent., the city became entitled to a judgment to the effect that the improvement was still the same improvement by showing that it was as beneficial to the property owners as the original improvement would have been, by making the same showing the city would be entitled to the same judgment if the width of the pavement had been reduced 28 per cent.

If the city, after passing the amendatory ordinance, had sought by a supplemental proceeding to collect from the property owners the increased cost of the pavement, it would scarcely contend that the improvement contemplated by the amended ordinance was the same as that described in the original ordinance, and the fact that the additional cost was to be paid by some person other than the property owners is entirely without weight in determining whether the improvement made was the one for which the property was originally assessed.

In our judgment, the improvement constructed by the city was not the one provided for by the first ordinance, and the objection was therefore properly sustained. The judgment of the county court will be affirmed.

Judgment affirmed.

(212 Ill. 125)

BARBER v. ALLEN.

(Supreme Court of Illinois. Oct. 24, 1904.)

DEEDS—CONSTRUCTION—RESERVATIONS—PRIVATE ALLEYS—USE—TRAVEL—LIGHT AND AIR.

1. Complainant's predecessor in title was the owner of four subdivided lots fronting on a certain street, only one of which extended 150 feet deep to a public alley. The other three were only 118 feet deep, bounded in the rear by a rectangular piece of ground facing a side street, so that access could be obtained to the rear of the short lots from the side street only across the rear of such lots. A deed of the two short corner lots expressly reserved the right to use a sufficient "private alleyway over and across the west end of the lots conveyed" for the use and accommodation of the store lots lying on the north side thereof, to be forever kept open and maintained for said purpose. The property was business property suitable only for stores, located in the center of the prin-

cial business district of a city, and the evidence warranted a finding that 18 feet was necessary for a suitable alleyway. *Held*, that the owners of such inside lots were entitled under such reservation to a private right of way, 18 feet in width over the rear of the corner lots, both for travel and light and air.

Appeal from Circuit Court, Will County; Dorrance Dibell, Judge.

Bill by Francis C. Barber, impleaded with Ellen F. Lahee and others, against Frank S. Allen. From a judgment in favor of complainant, impleaded, for less than the relief demanded, complainant appeals. Reversed.

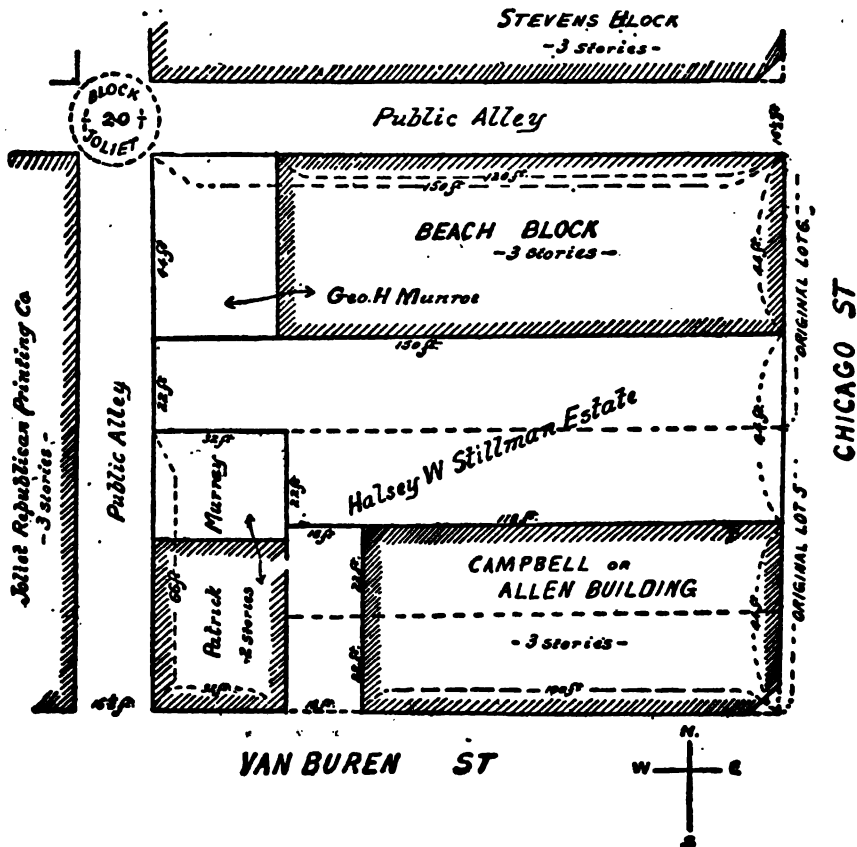
The plat showing the property in controversy is given below.

D. C. Haven, for appellant.

RICKS, C. J. This is an appeal from the circuit court of Will county to reverse a decree of that court entered upon a bill filed by the appellant and other complainants against the appellee. The master, in his report, found in favor of complainants upon all material allegations, and recommended a decree as prayed for. On exception to the report of the master part of his findings of fact were modified, and the relief granted was the establishing of a private alley or passageway, as appurtenant to the property of appellant and her co-complainants, of 12 feet in width when the prayer was for one

18 feet in width. The chancellor also seemed to entertain the view that the evidence of certain witnesses summoned and testifying on behalf of complainants was not material, and taxed the costs of their attendance, service, and the taking of their testimony, and \$15 of the general costs, to the complainants. A joint and several prayer for appeal was granted, and appellant prosecuted this appeal, complaining of the act of the court in sustaining the exceptions to the master's report and the order as to costs. Appellee has filed no brief in this cause or taken any notice of this appeal. The statement of the case as made by appellant will, under the rules of this court, be accepted as correct, and the propositions of law urged by appellant will be applied to the facts as stated.

From appellant's statement it appears that on September 6, 1880, Halsey W. Stillman, a resident of New York state, was the owner of 88 feet of ground fronting east on Chicago street, in the city of Joliet. The property was bounded on the south by Van Buren street. The depth of the lots was from east to west in that block 150 feet, but the south 66 feet of the land owned by Stillman extended back only 118 feet, and the north 22 feet extended clear through from Chicago street to a public alley. The west 32 feet of the south 66 feet belonged to one Murray, so that the south 66 feet of Stillman



lacked 32 feet of extending to the alley, and had no means of approach at the rear except by passing in over the end from Van Buren street. At the date above named Stillman conveyed to Hannah E. Campbell a tract of 22 feet front width on Chicago street and lying next to Van Buren street, and of the depth of 118 feet, and on the same date conveyed to her husband, Dr. Merritt B. Campbell, a like strip of 22 feet fronting on Chicago street, and extending west 118 feet to the Murray tract, and adjoining the tract conveyed to Mrs. Campbell on the north. After these conveyances were made, Stillman had remaining two tracts of 22 feet frontage each, one lying next to Campbell on the north, extending back 118 feet, and a 22-foot tract still further north, extending back to the alley. In each of the deeds to Campbell, immediately following the description of the lands conveyed, and as a part of it, was the following exception and reservation: "But hereby expressly excepting and reserving the right of use of a good and sufficient private alley way over and across the west end of the lot hereby conveyed, for the use and accommodation of the store lots lying on the north side thereof, which alley way shall be forever kept open and maintained for said purposes." Both these deeds were promptly placed of record, and Campbell subsequently conveyed his lot to his wife.

In the spring or summer of 1881 Mrs. Campbell erected on this property, at the corner of Chicago and Van Buren streets, a three-story brick building with a frontage of 44 feet. The south half of the building extended back west 100 feet, and the north half of the building extended back west 80 feet. There was no entrance to the third floor of this building from the front, and, for the purpose of gaining access to that floor, Mrs. Campbell had constructed a temporary and outside stairway. This stairway began at the west end of her building that lay along Van Buren street and about two feet back north from the street, and was carried north upon wooden posts for support across the west end of the building that extended west 100 feet, and was then turned east along the north side or wall of her building that projected farthest west until the stairway reached the third floor of the building that extended only 80 feet west. Where the stairway started from the street there was a sort of brick arch or entrance way. Originally the stairway seems not to have been covered, but it was afterwards covered overhead and remained open underneath.

While the Campbells owned the property, they, together with Stillman, subdivided the Campbell property and the Stillman tract that extended back only 118 feet, into three lots or sublots; and as they lay, counting from south to north, subplot 1, being the lot

Buren street; lot 2 lay next north, and was the lot bought by Dr. Campbell; and lot 3 was retained by Stillman and was the most northerly lot of the subdivision. Each of these lots, by the subdivision, had a frontage of 22 feet on Chicago street and a depth of 118 feet. Subsequently Mrs. Campbell extended her building that was only 80 feet in depth by building to the west thereof a one-story building extending back west 20 feet, so that the west end of her building as thus extended was 44 feet north and south and 100 feet west from Chicago street. It also appears that, prior to the building of the stairway across the west end of the south half of her building, she had constructed an ash pit that extended four or five feet west of the building, and having a brick or stone top, and that the posts supporting the stairway rested upon the ash pit.

When Stillman sold to the Campbells he reserved some old buildings that were on the property they bought, and moved them onto his lots lying north of the Campbell lots, and placed them so that they fronted upon Chicago street, where they were fitted and leased for business purposes. One of the old buildings was moved to the west end of subplot 3 belonging to Stillman, and was used for a barn for a number of years from 1881, and latterly as a warehouse; access to it being had from Van Buren street over the disputed tract in question. About the year 1892 appellee, Allen, purchased the property formerly owned by Mrs. Campbell. The deeds from the Campbells and the deeds to Allen all contained references to and were subject to the reservation in the deeds from Stillman to the Campbells. Allen afterwards caused to be constructed at the west end of that part of the building that was only one story an outside cellarway, which extended into the disputed strip about six feet.

The bill in this case was filed January 22, 1901. Shortly prior to the filing of the bill appellee began the preparation for extending the building on his lots back practically the full depth of the premises, and tore out the temporary stairway that was along the west end of his building and leading to the third story, and began to make excavations and bring to the premises material for his extension. In the bill, complainants, who by inheritance and purchase succeeded to the title of Halsey W. Stillman, and the present owners of the Stillman tracts, set out the foregoing facts, and alleged that a passageway of 18 feet in width between the Murray property and the building on appellee's property was in contemplation of the grantor and the grantees at the time of the conveyances by Stillman to the Campbells; that, though no particular width was described, the parties intended, and the deeds should be construed to mean, that an alleyway and passageway of a sufficient width to permit delivery wagons and drays to reach business houses that should be constructed on subplot

3, and the lot lying north thereof, and deliver goods and freight, and turn and pass out, should be held to be reserved and excepted from the conveyances.

A number of witnesses testified, on behalf of the complainants, as to the necessary width of such a passageway, and no witness fixed the width at less than 16 feet, and most of them from 18 to 22 feet. We think the overwhelming weight of the evidence shows that a passageway 18 feet in width was the least that would serve the purpose for which it is claimed the reservations were made, and that, if the deeds are to receive the construction contended for by the complainants in the bill, the findings of the master in that regard should have been sustained. The record shows that the property is in the principal business district of the city of Joliet, within one block of the courthouse, and in less than two blocks of all the banks and principal business establishments of the city; that the property surrounding appellant's property 'is, and has been for years, all built up with business blocks, most of them three or more stories high, and that the reason appellant's property has not been so built up is that Halsey W. Stillman, the original owner thereof, executed a life lease to his sister, a Mrs. House, and to her husband, which only terminated in 1897. Stillman, the original owner, lived in another state, and there is no act or agreement of his that justifies the placing of a different construction upon the deeds made by him to the Campbells than that contended for by appellant, although the acts of the Campbells in the building of the temporary stairway and the ash pit during their holding, and of appellee by extending his cellarway west of the Campbell building and into the disputed strip, would tend to show that they placed a narrower construction upon the reservation than is contended for by appellant; yet it did not lie within their power, alone, to so use the property or to so improve the same, without the consent of the owners of the Stillman tracts, as to change the legal effect of the deeds, unless such acts extended over a sufficient period to bar the rights of appellant and those claiming with her. No such length of time of adverse enjoyment or adverse claim is shown by this record as gives to appellee a title to the passageway intended by the parties, to the exclusion of the rights of complainants to the reservations in the deeds, nor is there anything shown that would operate as an estoppel against appellant or her co-complainants, or those with whose title they are in privity.

It is also contended by appellant that as the reservation of a private alleyway, contained in the Stillman deeds, is unrestricted in its terms, it includes not only the right of passage, but also the right to use the same for light and air, which latter rights are said to be quite as important to the property

for the benefit of which the reservation is made, as is the right of passage. We are thus brought to the consideration of the meaning and legal effect of the deeds from Stillman to the Campbells.

The cardinal rule in the construction of written contracts is to ascertain the intention of the parties. Where the language of the contract is so specific that the intention may be found in the instrument, then that intention as thus expressed must control; but where the language is doubtful, and the grant or reservation is clear and certain, the extent or limit of the grant may be ascertained by inquiring into the circumstances of the parties, the condition of the property to be affected, and the uses to which it was put or was in contemplation of the parties at the time of the making of the grant or reservation. It sometimes happens that, where a right of way is granted or reserved, there has existed at the place, prior to the grant or reservation, a way that has been used for the purposes mentioned or intended in the deed, and in such circumstances the limits of the way then existing are frequently adopted as the limits of the way thus granted or reserved. *Dickinson v. Whiting*, 141 Mass. 417, 6 N. E. 92. But in those cases where there has existed no previous passageway or way that can be regarded as in contemplation of the parties, then the intention of the parties must be determined by the condition of the property, and the uses to which the property is to be put, and it will be held that such a way was in the contemplation of the parties as was reasonably necessary and proper for the intended uses. *Atkins v. Bordman*, 2 Metc. (Mass.) 457, 37 Am. Dec. 100.

In looking to the reservation in the case at bar it is found that an alleyway is reserved for the use and accommodation of the store lots lying on the north side of the granted premises, and that this alleyway is to be forever kept open and maintained for said purposes. We find, then, from the instrument itself, that it was in the contemplation of the parties that the lots owned by the complainants in the bill were to be used for stores and for mercantile purposes, and that the way that is to be maintained is to be a sufficient private alleyway for the use and accommodation of these stores. This is as far as the instrument itself advises us as to what was the intention of the parties. From the evidence it is learned that the property in question was in the business center of an important city, and that the store lots for whose benefit the alleyway is reserved front upon a public street in that city. From these facts we may properly conclude that the parties contemplated that a mercantile business should be conducted on these lots, and that those having dealings as purchasers and patrons of the stores thus maintained upon these lots would ordinarily have access to them from Chicago street, upon

which they fronted, and that, therefore, the idea that was in the minds of the parties to the instrument was, not that an alleyway should be reserved in order that the patrons of those stores might have access to them for ordinary dealings, but that the parties may have had in their minds some other and different purpose. It is a matter of common knowledge that in the conducting of a mercantile business the goods received by the proprietor come in bulk, and are usually, where such method can be availed of, unloaded and received at some rear portion of the building—most commonly at a public alleyway; but we find in the case before us that one of the lots retained by the grantor in the deed in question was not accessible from any public alley, and therefore we are led to the view that the parties had in mind a way suitable for the delivery of goods and merchandise by the methods usually obtaining in all cities. These methods are shown by the evidence to be by drays and express and delivery wagons, and the conclusion must reasonably follow that such was the purpose of the reservation.

Having then before us the reservation and its purpose, the question remains as to the extent of the way necessary for the accommodation of such use. The deeds locate the way at the west end of the lots granted but do not define its width, but as the reservation is clear and certain, and the purposes reasonably susceptible of ascertainment, we are quite satisfied that the width of the alleyway or passageway that was in contemplation of the parties was such as would be necessary—in the words of the reservation, such as was "good and sufficient for the use and accommodation of the lots." That question then became one of fact, to be determined by calling those who were conversant with the requisites of a way that would be good and sufficient for the accommodation of such uses, and such evidence was offered and admitted before the master, and, as we have said, clearly showed that a way of at least 18 feet in width was necessary for the purpose of the reservation.

Whether the complainants in the bill were entitled to the way for the uses of light and air must, as we think, depend upon the character of the right that was granted. No such purpose is expressed in either of the deeds, and, unless the way itself shall be deemed to be such a way as carries with it the right of light and air which the property holder may enjoy as an incident to the way, it cannot be said to be included in the grant. The rule seems to be that the reservation of light and air for the use of buildings will not be implied, but must, ordinarily, be expressed; but if the alleyway or a right of way be granted, there must be no such interference with the light and air as would prevent the proper use of the alleyway or right of way thus granted. If the thing itself—that is, the alleyway, as a distinctive body of land—is granted or reserved, then, of course, the

person for whose use the grant or reservation is has the right to the enjoyment of the light and air without obstruction from earth to heaven; but if there be but a passageway only, then the restriction is that there must be no such deprivation of the light and air as would interfere with the use of the way. *Grafton v. Moir*, 130 N. Y. 465, 29 N. E. 974, 27 Am. St. Rep. 534. In the case at bar there seems to be a purpose to reserve an alleyway, which is designated by the reservation as a private alleyway, as contradistinguished from the mere right of passage or the use of a way for the purposes mentioned, and this right, according to the provisions of the reservation, is to be a perpetual right, and is to be forever maintained, and we are of the opinion that with such reservation, and as incident to it, is the unobstructed enjoyment of light and air. *City of Chicago v. Borden*, 180 Ill. 430, 60 N. E. 915; *Field v. Barling*, 149 Ill. 556, 37 N. E. 850, 24 L. R. A. 406, 41 Am. St. Rep. 311; *Horne v. Keene*, 177 Ill. 390, 52 N. E. 492. Such being our view, we hold that the circuit court of Will county erred in sustaining the exceptions to the report of the master as to the width of the alleyway and in its order in regard to costs.

The decree will be reversed and the cause remanded, with directions to the circuit court to enter a decree establishing the alleyway as of the width of 18 feet, and to enter a decree for complainants in the bill for costs.

Reversed and remanded, with directions.

(212 Ill. 43.)

SCHUKNECHT v. SCHULTZ et al.

(Supreme Court of Illinois. Oct. 24, 1904.)

WILLS—DEVISE—REMOTENESS—ELECTION.

1. Testator left a son and three grandchildren, sons of the son, and a clause of the will gave the son property until testator's youngest grandchild should attain the age of 25, when it was to be divided among the grandchildren. *Held*, that the will was void for remoteness, as not being clearly limited to the grandchildren then living.

2. The fact that one took a beneficial interest under a will did not preclude him from asserting that a clause thereof was void for remoteness.

Appeal from Circuit Court, Kane County; H. B. Willis, Judge.

Bill by J. Fred Schuknecht against Robert Schultz. From a decree for defendants, complainant appeals. Reversed.

This is a bill filed by the appellant in the circuit court of Kane county, by which he seeks to have declared void the third and fourth clauses of his father's will, on the ground that they violate the rule against perpetuities. The testator, John J. Schuknecht, died in 1898, leaving the complainant, his only son, and three grandchildren, sons of the complainant. The clauses of the will important to be considered in the decision of the case are as follows:

¶ 2. See Wills, vol. 48, Cent. Dig. § 554.

"Second—I desire that my son, J. Fred Schuknecht, shall have the use of my store building on Main street, West Dundee, during his life. It shall then be sold and divided among my grandchildren, equally.

"Third—I desire that my son, J. Fred Schuknecht, shall have the use of the money for which I hold three promissory notes against him for the sum of \$3612, until my youngest grandchild shall have reached the age of twenty-five years. It is then to be divided equally among my said grandchildren.

"Fourth—I desire that my homestead in West Dundee be rented for the benefit of my son, J. Fred Schuknecht, until my youngest grandchild be twenty-five years old. It shall then be sold and divided equally among my grandchildren.

"Fifth—I give and bequeath all of the residue of my personal property, of what nature soever, to my son, J. Fred Schuknecht."

Upon the probate of the will Robert Schultz was duly appointed executor thereof, and he and said grandchildren were made parties defendant to the bill. The executor and one of the grandchildren, Henry (being an adult), answered the bill, and a guardian ad litem was appointed for the other two, who were minors.

It is claimed by the bill that under the third and fourth clauses all grandchildren of the testator living at the death of appellant would be permitted to participate in the distribution, and therefore it is possible that grandchildren may yet be born who would not have arrived at the age of 25 years within the period of 21 years from the death of appellant, and that such possibility makes the provisions of these two clauses void for remoteness. It is also alleged in the bill that the executor claims the right to hold all of said property in trust for the use and benefit of the children of the complainant, and that such claim under the will constitutes a cloud upon the complainant's title. The answer of the executor denies the allegations of the bill as to the construction sought to be placed upon the third and fourth clauses, and claims the right to hold the property therein mentioned for the benefit of the grandchildren. Upon the hearing the chancellor found the equities against the complainant, and that he was not entitled to the relief prayed by his bill, and ordered and decreed that the same be dismissed for want of equity. To reverse that decree this appeal is prosecuted.

D. B. Sherwood, for appellant. Chas. Wheaton and W. G. Sutfin, for appellees.

WILKIN, J. (after stating the facts). No question was raised in the court below as to its jurisdiction of the subject-matter of the action, nor is any such question raised here. Waiving that question, we are of the opinion that the dismissal of the bill for want of equity was erroneous.

In the construction of a will it is the duty

of the court to ascertain, as nearly as possible, the intention of the testator as disclosed by the instrument, and to give it that construction which will carry such intention into effect. It is, of course, true that the will cannot carry into effect an intention of the testator in violation of law, and, if the provisions of the will in question violate the rule against perpetuities, they must be declared void, it being the duty of the court to enforce the rule, and not destroy it by adverse construction. *Schaefer v. Schaefer*, 141 Ill. 337, 31 N. E. 136. Where a will is susceptible of either of two constructions without doing violence to the intention of the testator as disclosed by the instrument, one of which would render it void and the other valid, that construction must be adopted which will enforce it, and not that which would defeat its operation. 29 Am. & Eng. Ency. of Law, 353; *Chapman v. Cheney*, 191 Ill. 574, 61 N. E. 363. The language of the testator in the third and fourth clauses of this will fails to clearly express his purpose. They provide that the property is to be equally divided among his grandchildren when the youngest shall have reached the age of 25 years, but whether the distribution shall be among the three grandchildren then living or among all his grandchildren living at the death of the son is not stated, and his intention in that regard can only be determined by applying the rules of construction recognized and adopted in similar cases.

The rule prohibiting perpetuities requires that the absolute ownership of property must vest in some one within the period of a life or lives in being and 21 years and 9 months thereafter. No interest subject to a condition precedent is good unless the condition must be fulfilled, if at all, within 21 years and the period of gestation after some life in being at the creation of the interest. Where the possibility exists that the fee would not vest within the limit fixed by the rule, the devise is void for remoteness. In other words, if there is a possibility that a violation of the rule can happen, then the devise must be held void. *Owsley v. Harrison*, 190 Ill. 235, 60 N. E. 89; *Lawrence v. Smith*, 163 Ill. 149, 45 N. E. 259; *Eldred v. Meek*, 183 Ill. 26, 55 N. E. 536, 75 Am. St. Rep. 86. If it was the intention of the testator that only the three grandchildren living at his death should share in the distribution, the rule would not be violated, but, if after-born grandchildren are entitled to participate therein, then the possibility exists that the birth of a grandchild may occur who would not have arrived at the age of 25 years within the required period—i. e., the death of the son—and that possibility would make the third and fourth clauses void. The gift in both of these clauses is to the grandchildren as a class, and not as individuals.

It is a settled rule of construction that, where there is a devise to a class of persons, as to the grandchildren of A., and the estate is to come into possession of the dev-

tees immediately upon the death of the testator, those persons of the class who are in being at the death of the testator will take the devise to the exclusion of those afterwards born; but if the will carves out a particular estate, which is to intervene between the death of the testator and the period of distribution of the estate devised to the class, then all persons belonging to such class at the time when the estate is divided are included—even those born after the death of the testator. The case of *Handberry v. Doolittle*, 88 Ill. 202, is an early case on the subject in this court. There the language of the devise was to "the children of my brother, Rawley S. Doolittle," with the provision: "And I do further will and declare that Rawley S. Doolittle, my brother, shall have uncontrolled and absolute management and disposal of all such part of my estate his said children at my decease shall become entitled to, until the youngest of said children shall become of full age, to use said means at his discretion, without having to account to any person or persons, in court or courts whatsoever, as to his application thereof." At the time of making that will Rawley S. Doolittle had two daughters born by his first wife. He afterwards remarried, and by his second wife had a third child. In 1856, prior to the birth of the last child, there was a partition between the three devisees then claiming under the will. In 1864 Rawley S. Doolittle died, and thereupon the third child filed a petition for a partition of the tract of land which had been set off to his half-sisters, and a decree was rendered in his favor. A writ of error was prosecuted to this court, and in the decision of the case we said (page 206): "It is a well-settled rule in the construction of wills that, where there is a devise to a class of persons, as to the children or issue of A., and the estate is to come into possession of the devisees immediately upon the death of the testator, those persons of the class who are in being at the death of the testator will take the devise to the exclusion of those thereafter born; but if the will carves out a particular estate, which intervenes between the death of the testator and the period of distribution of the estate devised to the class, then all persons belonging to such class at the time when the estate is divided are included, though born after the death of the testator." That rule has been followed in the cases of *Ridgeway v. Underwood*, 67 Ill. 419, *Blatchford v. Newberry*, 99 Ill. 11, and *Mather v. Mather*, 103 Ill. 607. In the case at bar the bequest or devise to the grandchildren by the third and fourth clauses was preceded by an interest in the son, the appellant, and the period of final distribution was fixed at the time when the youngest grandchild should become 25 years of age. Therefore, if the intention had been to give the three living grandchildren a present vested interest in the property therein mentioned, the testa-

tor would presumably not have limited the estate to take effect when the youngest grandchild should reach the age of 25 years. It was the expressed intention that the grandchildren were not to take the property upon the death of their father, or at any other period before the youngest grandchild should become 25 years of age, and therefore the gift and enjoyment were to take effect at the same time. Applying the settled rules of construction to the clauses in question, it being possible that grandchildren may yet be born who would not have arrived at the age of 25 years within the period limited, those clauses must be held void for remoteness.

But it is insisted by counsel for appellees that, as appellant has taken a beneficial interest under the will, he is bound to confirm and ratify every other part of the will, or, in other words, that a person is not permitted to take any beneficial interest under a will and at the same time set up any right or claim of his own, even if otherwise legal or well founded, which will defeat or in any way prevent the full effect and operation of every part of the will; and in support of the contention many cases are cited. These cases are founded upon the doctrine of election, and have no application to the facts of this case. Where a devisee or legatee takes something under the will to which he would not be otherwise entitled, and at the same time seeks to hold property disposed of by the will to which he would be entitled if there had been no will, the doctrine of election applies. But that is not this case. Here the contention of complainant below is that the third and fourth clauses of the will are illegal and void. Those clauses, being invalid, must be treated as though never made and constituting no part of the will.

The circuit court erred in dismissing the bill for want of equity, and its decree is reversed, and the cause remanded for further proceedings in conformity with this opinion.

Reversed and remanded.

(212 Ill. 406.)

ILLINOIS CENT. R. CO. v. TRUSTEES OF SCHOOLS OF TP. NO. 9 S., R. 2 W. THIRD P. M., JACKSON COUNTY.

(Supreme Court of Illinois, Oct. 24, 1904. On motion to modify, Dec. 7, 1904.)

RAILROAD COMPANIES—INJURIES TO ABUTTING LANDOWNERS—ELEMENTS OF DAMAGES.

1. In an action by the school trustees for damages arising from the operation of a railroad about 200 feet from the schoolhouse, refusing to strike out evidence as to obstructions to view, danger to children, attracting attention of children by passing trains, etc., was error.

2. In such case, an instruction that there could be no recovery for obstruction of view, or danger of children going on the track, did not cure the erroneous admission of such evidence.

3. In an action by school trustees for damages resulting from the operation of a railroad near

¶ 3. See *Eminent Domain*, vol. 13, Cent. Dig. §§ 278, 281.

a schoolhouse, there can be no recovery for the vibration of the ground caused by passing trains, without evidence of actual damages.

4. School Law, art. 16, § 1 (Hurd's Rev. St. 1903, p. 1702, c. 122), providing that no justice, clerk of court, sheriff, or constable shall charge any fees where any school officer or school corporation sues for the recovery of the school fund, or for any interest in the school fund, does not apply to an action by trustees of schools for injuries to school property.

Appeal from Appellate Court, Fourth District.

Action by the trustees of schools of Township No. 9 south, range 2 west third P. M., in Jackson county, against the Illinois Central Railroad Company. Plaintiffs had judgment, which was affirmed by the Appellate Court, (112 Ill. App. 488), and defendant appeals. Reversed.

Sidney F. Andrews (J. M. Dickinson, of counsel), for appellant. James H. Martin, for appellees.

CARTWRIGHT, J. This action on the case was brought by the appellees, the trustees of schools, for the use of School District No. 2 in the city of Murphysboro, against appellant, in the circuit court of Jackson county, for damages to a tract of land containing two acres, in said city, on which there is a two-story brick schoolhouse occupied for a graded school, alleged to have been damaged by the operation of appellant's railroad adjoining said tract. The declaration averred that defendant constructed its railroad track south of said premises, and was maintaining and operating a railroad thereon, and charged that, in passing, the locomotive engines emitted, discharged, and threw out and stirred up great volumes of smoke, cinders, ashes, and dust, and cast the same over, upon, and into said premises, and that the trains caused loud and ominous noises, and made the ground tremble, vibrate, and shake, causing the school in said premises to be disturbed and frequently to suspend. The plea was the general issue, and upon a trial there was a verdict for the plaintiffs for \$2,500. Defendant moved for a new trial, whereupon plaintiffs remitted \$700 from the verdict, and the court overruled the motion and entered judgment for \$1,800. The Appellate Court for the Fourth District affirmed the judgment.

The railroad was constructed and operated on defendant's own premises adjoining the schoolhouse grounds, no part of which was taken for the use of the railroad, and there was no interference with any right of access or easement appurtenant to the land or constituting a part or parcel of it. The railroad was built in a natural depression, upon an embankment about 25 feet high, bringing the track about on a level with the first floor of the schoolhouse. There was some difference in the hours of the different grades, but the school hours, including all of them, were from about 9 o'clock to 12, and from about 1 o'clock to 4. During that time six or eight trains passed the premises. There was a

single track with no switches, and the grade was 46 feet to the mile. The trains going downgrade caused little or no inconvenience to the school or premises, but it was claimed that damages were caused by trains going upgrade, and especially the freight trains. The railroad track was variously stated to be from 188 to 221 feet from the schoolhouse. There was no substantial or direct evidence that cinders, ashes, or dust were ever thrown on the premises from engines of the defendant. The school-teachers were examined as witnesses by the plaintiffs, and one of them, being asked whether cinders were cast upon the schoolhouse, replied that she did not know; that they had considerable cinders anyhow from the stoves in the schoolhouse. Another teacher, when asked if the trains emitted smoke or cinders, answered, "Oh, the trouble is not that so much," but she said there was some smoke. There were other witnesses who were residents of Murphysboro, and one of them thought there would be some dust, and another that there would be smoke and cinders, but he said that he never saw any cinders, or knew that any were ever dropped on the property. Another said that he thought there would be a certain amount of soot in the air that would fall on the schoolhouse, but no witness testified that any dust or cinders or soot was ever cast upon the premises. There was some testimony that a jarring or vibration could be felt at the schoolhouse when heavy freight trains went up the grade; but whether it was atmospheric, or whatever its nature, there was no evidence whatever of any damage from that source. There was no evidence that the building or the walls were affected in any manner whatever, or that the building, which was about 12 rods from the railroad, was not as secure, safe, and sound as it ever was. Wrong and damage must concur, and there must be injury or damage, to justify a verdict on account of vibration. There was no evidence tending to prove any damage from that source, and in that respect the case is different from *Chicago North Shore Street Railway Co. v. Payne*, 192 Ill. 239, 61 N. E. 467, where the ceilings and walls of the dwelling house were cracked and pieces of the plastering fell off. With reference to smoke, the evidence was that occasionally, when the wind came from the direction of the railroad, the smoke would enter the rooms on the south side, facing the track, if the windows were open. Two of the teachers testified that they were not disturbed much by the smoke. The school year commenced in September, and ended the latter part of April. During most of that time the windows were closed, and there was no annoyance from smoke when they were closed. The evidence was that there was some slight annoyance from the smoke, but the principal damage, in the opinion of all the witnesses, was the noise made by the trains, which interfered with recitations in the school. The railroad consisted of a sin-

gle track, and there was no switching or making up of trains opposite the premises. The evidence of the teachers was that, when a train passed, the children would turn to look at it or rise out of their seats, and in the case of heavy trains the noise would sometimes be so great as to compel a stoppage of recitations for a minute or two at a time. There were four passenger trains and two freight trains, together with an occasional extra freight and two trips of the yard engine, daily, during the school hours.

After examining the witnesses as to the effect on the premises of the operation of trains, none of whom testified as to value or damages, plaintiffs produced a number of witnesses, and asked them, on direct examination, to what extent the value of the schoolhouse premises was depreciated by the building and operation of defendant's railroad. These witnesses gave no specific reasons for fixing the damages, but testified that the school property before the railroad was built was worth \$7,000 or \$8,000, and some of them estimated the damages from \$2,000 to \$5,000, while others said they were damaged from one-third to 50 per cent. of the value. On cross-examination these witnesses were inquired of as to the injuries which formed the basis of their testimony as to damages. One estimate common to all of them was the noise made by the trains, which interfered with the school; and one said that the people were not getting the value of what they paid to the school-teachers because the work was interfered with. One estimate of damage included was attracting the attention of the school children during school hours and looking at the trains go by. Other witnesses had made the damage from the embankment obstructing the view a part of their estimate, and others the possibility of children getting on the track and being run over. They had all included in their estimates damages for which it is conceded there could be no recovery, and each of them testified that he was unable to state the amount of damages excluding those things for which there could be no recovery, such as attracting the attention of the school children, obstruction of the view, or the possibility of children being injured. It was made clear on the cross-examination that there was no testimony of those witnesses as to the amount of damages occasioned by smoke, cinders, dust, or other things for which damages could be recovered.

The court denied the motion, and allowed the testimony as to the amount of damages, ranging from \$2,000 to \$5,000, or from one-third to one-half the value of the property, to remain before the jury. In this the court erred. *City of Chicago v. Spoor*, 190 Ill. 840, 60 N. E. 540.

There are certain injuries to property for which the owner may recover damages although no part of the property itself is actually taken for the public use. While there is but little difficulty in laying down general

rules concerning the nature of such injuries, there is sometimes much difficulty in applying them to particular cases and drawing a definite line between injuries for which the law allows a recovery and those for which it affords no remedy. The provision of the Constitution that private property shall not be damaged for public use was not intended to reach every possible injury that may be occasioned by a public improvement. There are certain injuries incident to ownership of property in towns or cities, which directly impair its value, for which the law does not afford, and never has afforded, any relief. *Rigney v. City of Chicago*, 102 Ill. 64. Those injuries are compensated for by the conveniences and advantages of civilization, and both injuries and benefits are common and public. Under the Constitution of 1848, which only allowed compensation for property taken for the public use, there were certain direct physical injuries to property, none of which was actually taken, which were held to be within the Constitution. Obstructing the natural flow of water, and turning it in increased quantity upon the lands of an individual, is an example (*Nevins v. City of Peoria*, 41 Ill. 502, 89 Am. Dec. 392; *City of Aurora v. Gillett*, 56 Ill. 132; *City of Aurora v. Reed*, 57 Ill. 29, 11 Am. Rep. 1; *Toledo, Wabash & Western Railway Co. v. Morrison*, 71 Ill. 616); also discharging dirty water, offal, and filth upon premises (*City of Jacksonville v. Lambert*, 62 Ill. 519); also casting smoke and cinders, or dirt and dust, upon premises (*Stone v. Fairbury, Pontiac & Northwestern Railroad Co.*, 68 Ill. 394, 18 Am. Rep. 556; *Stack v. City of East St. Louis*, 85 Ill. 377, 28 Am. Rep. 619). The same rule has, of course, been applied under the present Constitution, and a direct physical disturbance of property by casting cinders, smoke, and dust upon it has been considered a taking. *Chicago, Milwaukee & St. Paul Railway Co. v. Darke*, 148 Ill. 226, 35 N. E. 750; *Chicago North Shore Street Railway Co. v. Payne*, *supra*.

The present Constitution requires compensation for property taken or damaged for public use, and the question what additional class of injuries it was intended to provide for was first fully considered in *Rigney v. City of Chicago*, *supra*. That was a case of the obstruction of a public street, interfering with the access to property. It was decided that damages from such an injury were guarantied by the Constitution. It was held that if an obstruction did not practically affect the enjoyment or use of neighboring property, and thereby impair its value, no action would lie, but that, if the owner sustained a special damage with respect to his property from such a cause in excess of that sustained by the public generally, the Constitution required compensation. This rule was then laid down (page 80, 102 Ill.): "In all cases, to warrant a recovery, it must appear there has been some direct physical

disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property and which gives to it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally. In the absence of any statutory or constitutional provisions on the subject, the common law afforded redress in all such cases, and we have no doubt it was the intention of the framers of the present Constitution to require compensation to be made in all cases where, but for some legislative enactment, an action would lie by the common law."

The important question is to determine what is a special damage and injury, within the meaning of that and other cases. One thing that is clear is that the damage must be a damage to property, and not a mere personal inconvenience or injury, such as a damage to trade or business. *Hohmann v. City of Chicago*, 140 Ill. 226, 29 N. E. 671. If a right of action is merely personal, without reference to property, the Constitution does not guaranty compensation. If the injury amounts only to an inconvenience or discomfort to the occupants of property which would authorize a personal action, but not affecting the value of the property, it is not within the provision. The injury must also be actual, susceptible of proof, and capable of being approximately measured. It must not be merely speculative, remote, prospective, or contingent. The special damage must be different in kind from that sustained by the general public, although it does not cease to be special because a considerable number are affected in the same way. *City of Chicago v. Union Building Ass'n*, 102 Ill. 379, 40 Am. Rep. 598. The general public does not mean the people of the state at large, or of some other town or city who are not affected at all by the improvement, but it means the people of the whole neighborhood, and, if the damages differ only in degree from those suffered in common by such public, the injury is not within the provisions of the Constitution. It is a matter of common knowledge that, where bituminous coal is used by individuals, manufacturing establishments, and railroads, the atmosphere is filled with smoke, and more or less soot is deposited over the whole neighborhood or city. In populous communities no one escapes injury and annoyance from other causes, such as the dust raised in dry weather by teams, and the noise of travel over stone pavements, and perhaps with loads which add greatly to the noise. Such things are inconveniences, but they are common to everybody and special to none. They affect every one who comes within their range, without regard to ownership of property. If it were not required that damages should be special to property, there would be no stopping place in litigation, and the number of infinitesimal injuries

for which action could be brought would be unlimited.

The provision of the Constitution must have a reasonable and practical interpretation, and cannot be extended to require compensation to every person in the community who can hear the noise of a train or be interrupted to some extent by it. Accordingly, it was held in *Aldrich v. Metropolitan West Side Elevated Railroad Co.*, 195 Ill. 456, 63 N. E. 155, 57 L. R. A. 237, that there could be no recovery for the usual noise and vibration attendant upon the operation of the railroad. In that case the declaration, in some of its counts, stated a good cause of action, charging obstruction of access to the premises, vibration and consequent damage to the property, but the evidence showed that there had been no direct physical disturbance of any right, public or private, which the plaintiff enjoyed in connection with her property. The road was not constructed in the street along plaintiff's property, injuring or destroying any right which she enjoyed in connection with it, and her damages were of the same kind as those sustained by the general public. The distinction between that case and the cases of *Chicago, Milwaukee & St. Paul Railway Co. v. Darke*, supra, and *Chicago, Peoria & St. Louis Railway Co. v. Leah*, 152 Ill. 249, 38 N. E. 556, was there pointed out. In the first of those cases, cinders, ashes, and smoke were thrown and blown directly on the plaintiff's premises in considerable amount, and there was a direct physical injury to the property. In the other case the plaintiff was the owner of a piece of land fronting on a narrow street, 20 feet wide, which the railroad crossed diagonally opposite plaintiff's premises, from which it was distant at the nearest point $6\frac{1}{2}$ feet. The street afforded the only approach to the premises, and there was a switch near by, and in both cases the premises were occupied for dwellings.

It is said by counsel for appellees that this case is the same as *Illinois Central Railroad Co. v. Turner*, 194 Ill. 575, 62 N. E. 798. We think the distinction is quite clear. In that case the railroad was built in a street within a few feet of the plaintiff's property, on a sharp curve and considerable grade, and the passing engines and trains threw large quantities of smoke, dust, and cinders upon the property, and caused the building to vibrate and shake, resulting in great damage to it. Counsel also say that they are unable to distinguish between this case and the case of *Calumet & Chicago Canal & Dock Co. v. Morawetz*, 195 Ill. 398, 63 N. E. 165. In that case a railroad was constructed and operated in front of plaintiff's premises in a public street. There was a house on the property, occupied as a store and residence for families. There was a track and several switches at the corner and west of the house near the side door, where the tracks were within a few feet of the building. The passing trains

threw smoke, soot, and cinders directly into the house. Both cases come directly within the rules already stated.

If a part of a tract of land is taken for public use, compensation is to be made equal to the market value of the property so taken, and, in considering the question of damages to the residue of the land not taken, all benefits and injuries which are real, and not merely speculative or imaginary, are to be taken into account and balanced against each other. The damages must be real, and not imaginary or speculative. *Chicago & Pacific Railroad Co. v. Francis*, 70 Ill. 238. But the nature of the use to which the property is applied, so far as it affects the remainder, must be considered. There would be an entirely different effect upon the residue where the land is taken for a public park, or similar use, than if taken for a noisy and offensive use—at least, if the premises were occupied for a residence. Noise, smoke, and dust might make very little difference in the value of a foundry or machine shop, while a residence within a few feet of a railroad track might be greatly damaged. The same rule has been substantially applied where access to property by way of a public street has been interfered with by building a railroad in the street. The right obstructed and interfered with in such a case is appurtenant to the land, and the nature of the obstruction and use is a proper subject of inquiry as affecting the measure of damages. In such a case it is a natural inquiry what the nature of the obstruction is, and what effect it and its use will have upon the property. Although the construction of a road is authorized by law, the corporation is not protected in the negligent and improper construction, nor is it exempt from liability for injuries for which an action would lie at common law against an individual. *Rigney v. City of Chicago*, supra.

The court, in instructing the jury, told them they could not allow any damages for cutting off the view, or danger to school children from getting on the track, but that the plaintiffs might recover for the casting of smoke, cinders, and ashes on the premises, the vibration of the ground caused by passing trains, and loud and ominous noises disturbing the school. It is clear that these instructions did not cure the error of denying the motion to strike out the evidence which included improper elements of damage. The amount of the verdict conclusively demonstrates that fact. The \$2,500 damages allowed by the jury, and the judgment of \$1,800 entered after the remittitur, have no foundation in the legitimate evidence of damages for which an action could be maintained. The instruction authorizing a recovery for the vibration of the ground caused by passing trains was wrong for want of any evidence that the property was damaged in any manner thereby; and if the evidence would warrant an inference that there was any direct physical injury from smoke, cinders, or

dust, and that the smoke and noise were special injuries to the property as herein explained, the jury could not have returned the verdict, or the court entered the judgment, without considering and including the improper elements testified to by the witnesses. The building was about 200 feet from the track, and was not used for a residence, but was devoted to school purposes during certain hours from September to April, inclusive. Neither the verdict nor judgment can be accounted for without including the improper testimony as to damages which the court refused to strike out, and the error was not cured by the instructions. For the errors indicated, the judgments of the Appellate Court and the circuit court are reversed, and the cause is remanded to the circuit court.

Reversed and remanded.

On Motion to Modify Judgment.

A judgment recovered by appellees, as trustees of schools, in this case, against the Illinois Central Railroad Company for damages to school property, was reversed and the cause was remanded for another trial. The clerk, in entering the judgment of the court, awarded an execution against the trustees, doubtless through inadvertence, as an execution cannot issue on school property be sold on a judgment. The motion, so far as it relates to the execution, is allowed.

The motion, further, is that no costs be taxed in the case, because, under the statute, no costs are taxable against trustees of schools. The provisions of section 1 of article 16 of the school law (*Hurd's Rev. St.* 1903, p. 1702, c. 122) are that no justice of the peace, constable, clerk of any court, sheriff, or coroner shall charge any fees in a case where any school officer, school corporation, or agent of the school fund sues for the recovery of the school fund, or for any interest on the school fund. It is the view of the court that that statute does not apply to a suit of this character, brought by trustees of schools to recover damages for injuries to school property. The motion as to that branch of the case is denied, as to costs.

(212 Ill. 20.)

CITY OF ELGIN v. NOFS.

(Supreme Court of Illinois. Oct. 24, 1904.)

MUNICIPAL CORPORATIONS—DEFECTIVE SIDEWALKS—PEDESTRIANS—INJURIES—EVIDENCE—NOTICE—CONTINUANCE—ILLNESS OF COUNSEL—AFFIDAVIT—ARGUMENT—TIME—DAMAGES—EXCESSIVENESS—FINDING BY APPELLATE COURT—REMITTITUR—COSTS.

1. Where an application for continuance for illness of two of defendant's counsel was not accompanied by an affidavit that defendant had a meritorious defense other than that two former judgments for plaintiff had been set aside on appeal, a continuance was properly denied.

2. Where a case had been twice tried and records made of such trials, in the absence of some specific allegation, in the affidavits for a continuance for illness of two of defendant's counsel, showing why the remaining attorneys were unable to present the defense, a denial was not an abuse of discretion.

3. Where, in an action for injuries on a defective sidewalk, defendant denied that the walk was out of repair, and insisted that defendant

¶ 1. See Continuance, vol. 10, Cent. Dig. § 120.

had no notice of any defect, the admission of evidence as to the general defective condition of the walk was not error, the court having limited the same to the issue of notice.

4. Where an action for injuries from a defective city sidewalk had been twice tried, and the questions of fact were few, and the law was well settled, it was not error to require the argument to proceed in the evening after the close of the testimony, and to limit it to an hour and a half on each side.

5. An objection that a judgment was grossly excessive, being a question of fact, cannot be reviewed by the Supreme Court on appeal from a finding of the Appellate Court.

6. Where a verdict was claimed to be excessive, and the Appellate Court on appeal directed a remittitur of \$5,000 as a condition to an affirmance, the entire costs of the appeal should have been taxed to the respondent.

Appeal from Appellate Court, Second District.

Action by Louis F. Nofs against the city of Elgin. From a judgment in favor of plaintiff, affirmed by the Appellate Court after remittitur (113 Ill. App. 618), defendant appeals. Affirmed in part.

R. N. Botsford and Charles H. Fisher, for appellant. Russell & Hazlehurst, for appellee.

RICKS, O. J. Appellee obtained a judgment against appellant in the circuit court of Kane county for \$20,000 for personal injuries alleged to be due to the negligence of appellant in the care of its sidewalk. An appeal was prosecuted to the Appellate Court for the Second District, and that court required a remittitur of \$5,000, taking the view that the damages were excessive, and in all other respects affirmed the judgment of the circuit court, and from that judgment this appeal is prosecuted.

No question arises or is made upon the instructions. None was given for the appellee. Twenty-one were given at the request of appellant, and two that were requested were refused, but no complaint is made concerning the same. The only question of law—and such matters alone are open to our consideration—relates to the refusal of the court to grant a continuance on account of the sickness of a portion of the counsel for appellant, and complaint is made with reference to the admission of certain evidence, the limiting by the court of the argument of counsel, the requirement of the court that the cause should be argued in the evening of the day upon which the evidence was closed, and the judgment of the Appellate Court as to costs.

The case has been three times tried in the circuit court, and the verdict in each instance was for appellee. The first was for \$10,000, the second for \$15,000, and the third for \$20,000. It has been three times to the Appellate Court (98 Ill. App. 291; 103 Ill. App. 11; 113 Ill. App. 618), and has once before been before this court (200 Ill. 252, 85 N. E. 679).

When the case was called for trial, appellant entered its motion to continue the same, or to postpone the hearing thereof to a fu-

ture day, because of the illness of R. N. Botsford, special counsel, and Charles H. Fisher, corporation counsel, for appellant. It appears from the record that the trial was entered upon on the 18th day of February, 1903; that on the 9th of February application was made by appellant for a change of venue, and that the attorneys appearing to make that motion on the part of appellant were Fisher & Mann, Botsford, Wayne & Botsford, and Aldrich & Worcester; that on the 16th of February the same attorneys were present at the consideration of the motion for a change of venue, when the same was overruled; that on the 18th the motion for a continuance because of the illness of two of the above-named attorneys was made by appellant and overruled, and the cause set for immediate hearing; and that at and during the trial there appeared for appellant J. P. Mann, C. H. Wayne, and N. J. Aldrich.

We think the evidence fairly and sufficiently shows that Attorneys Botsford and Fisher were in such state of health that it was not proper that they should try the cause, but we think also that the evidence failed to show that appellant was or could be injured thereby. Neither of the affidavits states that appellant had a meritorious ground of defense to the action. One states that Botsford was the leading counsel and had charge of the case at the former trials, and the other that Fisher was corporation counsel; and the affidavits also state that the former judgments were set aside, but do not state upon what ground, nor do they state any ground of defense. For all the court could know, the reason for setting aside the former judgments by this and the Appellate Court was solely for errors of the court, and not for lack of sufficient evidence to sustain a verdict. At all events, the mere statement that the former judgment had been set aside did not sufficiently show that appellant had a meritorious or substantial defense to the cause of action, and before delay can be indulged it must appear that there is such a defense, and that the applicant will be prejudiced in presenting it unless the application be granted. The above rule is of such general application that it has been enforced in criminal as well as civil cases. *Steele v. People*, 45 Ill. 152, *Mills v. Bland's Executors*, 76 Ill. 381. Neither of the affidavits stated that the remaining counsel were unable to fairly and fully present whatever defense appellant had. The partners of both Botsford and Fisher were in the case, and remained and conducted the trial in conjunction with Mr. Aldrich. The case had been previously tried twice and records made of such trials, and, in the absence of some specific allegation in the affidavits showing why the remaining attorneys were unable to fairly present appellant's defense, the court is not warranted in reaching the conclusion that they could not do so. *Dacey v. People*, 116 Ill. 555, 6 N. E. 165. The motion for continuance was not based upon a statutory

ground, but upon a ground that, where it appears clearly from the evidence that injury is likely to result from a refusal of it, a trial court, in the exercise of a sound discretion, will grant it; but being a matter within the discretion of the court, unless the court of review can see that there was an abuse of that discretion, a judgment otherwise fair upon its face will not be reversed. *Condon v. Brockway*, 157 Ill. 90, 41 N. E. 634. An inspection of the record discloses that every ground of defense that appellant could interpose to this action was urged, and the jury fairly and fully instructed upon the law of the case, and in such state of the record we are not able to say that the trial court abused its discretion in denying the application.

The sidewalk on which the injury was incurred was upon a bridge crossing the Fox river, which the evidence shows had become so old and in such state of repair that a new bridge was deemed necessary, and was, in a sense, under way of construction. The declaration contained the averments that the stringers of the walk were "old, rotten, loose, decayed, worn, and broken," and that the planks were "loose, broken, old, decayed, worn, rotten, unfastened, and misplaced," and that appellee "stepped upon, along, and against a portion of said old, broken, unfastened, misplaced, and decayed sidewalk, and was thereby thrown," etc.

A number of witnesses testified that in the immediate vicinity of the place where appellee was injured, and at and near to the time of his injury, the stringers were rotten and decayed, the planks worn, uneven, broken, misplaced, and unmatched, and that the nails would pull up and stand a half inch above the plank, and that, though the nails were driven back in place, they would again draw out and stand up. These witnesses were asked by counsel for appellee how long this condition had existed continuously, immediately prior to the injury of appellee, at the immediate point where the accident happened. Appellant objected, and urged that the evidence must be confined to the time when and the place where the accident happened. The objection was overruled, and the witnesses answered, some stating for one year, others two years, and one witness three years. Appellant urges that the court erred in admitting this evidence. Appellant was denying that the walk was out of repair, and further insisting that, even if it was out of repair, appellant had no notice thereof. The evidence was competent as tending to show notice to appellant of the alleged defects to which this evidence related, and the court, at the request of appellant, instructed the jury that it should only be considered for that purpose, and that if the claimed defects were so near to the time of the accident, or had not existed for such time as appellant would be presumed to have notice thereof, and actual notice was not shown, then the evidence as to the general defective condi-

tion of the walk should not be considered by the jury. The contention that the evidence should have been confined to the particular spot or particular plank or hole through which appellee fell, and to the particular time of the accident, cannot be admitted. The evidence was not broader than the declaration, and, for the purpose of charging appellant with notice, was clearly admissible. *City of Elgin v. Nofs*, 200 Ill. 252, 65 N. E. 679; *City of Taylorville v. Stafford*, 196 Ill. 288, 63 N. E. 624.

Appellant also urges objections and exceptions to other evidence admitted in the case, and we have examined the same and think there was no substantial error in the ruling of the court in regard to it.

When the evidence was closed, the court announced that the argument would be proceeded with at 7 o'clock in the evening of that day, and counsel were inquired of as to the length of time required to argue the case. Counsel for appellee stated that they would be satisfied with half an hour. Counsel for appellant objected to arguing the case that evening, and also objected to the argument being limited. The court overruled the objections of counsel for appellant, required the argument to be proceeded with, and limited the time to an hour and a half on each side. The questions of fact involved in the case were few and were not intricate, and the questions of law as applicable to the case are well settled and generally understood. It is not made to appear that appellant was in any manner prejudiced by the time fixed by the court for the argument, or by the limitation upon the same. We are disposed to the view that a reasonable time was given, and courts, in the discharge of the public business, must be given discretion as to when proceedings shall be had. *Monmouth Mining & Mfg. Co. v. Erling*, 148 Ill. 521, 36 N. E. 117, 39 Am. St. Rep. 187.

Appellant argues at great length that the judgment is grossly excessive and is the result of passion and prejudice, and insists that that question is open for the consideration of this court, and in support of its contention cites *Illinois Central Railroad Co. v. Ebert*, 74 Ill. 399, *Loewenthal v. Streng*, 90 Ill. 74, and numerous cases from the Appellate Court of this state wherein judgments have been reversed upon the ground here contended for. But appellant seems to overlook the fact that the two cases cited from this court were cases brought directly to this court from the trial court, when this court, as the Appellate Court now may do, could consider the evidence, and could reverse upon the ground that the judgment was excessive; but since the Appellate Court was established, and the laws regulating the appeals from that court have limited this court to the consideration of questions of law only, we are not now permitted to enter into a discussion of and base our action upon matters of fact. Upon reflection, we think counsel

for appellant will readily concede that whether the judgment at bar is excessive or was the result of passion or prejudice on the part of the jury are questions of fact, and not of law. We have numerous times held that the finding of the Appellate Court upon such matters is final in those cases that come from that court to this court. *Grossman v. Cosgrove*, 174 Ill. 383, 51 N. E. 694; *Boyce v. Tallerman*, 183 Ill. 115, 55 N. E. 703.

After the remittitur of \$5,000 was made in the Appellate Court, that court affirmed the judgment of the circuit court, and required appellee to pay one-half the costs of that court. Appellant urges that the order of the Appellate Court with reference to costs was error, and that appellee should have been required to pay all the costs of that appeal. The order was erroneous. The Appellate Court should have taxed all the costs of the appeal to appellee. The judgment was \$5,000 in excess of what appellee was entitled to have. He could have remitted in the trial court and thus save the appeal. He did not do so, but the appeal was necessary in order that appellant might be relieved from this excess. By remitting in the Appellate Court appellee cannot escape the error thus committed by the trial court in his favor and escape the payment of the costs of the appeal. *Elgin City Railway Co. v. Salisbury*, 162 Ill. 187, 44 N. E. 407; *Snell v. Warner*, 91 Ill. 472; *North Chicago Street R. R. Co. v. Wrixon*, 150 Ill. 532, 37 N. E. 895.

The judgment of the Appellate Court is erroneous as to costs, and in that respect is reversed. In all other respects the judgment of the Appellate Court is affirmed. Judgment will be entered in this court for appellant for all costs of appeal in the Appellate Court and in this court.

Reversed in part, and affirmed in part.

(212 Ill. 9.)

CITY OF CHICAGO v. MURDOCH et al.

(Supreme Court of Illinois. Oct. 24, 1904.)

MUNICIPAL CORPORATIONS—INDEPENDENT CONTRACTORS—CONSTRUCTION OF TUNNEL—USE OF EXPLOSIVES—LIABILITY OF CITY.

1. A city is liable for the negligence of an independent contractor in excavating a tunnel with dynamite, the work being inherently dangerous.

2. A city is liable for the negligence of an independent contractor in excavating a tunnel, where the work is done by virtue of the city's corporate power.

3. Where a city's contract for the construction of a tunnel provided that all labor performed should be subject to the inspection of the commissioner of public works, the city was liable for negligence of an independent contractor in doing the work.

4. A clause in a contract with a city for the excavation of a tunnel, that the use of explosives will not be allowed, may be waived under a further provision that the performance of all work shall be under the supervision of the commissioner of public works.

¶ 1. See *Municipal Corporations*, vol. 38, Cent. Dig. § 1580.

5. In an action against a city for injuries to a building from the use of explosives in excavating a tunnel, evidence held to show that the commissioner of public works consented to the use of explosives by the contractors.

6. A question to the commissioner of public works as to whether he made any objection to the use of dynamite by a contractor in excavating a tunnel does not call for a conclusion.

7. Where a contract for the excavation of a tunnel for a city provided that explosives should not be used, except in rock, but also provided that all work should be under the supervision and control of the commissioner of public works, it was the duty of the city to use reasonable diligence to see that the provision as to the use of explosives was carried out, and it was liable for injuries to a building caused by the improper use of explosives by the contractor without objection.

Appeal from Appellate Court, First District.

Action by Thomas Murdoch and others against the city of Chicago. From a judgment of the Appellate Court affirming a judgment for plaintiffs, defendant appeals. Affirmed.

This is an action on the case brought by the appellees against the appellant to recover for damages to their building resulting from the use of dynamite in the construction of a tunnel for the city. On September 15, 1895, the city entered into a contract with J. J. Duffy for the construction of a portion of a water tunnel under the surface of the ground, extending from a point near the center of Green street and Grand avenue to the pumping station at the corner of Filmore street and Central Park avenue, a distance of about four miles. The plaintiffs owned a four-story and basement building, having a frontage of about eighty feet, immediately west of Union Park Place, known as Nos. 530-536 West Lake street. The work on the portion of the tunnel in the vicinity of plaintiffs' building was done in May and June, 1896. The tunnel extended through or under the southeast corner of the block in which the building is located, and, in making the excavation, dynamite was used by the contractor to the extent that the building was jarred and shaken so that the walls were cracked and caused to settle, finally falling into such a dangerous condition that the city, through its building commissioner, notified the plaintiffs to repair the same within five days, and in default of their doing so the city would proceed against them according to law. Upon a trial before the court and a jury, judgment was rendered for the plaintiffs for \$1,400 and costs, which has been affirmed by the Appellate Court, and hence this appeal.

Thomas J. Sutherland (Edgar Bronson Tolman, Corp. Counsel, of counsel), for appellant. Wilson, Moore & McIlvaine, for appellees.

WILKIN, J. (after stating the facts). The principal grounds of reversal insisted upon by counsel for appellant are stated as fol-

lows in their argument: (1) "The circuit court erred on the trial in permitting the witness for the appellees, William D. Kent, to answer the following question on his direct examination: 'I will ask whether you, on behalf of the city, made any objection to the use of dynamite in bowlder clay, running from the Carroll avenue shaft west.'" (2) "The circuit court erred on the trial in giving to the jury the appellees' first and second instructions." (3) "The circuit court erred on the trial in refusing at the close of the evidence to exclude the same from the jury, and to instruct the jury to find the city not guilty." (4) "The verdict and judgment were and are against the law and the evidence." (5) "The circuit court erred in overruling the motion for a new trial and rendering judgment on the verdict."

It is not denied that the evidence fairly tended to prove the plaintiffs' case on their theory, but the contention is that the acts charged in the declaration as causing the injury were the wrongful or negligent acts of an independent contractor, for which the municipality is not liable. Hence the second, third, and fourth of the foregoing alleged errors involved the same legal questions, and may be properly considered together. The general rule is that the principle of respondeat superior does not extend to cases of independent contractors where the party for whom the work is done is not the immediate superior of those guilty of the wrongful act, and has no control over the manner of doing the work under the contract. 2 Dillon on Mun. Corp. (3d Ed.) § 1028. But the same author says in the following section: "The general rule is stated in the preceding section, but it is important to bear in mind that it does not apply where the contract directly requires the performance of a work intrinsically dangerous, however skillfully performed. In such a case the party authorizing the work is justly regarded as the author of the mischief resulting from it, whether he does the work himself, or lets it out by contract." We adopted and applied that rule, with the above exception as applied to a municipal corporation, in *City of Joliet v. Harwood*, 86 Ill. 110, 29 Am. Rep. 17, and again in *Village of Jefferson v. Chapman*, 127 Ill. 438, 20 N. E. 33, 11 Am. St. Rep. 186, and in the latter case quoted with approval the language of Judge Dillon set forth in section 1029. Another exception to the general rule applicable to this case is that, where an individual or a corporation does work pursuant to a special franchise or charter power, the doctrine of respondeat superior is applicable. *North Chicago Street Railroad Co. v. Dudgeon*, 184 Ill. 477, 56 N. E. 793, and authorities cited. Especially see *West v. St. Louis, Vandalia & Terre Haute Railroad Co.*, 63 Ill. 545; 16 Am. & Eng. Ency. of Law (2d Ed.) 201. In the recent case of *Fitz Simons & Connell Co. v. Braun & Fitta*, 189 Ill. 390, 65 N. E. 249, 59 L. R. A. 421, we said (page 394, 189 Ill., and page 250, 65 N. E., 59 L. R. A. 421): "The

performance of the work of excavating the tunnel underneath the buildings of a populous city with dynamite was intrinsically dangerous, no matter how carefully and skillfully the explosions were conducted. The nature and power of dynamite as an explosive have been demonstrated by universal experience, and it is a matter of common knowledge that the use of dynamite as an explosive is intrinsically dangerous, and of this the courts will take judicial notice. 17 Am. & Eng. Ency. of Law (2d Ed.) 909; *Norwalk Gas-light Co. v. Norwalk*, 68 Conn. 527, 28 Atl. 32." The work contracted to be done in this case was by virtue of the corporate powers of the city of Chicago, and the case is therefore clearly within both of the foregoing exceptions.

It is also the settled law of this state that when a municipal corporation contracts for the making of a public improvement under the supervision of its own engineer or other proper officer, and subject to his orders, the corporation is liable for damages caused by the negligence of the contractor; the doctrine of respondeat superior being applicable. In *City of Chicago v. Joney*, 60 Ill. 383, it was insisted by the city that under its contract with its contractors, Fox, Howard & Walker, the latter were not its servants, "but independent contractors, and alone liable for damages occasioned by the manner in which the work was done"; and it was there said (page 387): "Portions of the contract are found in the record, in which it appears the city retained a supervisory control over the work, and had power to dismiss any person employed by the contractors on the work; and the dismissals of the board of public works, who represented the city, were final and conclusive in every case that might arise under the contract. Here was dependence—serviency—in the contractors, and for their negligence the doctrine of respondeat superior must apply. By the contract the entire work was to be under the immediate direction and superintendence of the city, through the board of public works. The principle is well settled, when a contractor is under the direction and control of his employer, the employer is liable for the negligence of the contractor." The same doctrine was announced and followed in *City of Chicago v. Dermody*, 61 Ill. 431.

Upon looking into the contract between the city of Chicago and the contractor, Duffy, we find that it was signed by W. D. Kent, commissioner of public works, on behalf of the city, and contains, among other provisions, the following: "All of the material used in said work, manner, time and place of doing same, together with all things therewith connected, must be in each and every particular satisfactory to the commissioner of public works of said city." "Said work shall be done in accordance with plans prepared for the doing of the same. * * * Said work shall be commenced on or before the first day of October, A. D. 1895, shall pro-

gress regularly and uninterruptedly after it shall have been begun, except as shall be otherwise ordered by the commissioner of public works," etc. "Should the commissioner of public works deem it proper or necessary, in the execution of the work, to make any alterations which shall increase or diminish the expense, such alterations shall not vitiate or annul the contract or agreement hereby entered into, but the said commissioner shall determine the value of the work so added or omitted, such value to be added to or to be deducted from the contract price, as the case may be. And the said party of the first part covenants and agrees to perform all of said work under the immediate direction and superintendence of the commissioner of public works of the city of Chicago, and to his entire satisfaction, approval and acceptance. All material used and all labor performed shall be subject to the inspection and approval, or rejection, of said commissioner, and the said city of Chicago hereby reserves to its commissioner of public works the right finally to decide all questions arising as to the proper performance of said work." In short, the contract clearly shows upon its face that the city retained, through its commissioner of public works, the absolute control and supervision of the work, and the manner in which it should be performed. Therefore, under the foregoing decisions (*City of Chicago v. Joney* and *City of Chicago v. Dermody*, supra), Duffy was not an independent contractor, and for his negligence the doctrine of respondeat superior must apply.

It is said, however, that the evidence in this case proves that the dynamite, the use of which caused the injury complained of, was in what is termed "bowllder clay," in positive violation of the express terms of the contract. The commissioner of public works testified that he had charge of the work, and says: "When I went down in the tunnel at the times I indicated, I made an inspection of the character of the soil through which the tunnel was being constructed. I knew what the character of the soil was between the Carroll avenue shaft and the Hoyne avenue shaft. We had borings indicating what the soil was. Sometimes we found blue clay; at others, mixture of blue clay, bowlders; and as it got farther west we struck solid rock. My recollection is that we struck solid rock about Wood street, and from Wood street east the material was largely bowlders and clay." His evidence, as well as that of other witnesses, is to the effect that explosives were used in bowllder clay, but it cannot be determined from this record that blasting in solid rock, or what is called in the contract "sound rock," did not in some degree contribute to producing the alleged injury. The clause relied upon as prohibiting the use of dynamite is found in the specifications attached to the contract for the guidance of bidders, and made a part of the agreement. It reads as follows: "The use

of explosives will not be allowed or permitted except in rock excavation." It can hardly be regarded as an absolute prohibition against the use of explosives except in rock excavation. It is rather a reservation to the city to control that matter, but, however construed, there can, we think, be no serious question as to the right of the city to waive it, under the reservation to its commissioner of public works to control the manner of doing the work, together with all things therewith connected, to the satisfaction of the commissioner of public works, and which "reserves to its commissioner of public works the right finally to decide all questions arising as to the proper performance of said work." The commissioner testified: "They got the clay out by drilling and then putting charges of powder in—dynamite blasting. I saw them drilling in there in the excavation, and I saw them there when they were laying up their brickwork and packing it up, at various times when I was there, not only in that section, but in other sections. I never was there when there was any discharging of dynamite. I never saw them insert it in that section. I saw them drilling for it. The city engineer reported as to the progress and methods there, and as to whether the contractor was living up to the specifications or not. We had a meeting almost daily with all of the heads. They reported dynamite was being used in the tunnel proper, but not in the shafts. It was necessary to use dynamite to get out the bowllder clay. In some of the blue clay it was not absolutely necessary. At other points we found it hard as rock, and there they had to use dynamite. They could not make any progress without it. * * * I know they had to use dynamite there in the combination of bowllder and clay, where they got it together, and also in some rock, and that is all I know—the general knowledge that dynamite was used in the bowllder and clay there, as they did also in the regular formation." All this testimony was admitted without objection or exception, and it clearly shows that the dynamite was used, by and with the consent of the commissioner of public works, as necessary in the performance of the work in making the excavation.

But two instructions were given at the instance of the plaintiffs, the first of which announces the constitutional provision that private property shall not be taken or damaged for public use without just compensation therefor being made to the owner, and directs the jury that if they believe from the evidence that the plaintiffs' property was damaged by the use of explosives, etc., they should find for the plaintiffs and assess their damages at the reasonable cost of repairs necessary to place said building in the condition it was before such damage, if such reasonable cost appears from the evidence; and the second lays down the rule announced in *Fitz Simons & Connell Co. v. Braun & Fitts*, supra, as to the use of dynamite in a

populous city being inherently dangerous, however skillfully handled, and also directs the jury that if they believe from the evidence in this case "that the defendant caused to be constructed by a contractor a water tunnel for the use of the city, and as part of its water system, in the vicinity of the property of the plaintiffs, and that dynamite was used in the excavation of said tunnel, * * * and if the jury further believe from the evidence that injuries were caused to the building of the plaintiffs described in their declaration by the explosion of dynamite used in the excavation of said tunnel, then the jury will find for plaintiffs in this case, and assess plaintiffs' damages," etc. These instructions are in conformity with the views hereinbefore expressed, and, we think, correctly announce the rules of law applicable to the case. There was no error in giving them.

After the commissioner of public works had testified to the foregoing facts as to his consent to the use of dynamite, counsel for plaintiffs asked the question quoted in appellant's first ground of reversal. The objections to it by counsel for the defendant, as shown by the abstract, were: "The witness cannot draw any conclusions as to what he did as commissioner of public works. * * * It is incompetent to put the question as to what the witness did as commissioner of public works." The question did not call for the conclusion of the witness, and we do not think, for the reasons above stated, it was incompetent to show what he did in the supervision of the work. He answered the question: "I simply instructed them to keep their charges of dynamite in there as small as possible—not to use any more than was absolutely necessary. That was the only objection I made to it." In view of the former statements of the witness, which were made without objection, this question and the answer were of no controlling importance, but there was no error in overruling the defendant's objections. We concede that the commissioner of public works could not authorize a departure from the express provisions of the contract, except in so far as he was authorized by the city, in the contract, to do so; but, as we have already said, this contract placed the whole matter in his hands and under his supervision. The burden of the argument of counsel for the appellant is that the contract prohibited the use of explosives, and that the commissioner had no power to waive that provision. We think it clear that, if all that counsel claim should be admitted, still it was the duty of the city to see that that provision of the contract was carried out—at least, to use reasonable diligence, through its proper officers, to see that it was observed—and that it could not escape liability to third parties who have suffered damages by a violation of the provision.

The other points made on the ruling of the

72 N.E.—4

trial court in the admission and exclusion of testimony are not, in our view of the case, of sufficient materiality to justify an extension of this opinion by discussing them separately.

The case appears to have been tried in the court below on the theory of the instructions asked by the defendant and given by the court, the first of which is, in substance, that the sole question for the consideration of the jury is, was the plaintiffs' property injured by the blasting in the tunnel by the contractor, Duffy, and if it was, to what extent? and that the jury is not entitled to charge against the defendant any injury by the settling of the building produced by other causes than the blasting in the tunnel, and if the injury was the proximate result of the settling of the building, and not of the blasting in the tunnel, they should find the defendant not guilty. The second, that if the jury believed from the evidence that there was no blasting in the said tunnel by the contractor, Duffy, which, through and by reason of concussion resulting therefrom, injured the premises of the plaintiffs, then the jury should find the defendant not guilty. The third is to the same effect; and the fourth, that if any part of the alleged injury was caused by defective construction or depreciation from wear and tear, or the character of use to which the premises were put previous to May, 1896, or from other causes disconnected from the construction of the tunnel by the contractor, Joseph J. Duffy, then for such injury the defendant is not liable, and, if the jury find that the injury was not caused by blasting in the tunnel by said contractor, Duffy, then the jury should find the defendant not guilty. The fifth relates to the value of the testimony of the various witnesses; the sixth, to the burden of proof; the seventh, that if the jury believe that the evidence is evenly balanced, or preponderates in favor of the defendant, then the verdict should be for the defendant; the tenth, that if the jury believe that any witness has willfully sworn falsely, etc., the jury are entitled to disregard the entire testimony of such witness; the eleventh, that the jury are the judges of the credibility of the witnesses; and the twelfth, that, in determining upon which side the preponderance of evidence exists, the jury should consider the opportunities of the several witnesses for seeing and knowing the things about which they testify, as shown by the evidence, etc.

But two instructions asked by the defendant were refused—the eighth and ninth. The eighth is to the effect that each member of the jury is entitled to maintain the convictions he may arrive at from the evidence and instructions of the court, etc.; and the ninth, that in arriving at their verdict the jury should not consider any of the remarks of the court or counsel during the introduction of the evidence in the course of the trial.

It is not claimed that there was reversible error in the refusal of either of these instructions, and it is therefore apparent that the question as to the liability of the city upon the ground that it was not liable for the acts of Duffy, as an independent contractor, under the contract, was in no way raised by instructions, other than the request to take the case from the jury.

We are satisfied that, in any view of this case, the verdict of the jury and the judgment of the trial court were in conformity with the law and facts of the case, and that the Appellate Court committed no error in affirming that judgment.

Judgment affirmed.

(213 Ill. 37.)

CENTRAL UNION BLDG. CO. v. KOLANDER.

(Supreme Court of Illinois. Oct. 24, 1904.)

APPEAL AND ERROR—WAIVER—QUESTIONS FIRST RAISED ON REVIEW—INJURY TO EMPLOYÉ—CONTRIBUTORY NEGLIGENCE.

1. Where errors are assigned in the Appellate Court, but not argued or brought to the attention of that court, they will be deemed to have been waived, and cannot be raised for the first time in the Supreme Court.

2. If plaintiff's evidence tends to show a right of recovery, refusing to direct judgment for defendant is proper.

3. A variance between the declaration and proofs cannot be raised for the first time on review.

4. The modification of an instruction cannot be assigned as error where such modification is not specified in the trial court as one of the grounds for a new trial.

5. In an action to recover for injuries received while acting as conductor of a freight elevator, it was a question of fact for the jury whether the defective condition of an automatic stop on the elevator was, under the evidence, the proximate cause of the accident to the plaintiff.

6. Evidence in action for injuries to conductor of freight elevator *held* not to show him guilty of contributory negligence.

Appeal from Appellate Court, First District.

Action by Katherine Kolander, administratrix, against the Central Union Building Company, a corporation. Judgment for plaintiff was affirmed by the Appellate Court, and defendant appeals. Affirmed.

This is an action on the case, brought by Katherine Kolander, administratrix of the estate of Joseph Kolander, deceased, to recover damages for injuries resulting in the death of the deceased while he was in the service of the appellant company. The deceased, Kolander, left him surviving the appellee, Katherine Kolander, his widow, and four daughters and three sons, his children, the eldest of whom was 17 years of age, and the youngest 1 year old. The plea of the general issue was filed, and the trial in the court below resulted in verdict and judgment in favor of the appellee. This judgment has been affirmed by the Appellate Court, and the present appeal is prosecuted from such judgment of affirmance.

The declaration alleges that the appellant company was, on May 3, 1901, operating a freight elevator, in a six-story building in Chicago, for the purpose of carrying freight to and from the different floors of the building; that deceased, Joseph Kolander, was employed by the appellant as a conductor of said elevator; that it was the duty of appellant to provide deceased with a safe place to work, and one that was reasonably free from danger; that the place provided was not safe and was not reasonably free from danger, but was unsafe and dangerous in this, that said elevator was provided with a certain automatic stop, in general use, designed for the purpose of stopping the elevator at the extent or end of its travel, but on said day, and for a long time before, said automatic stop was detached, old, worn, and imperfect; that this condition caused it to fail to act properly, but instead to start said elevator suddenly in a certain direction without warning, and rendered the elevator very unsafe and dangerous for any person who might be thereon or thereabouts; that defendant had notice of this, but negligently permitted such condition to exist, and instructed the deceased to work in said elevator as its conductor, by means whereof, while he was on said day, about 6 o'clock in the afternoon, working as a conductor in said elevator, using all care for his own safety, without notice and knowledge of said danger, and was lowering the elevator to the bottom, it suddenly and without warning, by reason of the action of the defective automatic stop, swiftly ascended, carrying said deceased, and his body was caught between the wall of the shaft and the elevator, crushing him and causing his death.

The appellant, defendant below, offered no evidence, but made a motion in writing, at the close of the plaintiff's evidence, to exclude all such evidence from the jury, and to instruct the jury to find the defendant not guilty. This motion was overruled by the court, and exception was taken to the order overruling the same, and the defendant below elected to stand by its motion.

There was no eyewitness to the accident which caused the death of Kolander. He had come down alone on the elevator, making the last trip just about the time of quitting work for the day. He was found in a dying condition at the bottom of the elevator shaft at about 6 o'clock on the evening of May 3, 1901. A large iron shutter, some 6½ feet high, which it was the custom, when the conductor of the elevator left at night, to pull down from above, so as to inclose the opening to the shaft, was found pulled halfway down to the floor. In this condition it would be of convenient height to be closed from the outside. Commencing on the inside of this iron shutter, and leading upwards, there were marks of the dragging of a human body. These marks could be tra-

ced along the walls of the elevator shaft up to a window sunken into the wall at the third story. Here marks of the deceased's body were found, and on this sunken window recess pieces of his lead pencil and buttons from his jumper were found; and the marks, ending here, tended to show that he was caught between the side of the elevator and the iron shutter, and was dragged upward and pressed close to the wall of the shaft, until he came to the sunken window, where he was lodged, the elevator passing on in its ascent. From this window recess he fell to the bottom of the elevator shaft, and died soon after by reason of the injuries thus received.

Utt Bros., for appellant. Samuel Cohen and Wood & Elmer, for appellee.

MAGRUDER, J. (after stating the facts). At the June term, 1904, of this court, a motion was made by the appellee for leave to file certified copies of the appellant's brief and argument made in the Branch Appellate Court for the First District when this case was heard there, for the purpose of showing to this court the question raised by appellant and decided by the Appellate Court. This motion was allowed, and appellant's Appellate Court brief has been filed. It appears therefrom that the only error upon which appellant relied for a reversal in the Appellate Court was that the evidence did not sustain the verdict, and that the trial court should have sustained the motion to exclude it from the jury at the close of appellee's evidence. In their brief in the Appellate Court, counsel for appellant say: "This case is peculiar in that it stands clearly upon a question of fact. No errors of law are relied upon for reversal. The only question to be decided is, did the evidence of the appellee warrant the court in allowing the case to go to the jury? It is a case that should be either affirmed, or reversed without remanding."

The present appeal only has the effect of bringing the judgment of the Appellate Court before this court for review, and this court will not declare that the Appellate Court erred upon a point not presented to it for decision. Even where errors are assigned in the Appellate Court which would cover supposed erroneous rulings of the trial court, but such errors are not argued nor brought to the attention of the Appellate Court, they will be held to have been waived and abandoned, and cannot be raised in this court for the first time. *Chicago & Alton Railroad Co. v. American Strawboard Co.*, 190 Ill. 268, 60 N. E. 518; *Abend v. Endowment Fund Commissioners*, 174 Ill. 96, 50 N. E. 1052. Therefore the only question now before this court is whether or not the trial court erred in refusing to instruct the jury to find the appellant not guilty. If there is evidence in the record tending to show the plaintiff's

right to recover, the trial court did not err in refusing such instruction. *Frazer v. Howe*, 106 Ill. 563; *Wenona Coal Co. v. Holmquist*, 152 Ill. 581, 38 N. E. 946; *Landgraf v. Kuh*, 188 Ill. 484, 59 N. E. 501.

After a careful examination of the evidence, we are not able to say that there was no evidence tending to show that the appellant company was guilty of such negligence as caused the injuries which resulted in the death of appellee's intestate.

The elevator was operated by steam power, and the engine was directly back of and separated from the shaft by a partition. The operator controlled the movements of the elevator by means of a cable which ran through the southwest corner of the platform. The elevator was an open one, there being no cage on the outside, and the floor or platform was 8 by 12 feet in dimensions. Attached to the elevator and the engine was an automatic stop, the gear of which was in the engine room, and consisted of bevel gears held in place on shafts, to which they were attached by keys. The purpose of the automatic stop device was to bring the elevator to rest at the extremes of travel, both at the bottom and top floors of the building. When it was in operation and was not defective, it would bring the elevator to rest at the limit of travel, both at the top floor and at the bottom floor. This automatic stop device, being on the engine, was not under the control nor in sight of the operator of the elevator.

The evidence is undisputed that at the time of the accident this "automatic stop" was entirely disconnected, and of no use whatsoever, on account of the loss of the key the pinion was [is] caught on, and that key was lost." This key served to drive the train of gears to which the automatic stop was attached. The automatic stop, when the key was out, would not turn, and was of no use. Without attempting to describe the mechanical features of the device in question, it is sufficient to say that when the key was in its proper place, and the automatic stop was not defective, the elevator would descend to the bottom softly and safely, but that when the key was out, and the automatic stop was in such a defective condition as the proof here shows in regard to this automatic stop, the elevator, instead of remaining at the bottom, would rebound and ascend. The proof shows that it was the duty of the engineer to inspect the engine each day, and see whether or not the stop in question was in a safe and proper condition. The proof tends to show that it was the duty of the engineer to make such examination as would show the presence or absence of this key at least once each day. The proof also tends to show that the elevator was in a defective condition some time before the accident occurred, as it was noticed that, when it descended, instead of remaining at the bottom, it would give a jerk and ascend. One of the

expert witnesses says: "If the key is out, the elevator will not stop; it will reverse it." One of the city elevator inspectors, who examined the elevator on the day after the accident, says: "The automatic stop, when the key is out, is of no use whatsoever. It will not turn. * * * From my examination, that reversing, automatic reversal, was due to the automatic stop block not being in good condition." According to the expert testimony, "when the elevator is coming down, if it is coming down lightly, when it gets near the bottom the automatic stop would slow it down and let it down safely, throw it on the center; let it down safely to a quiet stop without any rebound or anything of that kind; it would come down and stop; the function of the automatic stop is to let that elevator down softly to a soft stop." Another expert witness states that he made an inspection of the elevator on the day after the accident, and was not able to find the key in its place, and he says: "As the arm of the car struck the stop at the bottom, the car reversed and started up again. It went up by its own action. * * * If the key was in position and the automatic in perfect working condition, it would have stopped the car in the event of anything happening." The testimony of the witnesses tends to show that the key had been absent from its proper place for some time; and this was indicated, among other things, by the accumulation of dust at the spot where the key must inevitably have fallen when it was removed from its place, and by the looseness of the cog on the pinion where it was formerly held by the key. The evidence tends to show that this key was in sight of the engineer, whose duty it was to keep his engine in repair and inspect it at least once each day.

It was charged by the appellant that the case made by the declaration was not the case sought to be established by the proof; in other words, that there was a variance between the allegations of the declaration and the proof introduced. The basis of this contention arises from the fact that the automatic stop was shown by the proof to have been merely a limit stop, and was intended to stop the elevator at the top floor and at the bottom floor, and not to start it upward. The theory of the accident was that, by reason of the ascent of the elevator, the deceased was caught between the floor and the door of the elevator while he was seeking to go out from the elevator under the door, which worked up and down instead of laterally. While it is true that when the automatic stop was in its proper condition it stopped the elevator, yet the proof, shows that, in view of its defective condition, the elevator, instead of remaining at the bottom when it reached the bottom, would rebound and ascend towards the top. The condition of things presented by the proof did not relate so much to the functions of the automatic stop when it was in good repair and

effective operation, as to its effect on the elevator when wholly detached and worthless. The declaration charged that the detached, old, worn, and imperfect condition of the automatic stop "caused it to fail to act properly, but instead to start said elevator suddenly, in a certain direction, without warning, and rendered said elevator very unsafe and dangerous." There was evidence tending directly to prove these allegations. The evidence tended to show that the automatic stop did not act properly, because, while it was intended to stop the elevator and keep it at the bottom, it failed to do this, and, in failing to do this, it caused a reversal of the power of the engine and started the elevator on its return upward. As it did not perform its proper function of keeping the elevator stopped and stationary at the bottom, but, on the contrary, reversed the engine, the defective condition of the automatic stop was the direct and proximate cause of the upward travel of the elevator. The allegations of the declaration so charged.

The testimony of one of the other operators of the elevators in this building, that this particular elevator had on some other occasions, when brought to the bottom, started upward, and the testimony of the inspectors, who found that it would reverse at the bottom if allowed to come down, together with the fact that on closing the elevator for the night the iron shutter had to be pulled down from the inside within easy reach when the operator would pass it between the floor and the partly closed shutter, and the further fact that the accident happened just at the hour for closing, all tended to show that the defective automatic stop caused the upward movement of the elevator after it had been brought to the bottom, and while the operator was closing down the door for the night. It was a question of fact, to be determined by the jury, whether the defective condition of this automatic stop was, under the circumstances already narrated, the proximate cause of the accident or not. *Dallemand v. Saalfeldt*, 175 Ill. 810, 51 N. E. 645, 48 L. R. A. 753, 67 Am. St. Rep. 214.

In addition to what has been said, there was at most but a variance between the allegations of the declaration and the proof, and, as no question of the kind was raised upon the trial, or urged in the motion for new trial, or assigned as error in the Appellate Court, the question is waived so far as this court is concerned. When the appellee proved a cause of action arising out of the negligence of the appellant in maintaining an unsafe elevator, that was sufficient, and, if it was not proved as alleged, this objection cannot avail the appellant when first presented on appeal. *Chicago, Burlington & Quincy Railroad Co. v. Dickson*, 143 Ill. 368, 32 N. E. 380; *Alford v. Dannenberg*, 177 Ill. 332, 52 N. E. 485.

There is no evidence, so far as we have been able to discover, to indicate that the

deceased was guilty of contributory negligence. The proof tends to show that he had no notice of the defective condition of the automatic stop, and the evidence also tends to show that he had been engaged in operating this elevator for a period of 10 years, and was a man of only 40 years of age, and of good health, and of careful habits, and that he exercised care in the operation of this elevator. In *Dallemand v. Saalfeldt*, 175 Ill. 310, 51 N. E. 645, 48 L. R. A. 753, 67 Am. St. Rep. 214, which was an action for damages by an administrator for the death of his intestate from falling down an elevator shaft, and where the evidence showed that the deceased was intelligent, sober, and careful, we said (page 313, 175 Ill., page 646, 51 N. E., 48 L. R. A. 753, 67 Am. St. Rep. 214): "The evidence shows that Saalfeldt was an intelligent, sober, and careful youth, and from this evidence and the circumstances before them, and as there was no eyewitness to the accident and no countervailing evidence, the jury were authorized to find that he was, at the time of the injury, using due care for his own safety."

Appellant complains that the trial court erred in modifying the second instruction asked by the appellant, and in giving the same as so modified. Even if the appellant was authorized to bring this matter to our attention, in view of the single point already mentioned upon which the case was heard in the Appellate Court, it is sufficient to say that the appellant failed to specify the modification of said instruction as a ground for new trial among the written reasons presented to the trial court in favor of a new trial. A party cannot be permitted to assign for error the modification of one of his instructions when he fails to specify this as one of his grounds for a new trial. *Consolidated Coal Co. of St. Louis v. Schaefer*, 135 Ill. 210, 25 N. E. 788. It also appears that, in its assignment of error in the Appellate Court, the appellant failed to assign as error such modification of its second instruction. An alleged error of the circuit court, not assigned for error in the Appellate Court, cannot be urged in this court. It comes too late. *Hyslop v. Finch*, 99 Ill. 171; *Redlich v. Bauerlee*, 98 Ill. 134, 38 Am. Rep. 87.

Appellant complains that the court permitted one of the elevator operators in this building to testify that about six or seven weeks before the accident he noticed, while operating the elevator on which the deceased met his death, that it started to ascend when lowered to the bottom, instead of remaining there, as it should have done. While in the motion for new trial in the trial court, and in the assignments of error in the Appellate Court, it was specified that improper evidence was introduced by appellee over the objection of appellant, such assignments were not called to the attention of the Appellate Court in appellant's brief and argument, nor urged upon the attention of the Appellate

Court in any manner; and such assignments are therefore waived. Although general errors are assigned in the Appellate Court which would cover erroneous rulings in admitting and refusing to admit testimony; yet, when the attention of that court is not called to any rulings in that behalf claimed to be erroneous, there is a waiver and abandonment on the part of appellant of such assignment of error. "Supposed errors waived or abandoned in the Appellate Court cannot be revived in this court and raised here for the first time." *Strodtmann v. County of Menard*, 158 Ill. 155, 41 N. E. 778. The judgment of the Appellate Court is affirmed.

Judgment affirmed.

(186 Mass. 439)

ALDRICH et al. v. BAY STATE CONST. CO.

(Supreme Judicial Court of Massachusetts.
Franklin. Oct. 17, 1904.)

CONTRACTS—CONSTRUCTION—OPINION EVIDENCE—VALUE OF CORPORATE STOCK.

1. Defendant offered to purchase railroad ties of plaintiffs, and pay in stock of either of two corporations, as plaintiffs might elect. Plaintiffs wrote defendant that they would sell the ties at the price offered, and take stock "in either the G. or D. roads." *Held*, that this did not necessarily mean that the option was to be exercised by defendant.

2. On an issue as to the value of corporate stock of which there had been no sales, the opinion of the treasurer as to what would be the fair market value was admissible.

Exceptions from Superior Court, Franklin County; Jabez Fox, Judge.

Action by one Aldrich and another against the Bay State Construction Company. There was verdict for plaintiffs, and defendant excepts. Exceptions overruled.

Burt H. Winn, for plaintiffs. Fredk. L. Greene and Wm. A. Davenport, for defendant.

BARKER, J. The plaintiffs, having street railway ties for sale, were called upon by the defendant's purchasing agent, who offered them a price less than they asked, and also offered to pay in stock of either of two railway companies. The defendant admits that the offer of payment in stock was an offer to allow the plaintiffs the choice as to the company whose stock they should take. At the interview, no bargain was made; the purchasing agent going away to ascertain whether the defendant would pay the price asked, and the partner who had acted for the plaintiffs to ascertain whether they would take pay in stock. After a few days the plaintiff, on April 20, 1903, wrote: "Mr. Allen and I have decided to let you have the electric ties you saw the other morning, at 22c. each down to 4 in. face, loaded on the cars at So. Vernon. Will take stock in either the Greenfield & Turners Falls or Deerfield roads. Please let me hear at once if this is all right. Respectfully, Allen & Aldrich." In reply the defendant wrote as follows: "Your letter re-

lating to ties has been received and I think we can use your ties as per your agreement. Will you kindly let me know where you intend to load these ties and be sure and load them in as large cars as possible and put in full loads. Please ship the first car to Greenfield consigned to the Bay State Construction Company. Yours very truly, Bay State Construction Company." The ties were delivered without further communication between the parties, and at the trial the defendant agreed that it received them, that they were satisfactory, and that the number of ties and the price stated in the plaintiffs' declaration were correct. On July 6th the plaintiffs went to the defendant's office, and, by an oral bargain, sold the defendant more ties at the same rate. Whether on this occasion they told the defendant's purchasing agent that they wanted the Greenfield & Turners Falls stock, and that he replied "All right," was in dispute upon the evidence, and also whether on the same occasion the defendant's president said that the letter called for Deerfield stock, and the plaintiffs assented, and told him how to make out the certificate. It was not in dispute that the ties sold on July 6th were delivered, nor that the charges for them in the declaration were correct. Before suit was brought, the defendant sent by mail to the plaintiffs four shares of stock in the Greenfield & Deerfield Railway Company, and a check for \$28.02, and the stock and check were returned. After the suit was brought, a legal tender of the stock and of the amount of money for which the check was drawn, with interest and costs, was made, and the stock and money so tendered were duly brought into court, and the tender was pleaded by the defendant as its defense to the action.

At the trial the defendant asked the court to rule that by the letter of April 20th the plaintiffs gave to the defendant the option of delivering either stock. The court refused to give the ruling, and instructed the jury that the letter did not necessarily mean that the option was to be exercised by the defendant. The exception to this refusal to rule, and to the contrary instruction given, raises the principal question in the case.

The defendant contends that, when the true meaning of a written instrument is doubtful, it must be construed most strongly against the person using the doubtful language. This doctrine is sometimes applied in favor of a party who has been misled into advancing money. See *Barney v. Newcomb*, 9 Cush. 46, 56. But it should be applied only in the last resort, when all other rules of construction fail. *Boston v. Richardson*, 13 Allen, 146. Our first duty is to put ourselves in the place of the parties to the instrument, and then to read it, giving to its words their plain and ordinary meaning in the light of the circumstances, and in view of the subject-matter, the acts of the parties, and their relations to each other. *Farnsworth v. Boardman*, 131

Mass. 115. The plaintiffs had for sale railway ties, and were asking for them 22 cents apiece. They were not in the business of buying stocks. The defendant was not a stockbroker dealing in options, but a construction company buying ties, and offering the plaintiffs for certain ties 21 cents apiece, but wanting to know what they would sell for, and take pay in one of two stocks; the plaintiffs to have their choice between the two. The parties separated, the plaintiffs to determine whether they would take stock in payment, and the defendant to determine whether it would pay the rate asked. The plaintiffs decided to take stock as offered, and the defendant to pay the price asked, and under these circumstances the letter was written and received, and its offer accepted by a reply which said nothing as to the particular stock to be used in payment. According to the talk, the option to take either stock was in the plaintiffs. To make a valid contract on the only lines under consideration by both parties, nothing more was necessary than for the plaintiffs to agree to take stock in payment, and for the defendant to assent to the price demanded. The performance of such a contract, but not its making, would involve the choice by the plaintiffs of one of the two stocks. If, upon the interchange of the letters, the option was in the defendant, instead of in the plaintiffs, a new term had been imported into the proposed bargain. If the language used so meant, such would be the legal result of the letter and the reply, but not otherwise. To show that such is the meaning of the plaintiff's letter, the defendant quotes as a definition of the word "either" the words "one or the other of two indifferently," while the dictionary to which reference is made adds, "or as the case requires." Common definitions of the word are "one of two"; "the one or the other." But the word when used in a connection which implies a choice of action on the part of the person using it indicates that the option is in the person who is to do the act involving the choice. It is the person who is to take one of two apples who may "take either apple."

"Spirits, when they please,
Can either sex assume, or both."

So with the word "take." While it may be used in a passive sense, as "to receive" or "to accept," its more usual and ordinary meaning is in an active sense, "to procure"; "to make selection of"; "to choose." It is not until the circumstances under which the letters were written are disclosed by outside evidence that the words "Will take stock" are shown to have connection with the sale of the ties, and to designate a way of liquidating the debt to arise if the plaintiffs' offer should be accepted. The language used is not "You may pay in stock of either road," but, "Will take stock in either the Greenfield and Turners Falls or Deerfield roads"; that is to say, in either one or the other. The action promised is action on the part of the

plaintiffs. Giving to the language used that one of its usual plain and ordinary meanings which is pointed out by the situation and purpose of the parties, the legal meaning of the letter is to offer to sell ties at a rate stated, for payment in one of two named stocks; 'the one so to be used to be selected by the plaintiffs, and not by the defendant. We think, therefore, that the ruling requested, that the letter gave the defendant the right to deliver either stock, was wrong, and that the instruction that the letter did not necessarily mean that the option was to be exercised by the defendant was right, so far as it went. As the evidence stood, it would have been wrong to apply the rule of construction now contended for by the defendant. See *Bascom v. Smith*, 164 Mass. 61, 76, 41 N. E. 130.

As there was evidence that, before the certificates for Greenfield & Deerfield stock were sent, the plaintiffs made known their election to take payment in the other stock, the ruling requested, that upon all the evidence the defendant was entitled to a verdict, was wrong, for the reason already stated, as well as for another. Some of the ties were sold on July 6th, and it was admitted that they were delivered and that the prices charged were correct, and that they were not paid for, unless in the Greenfield & Deerfield stock. But the plaintiff's evidence tended to show that at the time of that sale they said they would take the other stock, and that that statement was assented to by the purchasing agent. If so, the plaintiff had a clear right to a verdict in respect of the ties sold on July 6th. The evidence was abundant that the purchasing agent had authority at that time to make the bargain which the plaintiffs testified then was made.

The defendant now contends that it was the duty of the court to construe the letter, and not leave it to the jury as a question of fact. No exception is specifically directed to this phase of the case. The court did construe the letter, and gave it a construction contrary to that for which the defendant contended. We think that the course pursued followed, as near as might be, that approved in *Bascom v. Smith*, *ubi supra*, of undertaking to construe the contract with reference to all the circumstances which the evidence tended to establish as existing when it was made, and leaving it to the jury to determine whether the circumstances assumed had been established by the evidence. As was said in *Bascom v. Smith*, "This is not leaving the whole construction of a written contract to the jury."

There was contradictory evidence as to what occurred on July 6th. At that time neither party had attempted to designate to the other which of the two stocks should be used in the payment. The plaintiffs' evidence tended to show that they then said to the purchasing agent, who then bought of them the second lot of ties, that they would

take the Turners Falls stock, and that the agent replied: "All right. I will send it to you." The defendant's evidence tended to show that the defendant's president said that the contract called for Deerfield & Northampton stock, and that the plaintiff assented to that, and told the officer to have the stock delivered, and how to make out the certificates. The court instructed the jury, in substance, that, whatever the effect of the negotiations between the parties had been before that time, if there was an agreement either way on July 6th, that agreement by way of modification of the original contract would govern. To this instruction the defendant excepted, and now contends that it was wrong, because the authority of the purchasing agent was limited to the buying of ties, and did not extend to the modification of contracts. The bill of exceptions does not show that the question of the purchasing agents' authority was raised at the trial. However this may have been, he then could buy ties for stock, and we think the evidence discloses sufficient authority for him then to bind the defendant to pay in either stock for the ties first sold, as well as for those then sold.

The same person who was the president of the defendant construction company held also the office of treasurer in each of the street railway companies. There had been no sales of stock of the Turners Falls Company. Under these circumstances, the court admitted his answer to the question what, in his opinion, would be the fair market value of the stock—that he should call it \$100 per share. The bill of exceptions does not show that this question or answer were excepted to, although it shows an exception to evidence of value on a certain date. We think the evidence was properly admitted, in the absence of any possible evidence of ordinary market value.

The remaining contentions of the defendant are as to the amount of the recovery as affected by the value of the stock, by the time of demand, and by interest. The only evidence as to the value of the stock being that the market value and par value were the same, and there being sufficient evidence, in our opinion, to justify the jury in finding a demand of payment, the instructions excepted to were right.

Exceptions overruled.

(186 Mass. 474)

McDONALD v. NEW YORK CENT. & H. R. R. CO.

(Supreme Judicial Court of Massachusetts.
Berkshire. Oct. 17, 1904.)

RAILROADS—CROSSINGS—PERSONAL INJURIES—
FAILURE TO GIVE SIGNAL—EVIDENCE—QUEST-
ION FOR JURY—GROSS CONTRIBUTORY NEG-
LIGENCE—BURDEN OF PROOF—WITNESSES—
IMPEACHMENT—INCONSISTENT STATEMENT.

1. In an action against a railroad company for killing plaintiff's intestate at a crossing, in which the negligence charged was a failure to

give the required signals, positive testimony of two witnesses, who were near, that the signals were not given, and testimony of other persons similarly situated that they did not hear the signals, required submission of the question to the jury.

2. Failure of persons near to notice or hear the signals was competent for the consideration of the jury.

3. If in an action against a railroad company for death based on its failure to signal approach at a crossing as required by Rev. Laws, c. 111, § 268, defendant relies on the gross negligence of the person killed, it has the burden of proving such negligence, and plaintiff makes out a case by showing that the signals were not given, and that his decedent was killed by the train at the crossing.

4. If the only reasonable conclusion to be drawn from the evidence is that the person killed was guilty of such negligence, or was engaged in committing an unlawful act, the court should order a verdict for the defendant.

5. A companion of a boy killed on a railroad crossing testified in an action for the death that he and deceased did not hear the train as they ran down the street, and that on his arrival home he told his parents of the event, and told them the truth. They testified that he told them that he and deceased heard the train, and deceased said, "Let's run down and see the train go by." *Held*, that an instruction that the evidence was competent only to show that at some other time the boy had made statements inconsistent with his statement as a witness, and not to show that the statement made to his father and mother was a true statement, was correct.

6. Deceased, a boy of 7½ years of age, left school with a companion, and ran along a road where they were accustomed to seeing a train pass, and deceased was struck and killed by the train; but no one saw how the accident occurred, and there was no direct evidence that he failed to look or listen. *Held*, that it could not be said that there was no possible reasonable explanation save willful or gross negligence, and defendant was not entitled to a directed verdict, but the question was for the jury.

Exceptions from Superior Court, Berkshire County; Wm. B. Stevens, Judge.

Action by one McDonald, administrator, against the New York Central & Hudson River Railroad Company. Judgment for plaintiff, and defendant excepts. Exceptions overruled.

Thos. F. Cassidy and P. J. Ashe, for plaintiff. Crosby & Noxon, for defendant.

BARKER, J. The defendant's train struck and killed the plaintiff's intestate, a school boy of 7½ years of age, at a grade crossing, as the boy was going home from school about 4 o'clock of a winter afternoon. The action was in tort to recover for his death. At the trial the verdict turned upon the points whether the whistle was blown and the bell rung as required by the statutory provisions now embodied in Rev. Laws, c. 111, § 188, and, if not, whether the failure to give the signals contributed to the accident, and whether, if the signals were not given, the boy was guilty of gross negligence.

1. The first question argued upon the plaintiff's brief is whether there was evidence to justify a finding that the statutory signals

were not given. Fourteen or more witnesses testified on the point. Some of them, including the engineer and fireman of the train, testified positively that the whistle was blown and the bell rung. Many others testified either that they did not notice or did not remember. Two witnesses testified positively that the whistle was not blown nor the bell rung. Some of the witnesses who testified that they did not notice the signals or did not remember were in position where, if the signals had been given, the witnesses might be expected to notice them and to recall the fact. In this state of the evidence the question whether there was a failure to sound the whistle and ring the bell as required by the statute was for the jury. It was not the case of a single person who testified that he did not remember, as in *Tully v. Fitchburg Railroad*, 134 Mass. 499; or simply of several persons who testified either that they did not notice or did not hear, as in *Hubbard v. Boston & Albany Railroad Co.*, 159 Mass. 320, 323, 34 N. E. 459. At least two witnesses who were so placed that they might have heard the signals if given took the responsibility of testifying that the signals were not given. See *Johanson v. Boston & Maine Railroad*, 153 Mass. 57, 59, 26 N. E. 426; *Lamoureux v. New York, New Haven & Hartford Railroad Co.*, 169 Mass. 338, 47 N. E. 1009; *Walsh v. Boston & Maine Railroad*, 171 Mass. 52, 57, 50 N. E. 453. Others of the witnesses were in such positions that, if the signals had been given, the witnesses easily might have heard. *Menard v. Boston & Maine Railroad*, 150 Mass. 386, 23 N. E. 214. Their failure to hear or notice a signal was competent for the consideration of the jury. *Daniels v. New York, New Haven & Hartford Railroad Co.*, 183 Mass. 393, 396, 67 N. E. 424, 62 L. R. A. 751.

2. The bill of exceptions raises a question of evidence which it is well to consider before dealing with the other exceptions. The only count on which the case went to the jury was the one alleging the failure to give the statutory signals, and was founded on the provisions now embodied in Rev. Laws, c. 111, § 268. It is settled that, if the gross or willful negligence of the persons killed is relied on as a defense to such a count the burden of proving such negligence is upon the defendant. *Copley v. New Haven & Northampton Co.*, 136 Mass. 6; *Walsh v. Boston & Maine Railroad*, 171 Mass. 52, 57, 50 N. E. 453. If the only reasonable conclusion to be drawn from the evidence is that the person killed was guilty of such negligence, or was engaged in committing an unlawful act, the court should order a verdict for the defendant. See *Emery v. Boston & Maine Railroad*, 173 Mass. 136, 139, 53 N. E. 278. It was not in dispute that the deceased came out of school shortly before the passing of the train, and started homeward over a highway leading first in a direction parallel with, and not far from, the railroad, and then turn-

¶ 2. See *Railroads*, vol. 41, Cent. Dig. § 1132.

ing and leading over the crossing. He was in company with another school boy of about his own age, whose route homeward was over the same crossing. When the deceased was struck by the train the two boys were within a few feet of each other. The boy who was in company with the deceased was a witness at the trial. The substance of his testimony was that the deceased and himself were together at first, and that on the part of the road which was parallel with the railroad the deceased ran ahead a little ways, and got past the witness, and kept in advance to the crossing; that the witness was on the crossing when he saw the train coming and turned and went back; that he stood six or seven feet from the cars when the train went by; that as the witness turned and went back he did not see the deceased, as he remembered, and that he did not remember that the deceased was ahead of or behind him as the witness came down toward the crossing, and that he did not remember that he saw the deceased again after the witness turned and went back; that he did not see the train strike the deceased; that while the train was passing the witness was looking down towards the depot "about a minute," and then turned around and saw the deceased lying down on the snow bank beside the track; that he at the time of the trial was seven years of age, and going on eight; that he and the deceased usually went home from the school together, and that it was a frequent thing for this train to pass as they were going home; that the witness did not remember whether the deceased said anything when he started to run; that they did not hear the train, and so did not run down, and that he did not remember whether the deceased or himself said anything. He further testified that at his home on the same night he told his father and mother about the occurrence, and that he told his father and mother the truth about it that night. The father and mother were both called as witnesses, and their testimony tended to show that their son told them that he and the deceased left school together, and started for home; that when they got to Bowen's Hill (on the road parallel with the railroad) they heard the train whistle, and the deceased said, "Let's run down and see the train go by," and that they started on a run down the hill, and the deceased ran past him midway of the hill, and got down there before he did, and he did not pay any more attention to the deceased until he saw him lying in the snow. The jury were instructed that this testimony of the father and mother was not any affirmative evidence of what took place, and was competent only for the purpose of showing that at some other time the boy had made statements inconsistent with his statement made upon the witness stand, and was not competent for the purpose of showing that the statement made to his father and mother was a true statement. The defendant ex-

cepted to this part of the charge, and now contends that the statement to the father and mother should be deemed evidence of the truth of the occurrence so stated. We are of opinion that the instruction was correct. The testimony of the boy that he told his father and mother the truth about the occurrence that night did not change the statements then made by him from hearsay. They were still declarations made without the sanction of an oath, and with no opportunity for cross-examination by parties in interest. In *Jack v. Woods*, 29 Pa. 375, and in *Rothrock v. Gallaher*, 91 Pa. 108, the declarations considered were testimony given under oath in court in former trials, and were offered because of failure of mind on the part of the witness. See *Day v. Cooley*, 118 Mass. 524; *Brooks v. Weeks*, 121 Mass. 433, 435; *Manning v. Carberry*, 172 Mass. 432, 52 N. E. 521; *Knight v. Overman Wheel Co.*, 174 Mass. 455, 466, 54 N. E. 890. See, also, *Commonwealth v. Piper*, 120 Mass. 185, 187, and cases cited.

3. The remaining contentions made upon the defendant's brief relate to the question whether, even if the statutory signals were not given, the plaintiff ought to have been allowed to go to the jury upon the evidence. The defendant requested a ruling that the evidence was insufficient to warrant a finding for the plaintiff, which was refused, and also a ruling that, if the deceased went upon the crossing without looking or listening for the train, and was struck, he was guilty of gross negligence. The latter request was not given in terms, but the jury were instructed that, if the plaintiff's intestate heard the whistle of the train, and ran or walked towards the crossing for the purpose of seeing the train go by, and got so near the train as to be struck he was guilty of gross negligence, and they were also instructed in these words: "If the plaintiff's intestate, before arriving at the crossing, heard or saw the defendant's train approaching, and went upon the crossing to see the train go by, and was struck by the defendant's train, he was guilty of gross negligence, and cannot recover. That is to say, suppose this boy, seeing the train, knew it was coming, hearing the whistle, or not hearing the whistle, went down for the purpose of seeing the train go by, under those circumstances you see the railroad could not be held responsible, because it could not be said in that case that the failure of the railroad to blow the whistle or ring the bell contributed toward that accident." If, as the jury must have found, the required signals were not given, all that the plaintiff was required to prove further was that the deceased was killed at the crossing by the train. The plaintiff need not show that the deceased was careful. If the defendant relied upon the gross negligence of the deceased, that defense must be established by evidence. As the evidence stood, no person saw the deceased struck, or assumed to testify just how

the accident happened. We think the question whether he was grossly negligent was for the jury. There was no direct evidence that he failed to look or listen for the train, and it cannot be said that upon the evidence there was no possible reasonable explanation of the accident save his gross or willful negligence.

Exceptions overruled.

(186 Mass. 498)

HOLYOKE ENVELOPE CO. v. UNITED STATES ENVELOPE CO.

(Supreme Judicial Court of Massachusetts. Hampden. Oct. 18, 1904.)

SALES — CONTRACTS — CONSTRUCTION — INSURANCE — TRANSFER OF POLICIES — UNEARNED PREMIUM — ACCOUNTING — PLEADING — BILL OF PARTICULARS — DEFECTS — INTEREST.

1. Defendant purchased plaintiff's business, including real estate and personal property. The bill of sale provided that the business should be considered as belonging to defendant from and after December 31, 1897, and all proper accountings should be made accordingly. The contract price was paid on August 12, 1898, and October 31, 1898. The option contract, which preceded the bill of sale, required plaintiff to maintain the plant and keep it insured, and in case of loss to transfer to the purchaser the moneys collected in lieu of property damaged or destroyed. *Held*, that the transfer did not cover the return premiums on unexpired insurance previously purchased by plaintiff from December 31, 1897, to the termination of the policies in force on that day, and, such policies having been transferred to defendant, and by it surrendered for other insurance, defendant was liable to account to plaintiff therefor.

2. Where, in an action by the seller of a business against the buyer to recover the value of certain insurance policies transferred, it was uncontradicted that it was a custom to allow pro rata value in place of surrender value where new insurance is taken out through the same agency, and the cost of the insurance between the dates in controversy was proved, assuming that the basis on which the return premiums testified to was the same as that on which the value of the policies for the whole period from the date of the sale until the policies expired, the evidence was sufficient to establish the pro rata value of insurance.

3. Where the owner of a business transferred the same to defendant by a bill of sale providing that the business carried on after December 31, 1897, should be accounted for as defendant's business, the seller was not entitled to recover return premiums on unexpired policies on the plant transferred which were assigned to defendant, and by it surrendered for cancellation under a count on the contract providing for the accounting of the business.

4. Where, in an action by the seller of a business against the buyer, the complaint contained a count on an account annexed, one of the items of which was, "Unexpired insurance to credit of [plaintiff] Jan. 1, 1898, \$807.87," and plaintiff was only entitled to recover for return premiums received on the cancellation of the policies assigned to defendant, with interest from the date of the transfer, but no objection was made at the trial to the item specified, the fact that it did not properly describe the transaction was insufficient to preclude plaintiff's recovery thereunder, the case having been held open until defendant had an opportunity to investigate the facts, and no injury having been sustained by such inaccuracy.

5. Where a contract for the sale of a business including both real and personal property pro-

vided that the business transacted after December 31, 1897, should be accounted for as the property of the buyer, but that the consideration should not be paid until September 1, 1898, the seller was not entitled to interest on such consideration between December 31, 1897, and August 18, 1898, when the consideration was in fact paid.

Exceptions from Superior Court, Hampden County; Elisha B. Maynard, Judge.

Action by the Holyoke Envelope Company against the United States Envelope Company. From a judgment in favor of defendant, plaintiff brings exceptions. Sustained in part.

E. H. Lathrop, for plaintiff. Chas. L. Long, for defendant.

LORING, J. After the decision of this court when this case was before it on demurrer (Holyoke Envelope Co. v. United States Envelope Co., 182 Mass. 171, 65 N. E. 54) the declaration was amended twice, and the case came on for hearing before a judge sitting without a jury. The plaintiff asked the court to make three findings of fact. Without dealing with these specifically, the judge made a general finding in favor of the defendant, and the case is here on an exception to that finding and to his refusal to make the three findings asked for.

It appeared that the plaintiff gave to Messrs. Dean & Shibley a written option, dated January 14, 1898, to sell to them or their appointees its real estate; machinery, stock in trade, and "all its business and good will as a going concern" for a sum to be ascertained by appraisal, and to be paid in cash on delivery of proper conveyances. The option was to be exercised and the amount to be paid fully determined on or before April 30th. The purchase money was to be paid on or before September 1st, and on completion of the sale it was agreed that the plaintiff's business "shall be considered as belonging to the purchaser from and after December 31, 1897, and all proper accountings and adjustments shall be made accordingly." The time within which the option was to be exercised and the amount of the purchase money to be paid fully determined was subsequently changed from April 30th to June 30th. The defendant corporation was chartered some time in the month of June, 1898. On or before June 22d, Messrs. Dean & Shibley exercised their option, and by a written contract made on that day it was agreed that the time within which the amount to be paid as purchase money was to be fully determined should be extended to July 15th. By a later contract, dated July 27th, it was agreed that the purchase money should be \$615,000 in cash and preferred stock in the defendant corporation to the amount of \$43,000 at par. On August 12th a vote was passed by the directors of the defendant company that their corporation, as the appointee of Dean & Shibley, purchase the property of various corporations and firms de-

scribed in certain deeds and bills of sale then presented to them. Among these corporations was the plaintiff. On August 18th the plaintiff executed a deed and bill of sale by which the plaintiff conveyed and assigned to the defendant corporation its real estate and personal property and delivered them to Messrs. Dean & Shibley, and they in turn delivered them to the defendant as their appointee. Thereupon Messrs. Dean & Shibley paid the plaintiff \$723,800, being the \$615,000 in cash plus the \$43,000 in preferred stock agreed upon on July 27th, plus 10 per cent. thereof, which, by the agreement, was to be paid to Messrs. Dean & Shibley for their services. The plaintiff and defendant then entered into an accounting as to the business which had been sold and assigned to the defendant by the plaintiff, and which (by the terms of the bill of sale as well as by the terms of the agreement between the plaintiff and Messrs. Dean & Shibley) it was provided "shall be considered as belonging to the purchaser from and after December 31, 1897, and all proper accountings and adjustments shall be made accordingly." On October 31, 1898, the defendant paid the plaintiff \$31,799.45, due it under said accounting. This was received by the plaintiff without prejudice, reserving to itself a right to sue the defendant to recover four items claimed by it to be due, for which the defendant denied liability. This action was accordingly brought. Before the trial the plaintiff waived all but two of the four items. The two insisted upon at the trial were, first, a claim to be paid interest at 6 per cent. on the \$723,800, the amount of the purchase money, from December 31, 1897, to August 18, 1898, and, second, a claim for the value of the unexpired insurance to the credit of the Holyoke Envelope Company January 1, 1898, amounting to \$807.87, with interest to September 23d, inclusive, \$35.82; making in all \$843.69.

1. We are of opinion that as matter of law the judge was not warranted in finding for the defendant on the items as to unexpired insurance. At the trial the president of the plaintiff corporation testified that the second item was the pro rata value of the unexpired insurance from December 31, 1897, to the termination of the policies in force on that day; that this insurance had been paid for by the plaintiff before December 31st, and the policies were handed to the defendant when the deed and bill of sale were delivered on August 18th. On his cross-examination it appeared that the pro rata value had been estimated by a clerk, but this witness testified, from his knowledge of the amount of insurance then on the property and of the rate of the insurance, that the estimated amount was substantially correct; that the amount of insurance then on the property was \$300,000; that his recollection was that the policies matured in September, and he remembered that when the bookkeeper gave him the figures on this item he, knowing

these data, computed in his head the amount due; that the amount was substantially correct. At the original hearing the officers of the defendant corporation denied having received these policies, but in a supplemental agreement it is stated that since the hearing it had been ascertained that the policies were delivered to the defendant's attorney when the papers were passed, and were in turn delivered by him to the insurance broker who was attending to the defendant's insurance on the property then taken over, and at the attorney's request were canceled on August 18th; that on their cancellation the broker received return premiums amounting to \$324.81, and new policies were issued to the defendant, for which the insurance broker paid, using the amount of the return premiums in part payment. It appears from the bill of exceptions that the case was finally submitted to the judge on this supplemental agreement, as well as on a prior agreement and on oral testimony.

The defendant's first contention is that the evidence failed to show an express adoption by the defendant of the agreement between the plaintiff and Messrs. Dean & Shibley; that, in addition, the judge was not bound as matter of law to find that the defendant knew of the terms of that agreement, and for these reasons the plaintiff had not, as matter of law, brought itself within the decision of this court in 182 Mass. 171, 65 N. E. 54. But the agreement that the business conducted with the property covered by the deed and bill of sale delivered August 18, 1898, was to be considered as the business of the defendant from December 31, 1897, and that all proper accountings and adjustments were to be made accordingly, was set forth in the bill of sale, which ran directly from the plaintiff to the defendant, as well as in the option given by the plaintiff to Messrs. Dean & Shibley. The bill of sale to the defendant, as well as the option to Messrs. Dean & Shibley, is counted on in what is termed in the record the "third amended declaration," which we assume was the second count on which the plaintiff went to trial. The liability of the defendant to pay for the insurance if it was carried in conducting the business during the period in question is made out by the acceptance by the defendant of this bill of sale, and it was not necessary to resort to an implied adoption by the defendant of the agreement between the plaintiff and Messrs. Dean & Shibley. The insurance in question was in fact carried in conducting the business to be accounted for as the business of the defendant during the period beginning December 31, 1897, and ending August 18, 1898. Had it been paid for during that period, it would, in the absence of any further agreement on the subject, have been a payment which would have been allowed as made in the course of that business. The fact that it had been paid for by the plaintiff in advance before the period began

is of no consequence in determining which of these two parties is ultimately to bear the burden of it, unless this unexpired insurance was a portion of the personal property sold and assigned to the defendant by the plaintiff, for which (together with the real estate) it was paid \$723,800; that is to say, unless the unexpired policies of insurance to the value of \$807.87, on hand on December 31, 1897, stood on the same footing as stock in trade to that amount, and, like stock in trade then on hand, were paid for by the \$723,800 purchase money. As matter of description it does not seem to come within the personal property assigned by the bill of sale. Moreover, it partakes of the character of what is excepted from the personal property assigned, to wit, "accounts receivable prior to January 1, 1898," by which we understand is meant accounts receivable due in respect of business done before January 1, 1898. It appears that on January 1st the plaintiff took an account of stock, and by the terms of the bill of sale it was to pay its debts and liabilities existing on December 31, 1897, out of the property not covered by the assignment. The intention, not very clearly expressed, seems to have been that all the results of the business done prior to January 1, 1898, except stock on hand, should not pass to the defendant. Cash on hand at the close of business is not specifically excepted, but it is not included within the description of what is assigned. The same is true of the unexpired insurance. The value of unexpired insurance is properly taken as an asset in making up the condition of a business adventure on a specified day. We are of opinion that in the case at bar the policies of insurance on hand at the close of business on December 31, 1897, were not sold to the defendant, and that the defendant was bound to credit the plaintiff with the pro rata value thereof for the period in question, to wit, the period from December 31, 1897, to August 18, 1898.

The defendant's next defense on this item is to invoke in its support a clause in the option given by the plaintiff to Messrs. Dean & Shibley, dated January 14, 1898. In that contract, after providing that, pending performance of the contract, the plaintiff should maintain its plant and general equipment in as good and efficient running order and repair, fire and other accident excepted, as the same now are, it is stipulated also that pending such performance the plaintiff should "keep its plant and stock at all times well insured in a total of at least two hundred and seventy-five thousand (275,000) dollars, and in case of loss, that it will transfer to said purchasers the moneys collected on account of such loss or claims therefor in lieu of the property damaged or destroyed, provided this contract is accepted and its conditions fully carried out by said Dean & Shibley." The contention is that the sum paid for insurance under this clause is a sum

which, by this covenant, the plaintiff was bound to expend, and for that reason the burden of it is ultimately to be borne by it. Without stopping to discuss the right of the defendant to invoke in its support one of the terms of a contract to which it insists it was not a party, it is enough, and it is more satisfactory, to dispose of the contention by pointing out that the effect of the clause in question is not what the defendant contends it to be. Under the prior clauses of this contract it had become the duty of the defendant to carry on the business until it was ascertained whether the option would or would not be exercised, having regard to the possibility that it might have to account for the business so carried on as carried on for the purchaser. Fire and other accidents were excepted from the covenant to maintain the plant and general equipment in good and efficient running order and repair. The covenant in question then follows. Its effect was, not to throw on the plaintiff the ultimate burden of what, but for this covenant, we have already seen would be borne by the purchaser in the event which has happened, but to regulate and make certain what should be done by the plaintiff in respect to insurance during the period in question. In our opinion, this covenant did not change the rights of the parties, and shift onto the plaintiff the burden of paying for the insurance carried in conducting what is now to be adjusted as having been the defendant's business.

The next objection taken is, first, that the value of the insurance for the period between December 31, 1897, and August 18, 1898, was not proved, and that is all that can be recovered under this count in the declaration; and, second, that, although a case is made out for the recovery of the \$324.81, in the supplemental agreement for the cancellation of the policies on August 18, 1898, that sum cannot be recovered under the pleadings in this action. But the cost of the insurance between December 31, 1897, and August 18, 1898, was proved if it is assumed that the basis on which \$324.81 was computed to be the amount of the return premiums for the period between August 18th and the expiration of the policies was the same as that on which it was testified to in behalf of the plaintiff that \$807.87 was the value of this insurance for the whole period from December 31st until the policies expired. The cost of insurance while the business was carried on for the defendant is the difference between these two sums, namely, \$483.06. Having regard to the uncontradicted testimony of the plaintiff that it is customary to be allowed pro rata value in place of surrender value in case new insurance is taken out through the same agency, we are of opinion that this assumption must be made. It follows that the plaintiff was entitled to recover under this count of the declaration \$483.06, with interest from Jan-

uary 1, 1898, and the exception to the finding in favor of the defendant on this item must be sustained.

This brings us to the question of pleading raised by the defendant. Had the second count on which the plaintiff went to trial (termed in the record "third amended declaration") been the only count in the declaration, this objection would have been well taken. That was a count on the contract contained in the bill of sale by which the business carried on between December 31, 1897, and August 18, 1898, was to be accounted for as the business of the defendant. The plaintiff's claim here is to be paid, \$324.81, because the defendant accepted an assignment of these policies on August 18, 1898—that is, on the expiration of that period—has had them canceled, and collected this sum of money as the value of them. This \$324.81 cannot be recovered under that count. But there was also what is termed in the record the "second amended declaration." That, we assume, was the other count on which the plaintiff went to trial. It is a count on an account annexed, and one of the items in the account annexed is, "Unexpired insurance to credit of Holyoke Envelope Company, January 1, 1898, \$807.87. Interest January 1, 1898, inclusive, to September 23, inclusive, \$35.82"—making \$843.69. The only difficulty in the way of the plaintiff's recovering this claim under this count of the declaration is that the item in the bill of particulars does not accurately describe the transaction. To describe the transaction properly, the item should have been for return premiums received on cancellation of policies of insurance assigned to the defendant on August 18, 1898, with interest from that day. Had it been contended at the trial that the bill of particulars did not properly describe the claim proved, the objection would have had to be sustained. But this item in the bill of particulars in a way includes the insurance in question, although it does not accurately describe the transaction which gave rise to the right to recover this \$324.81 as money had and received to the plaintiff's use. It is apparent that no injury was suffered by the defendant from the inaccuracy of description. The case was held open until it had had an opportunity to investigate the facts, and the result of its investigation was submitted to the court in the supplemental agreement. Under these circumstances we are of opinion that the objection of pleading is not well taken.

2. The other item remains to be disposed of. We are of opinion that this claim of the plaintiff is wholly without merit. The plaintiff's contention here is based on the rule that the vendee must pay interest on the purchase money in cases like *Sanders v. Bryer*, 152 Mass. 141, 25 N. E. 86, 9 L. R. A. 255. That is to say, when specific performance of a contract for the sale of land is decreed,

and by the terms of the contract payment was to be made upon delivery of the deed, the vendee is entitled to the intervening profits between the day when the deed should have been delivered and the day it is delivered, and the vendor is entitled to interest on the purchase money for the same period. This result is reached on the ground that the conveyance ought to have been made at the earlier day, and in equity the rights of the parties will be enforced on that basis, namely, by carrying into effect what would have ensued if that had been done which ought to have been done. That has no application to the case now before us, where the \$723,800 was to be paid on or before September 1, 1898, and was paid on August 18, 1898, and where, by the terms of the contract the thing bought by this payment was not only the real estate and the personal property, but the business since December 31, 1897.

Exception sustained to the findings on item 3 of the bill of particulars annexed to the account annexed, and on item 3 of the bill of particulars annexed to the third amended declaration. Exception to the finding on item 2 of the bill of particulars of both counts overruled.

(186 Mass. 511)

MEEHAN v. HOLYOKE ST. RY. CO.

(Supreme Judicial Court of Massachusetts.
Hampden. Oct. 18, 1904.)

MASTER AND SERVANT—INJURY TO SERVANT—
ELECTRIC LINEMAN—METHOD OF WORK—IN-
STRUCTIONS—ASSUMPTION OF RISK—EXPERT
EVIDENCE.

1. Plaintiff, a lineman in defendant's employ, was injured by being thrown from a pole by the recoil of a cable while lifting it from one insulator pin to another. In order to do the work, plaintiff stood on a tower wagon underneath the arm of the pole on which the cable rested, with one foot on a brace supporting the arm, and the other foot on the rail attached to, but some two feet higher than, the platform of the tower wagon. The cable at that point was being strung on a sharp turn, and there was nothing to prevent plaintiff from releasing his grasp on the cable as it recoiled. Held, that since the danger under such circumstances was open and obvious, defendant was not guilty of negligence in failing to instruct plaintiff with reference thereto.

2. Where a lineman was substantially familiar with the manner in which a cable was being raised and attached to the arms of posts at the time he was injured, and the method then employed to adjust the cable to the pole did not differ from that previously followed, he assumed the risk of injury from the use of such method.

3. Where a lineman was thrown from a pole by the recoil of a cable while he was lifting the same from one insulator pin to another, the process employed, being a matter of common observation and knowledge, was not a proper subject of expert testimony.

Exceptions from Superior Court, Hampden County; Lawton, Judge.

Action by Joseph Meehan against the Holyoke Street Railway Company. A verdict was directed in favor of defendant, and plaintiff brings exceptions. Overruled.

R. P. Stapleton and Wm. H. McClintock, for plaintiff. Brooks & Hamilton, for defendant.

BRALEY, J. The plaintiff rests his right to recover on the ground that the defendant's negligence consisted either from putting him to work in a dangerous place without warning him of the danger to which he was exposed, or in moving the wire by an improper method. We assume, in our decision of the case, there was evidence for the consideration of the jury that Connors was intrusted with and exercised superintendence over the plaintiff at the time of the accident. *Knight v. Overman Wheel Co.*, 174 Mass. 455, 54 N. E. 890. But to find the defendant liable for a failure to give proper instructions the danger must have been such that the plaintiff would be presumed to have been ignorant of it. There were no concealed risks, and whatever danger there was arose from the possibility of falling, while handling the wire, from the place where he was required to work. Neither was he being urged in his work so that it could fairly be claimed that his attention was distracted by such a command, and on which he would have a right to rely as a possible excuse that would relieve him from the imputation of negligence. It appears that when the cable was firmly drawn and ready to be adjusted the order was given to the plaintiff "to help * * * lift the wire over." To do this he knew that it would be necessary for him to stand on the platform of the tower wagon, which was just underneath the arm on which the cable rested, and from this position he then voluntarily placed himself with one foot on the brace which supported the arm on that side of the pole and the other foot on the rail attached to, but two feet higher than, the platform, and while taking hold of the arm with his left hand he grasped the cable with his right hand to help lift it over the inner pin so that it could be set in the groove of the insulator on the outside pin and tied. He also must have known something of its weight and the strain to which it was subjected, for he had helped to place it in position upon the top of the arm; and the fact that at this point of the line, and nearly at a right angle with its former course, there was a sharp turn in the direction in which the cable was to be extended, and which might make it more difficult of attachment to the arm, was a matter of common observation. The physical requirements of his work did not prevent him from releasing his grasp, nor was he required by any order, or from the nature of his employment, to retain it, when by so doing his personal safety might be put in peril. If the cable was sufficiently slackened, it was plainly apparent that its weight would be likely to cause it to fall; and in taking the position assumed by him he could easily have perceived that if, from any cause, the cable was not held securely until fastened to the

pin, it would recoil, and, if he then retained his grasp, he might be thrown to the ground. As all these conditions were open and visible, no instructions at this time would have afforded to him any further information as to the nature of the work, or the way in which it was to be performed, that he did not already possess, and the defendant owed no duty to instruct where instructions were unnecessary. *Downey v. Sawyer*, 157 Mass. 418, 32 N. E. 654; *Stuart v. West End St. Ry. Co.*, 163 Mass. 391, 393, 40 N. E. 180.

Under the second claim of liability the plaintiff argued that he had a right to have this issue submitted to the jury. If some other way than the simple process finally used to place the cable in position would have been better and more safe, yet the plaintiff had been assisting in putting up the cable for more than two weeks before the accident, and during this time about three miles of wire had been strung, and his testimony discloses that he was substantially familiar with the manner in which it was raised and attached to the arms of the poles, and there is nothing to show that the method employed to adjust it to the arm of this pole differed from that previously followed. The acting superintendent was using a method already in use by the defendant, and with which the plaintiff was familiar; and, if he considered the way in which the work was being done unsafe, he was not obliged to continue in its employment as a lineman, but, if he chose to go on, he accepted that way with whatever risk attached to it. *Goodes v. B. & A. R. R. Co.*, 162 Mass. 287, 288, 38 N. E. 500. Although he also testified he was not told and that he did not know it was dangerous to move the cable from one pin to the other, yet under the circumstances he cannot be excused in the exercise of ordinary care from being chargeable with such knowledge, and must be presumed to have realized and appreciated any danger incidental to the process. *Moulton v. Gage*, 138 Mass. 390; *Lothrop v. Fitchburg R. R. Co.*, 150 Mass. 423, 425, 23 N. E. 227; *Goldthwait v. Haverhill & Groveland St. Ry. Co.*, 160 Mass. 554, 556, 36 N. E. 486; *Sullivan v. Simplex Electrical Co.*, 178 Mass. 35, 59 N. E. 645; *Lodi v. Maloney*, 184 Mass. 240, 68 N. E. 229; *Gavin v. Fall River Automatic Tel. Co.*, 185 Mass. 78, 69 N. E. 1055.

The remaining exception relates to the exclusion of the evidence of a witness called by the plaintiff, who, from his large experience in stringing, moving, and repairing similar wire, was asked to give his opinion of what would be the proper way to move the cable, and whether the method adopted was improper. Even if it is conceded that the witness was qualified to give an opinion, this evidence was excluded properly. Where the issue to be tried involves technical or mechanical knowledge not commonly understood, such evidence is admissible to enable a jury to draw correct inferences, and to form

a reliable judgment of the effect of the testimony; but the process of stringing a cable wire on the arms of poles erected for that purpose is so plain and simple that it is well within the scope of common observation and knowledge, and can be intelligently comprehended by a jury without the aid of opinion evidence. *Oliver v. North End St. Ry. Co.*, 170 Mass. 222, 49 N. E. 117; *Flynn v. Boston Electric Light Co.*, 171 Mass. 395, 50 N. E. 937; *Edwards v. Worcester*, 172 Mass. 104, 51 N. E. 447; *Spillane v. Fitchburg*, 177 Mass. 87, 58 N. E. 176, 83 Am. St. Rep. 262.

As the plaintiff has failed to prove any act of negligence on the part of the defendant, his exceptions must be overruled. So ordered.

(186 Mass. 518)

YOUNG v. CITY OF CHICOPEE.

(Supreme Judicial Court of Massachusetts.
Hampden. Oct. 18, 1904.)

CONTRACTS — DESTRUCTION OF SUBJECT-MATTER—REPAIR OF BRIDGE—DESTRUCTION OF MATERIAL BELONGING TO CONTRACTOR.

1. Plaintiff contracted with defendant city to repair a bridge, the contract providing that plaintiff's compensation should be a certain sum per thousand feet for the lumber used, and that no work should be begun until material for at least one-half of the repairs should be upon the job. In compliance with this requirement, plaintiff distributed lumber along the bridge, and had used a part of it in making repairs, when the bridge and all the lumber was destroyed by fire. *Held*, that plaintiff was entitled to recover for the lumber which had been used, but not for that which had not.

Exceptions from Superior Court, Hampden County.

Action by David H. Young against the city of Chicopee. There was verdict for plaintiff, and defendant excepts. Exceptions sustained.

T. D. O'Brien, for plaintiff. Luther White, for defendant.

HAMMOND, J. This is an action to recover for work and materials furnished under a written contract providing for the repair of a wooden bridge forming a part of the highway across the Connecticut river. While the work was in progress the bridge was totally destroyed by fire without the fault of either party, so that the contract could not be performed. The specifications required that the timber and other woodwork of the carriageway, wherever decayed, should be replaced by sound material, securely fastened, so that the way should be in "a complete and substantial condition." As full compensation, both for work and materials, the plaintiff was to receive a certain sum per thousand feet for the lumber used "on measurements made after laying and certified by the engineers"; or, in other words, the amount of the plaintiff's compensation was measured by the number of feet of new material wrought into the bridge. That the public travel might not be inter-

fered with more than was reasonably necessary, the contract provided that no work should be begun until material for at least one-half of the repairs contemplated should be "upon the job." With this condition the plaintiff complied, the lumber, which, at the time of the fire had not been used, being distributed "all along the bridge" and upon the river banks. Some of this lumber was destroyed by the fire. At the trial the defendant did not dispute its liability to pay for the work done upon and materials wrought into the structure at the time of the fire (*Angus v. Scully*, 176 Mass. 357, 57 N. E. 674, 49 L. R. A. 562, 79 Am. St. Rep. 318, and cases there cited), and the only question before us is whether it was liable for the damage to the lumber which was distributed as above stated and had not been used. It is to be noted that there had been no delivery of this lumber to the defendant. It was brought "upon the job," and kept there as the lumber of the plaintiff. The title to it was in him, and not in the defendant. Nor did the defendant have any care or control over it. No part of it belonged to the defendant until wrought into the bridge. The plaintiff could have exchanged it for other lumber. If at any time during the progress of the work before the fire the plaintiff had refused to proceed, the defendant, against his consent, could not lawfully have used it. Indeed, had it not been destroyed, it would have remained the property of the plaintiff after the fire. Nor is the situation changed, so far as respects the question before us, by the fact that the lumber was brought there in compliance with the condition relating to the commencement of the work. This condition manifestly was inserted to insure the rapid progress of the work, and it has no material bearing upon the rights of the parties in relation to the lumber. It is also to be borne in mind in this connection that the compensation for the whole job was to be determined by the amount of lumber wrought into the bridge. The contract was entire. By the destruction of the bridge each party was excused from further performance, and the plaintiff could recover for partial performance. The principle upon which the plaintiff can do this is sometimes said to rest upon the doctrine that there is an implied contract upon the owner of the structure upon which the work is to be done that it shall continue to exist, and therefore, if it is destroyed, even without his fault, still he must be regarded as in default, and so liable to pay for what has been done. *Niblo v. Binsse*, *40 N. Y. 476; *Whelen v. Ansonia Clock Co.*, 97 N. Y. 293. In *Butterfield v. Byron*, 153 Mass. 523, 27 N. E. 669, 12 L. R. A. 571, 25 Am. St. Rep. 654, it was said by Knowlton, J., that there was "an implied assumpsit for what has properly been done by either [of the parties], the law dealing with it as done at the request of the other, and creating a liability to pay for it its

value." In whatever way the principle may be stated, it would seem that the liability of the owner in a case like this should be measured by the amount of the contract work done which at the time of the destruction of the structure had become so far identified with it as that, but for the destruction, it would have inured to him as contemplated by the contract. In the present case the defendant, in accordance with this doctrine, should be held liable for the labor and materials actually wrought into the bridge. To that extent it insured the plaintiff. But it did not insure the plaintiff against the loss of lumber owned by him at the time of the fire, which had not then come into such relations with the bridge as, but for the fire, to inure to the benefit of the defendant, as contemplated by the contract. The cases of *Haynes v. Second Baptist Church*, 88 Mo. 285, 57 Am. Rep. 413, and *Rawson v. Clark*, 70 Ill. 656, cited by the plaintiff, seem to us to be distinguishable from this case.

The exceptions therefore must be sustained, and the verdict set aside. In accordance with the terms of the statement contained in the bill of exceptions, judgment should be entered for the plaintiff in the sum of \$584 damages, and it is so ordered.

(186 Mass. 546)

AMERICAN ELECTRICAL WORKS v. NEW ENGLAND ELECTRIC R. CONST. CO.

(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 18, 1904.)

CONTRACT—CONSTRUCTION—CONTRACT ON TERMS OF ANOTHER CONTRACT—ACTION ON—ABSENCE OF ASSIGNMENT—EVIDENCE—ADMISSIBILITY—TRIAL—MISCONDUCT OF COUNSEL—NEW TRIAL—TRIAL COURT'S DISCRETION.

1. Where plaintiff and defendant made an agreement on the terms of a certain contract between defendant and a third person, in an action on their agreement it was not necessary that plaintiff should show an assignment of the contract with the third person to him.

2. Where in an action for the balance due on a sale of wire it appeared that defendant had exercised the option given him under the contract, and had given his notes to the amount of \$12,000 in part payment and had paid the same, and had paid \$3,000 in cash, a finding that plaintiff had delivered all the wire defendant had called for under the contract was warranted.

3. Plaintiff sued for the price of a quantity of wire delivered to defendant under a written contract on the terms of another contract between defendant and a third person. *Held*, that evidence of statements of a salesman for the third person as to the number of pounds of wire which constituted a mile of that kind of wire which made up most of the wire delivered, in a conversation before the contract was made, was incompetent, immaterial, and properly excluded.

4. The fact that certain interrogatories had not been put in evidence, and no allusion made to them during the trial up to the time when plaintiff's counsel referred in argument to the difficulty of getting answers to such interrogatories propounded to the president of defendant, was no ground for a new trial where the court directed plaintiff's counsel to confine his argument to the evidence, and the request was immediately complied with.

5. Where plaintiff's counsel, in argument to the jury, made improper remarks, but on the direction of the trial judge he discontinued such argument, and defendant did not ask to have the trial ended because of such misconduct, the refusal of a new trial on the ground of such misconduct was within the trial court's discretion.

Exceptions from Superior Court, Worcester County; Chas. A. De Courcy, Judge.

Action by the American Electrical Works against the New England Electric Railroad Construction Company. Judgment for plaintiff, and defendant brings exceptions. Exceptions overruled.

Robert M. Washburn and Grosvenor Calkins, for plaintiff. Wm. C. Mellish, for defendant.

LORING, J. This is an action to recover a balance of purchase money due for wire sold by the pound. The defendant admitted at the trial the receipt of the wire specified in the declaration, and put in evidence a written contract between it and a company called the Bibber-White Company for the delivery of certain wire at its option, the amount to be delivered being stated in miles and feet, and the price to be paid being by the pound. The plaintiff had a verdict, and the case is here on exceptions to a refusal to direct a verdict for the defendant, to the exclusion of evidence, and to a refusal to grant a motion for a new trial.

1. The first ground on which the defendant now contends that the evidence did not warrant a verdict for the plaintiff is that there was no evidence that the Bibber-White Company ever had assigned the written contract to the plaintiff. But this is not necessary. The evidence, and especially the correspondence, warranted a finding that the plaintiff and defendant had entered into an oral agreement on the terms of the written contract between the Bibber-White Company and the defendant, as in *Plunger Elevator Co. v. Day*, 184 Mass. 130, 68 N. E. 16.

2. The next contention made by the defendant in support of this exception is that there was no evidence that the contract so made was fully performed by the plaintiff. It was in evidence that the defendant had exercised the option given it under the contract by delivering its notes to the amount of \$12,000 in part payment for the wire sold, all which notes had been finally paid, and had paid \$3,000 in cash. This evidence warranted a finding that the plaintiff had delivered all the wire the defendant had called for under the contract.

3. The president of the defendant company testified without objection on the part of the plaintiff that before signing the contract with the Bibber-White Company he asked one Smith, who was a salesman for that company, "the price at which Bibber-White Company sold wire. Smith stated

¶ 5. See *New Trial*, vol. 27, Cent. Dig. §§ 44, 62.

that a mile of 500,000 c m wire should weigh so many pounds per thousand feet. Witness had contract drawn up in writing, which was signed by both parties [Exhibit A].” Later on Smith was put on the stand by the defendant, and asked what was said at this interview in relation to the number of pounds of wire which constituted a mile of 500,000 c m wire, which made up most of the wire delivered. The evidence was rightly excluded. The evidence offered was not that a mile of 500,000 c m wire had a trade meaning of a mile in length and approximately 9,800 pounds in weight. What the defendant offered to put in evidence was nothing more than testimony of previous oral statements not made part of the trade agreed on when the bargain was struck and reduced to writing. We do not stop to point out that, even if the action had been between the parties to the contract, it would not have been admissible, because the plaintiff's case here was not that the Bibber-White contract had been assigned to it, but that it had made an oral agreement with the defendant on the terms stated in the written contract between it and the Bibber-White Company, on the principle enforced in *Plunger Elevator Co. v. Day*, 184 Mass. 130, 68 N. E. 18. In such a case the previous oral statements of the salesman of the Bibber-White Company are not only incompetent, but are immaterial.

4. The only ground on which it is now contended that the defendant's motion for a new trial should have been granted as matter of law is the reference made in the closing argument of the plaintiff's counsel to the difficulty of getting answers to its interrogatories to the president of the defendant corporation, and to the unsatisfactory character of the answers finally obtained. The interrogatories had not been put in evidence, and no allusion had been made to them during the trial up to that time. The defendant objected, and the plaintiff's counsel was directed by the presiding judge to confine his argument to the evidence, and that request was immediately complied with. The defendant was not entitled to have the trial ended because of this impropriety on the part of the plaintiff's counsel. Moreover, if he could have asked to have the trial ended because of this, he did not do so, but, on the judge's directing the counsel to confine his argument within proper limits, took his chances of getting a verdict without asking to have instructions given to the jury on the matter. Under these circumstances the general rule that a motion for a new trial rests in the discretion of the judge (as to which see *Fox v. Chelsea*, 171 Mass. 297, 50 N. E. 622) applies here. *O'Connell v. Dow*, 182 Mass. 541, 66 N. E. 788; *Com. v. White*, 148 Mass. 429, 19 N. E. 222.

The other exceptions have not been argued, and we treat them as waived.

Exceptions overruled.

72 N.E.—5

(186 Mass. 472)

CROSSIN v. BEEBE.

(Supreme Judicial Court of Massachusetts.
Berkshire. Oct. 13, 1904.)

APPEAL—EXCEPTIONS—TIME OF ENTERING—NECESSITY OF JUDGMENT—DETERMINATION OF CAUSE.

1. Where, in an action on a note, an instruction in favor of plaintiff was refused, and certain questions of fact were submitted to the jury and answered, but no general verdict in favor of either party was ordered or returned, so that judgment could be entered for either party, exceptions entered in the Supreme Court were premature.

Exceptions from Superior Court, Berkshire County; Edward P. Pierce, Judge.

Action by George Crossin against Charles Beebe. Answers having been made to certain special interrogatories, plaintiff brings exceptions. Dismissed.

P. J. Moore, for plaintiff. Chas. E. Burke and H. C. Joyner, for defendant.

BRALEY, J. This is an action of contract, brought in the district court of Central Berkshire to recover a balance due on a promissory note given by the defendant, and on which several payments had been made. The answer pleaded payment and tender before suit of the amount admitted to be due, followed by payment into court of this sum for the use of the plaintiff. At the trial on appeal in the superior court, the sole issue of fact was whether two of these payments—one of \$50, and one of \$20—had been made. The defendant contended and testified that he had made the first payment by his check to the order of the plaintiff, and delivered to the plaintiff's wife, and the second in money to a son of the plaintiff, who had been sent to demand "money on the note," each of whom as a witness contradicted his evidence. It appeared that the payee's name was indorsed on the back of the check, which was presented to and paid by the bank on which it was drawn, and charged to the defendant's account; and there was evidence that this indorsement was made by one of the plaintiff's sons, though the plaintiff denied that he had received either the check or the money, or that the indorsement was made by his authority. On this state of the evidence the defendant asked for an instruction to the jury that: "If you find that the plaintiff sent his wife to the defendant to collect money on the note, and the defendant gave her his check of fifty dollars as a payment on the note, and she accepted it as such payment, and afterwards failed to deliver the check to the plaintiff, but took it, or caused it to be taken, to the bank, and procured her son to write the plaintiff's name on the back of the check, and either personally or through some other person collected the fifty dollars on the check at the bank, and failed to hand the money over to the plaintiff, then the defendant is entitled to credit on the note

to the amount of the check." This instruction was refused, and the defendant excepted, when, without any objection or exception being taken by either party, and without argument, these questions of fact were submitted by the presiding judge to the jury: "First. Whether or not the check of fifty dollars was given April 22, 1892. I am going to ask you to answer that question 'Yes' or 'No,' bearing in mind that, what may be its worth, the burden is upon the defendant to establish that he gave it to a person who was authorized by the plaintiff, the holder of the note, to receive it on his behalf. Did the wife of the plaintiff go to this defendant, and did this defendant give her a check for fifty dollars? Second. On March 6, 1894, did the defendant give to the son of the plaintiff the sum of twenty dollars?" Both of these questions were answered in the affirmative, but after these special findings had been made no general verdict in favor of either party was ordered or returned, and no further action appears to have been taken. The record of the case thus fails to show that judgment can be entered for either party, or that the defendant is aggrieved by the refusal to give the ruling requested. Until the case is ripe for final judgment, these proceedings therefore must be treated as purely interlocutory; and, as the exceptions are prematurely entered in this court, they must be dismissed. *Safford v. Knight*, 117 Mass. 281, 283; *Platt v. Justices of the Superior Court*, 124 Mass. 353, 355; *Lowd v. Brigham*, 154 Mass. 107, 109, 110, 26 N. E. 1004.

So ordered.

(186 Mass. 567)

FLAHERTY v. BOSTON & M. R. R.

(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 18, 1904.)

CARRIERS OF PASSENGERS—INJURY TO PERSON ASSISTING PASSENGERS—NEGLIGENCE OF EMPLOYÉES—CONTRIBUTORY NEGLIGENCE.

1. The failure of the employés in charge of a train to assist children to board it at a station, necessitating their mother to assist them, if negligence was too remote to be the cause of the mother's injury, sustained while afterwards attempting to alight from the train while in motion.

2. A person boarding a train to assist passengers to enter it is not entitled to the protection accorded a passenger, and if his attempt to leave the train while in motion contributed to his injury there can be no recovery.

3. A mother boarded a train at a station to assist her children to take the train. She gave no notice to any employé in charge that she did not intend to become a passenger. Before she left the interior of the car the usual preparation for starting had been made, and when she came to the door of the car its platform gates were closed, and a brakeman beckoned her to the next platform, and said, as he helped her down the steps, "It is all right, not going very fast; be careful." Held, that the circumstances which made it negligent on the part of the brakeman to act as he did were obvious,

making it contributory negligence on her part to attempt to leave the train, precluding a recovery for injuries sustained.

Exceptions from Superior Court, Worcester County; Daniel W. Bond, Judge.

Action by Katherine A. Flaherty against the Boston & Maine Railroad. There was a verdict for defendant, and plaintiff brings exceptions. Exceptions overruled.

C. E. Tupper, for plaintiff. Chas. M. Thayer and Alex. H. Bullock, for defendant.

BARKER, J. While a train was stopped at a station the plaintiff entered a car. She had no ticket and did not intend to ride, but to help her two children, who took the train as passengers, and to place in the car a bag which was to go with the children. She was the last person other than the trainmen to get upon the train, and she gave no notice to any one that she did not intend to become a passenger. Before she left the interior of the car the usual preparations for starting the train had been made, if it was not then in motion: When she came out of the door of the car its platform gates had been closed, and she found, directly opposite her and with his hand on the gate, a brakeman, to whom she said, "I want to get off the train." By a gesture he invited her to the next platform, took hold of her elbow, and assisted her down the step, saying, "It is all right, not going very fast; be careful." As she stepped off the car, which was moving slowly, she fell and was hurt. The suit is to recover compensation for her injury. A verdict was ordered for the defendant, and the case is here upon her exception to that order.

Upon her own testimony she had done nothing up to the time when she appeared to the brakeman and told him that she wished to get off which could indicate to the trainmen that she intended to get off at that station. She contends that some servant of the defendant should have helped her in placing the children and the bag in the car. But she made no request for such aid, and the failure to render it, if a fault of the stationmen or the trainmen, was too remote to be in any sense the cause of her injury. We find no evidence of negligence in the starting of the train when it was set in motion, nor is it contended that there was any jolt or jerk. It is settled by *Lucas v. New Bedford & Taunton R. R. Co.*, 6 Gray, 64, 68 Am. Dec. 406, that she was not entitled to the rights of a passenger, or to any extraordinary care on the part of the defendant, and that if her attempt to leave the train while it was in motion was the cause of or contributed in any degree to the accident she cannot recover. But she contends that the action of the brakeman in beckoning her to the next platform, and in saying, as he helped her down the steps, "It is all right, not going very fast; be careful," was negligence on the part of the defendant. If it could be so found, the circumstances which made it negligence were obvious, and

¶ 1. See *Carriers*, vol. 9, Cent. Dig. §§ 1111, 1112, 1242.

made it contributory negligence on her part to attempt to leave the train while it was in motion. *Lucas v. New Bedford & Taunton R. R. Co.*, ubi supra. Her relation to the defendant not being that of a passenger, she having made no request to have the train stopped, not having been ejected from it or injured until she stepped from it of her own choice, she cannot recover, even if the brakeman was negligent. There was no evidence which would justify a finding either that she acted under any misapprehension or compulsion, or that she was in a condition in which her conduct was not to be judged by the ordinary standard of care.

Exceptions overruled.

(186 Mass. 484)

WILLISTON SEMINARY v. EASTHAMPTON SPINNING CO.

(Supreme Judicial Court of Massachusetts. Hampshire. Oct. 18, 1904.)

CREDITORS' SUIT—RECEIVERS—DISTRIBUTION—REMEDIES OF CREDITORS INTER SE—INTERVENTION—DEMURRER—APPEAL.

1. Where the parties and the trial judge treated a demurrer as filed to a petition as amended, and not merely as a demurrer to the original petition, it would be so considered on appeal, though the record did not show any order disposing of the amendment.

2. Where a receiver of a corporation was appointed in a creditors' suit, a petition of intervention was not maintainable therein, prior to the entry of a decree of distribution, either against the receiver or the corporation, by one creditor for the purpose of subjecting the claim of another against the corporation, or any dividend that might be paid thereon, to an individual indebtedness existing between such creditors.

Report from Superior Court, Hampshire County; Lemuel Le B. Holmes, Judge.

Bill by the Williston Seminary against the Easthampton Spinning Company for the appointment of a receiver. An order was entered overruling a demurrer filed by George H. Seeley, a creditor of the defendant, to an intervening petition on behalf of plaintiff, and the case was reported to the Supreme Judicial Court. Demurrer sustained; petition dismissed.

M. F. Dickinson and Walter Bates Farr, for the Williston Seminary. John W. Mason, Louis H. Warner, and Walter L. Stevens, for respondent George H. Seeley.

BRALEY, J. The plaintiff, claiming to be a simple contract creditor of the defendant, on December 16, 1898, brought in the superior court this bill in equity, which, after alleging that the defendant was possessed of certain machinery in its factory, and of personal property "consisting of office furniture and stock, raw, wrought, and in process of manufacture, located in said mills," included the further allegations that "said property has long been disused by the defendant, and lies idle at the place aforesaid, and is rapidly

deteriorating in value." "And the defendant gives no adequate care and attention to the property aforesaid, but has neglected and abandoned the same." "Suit has been brought against said corporation, * * * and said personal estate has been attached in said suits, and the defendant pays no attention thereto, and the same will soon mature in a preference on a lapse of four months, whereby said attaching creditors will secure a great and inequitable advantage, and other creditors will be greatly damaged." And asked for the appointment of a receiver that these assets might be converted into money, and applied in payment of the plaintiff's debt. The usual preliminary proceedings were taken, and a temporary receiver appointed, whose appointment was subsequently made permanent. He took possession of the personal property of the defendant, which, by his report, appears to have been converted into money, and forms a fund from which a dividend can be paid. Other creditors, upon notice, appeared, and made proof of debts, and among them came George H. Seeley, who presented a claim for a large amount, but as the receiver was of opinion that some of the items contained in the proof of debt were not correct, he did not approve it, and so reported to the court, with a further statement that it had been assigned June 1, 1900. Before this report was presented, on April 30, 1900, the plaintiff filed an intervening petition, alleging that it was a creditor of Seeley, and, setting forth the debt, averred that he was not a resident or citizen of this Commonwealth, or amenable to legal process, and except his claim against the defendant he had no property that could be reached by attachment or otherwise, and praying that any dividend that ultimately might be payable to him should be applied in satisfaction of the debt he owed the petitioner. To this petition he entered a general appearance by counsel, and filed an answer denying any indebtedness, or that a case had been stated which entitled it to equitable relief. November 7, 1900, on application of the receiver, a special master was appointed, under a decree, afterwards enlarged, that required him to pass upon disputed claims of creditors and "upon matters relating to the equitable trustee process," which must be construed to mean the issue raised by the intervening petition. Several hearings took place before him, but no report has been filed. While the case, as thus made up, was pending under the reference, the petitioner asked leave to amend its petition by adding a new paragraph restating the account, and increasing the amount alleged to be due. To the petition as thus amended Seeley demurred, assigning nine causes of demurrer why the petition could not be maintained, and, the demurrer having been overruled, the case was reported to this court under Rev. Laws, c. 159, § 27.

It is the petitioner's contention that the original bill is to be treated as a "creditors'

bill, as long known in chancery, seeking to have the property of the defendant corporation taken into the possession of the court, which shall adjudicate upon the rights and priority of the various creditors, and make a fair and equitable distribution of the assets among such creditors. * * * The relief sought is of such a nature that it must be regarded as a bill by one creditor in behalf of all the creditors to subject the property of the defendant to the claims of all the creditors, these claims to be equitably determined by the court of equity." But this important question has not been argued and we express no opinion upon it, as it is not open on the report. The intervening petition, however, is a separate and distinct suit from the original bill, though filed in the same cause, and, while it need not be as formal as a bill of complaint, it should set forth all the material facts on which the petitioner relies, and affirmatively show that the court has jurisdiction of the parties and the subject-matter; and, as the demurrer admits all its substantial allegations, they must be taken as true, and the question to be determined is whether a case is stated which entitles the petitioner to the relief asked.

We find an embarrassment in dealing with the demurrer because the amendment is only a further specification of the debt for the purpose of properly establishing it before the master, and as its allowance rested solely in the discretion of the court, no jurisdictional question was involved. Neither does it appear that any order was made disposing of the amendment, and on the technical record alone the original petition stands unaffected by it. But as the parties and the justice who made the report evidently considered that the demurrer was to the petition as amended, we adopt this course in our disposition of the case presented and argued. If the petition can be maintained, it must be treated as in the nature of an equitable trustee process, for the receiver, before the decree of distribution had been entered, could not be charged as trustee in an action at law against a creditor of the company, nor could the company be held, as its property by a decree of the court was in the possession of the receiver. *Columbian Book Co. v. De Golyer*, 115 Mass. 67; *Phoenix Ins. Co. v. Abbott*, 127 Mass. 558. See Pub. St. 1882, c. 183, § 24. While the dividend which may be ultimately declared and paid on the claim of Seeley is not in his possession or control, and he is entitled in common with other creditors to an accounting from the receiver, yet there is a clear distinction between a case where the property sought to be reached and applied is held by those who are under some contractual obligation to account for it to the debtor and that where the possession and control is that of a tribunal established by law to convert it into money for the purpose of distribution among the creditors of the original debtor. In the performance of this function

neither the court nor its representative, the receiver, is charged primarily with any duty to ascertain whether the petitioner is a creditor of any person who is entitled to share in such distribution, and to make payment to it, in whole or in part, of any dividend coming to its debtor. *Com. v. Hide & Leather Ins. Co.*, 119 Mass. 155; *Tuck v. Manning*, 150 Mass. 211, 22 N. E. 1001, 5 L. R. A. 686. It has been said that, if a creditor has made an assignment of his interest in any dividend which may be coming to him, or liens have been created upon his interest in the fund held by the court, those who succeed to his rights are generally allowed to appear as claimants, and establish their claim to his share of the fund. *Tuck v. Manning*, ubi supra. But with this exception creditors of a creditor as such have no corresponding right, and are not permitted to intervene. The principal object of a receivership as a remedial agency when used by our courts in bills in equity by judgment creditors and bills brought under Rev. Laws, c. 159, § 3, cl. 7, 8, is to afford prompt and efficient relief; and this might in many instances be seriously impaired, if not destroyed, if the privilege of intervening was held to include a class of creditors to whom the petitioner belongs. If this privilege is extended to them, it would delay the determination of causes, and lead to unnecessary and prolonged litigation and increased expense in the winding up of estates which are being marshaled, and cause delay to those entitled to a speedy and final settlement of the accounts of receivers, and payment to them of their share of the estate of the debtor. As the petitioner shows no claim to the fund which he seeks to reach except the bare fact that the proving creditor is its debtor, the demurrer must be sustained, and the petition dismissed.

Decree accordingly.

(186 Mass. 529)

FARNES v. NEW YORK CENT. & H. R. R. CO.

(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 18, 1904.)

MASTER AND SERVANT—INJURIES TO SERVANT—RAILROADS—BRAKEMAN—DEFECTIVE CROSSING GATES—NEGLIGENCE—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

1. Since a railway brakeman assumes all the ordinary risks of the business, the railway company owes him no duty with reference to structures erected for a proper purpose at a reasonable distance from the track, except to see that they do not expose him to unnecessary danger by being left in an unsafe or improper condition.

2. Crossing gates erected by the side of a railway track had become out of repair, so that the ends of the two gates were not opposite in the same line when lowered. Plaintiff, a brakeman, while running by the side of an engine in the evening in the line of his duty, passed by the side of one of the gates and collided with the end of the other, which projected into his line of travel, and was injured. *Held*, that

plaintiff did not assume the risk of such injury as a matter of law.

3. Where a brakeman was injured in the evening by running into a crossing gate which was out of repair and projected into his line of travel as he was running along the side of an engine in the line of his duty, he was not guilty of contributory negligence as a matter of law.

Report from Superior Court, Worcester County; Francis A. Gaskill, Judge.

Action by Cornelius E. Fearn against the New York Central & Hudson River Railroad Company. A verdict was rendered in favor of plaintiff, and the case reported to the Supreme Judicial Court. Judgment on verdict.

Alfred S. Hayes and Wm. S. Bangs, for plaintiff. Ralph A. Stewart, for defendant.

KNOWLTON, C. J. The plaintiff, when he entered the service of the defendant as a brakeman, impliedly assumed all the ordinary risks of the business, which included the risk of injury from permanent structures erected for proper purposes at reasonable distances from the tracks, whether then in existence or erected afterwards. In reference to the existence of such structures, his employer owed him no duty other than to see that they did not expose him to unnecessary danger by reason of their being left in an unsafe or improper condition. If the gates had been properly constructed and in good repair, their existence near the track, at the distance shown by the testimony, would have been no evidence of negligence on the part of the defendant. *Thain v. Old Colony R. R. Co.*, 161 Mass. 353, 37 N. E. 309. But they were improperly constructed, or out of repair, so that the ends of the two gates erected upon opposite sides of the street were not opposite to each other in the same line, as they should have been, when they were lowered, but one turned to one side and the other to the other, so as to leave an opening between them through which a man could pass. The plaintiff, while running by the side of the engine in the evening to get a car ready for coupling, passed along by the side of one of the gates and collided with the end of the other, which projected out into his line of travel, and he was thereby thrown under the engine and injured.

There was evidence that this was an improper and defective condition of the gates, and that repairs had been made previously in an attempt to improve them. The plaintiff's implied contract, when he entered the defendant's service, did not cover the risk from this defective condition of the gates, if it then existed; for the condition was not so open and obvious that a brakeman, on entering the service, would be supposed to know of it, or to discover it if he undertook to ascertain the conditions under which he was to work. The evidence tends to show that it was an unusual and unexpected condition, which it was the duty of the defendant to improve. In this particular the case is not like *Lovejoy v. Boston & Lowell R. R. Co.*,

125 Mass. 79, 28 Am. Rep. 206; *Thain v. Old Colony R. R. Co.*, 161 Mass. 353, 37 N. E. 309; *Bell v. N. Y., N. H. & H. R. Co.*, 168 Mass. 443, 47 N. E. 118; and *Ryan v. New York, New Haven & Hartford R. R. Co.*, 169 Mass. 267, 47 N. E. 877. We are therefore of opinion that there was evidence of negligence on the part of the defendant, and that it could not be ruled as a matter of law that the plaintiff assumed the risk of the gates as they were at the time of the accident.

We are also of opinion that the question whether the plaintiff was in the exercise of due care was properly left to the jury. He was in the performance of his duty, and if the end of the gate which obstructed him had been in a line with the opposite gate, he would not have been hurt. So far as appears, he did not know that the end of this gate projected out from the line of the other into the line of travel. *Thyng v. Fitchburg R. R. Co.*, 156 Mass. 13, 30 N. E. 169, 32 Am. St. Rep. 425; *Garant v. Cashman*, 183 Mass. 13, 66 N. E. 599.

Judgment on the verdict.

(186 Mass. 569)

SHEA v. McCAULIFF.

(Supreme Judicial Court of Massachusetts. Worcester. Oct. 18, 1904.)

LANDLORD AND TENANT—LEASES—RESERVATION OF RENT—INDEMNITY BOND—BREACH.

1. Where, pending a lease of certain quarry property, the lessors executed a lease to plaintiff for the property covered by the existing lease and certain other property, which lease declared that it was subject to the prior lease, and that all rents received on account of such prior lease should be credited as part payment under the terms of the lease in question, the lessors thereby reserved the right to collect rents payable under the first lease, and were entitled to enforce the liability of the original lessee to pay rent to them.

2. After the dissolution of a firm, which was the lessee of certain premises, defendant succeeded to the firm's rights under the lease, and plaintiff, who had been a member of the firm, having leased the same property from the original lessor, subject to defendant's lease, under an agreement, reserving to the lessors the rent under the first lease, collected rent from defendant on bills presented in plaintiff's name, and after defendant surrendered the property in violation of the original lease no demand was made on him for the rent, except by plaintiff, and, on being refused, plaintiff paid to the lessors the rent accruing under the original lease. *Held* that, since plaintiff in collecting rent from defendant merely acted as agent of the lessors, and in paying the rent after defendant's default was discharging a debt of the old firm, the payment of such rent was within the condition of defendant's bond to indemnify plaintiff against any liabilities of such firm.

Report from Superior Court, Worcester County; Jabez Fox, Judge.

Action by Jeremiah Shea against Francis A. McCauliff. On report from superior court. Judgment for plaintiff.

The action was brought on a bond given by defendant to the plaintiff, by which defendant agreed to indemnify and save plain-

tiff harmless from any liabilities of the firm of F. A. McCauliff & Co., the amount claimed being \$653.48 for rent, reserved under lease from Dorothy S. Bailey and others to F. A. McCauliff & Co. from October 1, 1900, to January 1, 1902, with interest. Prior to July 12, 1897, plaintiff, Shea, and defendant, McCauliff, were copartners in the business of quarrying granite under the name of McCauliff & Co., and on that day plaintiff sold his interests in the firm to McCauliff, and took from him the bond sued on. At that time the firm held a lease from Bailey and others of the quarry property, providing for payments of \$500 a year, which lease expired by its terms January 1, 1902. McCauliff continued in possession of the premises, paying rent to the lessors, until April 1, 1899. On March 1, 1899, the lessors named in the McCauliff lease and Shea made another lease covering the same and other premises to plaintiff for a term of seven years, which lease contained a provision that the premises were subject to the prior lease expiring January 1, 1902, and that all rents received on account of said lease should be credited as part payment under the terms of the lease in question. McCauliff continued to occupy the quarry until October 1, 1900, and after the execution of the new lease to Shea paid to Shea the rent reserved under the first lease, the bills being presented in Shea's name. In July, 1900, McCauliff gave Shea notice that he would vacate the premises October 1st following, which he did. No demand on McCauliff was made for rent after October 1st, except by Shea, and after the execution of the lease to Shea he paid to Bailey the rentals called for by that lease to January 1, 1900, making no payments distinctively on account of the old lease.

Chas. A. Babbitt, for plaintiff. Jas. H. McMahon, for defendant.

HAMMOND, J. The lease to the plaintiff recites that it is subject to the prior lease to McCauliff and Shea, and provides that "all rents received on account of said lease are to be credited as part payment under the terms of this lease" (the lease to the plaintiff). It is plain that the word "received" means received by the lessors, and the language fairly implies that the rent to accrue under the prior lease was to remain payable to them notwithstanding the second lease. A lessor may assign the rent to become due upon a lease without granting the reversion, or he may grant the reversion and reserve the rent. *Hunt v. Thompson*, 2 Allen, 341; *Leonard v. Burgess*, 16 Wis. 41; *Taylor's Landlord & Tenant*, § 426, and cases cited. Even if this second lease is to be taken as a grant of the reversion, the lessors still reserved the right to the rent payable under the first lease, or, in other words, they reserved the rent; and hence the obligation

of F. A. McCauliff & Co. to pay to them the rent remained intact. In this respect this case differs materially from *Harmon v. Flanagan*, 123 Mass. 288, in which the rent was assigned with the reversion. While, after the execution of the second lease, McCauliff paid no rent to his lessors, but paid only to the plaintiff upon bills presented in the plaintiff's name, and while no demand was made upon McCauliff, except by the plaintiff, for the rent after October 1, 1900, yet, notwithstanding all this, the judge, in view of the fact of the reservation of the rent, may have found that in collecting the rent from McCauliff the plaintiff was in reality acting as the agent of the lessors, and also that in paying to the lessors the sums which were payable under the first lease after the default of McCauliff he was paying a debt of the late firm of F. A. McCauliff & Co., and to that extent discharging its obligations to the lessors under the first lease. Such a finding brings the case within the condition of the bond.

Judgment on the finding.

(186 Mass. 454)

GIBSON v. INTERNATIONAL TRUST CO.

(Supreme Judicial Court of Massachusetts.
Suffolk. Oct. 18, 1904.)

ELEVATORS—INJURY TO PASSENGERS—NEGLIGENCE—PROXIMATE CAUSE—APPEAL—FORMER DECISION—LAW OF THE CASE.

1. A decision on a former appeal, in an action for injuries by the alleged negligence of defendant's superintendent, that his negligent act was not within the scope of his employment as superintendent, was conclusive on a subsequent appeal, the evidence as to his duties on the second trial being substantially the same as that on the first trial.

2. The owner of a passenger elevator in a building was not guilty of negligence, justifying a recovery for injuries to a passenger, in permitting a movable stool to remain in the elevator for the convenience of the operator.

3. Defendant's building superintendent, while riding in a passenger elevator, moved the elevator boy's stool without the latter's knowledge, and he, on losing his balance while attempting to sit down, clutched involuntarily at the elevator lever, which started the elevator and caused injury to plaintiff, a passenger therein. *Held*, that the proximate cause of the injury was the elevator boy's act in clutching the lever, which was a mere accident, and not the act of the superintendent in moving the stool.

Exceptions from Superior Court, Suffolk County; Fessenden, Judge.

Action by one Gibson against the International Trust Company. A verdict was rendered in favor of defendant, and plaintiff brings exceptions. Exceptions overruled.

Whipple, Sears & Ogden, for plaintiff. Robert M. Morse and John Lowell, for defendant.

HAMMOND, J. When this case was first before us, Lathrop, J., speaking for the court, used the following language: "We are of

opinion * * * that the jury should have been instructed, as requested, that there was no evidence that Bagley was at the time of the accident employed in the operation of the elevator. The evidence was that he was the janitor of the building; that he had gone to the eighth floor for some tools, and was returning as a passenger on the elevator when the accident happened. Bagley, in moving the stool, did not act as the servant or agent of the defendant, and the defendant is not liable for his act in moving the stool, if it were negligent in him to move it. There is nothing in the evidence to show that he was exercising any control over the running of the elevator, or that he was at the time of the accident doing anything more than riding as a passenger. The moving of the stool cannot be considered as an act within the scope of his employment at that time." 177 Mass. 102, 58 N. E. 278, 52 L. R. A. 928. Upon this point the evidence at the second trial differs from that at the former trial only in showing in greater detail the duties of Bagley. In substance, however, it is the same, and, so far as respects the contention of the plaintiff that Bagley's act in moving the stool (if, indeed, he moved it at all) was an act done within the scope of his employment as a superintendent, the prior decision must be regarded as conclusive against the plaintiff.

At this second trial the plaintiff contended that he was entitled to go to the jury on the ground that there was negligence in permitting the movable stool to remain in the elevator, and he cites the testimony of Kilgore, who said that, as the result of an extended experience in the charge of passenger elevators, he did not believe such a stool was "a safe article to put into a passenger elevator." It is a matter of common knowledge, however, that passenger elevators are often furnished with such stools, and we do not think that whether they may safely be there is a matter for expert testimony. As well might it be said that a cushion upon a seat in a car is dangerous because it might slip and let a passenger down. But even if it be otherwise, there is no such connection between the presence of the stool and this accident as to make the question material. The direct and proximate cause of the accident was the starting of the elevator, caused by Hersey's act in clutching the lever to save himself from falling. The accident might not have happened if the stool had not been moved, but the direct and proximate cause of it was not the moving of the stool, but Hersey's act, and this was a mere mischance, for which neither Hersey nor any one else was at fault. Neither Bagley nor any one else could have anticipated such a result. We think that the case shows a pure accident which could not have been anticipated or foreseen. In the opinion of a majority of the court the entry must be:

Exceptions overruled.

(186 Mass. 531)

WORCESTER CITY MISSIONARY SOC. v. MEMORIAL CHURCH et al.

(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 18, 1904.)

WILLS—CHARITABLE TRUSTS—CONSTRUCTION—
CONTROL OF PROPERTY—EXPENDITURE OF IN-
COME—PARTIES—OBJECTIONS—INSTRUCTIONS
—DECREE.

1. A will devised certain real estate in trust to a religious society for the erection of a chapel, and provided that the society should "suffer and permit" the same "to be under the care, custody, and management" of the deacons of the society as designated. A subsequent clause bequeathed a legacy for the support of an industrial school, "to be held and managed by the same persons as are to hold and manage the trusts in respect to the chapel," and a third clause bequeathed a legacy to defray the expenses of maintaining a minister and public worship, and, if necessary, to be applied toward rebuilding the house if destroyed. *Held*, that the deacons of the society were entitled to control the disposition and management of the property so devised and bequeathed, independent of the society holding the title.

2. Where testator bequeathed a legacy in trust for the construction of a chapel, and provided that, if it became necessary to loan the fund, or a part thereof, on real estate, the real estate should be appraised by three disinterested judges, of which value not more than one-half should consist of buildings thereon, etc., such direction was valid and binding on the trustees.

3. Testator bequeathed \$20,000 in trust for the construction of a chapel, and provided that the income should be collected semiannually, and applied to defray the expenses of maintaining a minister and public worship, and, if necessary, to apply the principal toward rebuilding the house of worship, if destroyed. *Held*, that the net income should be expended from year to year towards the defraying of expenses of maintaining a minister and public worship, notwithstanding an anticipated loss of principal.

4. Where a will created a trust for the people of a certain city, and devised the property to a church and an industrial school to be maintained in connection therewith, a decree construing the will, finding that the trusts were established for the benefit of the church and school instead of for the benefit of the people of the city, as shown by the will, was not erroneous, the church and school being public charitable institutions, which were to act as agencies in dispensing the charity.

5. An objection to parties should be raised as a part of the procedure in the case, and is not a proper subject for instructions.

6. A statement in the preliminary part of a decree that all proper parties have been joined, though unnecessary, was not so irregular as to call for a change in the decree.

Appeal from Supreme Judicial Court, Worcester County; John W. Hammond, Judge.

Petition by the Worcester City Missionary Society, as trustee under the will of Ichabod Washburn, deceased, against Memorial Church and others, for the construction of a will. From a decree in favor of petitioner, defendants appeal to the Supreme Judicial Court, where the case was reserved for consideration of a full bench. *Affirmed*.

That part of testator's will creating the trusts referred to in the opinion is as follows:

"Whereas I have long felt that it was desirable to devise some means by which a

pretty numerous class of persons in the City of Worcester who are now living without the benefits of moral and religious instruction and restraint which grows out of an habitual attendance upon the ministrations of the gospel, should be supplied with opportunities and inducements to enjoy the same.

"And whereas it has seemed to me that the readiest way of accomplishing this purpose would be to open for the use of all who may be disposed to avail themselves of the same, a suitable and respectable place of worship wherein upon the Lord's Day and at suitable times on week days religious services may be held and conducted by some learned, pious and devoted Christian Minister, who, in addition to preaching and conducting public worship shall devote himself by visits and personal influence to persuading inducing such as may be unaccustomed to attend worship or who neglect the Sabbath or from any cause are destitute of the healthful restraints and moral influence of religious instructions, to attend upon the services in such place of worship.

"And whereas I have caused such a house to be erected in which the Rev. Henry T. Cheever is now officiating as City Missionary, I have a strong hope of aid hereafter to carry out the design I had in causing said house to be erected.

"Now in order to give constancy and effect to a plan for accomplishing the purposes and views above named, I give and devise unto the Union Society, a Parish or religious society in Worcester (of which I am now a member) that real estate situate in Worcester at the intersection of Bridge with Summer Street, containing fifty-five hundred square feet of land, viz.: fifty-five feet in front upon Summer Street, and one hundred feet on Bridge Street with the building erected thereon, with all the privileges and appertinences thereto belonging, to have and hold the same to the said Parish or religious society, their successors and assigns forever. In trust, nevertheless, and to and for the purposes and trusts hereinafter declared and no other.

"And in order the more clearly to indicate the character and objects of these trusts, I wish to premise that the plan I have proposed to carry out is this:

"First. To have a suitable and respectable place of public worship with convenient accommodation for Bible and Sunday School classes, and one or more tenements for the accommodation of the Minister and Sexton.

"The Minister to be employed to preach in said house or to be let at a reasonable rent towards keeping the premises insured and in repair and supporting the Minister aforesaid.

"Second. To have a Minister whose religious views shall substantially harmonize with what are denominated to be Evangelical in their character who shall be endowed

with respectable powers of intellect and be as faithful, pious and devoted labourer in the work of teach and preaching the word of God.

"Third. It is my wish and intention by this bequest to form an important auxiliary in the missionary enterprise of preaching and ministering to the destitute in the city, and to those who do not feel sufficient interest in sacred things to attend upon the preaching of other ministers.

"The Trusts, therefore, upon which said estate is to be held by said devisees and trustees are as follows:

"In the first place, That they shall suffer and permit said estate and every part thereof to be under the care and custody and management of two of the deacons of the Union Church as shall be designated by said church, and two deacons of the Mission Chapel Church recently organized, and their respective successors for the time being or of a major part of them, and shall allow said four deacons to obtain insurance upon said buildings in the name of said trustees and the said deacons, and to cause the same to be kept constantly insured to a reasonable amount, and in case of loss or damage by fire shall allow said deacons to recover said insurance money, and to apply the same according to their best discretion in repairing or rebuilding said building, as the case may be, in the name of said trustees, but without charge to them and permit said deacons from such insurance or other monies forever to keep and maintain upon said premises a house of public worship and tenements connected therewith as large and convenient as the same now standing thereon are.

"In the next place, That said trustees shall forever suffer and permit that portion of said premises designed for the purposes of public worship to be occupied at all reasonable and proper times for public worship under the charge and ministration of a Minister of the Gospel who has been regularly ordained or set apart according to the usages of the denomination of Christians with which he may be connected and whose religious sentiments and opinions shall substantially conform to those now generally known and understood as Evangelical.

"And further that said trustees shall suffer and permit the parts of said building designed for the use and accommodation of the sabbath and Bible classes to be occupied for that purpose at all suitable times under the direction of such minister and deacons or a major part of them.

"And suffer and permit the house to be occupied free from rent or charge by any decent and orderly person who may resort thither for the purpose of attending worship at all times under such reasonable regulations as may be adopted by said deacons and said minister or a major part of them for preserving order and propriety of deportment in said house.

"And suffer and permit the minister selected as aforesaid to occupy and improve so much of the tenement in said building designed for the use of the families as in the judgment of the deacons shall be reasonably sufficient for his convenience so long as he shall be employed by them as such minister and upon such terms as they shall judge expedient having proper reference to the use of such tenement as a means of support and encouragement of such minister.

"And shall permit said deacons in the name of said trustees to let such other portions of the said estate as they may judge best upon reasonable rents and collect and apply the same in keeping the premises in repair in paying the contingent expenses in conducting and managing the same and in causing the same to be insured and appropriate and apply the surplus if any towards the support of the minister.

"And further shall suffer and permit said deacons in the name of said trustees to commence and carry on to final judgment all necessary and proper suits or actions at law or in equity to enable them to manage and control said estate as hereinbefore expressed, to collect the rents thereof or remove the tenants thereof when the same shall be necessary and generally to do whatever acts or things may be necessary or proper to effect and carry out the true interest and meaning of the trusts aforesaid and accomplish the same.

"And whenever the said deacons or a major part of them shall shall with the approbation of the Mission Chapel Church judge it expedient to terminate the engagement of any minister who may have been employed to officiate in said house of public worship it shall be competent for them so to do and they may thereupon proceed to select another in his stead in in manner aforesaid and if approved as aforesaid to employ him accordingly.

"And I further give bequeath and devise unto said trustees the sum A twenty thousand dollars to be by said trustees invested in the bonds or securities of the United States or of the Commonwealth or of towns within the Commonwealth if such bonds or securities can be obtained for investment, otherwise upon personal notes or bonds secured by a first mortgage of real estate or full and ample value not exceeding one half of its appraised value to render the loan thereon safe and undoubted in no case is any part of the money to be so loaned on personal notes or bonds if the first named class of securities can be obtained. The fund on no condition to be reduced below the amount devised.

"In the event of the necessity of loaning a part or the whole of said fund on real estate, the appraisal of the same shall be made by three disinterested and competent judges of such estate of which value not more than one half shall consist of build-

ings thereon, the interest thereon and income thereof, shall be semi-annually collected and applied by said trustee towards defraying the expenses of maintain a minister and public worship as hereinabove expressed or if it shall become necessary may apply the principal toward rebuilding said house if destroyed, nor are said trustees to be held reponsible for the loss of any part of said principle or interest provided the same shall be invested and applied by said trustees, nor are they to be subjected to any charge or cost on account of the same nor on account of any suit or action which may be necessary to bring to collect or recover said fund or the interest thereof.

"It is my further direction and devise that there should be kept and maintained in connection with the Mission Chapel aforesaid an Industrial School for children of poor parents in the City of Worcester who in the judgment of said trustees may be fit objects to share in the benefits thereof, said school to be taught on some day or days in the week and devoted to instruction in knitting, sewing making garments and such other domestic arts as in the judgment of those in charge of the school can be usefully and properly taught in such a school as well as to the inculcation of moral duties, the cultivation of good manners and the social intellectual and moral elevation of its pupils.

"And to enable said trustees to provide a portion of the means for carrying on said school and furnishing if need be to deserving destitute children who may regularly attend said school some parts of their necessary clothing.

"I direct that the sum of five thousand dollars in addition to what I have above given for the purpose of said Chapel be paid to be held and managed by the same persons, as are to hold and manage the trusts in respect to said chapel.

"All my legacies hereinbefore given and declared except my wife, The Mission Chapel Fund, and the provision for the Industrial School, as also the Free Institute of Industrial Science, are to be paid in five equal annual payments after my decease but without interest in any case.

"And if from any cause it shall happen that my estate shall be insufficient to pay all of the foregoing legacies in full, I direct that no abatement be made in those to my wife the Mission Chapel Fund, the legacy for the Home for aged females, The Bangor Theo. Seminary, the provision for the Industrial School and the legacy for the Free Institute of Industrial Science, but the amount shall be abated from the other legacies pro rata.

"The rest residue and remainder of my estate of every description of which I may die seized and possessed, I give, devise and bequeath to the Charitable Institutions and objects hereinbefore named, to wit:

"To the Children's Friend Society of Wor-

cester, the Board of Commissioners for Foreign Missions, the American Bible Society, the American Tract Society, the American Missionary Association, the American Seamen's Friend Society, the Home for Aged Females and the Mission Chapel Fund, to be divided in proportion to the several legacies hereinbefore named, and to be applied to the Charitable uses and purposes for which they are organized.

"3rd Codicil:—

"In the belief that the interest of the church and congregation who worship in the Mission Chapel will be advanced by having an inducement to contribute a part of the expenses incident to its support I revoke so much of my said will as appropriates a part of the residue of my estate, as therein expressed, to the benefit of said Chapel."

The fifth and sixth instructions stated in the decree and referred to in the opinion are as follows: "(5) The net income of the fund of \$20,000 should be expended from year to year 'toward defraying the expenses of maintaining a minister and public worship,' even if the trustees reasonably anticipated loss to the principal on account of a mortgage loan, the exact value of which can not now be determined. (6) The trustees are not to allow the fund to be reduced below the sum of \$20,000 by any intentional act of diversion, but if in fact the fund falls below that amount the net income of the fund is to be expended as above set forth, and is not to be held back to make good any anticipated loss of the principal."

Chas. M. Thayer and Chas. A. Hamilton, for appellants. John S. Gould, for appellee.

KNOWLTON, C. J. The first question of importance between the petitioner and the respondents is whether the will gives the petitioner, as trustee, a right to control the disposition and management of the property of which it holds the title, or whether the deacons referred to in the will can act independently of the holder of the title in all matters involved in the care, custody, and management of the property. Looking first to the real estate devised, we think it pretty plain that the deacons are to act independently in a relation of trust in all the matters of which, under the will, they are to have the management. Although the first statement of the trust under which the petitioner holds the property requires the petitioner to "suffer and permit" the estate "to be under the care, custody, and management" of the deacons designated, the language is imperative, and it gives these deacons authority in the management of the trust estate, of which the corporation cannot deprive them. Their relation to the scheme of the testator is similar to that of the managers of the library in *Cary Library v. Bliss*, 151 Mass. 364, 25 N. E. 92, 7 L. R. A. 765, and the selectmen and ministers under the will of

Dr. Franklin, as appears in the suit of *Boston v. Doyle*, 184 Mass. 373, 68 N. E. 851. As managers they stand in a relation of trust to the property whose legal title is held by another as trustee. The legacy of \$5,000 given for the support of an industrial school is by the express terms of the will "to be held and managed by the same persons as are to hold and manage the trusts in respect to said chapel." The powers and duties of the deacons in regard to this legacy are similar to their powers and duties in regard to the chapel. There is more room for doubt about the legacy of \$20,000 given to defray "the expenses of maintaining a minister and public worship," and, if necessary, to be applied "toward rebuilding said house, if destroyed." In making this gift the testator does not in terms refer to the deacons as managers; but this is one of the trusts in respect to the chapel, mentioned in a later clause, and in reference to the methods of management it is there put in the same clause with the devise of the real estate, and is spoken of as held and managed by the same persons. The close connection of this legacy with the devise of the real estate brings us to the conclusion that the testator intended the three gifts to be held and managed by the same persons. We are therefore of opinion that the first three propositions embodied in the order and decree of the probate court establishing the respective rights of the petitioner and of the deacons in the three gifts are correct. It is also plain that the directions in the will as to the investment of the fund of \$20,000 should be literally followed by the trustees, as declared in the decree.

The fifth and sixth of the instructions stated in the decree are also correct. They are just and equitable, and in accordance with the decisions of this court. *Parsons v. Winslow*, 16 Mass. 361; *New England Trust Co. v. Eaton*, 140 Mass. 532-534, 4 N. E. 69, 54 Am. Rep. 493; *Stone v. Littlefield*, 151 Mass. 485, 24 N. E. 592.

The petitioner objects to the finding stated in the decree as a preliminary to the substantive parts of the decree that "the trusts were established for the benefit of Memorial Church and an industrial school to be maintained therewith," and contends that they were established for the benefit of people in Worcester who would enjoy their privileges. Undoubtedly they were established for the benefit of the people; but, as the church and the school are public charitable institutions, which are acting as agencies in dispensing the charity, it is not incorrect to say that the trusts are for the benefit of these institutions.

The petitioner, in its petition, asked the court to give instructions as to whether the proper parties were joined in the suit. This is not a proper subject for instructions, but is proper for determination as a part of the procedure in the case. The finding "that all necessary parties have been joined as re-

spondents to the petition," stated as a preliminary in the decree, is unnecessary; but, as it appears before that which is ordered and decreed, it is not so irregular as to call for a change of the decree.

The objection to the fifth instruction is now waived, as it is agreed that a loss has occurred.

We perceive no such inconsistency between the present decrees and the former decrees of the probate court in reference to this trust as should preclude the court from giving these instructions.

Decree affirmed.

(186 Mass. 464)

MCCURDY et al. v. McCALLUM et al.

(Supreme Judicial Court of Massachusetts.
Middlesex. Oct. 18, 1904.)

**WILLS—CONSTRUCTION—WHAT LAW GOVERNS—
MEANING OF WORD "REQUEST"—MANDATORY—DIRECTORY.**

1. The construction and legal effect of a will is determined by law of the domicile of the testator.

2. Under law of England the word "request," when used in a will, may be construed to be mandatory or directory, depending on the intention of the testator as gathered from the will.

3. Testatrix, domiciled in Nova Scotia, gave to her daughter-in-law \$2,000, to be free from the control of husband and a son, and declared "I request" that she shall at her death give the same to her two daughters, and provided that the receipt of the daughter-in-law "shall be a sufficient discharge" to the executors. She devised real estate to a son, and specified sums to another son and a granddaughter absolutely. She made no provision as to the receipt of these legatees. She also made a bequest to two grandsons, and provided that if they, or either of them, should not have arrived at the age of 21 when the executors were ready to pay the legacies, the executors were authorized to accept the receipt of the parent of these legatees. *Held*, that by the law of Nova Scotia, which is the same as that of England, the daughter-in-law held the \$2,000 with the right to use the income for life, and that the principal was charged with a trust in favor of her two daughters, the word "request" being mandatory.

Report from Superior Court, Middlesex County; John H. Hardy, Judge.

Bill by McCallum and others, judgment creditors in Nova Scotia, to apply to their judgment money held by a bailee in Massachusetts, which was bequeathed to the judgment debtor, Susan B. McCallum, under the will of Mrs. Jane McCallum, deceased. Case reported for full court. Bill dismissed.

Eaton, McKnight & C. rver, for complainants. Frank Gaylord Cook, for respondents.

HAMMOND, J. The first question is whether the bequest made to Susan B. McCallum in the fifth clause of the will of M. Jane McCallum is absolute or upon trust. Inasmuch as the testatrix was domiciled in Nova Scotia, the construction, meaning, and legal effect of the clause is to be determined by the law of that province, which it is

agreed is the same as the law of England. While the report speaks of this question as one of the "questions of law raised at the trial" before the superior court, yet, being a question as to the law of a foreign country. It is here one of fact, and the judge who signs the report speaks of his "finding" with reference to it. While in this and other respects the language used in the report is somewhat conflicting, still we think it plain that the report submits to us this question as a question of fact to be decided upon the pleadings in connection with the agreed statement of facts, in the twelfth paragraph of which it is agreed that "either party may refer * * * to the Reports of the Supreme Court of Nova Scotia, the Reports of the Supreme Court of Canada, and the Reports of any courts in England, as well as any English text-books on the subject." The clause in question reads as follows: "5. To Susan McCallum wife of Hugh McCallum, I devise and bequeath the sum of two thousand dollars (\$2000.00) this amount is to be free from the control of her husband and her son Guy McCallum, and I request the said Susan McCallum at her death to give the same to her two daughters Vesta Vane McCallum and Marion McCallum, but the receipt of the said Susan McCallum for the said amount shall be a sufficient discharge to my executors therefor." The question is as to the meaning of the word "request." Is the word used simply to make to Susan a suggestion which she is at liberty to disregard if she sees fit, or is it imperative? This question is to be decided in the light of the authorities upon the English law which have been cited by the respective counsel. From a perusal of these authorities it is manifest that while in the earlier cases there was a disposition to formulate general rules, and to give to a particular word or phrase the same meaning in one will as in another, sometimes even at the risk of defeating the real intention of the testator, the later cases, in trying to ascertain the true meaning of the will, are inclined to give more consideration to the language of the whole will, and to the particular circumstances of each case. In England, as here, the cardinal rule in the interpretation of wills, to which all other rules must bend, is that the intention of the testator shall prevail, provided that it is consistent with the rules of law. A vigorous statement of the manner in which this rule is applied in England in recent cases is to be found in the following language of Lindley, L. J., in *In re Hamilton* [1895] 2 Ch. 370, 373: "You must take the will which you have to construe and see what it means, and if you come to the conclusion that no trust was intended, you say so, although previous judges have said the contrary on some wills more or less similar to the one which you have to construe." As to this very word "request" it has been held in several cases (see *Earle v. Earle*, 5 Mod. 118, decided in

¶ 1. See Wills, vol. 49, Cent. Dig. §§ 947-960.

1820) that it was mandatory, and in several (see *Hill v. Hill* [1897] 1 Q. B. 483) that it was not. While it is true, as stated by Lord Esher in *Hill v. Hill*, that "words of request in their ordinary meaning convey a mere request, and do not convey a legal obligation of any kind, either at law or in equity," it is also true, as stated by Lindley, L. J., in *In re Williams* [1897] 2 Ch. Div. 12, that "not only in wills, but in daily life, an expression may be imperative in its real meaning although couched in language which is not imperative in form"; and that "a request is often a polite form of command." In wills words have their ordinary signification, unless in the particular case there is something which leads to the conclusion that the testator used them in a different sense. At the time this will was made the testatrix was a widow of advanced age, having several children and grandchildren. In the first item she nominates persons to be executors; in the second she devises certain real estate in fee to her son Oscar; in the third she gives \$10,000 to her son Charles; in the fourth she gives \$7,000 to her granddaughter Ida absolutely, and in addition establishes a trust for her. Then follows the fifth clause, and after that come several clauses containing various bequests of money to her children, grandchildren, and other legatees, and finally a residuary clause to three of her daughters. In general, the will is drawn in apt language, and is very clear; and it is hard to see how any question could be raised as to the meaning of any item except the one now under consideration. Susan, the legatee named in this fifth item, was the wife of Hugh McCallum, the son of the testatrix. Although, as before stated, many of the children and grandchildren receive bequests, all of which, with the exception of the trust fund created for the granddaughter Ida in the fourth item, are absolute, still the testatrix, for reasons satisfactory at least to herself, treated the family of her son Hugh in a peculiar way. She was willing that \$2,000 should go to that family, but she was determined that neither Hugh nor his son Guy should have anything whatever to do with this bequest. She makes the bequest to Hugh's wife, in whom she apparently has confidence, and declares that it shall be entirely free from the control of the husband or son, and she "requests" that Susan shall at her death give it to her daughters, who are the granddaughters of the testatrix. The request is from a woman to her daughter-in-law, a person connected with her by family ties. This is not a case where there is uncertainty as to the objects of the trust, or as to the amount of it, or where there are any words—as, for instance, "if she thinks best," or "at her discretion"—expressly giving a clear discretion or choice, or where there are words like "absolutely," directly expressing that the bequest is absolute. On the contrary, the objects of the bounty, namely, the two grand-

daughters, are clearly specified, the amount of the trust fund is clearly stated, it is not mingled with any other property, and the relations of the testatrix to the objects of the trust are such as to indicate a strong motive for the bounty and to this method of providing for it.

Whether these considerations would of themselves be sufficient to show a trust in this case, we are not called upon to decide, because we are of opinion that the intent of the testatrix to create a trust is quite clearly shown by the last clause of the item in question, when it is considered in connection with similar language in the nineteenth item and with the other parts of the will. In this last clause the testatrix provides that "the receipt of the said Susan McCallum for the said amount shall be a sufficient discharge to my executors therefor." It is to be noted that wherever in the will a legacy is given absolutely there is no such provision as to the receipt of the legatee. None is needed. In the case of an absolute legacy the receipt of the legatee for the amount of his legacy when paid to him is sufficient, and so the will assumes. If, therefore, this legacy to Susan was absolute, there was no need of this clause, but, if it was charged with a trust, there was need of it. It must be assumed that the testatrix's intention was definite, and that it was known at least to her. This clause is very significant as showing what her intention was. But this is not all. In the eighth item there is an absolute bequest of \$1,000 to Archibald Clinch, and in the ninth item a similar bequest of like amount to one Wilson, both being grandsons of the testatrix. In the nineteenth item it is provided that if the grandsons, or either of them, shall not have arrived at the age of 21 years when the executors are ready to pay the legacies, then the executors are authorized to pay to their parents, "and the receipt of either parent of these legatees" for their respective legacies "shall be a sufficient discharge therefor." It is certain that the payment of these legacies to the parents and their receipt for the same would not have been a discharge to the executors except for the provision in the will, and hence the provision. The inference is strong that the last clause of the fifth item was inserted for similar reasons, namely, that the person who was not legally entitled to the legacy might receive it and discharge the executors from further liability.

In view of the language of the fifth item when read in connection with the other parts of the will, and of all the circumstances, we are of opinion, upon the authorities placed before us, that by the law of Nova Scotia the word "request" in the fifth item of the will is imperative, and that Susan McCallum holds the \$2,000 with the right to use the income during her life, and that the principal is charged with a trust in favor of her two daughters.

We understand that this view of the legal effect of this item under the law of Nova Scotia agrees with that taken by the justice who made the report which is before us, and is the "finding" to which he alludes, and which, under the form of the report, is decisive of the case. In accordance with the terms of the report, therefore, the following entry must be made:

Bill dismissed, with costs.

(126 Mass. 536)

BLOCK v. CITY OF WORCESTER.

(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 18, 1904.)

MUNICIPAL CORPORATIONS — PERSONAL INJURIES — DEFECTIVE STREETS — EXCAVATIONS — NEGLIGENCE — EVIDENCE — SUFFICIENCY — CONTRIBUTORY NEGLIGENCE — CONCURRENT NEGLIGENCE OF THIRD PERSON.

1. In an action against a city for personal injuries caused by falling into an excavation in a street, evidence *held* to justify a finding that the street was in a defective condition.

2. In an action against a city for injuries occasioned by stepping into an excavation in a street while following and attempting to board a street car, evidence *held* to justify a finding that plaintiff was not guilty of contributory negligence.

3. If the wrongful or negligent act of a third person contributes to an injury, there can be no recovery under the statute making cities liable for injuries resulting from the defective condition of the streets; but if the defect is a direct and proximate cause of the accident, other concurring conditions, which do not involve negligence or culpability, even if they come into a causal relation to the accident, do not relieve the city from liability.

4. In an action against a city for personal injuries alleged to have been caused by the existence of an excavation in the street into which plaintiff fell while following and attempting to board a street car, evidence *held* to support a finding that the railway company was not guilty of negligence proximately contributing to the injury.

Exceptions from Superior Court, Worcester County; Edward P. Pierce, Judge.

Action by Mandel Block against the city of Worcester. There was verdict for defendant, and plaintiff excepts. Exceptions sustained.

Burton W. Potter and Paul Potter, for plaintiff. Arthur P. Rugg, City Sol., for defendant.

KNOWLTON, C. J. The question in this case is whether there was any evidence which would warrant a verdict for the plaintiff. The defendant had dug in a street, between the tracks of an electric railway, a hole about 5 feet square and 10 or 12 feet deep, which had been there a considerable time, and was used in taking out earth from an underground sewer which was then being constructed. At the time of the accident this hole was left unguarded, and according to the testimony there was nothing on the sur-

face of the street to indicate its existence, unless it be a small quantity of dirt not far away, about nine inches or a foot high. We think the jury would have been well warranted in finding this to be a defective condition of the street.

There was evidence for the jury on the question whether the plaintiff was in the exercise of due care. There were two railway tracks in the street, and he was standing on the side of the street opposite to the track in which the hole was, a little distance away from a point opposite to it. He gave a signal with his hand to stop the car that he might get on, and went across the street behind the car to get upon the right-hand side of it, as the left-hand side was not open for the reception of passengers. He followed a short distance on the right-hand side, behind the car, which came nearly or quite to a stop, and took hold of the rods on the car, and tried to get on while it was moving. Falling in this, he let go just as he had reached the hole, and by reason of his momentum he fell in. It cannot be said as a matter of law that he was negligent in failing to see the hole before he reached it. Apparently it was concealed from his view by the car as he approached it. He had given a signal to stop the car, and, whether the conductor or motorman saw it or not, he might have supposed that the car had stopped or was stopping for him to get on. Upon the evidence, it cannot be said as a matter of law that he was negligent in trying to get on while the car was moving slowly. Whether he was negligent or not was a question of fact for the jury. *McDonough v. Metropolitan Ry. Co.*, 187 Mass. 210; *Corlin v. West End St. Ry. Co.*, 154 Mass. 197, 27 N. E. 1000; *Gordon v. West End St. Ry. Co.*, 175 Mass. 181, 55 N. E. 990. To entitle him to recover against the city under the statute, it must appear that the defect was the sole cause of the accident. *Kidder v. Dunstable*, 7 Gray, 104; *Shepherd v. Chelsea*, 4 Allen, 113; *Pratt v. Weymouth*, 147 Mass. 245, 17 N. E. 538, 9 Am. St. Rep. 691. But this does not mean that there must be no other innocent or accidental contributing cause. *Rowell v. Lowell*, 7 Gray, 100, 66 Am. Dec. 464. It means that there must be no other culpable cause. If the wrongful or negligent act of a third person contributes to an injury, there can be no recovery under this statute, even if the plaintiff is in the exercise of due care; but, if the defect is a direct and proximate cause of the accident, other concurring conditions which do not involve negligence or culpability, even if they come into a causal relation to the accident, do not relieve the city or town from liability. *Hayes v. Hyde Park*, 153 Mass. 514, 27 N. E. 522, 12 L. R. A. 249. The party responsible for the defect ought to contemplate the probability of such concurring conditions and contributing causes. The limitation of liability under the statute, as construed by the court, does not go far

¶ 2. See *Highways*, vol. 25, Cent. Dig. § 497; *Municipal Corporations*, vol. 26, Cent. Dig. § 1670.

enough to relieve a city or town because of the existence of such conditions.

It is contended that the plaintiff does not show that the accident was not caused by the negligence of the railway company. Upon this point, too, we think that the evidence was for the jury. They might well find that, if the plaintiff was in the exercise of due care, the negligence of the conductor or motorman contributed to the injury, and that, therefore, the verdict must be for the defendant. On the other hand, they might believe that the conductor and motorman did not observe his signal, or his attempt to get upon the car, and that the car was stopped at that point, or made to go very slowly, because of the hole, and the risk to persons working in or about it, or to the track or car, if the car should run at its usual speed. There was much ground for an argument that the accident was due at least in part either to negligence on the part of the plaintiff, or to negligence on the part of the managers of the car. But we are of opinion that this could not properly be ruled as a matter of law, and that the case should have been submitted to the jury.

Exceptions sustained.

(186 Mass. 549)

FISHER v. ALSTEN et al.

(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 18, 1904.)

REPLEVIN—RIGHT OF POSSESSION—PROOF—SUFFICIENCY.

1. The action of replevin cannot be maintained unless the plaintiff shows a legal right to possession.

2. In replevin of a motor cycle it appeared that the machine was a prize offered by a cycle club for the most popular bicycle rider, to be determined by a voting contest. The club had bought the machine from defendants. The machine was not paid for until after the fair and subsequent to the action having been instituted. A committee having power to manage the fair and the voting contests decided that a contestant other than plaintiff was the winner, and delivered to him an essential part of the machine as symbolical delivery of the whole. It was not shown that the committee did not act in good faith, nor did it appear that when the result was announced plaintiff was present, or knew the state of the "polls," but he did not make any objections until the Monday following the decision on Saturday immediately preceding. Held insufficient to show that either the title or right of possession arising therefrom ever passed to the plaintiff.

Exceptions from Superior Court, Worcester County; Francis A. Gaskill, Judge.

Action by John P. Fisher against John A. Alsten and others. Verdict directed for plaintiff, and defendants brings exceptions. Exceptions sustained.

The facts, as stated in defendant's bill of exceptions, are as follows: "This was an action of replevin of a motor cycle, which had been the subject of a 'voting contest' at a public fair of a voluntary association

known as the Viking Cycle Club, in Worcester. Some time prior to the fair the club voted to hold one, and to have several 'voting contests,' and it chose a committee of five members to whom it gave full power to manage and carry on the fair and the voting contests. Pursuant to this authority, the committee bought in the name of the club several articles, pledging the club's credit for the same, including this motor cycle, which was purchased from the defendants, but which was not paid for until after the fair, and after it had been replevied in this action. The committee hired Mechanics Hall, and conducted a 'Fair of the Viking Cycle Club' for several days and evenings, closing on Saturday. It appeared that the voting contest for 'the most popular bicycle rider in Worcester' was open to all, and that several persons, including the plaintiff, Fisher, one Eld, and one Nilson, were solicited by members of the committee to enter the contest. The plaintiff, Fisher, testified that Pope, a member of the committee, asked him to enter the contest, and gave him a book with which to solicit votes, saying that they would be ten cents apiece, and the man who turned in the most money by 11 o'clock the last night of the fair would be the winner of the wheel. Pope, a witness called by the plaintiff, testified that nothing was said about money, excepting that the votes were to be ten cents each. Eld testified that Pierson, a member of the committee, urged him to enter the contest, and told him that the wheel would be voted away at ten cents a vote. Each contestant was given a book, in which persons desiring to vote wrote their names together with the amount contributed towards the cause of the contestant whose book it was. The contestants themselves and their friends circulated these books and solicited votes. The sums paid for votes remained the property of the club, whether the votes were given for a successful or an unsuccessful contestant. No rules of the contest were announced other than has been described. The motor cycle was on exhibition in the hall during the fair. At about a quarter past 10 in the evening of Saturday, Nilson, who, as it appeared, was a man of good financial standing, and an owner of real estate, went to the treasurer of the committee, and showed a promissory note for fifty dollars, signed by himself, and payable to the Viking Cycle Club on demand, proposing to turn it in for five hundred votes for himself in the motor cycle contest. The note was shown to a majority of the committee, all who saw it assenting to the acceptance of the same in payment for votes. No public announcement was made as to whether notes would be accepted in payment for votes. It did not appear that any note was offered by the plaintiff, Fisher, or his friends, or that any note was refused. Before the time for voting expired, the Nilson note was placed with the cash which represented the proceeds of the

¶ 1. See Replevin, vol. 42, Cent. Dig. §§ 45, 48, 52.

voting for Nilson, and the votes purchased thereby were sufficient to give him the highest number, although the plaintiff, Fisher, at 11 o'clock on Saturday evening had the most cash turned in, and would have had the highest number if the note had not been allowed. Subsequently the full committee voted to accept and count the note, and they declared Nilson to be the winner. Between 11 and 12 o'clock on Saturday evening the committee caused it to be publicly announced from the platform of the hall that Nilson had won the motor cycle. The treasurer then, in behalf of the committee, informed Nilson that the motor cycle was his, and delivered to him the 'spark-valve,' which, as it appeared, was a small, but important, part of the mechanism, and without which the machine would not run. The rest of the motor cycle was carried from the hall to the store of the defendants, to be set up to run. Both Nilson and Fisher were members of the club; the former being an old member and the latter a recent joiner. Eld was not a member of the club. On the Monday morning next following the week of the fair, the plaintiff, Fisher, visited the defendants' store and demanded the motor cycle. The defendants replied that they understood Nilson to be the winner, and refused to give it up. So the motor cycle was replevied by a constable, who had accompanied the plaintiff, and had previously made a demand. Afterwards, on the same day (Monday), Nilson paid the note for fifty dollars, giving a check therefor, which was immediately cashed by the treasurer of the committee. On the next day (Tuesday) the committee paid the defendants the bill of the club incurred in connection with the fair, including the price of the motor cycle which was the subject of this replevin. At the close of the plaintiff's evidence, counsel for the defendants asked the court to rule that the plaintiff was not entitled to recover. The court asked the defendants' counsel if he rested, and the latter replied in the affirmative. The court declined so to rule, and upon the foregoing undisputed facts directed a verdict for the plaintiff. To the refusal to rule and to the ruling made the defendants duly excepted."

John H. S. Hunt, Edwd. H. O'Brien, and Thayer & Perry, for plaintiff. Chas. T. Tatman and Harrison W. Bowker, for defendants.

HAMMOND, J. Even if it be assumed in favor of the plaintiff that the "voting contest" was legal, and, further, that he, as the person who turned in the most cash, should have been declared the winner, there is still one defect in his case, which is fatal. The action is replevin, and the plaintiff must show at least his right to possession. And this must be a legal right. An equitable right is not sufficient. In this case the right must rest on title alone, and the title never was in the plaintiff. The com-

mittee, acting under "full power to manage and carry on the fair and the voting contests," decided and formally announced that Nilson was the winner, and delivered to him an essential part of the machine as a symbolical delivery of the whole. It is not shown that the committee did not act in good faith and in accordance with an honest belief as to the proper interpretation of the conditions of the contest and the rights of the contestants. It does not appear that at the time Nilson was declared the winner the plaintiff was present, or knew the state of the "polls"; but, at any rate, he does not seem to have made any objection to the action of the committee until the following Monday. It is plain that up to the time of the decision of the committee in favor of Nilson the proceedings had not gone beyond a mere executory contract, so far as respected the committee. Right or wrong, they did not think that the plaintiff had won, and the minds of the contracting parties never met in favor of the plaintiff on that question. Hence neither the title nor the right to possession arising therefrom ever passed to the plaintiff. If he has been aggrieved by the action of the committee, he must seek his remedy in another form of action.

Exceptions sustained.

(186 Mass. 521)

RICE v. NEW YORK CENT. & H. R. R. CO.
(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 18, 1904.)

CARRIERS—POSTAL CLERKS—INJURIES—CONTRIBUTORY NEGLIGENCE.

1. Postal cars were built with projecting planks surrounding the end doors so that the space between the same when coupled ordinarily was only 13 to 14 inches, which, during the impact in coupling with automatic couplers, was narrowed to only from 2 to 5 inches. Plaintiff, who had been a postal clerk for more than 10 years, and was familiar with the type of cars used and the management of the trains at a particular station, attempted to leave the car by the end door and squeeze himself between such planks, and as he did so was injured by being caught between the same as the cars were bumped together in changing locomotives. *Held*, that plaintiff was guilty of such contributory negligence as precluded a recovery for his injuries.

Report from Superior Court, Worcester County; Francis A. Gaskill, Judge.

Action by Henry E. Rice against the New York Central & Hudson River Railroad Company. A verdict was directed in favor of defendant, and the case was reported to the Supreme Court. Judgment on verdict.

Plaintiff, a railway mail clerk, was injured by being squeezed between two mail cars while attempting to alight from a train of the defendant railroad at its station in Worcester. The plaintiff was on the train as one of the mail clerks, and, it being plaintiff's duty on the arrival of the train at a station where engines were changed to collect the mail from a nearby box in the station, he at-

tempted to alight to perform such duty, and while doing so received the injuries complained of. The train was made up so that two mail cars were immediately back of the engine, then a Pullman baggage car, and behind that five or more Pullman sleeping cars. The car in which plaintiff was riding had two wide sliding doors on each side and at each end, doors which opened inward on hinges. Each mail car was equipped with a front and rear platform formed by the projection of the door frame about 12 inches beyond each end, but neither mail car had at either end a platform gate or rail of any sort. On each end of each mail car an upright plank projected on each side of the door molding and extended from the platform to the roof of the car. These planks were firmly fastened to the car about 1½ inches from the curved molding which formed the side of the door. The cars were equipped with automatic couplers, and were so constructed that when engines were changed the space between the two upright planks might be narrowed at any time to a width of only from two to five inches by the impact of the cars. When the train arrived at the station plaintiff attempted to alight, when he was caught and injured between such upright planks during a change of engines.

Frank H. Stewart and Frank J. Gerry, for plaintiff. Ralph A. Stewart and J. Francis Berry, for defendant.

BARKER, J. We assume that the plaintiff, as a postal clerk employed by the Post-Office Department of the general government upon the defendant's train, stood to the carrier in the general relation of a passenger, although that relation was modified to some degree by the circumstances that his position and movements in the postal cars and his leaving or returning to those cars, and the internal arrangement and use of those cars and of the appliances and utensils within them designed to facilitate the care and disposition of the mails, were not in the control of the defendant, but of the postal officials and employes. We assume also, without so deciding, that the presence in the train of postal cars of the construction described in the evidence, built without the usual outside end platforms, and having no platform gates as required by Rev. Laws, c. 111, § 214, was an infraction of that statutory requirement, and so some evidence of negligence on the part of the defendant. But we are of the opinion that the verdict properly was ordered for the defendant on the ground that the plaintiff himself was guilty of contributory negligence. He had been a railroad mail clerk for ten years on the same route, and for a year and a half in cars of the same type, and must be taken to have been entirely familiar with the method of managing the trains at the station, and with the construction of the cars, and with all possible modes

of leaving or entering them. On each side of the mail cars were side doors with grab-irons and iron stirrups. The end doors of the mail cars were designed to afford a way of passing from the mail cars to the ordinary cars. The train was run with two locomotives, and the plaintiff knew that these were to be changed at the station, and he must be taken to have known that the changing of engines would involve the forcing nearer together of the two mail cars in the process of uncoupling and coupling the engines during the stoppage of the train. As the postal cars were built, leaving the train by the narrow opening between the two compelled the plaintiff to force his body through a space only 13 or 14 inches wide between two upright planks, and which space he must be taken to have known was liable to be narrowed at any instant, without warning, to a width of only 2 or 5 inches, when the two postal cars should be bumped together in the changing of locomotives. There was no unusual exigency, and no special demand for haste on the part of the plaintiff. To attempt to leave the train by forcing his body through the narrow space between the planks at a time when it was to be expected that the cars would be forced nearer together in the process of changing engines was negligence on the part of the plaintiff, contributing to his injury.

Judgment for defendant on the verdict.

(186 Mass. 565)

NEEDHAM v. STONE et al.

(Supreme Judicial Court of Massachusetts, Worcester. Oct. 18, 1904.)

MASTER—INJURY TO SERVANT—NEGLIGENCE—
DEFECTIVE TOOLS—EVIDENCE—SUFFI-
CIENCY—FELLOW SERVANT.

1. In an action by an employe against his employer for injuries alleged to have been caused by a piece flying off of the head of a metal cutter used in defendant's foundry while plaintiff was cleaning castings, evidence held insufficient to show that there was any want of due care on the part of defendants in keeping in order proper and suitable cutters in sufficient numbers for the work.

2. The negligence, if any, in the selection of the cutter in use held to be that of the plaintiff's fellow servant, who made the selection.

Exceptions from Superior Court, Worcester County; Francis A. Gaskill, Judge.

Action by Michael Needham against Christopher C. Stone and others. Verdict ordered for defendants, and plaintiff brings exceptions. Exceptions overruled.

J. E. McConnell and P. F. Ward, for plaintiff. Herbt. Parker, Chas. O. Milton, and Henry H. Fuller, for defendants.

BARKER, J. The plaintiff and a fellow workman were cleaning a casting in the defendant's foundry. The process was for one workman to hold the edge of a cutter next to the projection to be removed from

the casting and for the other workman to strike the head of the cutter with a hammer. The cutter had a wooden handle inserted in it, similar to that of an ordinary hammer. The pieces removed from the casting would be made to fly off by the force of the blow. The blows of the hammer also tended to knock off bits of the head of the cutter, and it was the plaintiff's contention that a piece of the cutter's head flew up and entered his eye, causing the injury for which he sought compensation. A count under the employer's act was waived, and the trial proceeded under the common-law count. At the close of the evidence a verdict was ordered for the defendants, and the case is here upon the plaintiff's exception to that order.

The negligence alleged was a failure to furnish and keep in repair proper tools, and the defect in tools was alleged to be a loose handle in the cutter, and a battered and worn condition of its head. The undisputed evidence showed that there were upon the premises for the use of the workmen about a dozen cutters, and that the selection of one in use at the time of the accident was made from several of them by a fellow servant of the plaintiff's, who took it from among a number because it was pointed. There is nothing in the evidence to indicate that the other cutters were not free from the defects relied on by the plaintiff. There was no evidence that its handle was loose at the time, nor that a looseness of the handle would tend to cause the accident. The fellow servant who selected the cutter testified that he picked it out because it was newly painted, and that the cutters from among which he selected it were in the blacksmith shop. The evidence was that the blacksmith shop was the place for a man to go and get a cutter if he needed one. The cutter itself was put in evidence, and from its appearance it could be inferred that pieces had been knocked from its head by the blows of a hammer when the cutter was in use. There was uncontradicted testimony from one of the defendants tending to show that there was no greater probability or possibility of chips flying from a cutter in the condition of the one in evidence than from one just from the hands of the manufacturer, and that the first blow of the hammer may split scales from a cutter. There was also uncontradicted evidence tending to show that the blacksmith had charge to see that such tools or appliances were in suitable condition.

Upon this state of the evidence we are of opinion that it could not be found that there was any want of due care on the part of the defendants to furnish and keep in order proper and suitable cutters in sufficient numbers for the work, and that, if there was any negligence in the selection of the cutter in use, it was the fault of the plaintiff's fellow servant who made the selection. See John-

son v. Boston Tow-Boat Co., 135 Mass. 209, 40 Am. Rep. 458; Allen v. Smith Iron Co., 160 Mass. 557, 36 N. E. 581; Carroll v. Western Union Telegraph Co., 160 Mass. 152, 85 N. E. 456.

Exceptions overruled.

(186 Mass. 552)

LAKESIDE MFG. CO. v. CITY OF WORCESTER.

(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 18, 1904.)

EMINENT DOMAIN—CONDEMNATION—STIPULATION—CONSTRUCTION—EVIDENCE—DAMAGES—VALUE OF WATER POWER—ADMISSIBILITY OF EVIDENCE—WITNESSES.

1. In proceedings to recover damages for the taking of the waters of a brook under St. 1895, p. 427, c. 384, the taking having included all the waters of the brook together with petitioner's factory, lands, etc., the petitioner and the city which had brought about the condemnation agreed to divide the damages into two parts for the purpose of assessment, and submitted to referees petitioner's claim for damages "sustained by the taking of the land, water, and water rights, and by the construction of any aqueducts, reservoirs, or other works in relation to the waters of the brook, * * * except the damages incidental to the use and value of the waters of the brook for purposes of power." *Held*, in proceedings to determine the amount of damages under the exception in the agreement, that it was intended by the parties that the assessment for each part should be at its fair value as a part of the whole, and the decrease in value in the parts of the property which had been procured or constructed in order to make the right to use the water available, was not a damage incidental to the taking of the right to use the water, such parts of the property having been also taken, and to be paid for.

2. In proceedings to recover damages for the taking of a water power under St. 1895, p. 427, c. 384, it appeared that at various points on the stream above petitioner's mill reservoirs had been constructed by riparian proprietors, and that the use of them had materially increased the power at the mill. *Held*, that petitioner had acquired no prescriptive rights to have the reservoirs maintained, and hence the value of the power must be determined without reference to the reservoirs.

3. In proceedings to recover damages for the taking of the waters of a brook, petitioner's factory, etc., under St. 1895, p. 427, c. 384, the parties agreed to divide the damages into two parts, and submitted to referees petitioner's claim for "damages sustained by the taking of the land, water, and water rights, and by the construction of any reservoirs or other works, except the damages incidental to the use and value of the water for power purposes." *Held*, in proceedings to determine the amount of petitioner's damages under the exception in the agreement, that flowage rights and the dam and the right to maintain it were elements not to be considered.

4. In proceedings to recover damages for the taking of a water power under St. 1895, p. 427, c. 384, the measure of damages was not, as a matter of law, the cost that might result from the substitution of steam power for the water power.

5. In proceedings to recover damages for the taking of a water power under St. 1895, p. 427, c. 384, an instruction that the jury could ascertain what amount of money, invested at a reasonable rate of interest, would produce an annual income amounting to the annual cost of

replacing the amount of water taken away by substituting steam or other power for the water power so taken, was properly refused, since it amounted to a request to instruct on a part of the evidence, and to a statement that there were possible views of the evidence which would warrant the jury in coming to a certain result.

6. In proceedings to recover damages for the taking of a water power under St. 1895, p. 427, c. 384, it was proper to exclude an award made by certain engineers determining the amount of water in a reservoir below petitioner's mill which received a part of its water from a watershed which did not flow into petitioner's pond.

7. In proceedings to recover damages for the taking of a water power under St. 1895, p. 427, c. 384, the "average daily yield, including times of the highest water and of the lowest," would not fairly represent the usual available power.

8. In proceedings to recover damages for the taking of a water power under St. 1895, p. 427, c. 384, a witness testified that at certain seasons a very much larger volume of water would come over the watershed than at other seasons, and that when the pond was filled so that it would run over the flashboards the owners would put on a "full gate," and that they ran the mill sometimes all night, and there was other testimony as to the usual amount of water used at the mill. *Held*, that petitioner could not complain of the exclusion of a question to a witness as to the average daily yield of water from the watershed, including the reservoirs above the mill.

9. In proceedings to recover damages for the taking of a water power under St. 1895, p. 427, c. 384, a mechanical engineer of large experience with steam engines testified that he had made tests of the engines at the mill before the water was taken, but it did not appear that he had any knowledge of values in that neighborhood, except that of a mechanical engineer. He was asked to state from his knowledge what was the value of power there per horse power, and the question was excluded, but he was permitted to give the cost of producing it. *Held*, that there was no error.

10. In proceedings to recover damages for the taking of a water power under St. 1895, p. 427, c. 384 (under agreement no damages to property used to make the power available being considered), witnesses who were experts in hydraulic engineering and familiar with the value of water and steam power were asked to give an opinion as to the value of the waters, and as to the damage caused by the taking of the same; but it did not appear that either of them had any knowledge of the value of real estate at the mill or elsewhere, or that they knew of any sales of power apart from the land. *Held*, that it was within the discretion of the justice to exclude such questions.

11. In proceedings to recover damages for the taking of a water power under St. 1895, p. 427, c. 384, a witness testified in detail as to what it would cost to produce steam power, and stated that to produce it with a new steam plant, and under the most favorable conditions, would cost somewhat less than the amount he had stated, as he had made his estimates of the cost under existing conditions. Having said he could not state how much less, his testimony was stricken, and he was given an opportunity to present another estimate. *Held*, that it was within the discretion of the presiding justice to make such order.

12. In proceedings to recover damages for the taking of a water power under St. 1895, p. 427, c. 384, in making an estimate of the cost of production of power as a foundation for an assessment of damages, the best test would be the cost under the most favorable conditions.

13. In proceedings to recover damages for the taking of a water power under St. 1895, p.

427, c. 384, where a witness was called to testify generally as to the damages, but said his opinion was founded wholly on the value of his own plant, and that he arrived at that value from an offer made him for it, the trial judge might well find that he was not qualified to give the opinion.

14. In proceedings to recover damages for the taking of a water power under St. 1895, p. 427, c. 384, a question put to a trustee of a savings bank as to the rate of interest at which money could be invested safely for a long term of years was properly excluded as introducing an uncertain element.

15. In proceedings to recover damages for the taking of a water power under St. 1895, p. 427, c. 384, it was not error to exclude the testimony of a witness as to the value of power in another city, in the absence of evidence that the value of power in the small town where petitioner's mill was located was the same as the value in the city.

Exceptions from Superior Court, Worcester County; Edward P. Pierce, Judge.

Proceedings by the Lakeside Manufacturing Company against the city of Worcester to recover damages for the condemnation of the waters of a brook, etc. From the judgment petitioner brings exceptions. Exceptions overruled.

Henry W. King and Chas. M. Rice, for plaintiff. Arthur P. Rugg and J. F. Humes, for defendant.

KNOWLTON, C. J. This was a petition to recover damages for the taking of the waters of Kettle brook, under St. 1895, p. 427, c. 384. The taking included all the waters of the brook at the petitioner's woolen factory and above it, together with the factory itself, the dam, the pond, and lands around it, and certain lands of other parties. The petitioner and the respondent agreed to divide the damages into two parts for the purpose of assessment, and submitted to three referees the petitioner's claim for damages "sustained by the taking of land, water, and water rights, and by the construction of any aqueducts, reservoirs, or other works in relation to the waters of Kettle brook, * * * except the damages incidental to the use and value of the waters of said Kettle brook for purposes of power, including any unoccupied fall or power that may be damaged by said taking," etc. Under the submission these referees awarded a certain sum as damages, which was paid. The claim for the remaining damages was heard before commissioners under the statutes, and the petitioner afterward demanded a trial by jury in the superior court. The case is before us on exceptions taken by the petitioner at this trial.

The important question is how the exception in the submission which defines the petitioner's present claim is to be construed in its application to certain facts. This claim is for "damages incidental to the use and value of the waters of Kettle brook for the purposes of power, including any unoccupied fall or power that may be damaged by said taking." The claim formerly considered was

for all other damages caused by this taking. There is nothing in the record to show that damages were claimed by the petitioner for any injury to property which was not taken, and it would seem, therefore, that the intention was to divide the value of all that was taken into two parts, and to have the value of the use of the waters for the purposes of power assessed in one sum, and the value of everything else that was taken assessed in another sum. Of course, the value of each part was to be assessed in reference to the fact that at the time of the taking it was connected and used with the other. If either part had been taken without taking the other, the claim for damages would have been not only for the fair value of the part taken, but also for the injury to that which was left, by reason of the taking of that which was essential to its profitable use. In that case the damage for injury to that which was left would be incidental, in a sense, to the taking of the other part. If the use of the water, and nothing else, was taken, the dam and water wheel and the rights of flowage over lands of other persons would become of little value, and the mill and the machinery would be greatly reduced in value, unless power from another source could be procured to operate them. So, if everything but the use of the water was taken, the right to this use would be worthless without ownership of the land, and the damage for the taking of the land would include the incidental damage to the right to use the water. We do not think the parties intended that this kind of damage should be assessed as incidental to the taking of either part of the property, but that the assessment for each part should be at its fair value as a part of the whole, thus dividing the entire damages represented by the value of all that was taken into two parts, proportional to the values of the respective classes of property for which the assessments were to be made. The diminution in value in the parts of the property which had been procured or constructed in order to make the right to use the water available was not a damage incidental to the taking of the right to use the water, because these parts of the property were also taken, and were to be paid for by the respondent. This conclusion furnishes a ground on which we may dispose of several of the important exceptions.

Another question grows out of the fact that at various points on the stream above the petitioner's mill reservoirs had been constructed and used by riparian proprietors in a reasonable way, and in the exercise of their rights, as such proprietors, to hold back the water, and equalize and increase the power at their mills. Several of these had been in existence for many years, and the use of them, over which the petitioner exercised no control, materially increased the power at its mill. The petitioner contended that it had a legal right to have these reservoirs

continued and used as they had been used; but the respondent contended and the judge ruled that the petitioner had acquired and could acquire no prescriptive rights to have the reservoirs maintained and used as the owners of them had been accustomed to use them, and that the value of its power must be determined in reference to this fact. This was plainly correct, and the exceptions founded upon an assumption to the contrary must be overruled. *Thurber v. Morton*, 2 Gray, 304, 61 Am. Dec. 468; *Gould v. Boston Duck Company*, 13 Gray, 442; *Springfield v. Harris*, 4 Allen, 494, 81 Am. Dec. 715; *Villet v. Sherwood*, 35 Wis. 229; *Crawford Company v. Hathaway* (Neb.) 93 N. W. 781, 60 L. R. A. 889-909. The judge, however, instructed the jury as follows: "You have the right to take into consideration, in determining the amount of natural water power which would be developed on this stream, the watershed, the situation of the privileges as they are along down, the fact that there were reservoirs at that time in 1895, and had been, and the various configurations and conditions relating to that shed and that power, including therein, of course, the nature of the soil, its adaptability, its capacity for holding water, the question whether the swamps would retain water upon any part of the watershed, the question whether or not there are trees, the question whether or not there are springs upon the land, and everything else which existed, as had appeared in the testimony in this case, which will enable you to come to a conclusion as to not only the amount of water which would naturally flow upon that shed from the clouds, but those things which relate to its conservation and preservation and its continued flow." He further instructed them, as to these upper reservoirs, that they could continue "as long as the owners saw fit to have them continue; * * * that the waters which were contained in them could not be sent down in unreasonable bodies at any time, and that the privileges below could not be flooded, neither could the waters be unreasonably retained."

The first request for instructions was that the petitioner's right to use and maintain its dam and its flowage rights were not included in the former submission, and that the damages for the taking of these rights were to be assessed in this suit. This is covered by the first proposition which we have stated as to the construction of the agreement of submission. These flowage rights were rights in the lands of others, conveyed by deeds. They and the dam and the right to maintain it were parts of the property, which were to be considered and paid for under the first reference.

The second and third requests were that, if the substitution of steam power for water power was an economical and proper mode of repairing the damage at the privilege due to the taking of the water, and if the use of the mill privilege for manufactur-

ing purposes with steam power substituted for the water power taken would, after the taking, have been a reasonable and proper mode of using the property to obtain the best financial results, then the measure of the petitioner's damages due solely to the taking of the water power "is the cost of producing annually the full equivalent therefor by the substitution of steam power for the water power taken as aforesaid." While this would be a proper subject for the consideration of the jury, we should be slow to say as a matter of law that the measure of damages was the cost that might result from a certain reasonable and economical mode of repairing the damage, to the exclusion of every other reasonable and proper mode, the financial result of which might not be precisely the same. Besides, the proposed instruction assumed that the present conditions would remain unchanged in the future. A separate and independent answer to the request is that, because of expensive buildings and machinery upon the property, adapted to the manufacture of a particular kind of goods, which would be of little value without power, it might be economical, if the power was taken and the remainder left, to procure another kind of power, even at a great expense, rather than to suffer a heavy loss on the mill and the machinery. In such a case the great cost of the new kind of power would represent, not the fair value of the power, taken as a part of the whole property, on the basis of its proportional part of the value of the whole, but it would represent the value of the power taken, together with an additional sum made necessary on account of the damage which would otherwise come to the property which was left. As no property was left in this case, such damage is not to be assessed in determining the damage for taking the power.

For the same reason it would have been erroneous for the judge to give the ninth instruction requested. In the case supposed the assessment suggested in the request would have given the value of the property taken, with an additional sum for the damage to the remaining property.

The fourth, fifth, sixth, and seventh requests for rulings are all founded upon the contention that the petitioner was entitled to have the reservoirs on the stream above managed and used in the future as they had been in the past, which, as we have already said, was erroneous.

The eighth request was that upon all the facts of the case it was competent for the jury "to ascertain what amount of money, invested at a reasonable rate of interest, would produce an annual income amounting to the annual cost of replacing the amount of water power taken away by substituting steam or other power for the water power so taken." This is, in substance, a request to instruct upon a part of the evidence, and to say that there are possible views of the evi-

dence which would warrant a jury in coming to a certain result. An instruction of this kind, without more, would usually be confusing, and thus misleading. The court is not called upon to instruct in this way. *Hicks v. New York, New Haven & Hartford Railroad Company*, 164 Mass. 424-428, 41 N. E. 721, 49 Am. St. Rep. 471, and cases cited. The jury were told that they might consider the subject of substitution of other power for the water power, and the cost of such substitution, if they found this method reasonable.

The remaining exceptions are to the exclusion of evidence. The award of Ball and Butterick, and the use of the water in accordance with it, had reference to a reservoir below the petitioner's mill, which received a part of its water from a watershed which did not flow into the petitioner's pond. It was rightly excluded as being too remote to be of assistance to the jury.

The petitioner inquired of one Allen if he had computed the amount of power that could be developed by the petitioner's plant, taking into account the natural flow of the watershed, as regulated by the several reservoirs, etc., and asked what would be the average daily yield in horse power from that shed, including the reservoirs. The form of the questions as to what "could be developed" and "what would be the average daily yield" indicates that the question was put under the petitioner's contention that it had a right to control the future use of the reservoirs, in accordance with the manner of their former use, in the development of its power, which, as we have said, was erroneous. The average daily yield, including times of the highest water and of the lowest, would not fairly represent the usual available power. A witness testified that "at certain seasons of the year a very large volume of water would come down over the watershed—a very much larger volume of water than at other seasons of the year—and when the pond was filled so it would run over the flashboards they would put on full gate and run full gate, which took a great deal more than the natural flow of the stream; and they ran the mill some nights all night; and by the operation of the mill overtime and by using open gate they were able to manage the surplus of water in the wet seasons." There was other testimony as to the usual amount of water power used at the mill. We are of opinion that the petitioner cannot justly complain of the exclusion of this question.

The witness Hill was a mechanical engineer of large experience, especially in connection with steam engines and the production of power by steam. He testified that he had made tests of the engines at the petitioner's mill before the water was taken. It did not appear that he had any knowledge of values in that neighborhood, except that of a mechanical engineer. He was asked to state, from his knowledge of

the cost of producing horse power in that locality and in other localities, what was the value of power there per horse power. The question was excluded, but he was permitted to give the cost of producing it. The witness Tolman had been a partner of the last witness, and was a mechanical engineer, who testified to a large experience with steam power. It did not appear that he had any knowledge of the value of power in the vicinity of the petitioner's mill except that derived from his knowledge of the cost of producing it. He was asked the market value of power per horse power at the petitioner's mill previous to the taking, and the question was excluded. He was permitted to testify as to the cost of producing power at that place by steam or any other method. The witnesses Allen and Shedd were experts in hydraulic engineering, and in that capacity were familiar with the cost and value of water power and steam power; but it did not appear that either of them had any knowledge of the value of real estate in the town of Leicester, where the petitioner's mill was situated, or elsewhere, or that they knew of any sales of power apart from land. These witnesses were asked to give an opinion as to the value of the waters of Kettle brook, and as to the damage to the petitioner's property caused by the taking of the water. For the reasons stated in *Conness v. Com.*, 184 Mass. 541, 69 N. E. 341, it was within the discretion of the presiding justice to exclude these questions to the several witnesses; and, so far as appears, the discretion was properly exercised. The witness Hill, having testified at length and in detail as to what it would cost to produce steam power at this mill, said that to produce it with a new steam plant and under the most favorable conditions would cost somewhat less than the amount he had stated, as he had made his estimates of the cost under existing conditions at the mill. Having said that he could not then state how much less, his testimony was stricken out on motion of the respondent, and he was given an opportunity to present another estimate later. It was within the discretion of the presiding justice to make this order. In making an estimate of the cost of production of power, as a foundation for an assessment of damages in gross, the best test would be the cost under the most favorable conditions. While the cost with the inferior engine then in use might be pertinent in reference to the damage for a time, before a better engine could be substituted economically, it would be misleading if made a basis for a general assessment for all time. What we have said on this point applies also to the testimony of the witness Tolman.

The witness Olney was called to testify generally as to the damages in question; but he said his opinion was founded wholly on the value of his own plant, which was a mill

further down the stream, and that he arrived at the value of that from an offer which had been made for it. The judge might well find that he was not an expert in the value of real estate, or qualified to give the opinion asked for. What it would cost to reproduce the dam was immaterial to the inquiry before the court. The dam, the land under the pond, and the flowage rights in the lands of others, were a part of the property for which damages were to be assessed in the former reference. The use of the water for power, with any unoccupied fall that might be damaged, was the only property to be paid for by this assessment. For this reason the petitioner's evidence of a special value in the water for washing and scouring was also rightly excluded.

The question to the trustee of a savings bank as to the rate of interest at which money could be invested safely for a long term of years was too remote to be of assistance. The percentage of income that can be obtained from investments changes from time to time, as everybody knows, and the inquiry as to an investment for a given term of years would introduce an element of too much uncertainty, in various particulars, to be helpful upon the question of damages.

No error is shown in the exclusion of the testimony of the witness Ely as to the value of power in the city of Worcester. It does not appear that the value of power in the small town where the petitioner's mill was situated was the same as its value in the city of Worcester.

Exceptions overruled.

(186 Mass. 574)

BARNES v. SHELBURNE FALLS SAV. BANK.

(Supreme Judicial Court of Massachusetts.
Franklin. Oct. 28, 1904.)

GARNISHMENT—LIABILITY TO SUBSEQUENT PROCESS—NECESSITY OF DEMAND.

1. A demand by an execution plaintiff is not a demand "by force of the execution" within the meaning of Rev. Laws, c. 189, § 40, providing that, if goods in the hands of one adjudged a trustee in trustee process are not demanded of him "by force of the execution" within 30 days after final judgment, they shall be liable to another attachment; such demand, to be effective, must be made by an officer in whose hands the execution has been placed.

Exceptions from Superior Court, Franklin County; Elisha B. Maynard, Judge.

Action by one Barnes against the Shelburne Falls Savings Bank. There was a finding for plaintiff, and defendant excepted. Exceptions overruled.

S. S. Taft and B. H. Winn, for plaintiff.
Fredk. L. Greene, Wm. A. Davenport, and
Wesson E. Mansfield, for defendant.

KNOWLTON, C. J. The only question in this case is whether a party adjudged a trustee of the principal defendant in trustee

process can properly pay over the amount in his hands upon a demand made upon the execution within 30 days after the judgment, if the demand is made by the plaintiff in the suit; or whether, in order to protect the trustee in paying, the execution must be put into the hands of an officer and a demand be made by him. The answer depends upon the construction of the statutes. Rev. Laws, c. 189, § 40, is as follows: "If the goods, effects and credits in the hands of a person who has been adjudged a trustee are not demanded of him by force of the execution within thirty days after final judgment, they shall be liable to another attachment, whether made before or after the judgment; or, if there has been no second attachment, they may be recovered by the defendant." To protect the rights of parties there must be a demand "by force of the execution," and the question is whether a demand made by the plaintiff holding the execution is a demand "by force of the execution" within the meaning of the statute. The case of *Burnap v. Campbell*, 6 Gray, 241, decided that a payment made by a trustee to the plaintiff, after the expiration of 30 days from the final judgment without a demand made by force of the execution, and after a suit had been brought by the principal defendant to recover the money, could not be set up as a defense to the suit. The language of the opinion goes further, and states the reason for the enactment of the statute, namely, that by a payment on an execution, which properly would be returned to the court, there would be evidence of the payment and of the satisfaction or partial satisfaction of the judgment, which would protect the rights of all parties. This reason is applicable to an interpretation of the statute, which requires the demand on the execution to be made by an officer. An execution is directed to an officer, who is required by the precept to return it into court. A plaintiff who keeps the execution in his own hands is under no such direction. It may happen that there are subsequent attachments of the property in the hands of the trustee. It is important that subsequent attaching creditors should have the means of ascertaining their rights. The rule as to the demand upon the execution should be the same, whether there are subsequent attaching creditors or not. The fund in the trustee's hands may be assigned after the service of the original trustee writ, and the rights of the assignee will then be involved. Even if it is not assigned, it is for the interest of the principal defendant that the payment should be made, if made at all, in such a way that the evidence of it will be open to him. Rev. Laws, c. 189, § 41, refers to the property being "demanded of the trustee by the officer," and this provision, which was then found in Rev. St. 1836, c. 109, § 45, is mentioned by Chief Justice Shaw in *Burnap v. Campbell*, *ubi supra*. None but collateral and

subsidiary rights are acquired against the trustee by the original judgment, and not until after a service of the execution upon him by an officer, and the return of the execution into court, can a writ of *scire facias* be issued against him. Rev. Laws, c. 189, § 45; *Adams v. Cummiskey*, 4 Cush. 420. After the return of the writ of *scire facias* all defenses are open to the trustee which have not previously been passed upon by the court. Rev. Laws, c. 189, § 48; *Brown v. Tweed*, 2 Allen, 566; *Fay v. Sears*, 111 Mass. 154.

As an execution is directed to an officer, who alone can give compulsory effect to the judgment of the court, it is difficult to see how anything can be done by anyone else "by force of an execution." To the plaintiff, for his personal action, the execution gives no greater rights than the judgment. We are of opinion that the demand by an officer under Rev. Laws, c. 189, § 40, is a necessary prerequisite to the protection of the rights of the judgment creditor and the trustee.

Exceptions overruled.

(186 Mass. 524)

INHABITANTS OF BROOKFIELD v. INHABITANTS OF WEST BROOKFIELD.

(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 18, 1904.)

PAUPERS—SETTLEMENT—NOTICE—SUFFICIENCY—WAIVER.

1. Under Pub. St. 1882, c. 84, § 29, empowering overseers to act for the town in respect to matters concerning the support of paupers, an answer of no settlement to a notice to remove a pauper, given under chapter 84, § 28, waives an alleged defect in the notice arising from the fact that it was signed by only one of the overseers.

Exceptions from Superior Court, Worcester County; Francis A. Gaskill, Judge.

Action by the inhabitants of Brookfield against the inhabitants of West Brookfield. Judgment for plaintiff, and defendant excepts. Exceptions overruled.

Henry E. Cottle and L. H. Butterworth, for plaintiff. Henry W. King and Chas. M. Rice, for defendant.

LORING, J. This is an action to recover for the support of a pauper. The only defense now insisted upon is that the notice sent by the plaintiff was not a sufficient notice within Pub. St. 1882, c. 84, § 28, in that it was signed by one of the overseers, and that the statute requires that written notice shall be given by the overseers. The case is here on an exception to a refusal to direct a verdict for the defendant.

We do not stop to consider whether, taking the whole notice in connection with the subsequent correspondence and action, it ought not to be taken to have been sent originally or subsequently adopted by the overseers, and so was a sufficient notice within

the statute, for we are all of opinion that it is not open to the defendant, to set up the objection. The notice given was sent to the proper persons, namely, the overseers of the poor of the defendant town, and an answer was sent, signed by one of the overseers of the defendant town, stating that the pauper's settlement was in the plaintiff town, and on that ground refusing to accede to the request made. Prior to the case of *Com. v. Dracut*, 8 Gray, 455, it had been held in several cases that the objection of an insufficient description of the pauper was waived by an answer of no settlement. *Emlden v. Augusta*, 12 Mass. 307; *Shutesbury v. Oxford*, 16 Mass. 102; *Northfield v. Taunton*, 4 Metc. 433. Following this rule, it was held in *Com. v. Dracut*, 8 Gray, 455, where it does not appear in what respect the notice was insufficient, that in case of an answer of no settlement the defendant could not object to the sufficiency of the notice. The case at bar comes within those decisions. The defendant's argument is that the overseers of the defendant town cannot waive the rights of the town. But by Pub. St. 1882, c. 84, § 29, the overseers are empowered to act for the town in this respect, and it has not been suggested that the evidence did not warrant a finding that the written statement, which was signed by one of them, was not in fact the act of the overseers of the defendant town. We are of opinion that such a finding was warranted by the evidence.

Exceptions overruled.

(186 Mass. 573)

HOFFMAN v. HOLT.

(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 18, 1904.)

MASTER AND SERVANT—INJURIES TO SERVANT—SUPERINTENDENTS—NEGLIGENCE.

1. Plaintiff was directed to do certain painting under the direction of D., a servant of defendant. Though D. had charge of the job, it was his duty to work with the other painters. D. ordered plaintiff to fasten a ladder to the ridgepole of a house, and said that he would hold the ladder while plaintiff was nailing the cleat, but let go his hold, and the ladder slipped and plaintiff was injured. Held, that such facts did not justify a finding that D. was a superintendent within the employers' liability act (St. 1887, p. 899, c. 270), rendering the master liable for the negligence of the superintendent.

Report from Superior Court, Worcester County; Francis A. Gaskill, Judge.

Action by Jennie E. Hoffman against Lafayette B. Holt. A verdict was directed for the defendant, and the case was reported to the Supreme Judicial Court. Judgment on verdict.

Rockwood Hoar and Geo. R. Warfield, for plaintiff. Herbert Parker, O. C. Milton, and G. A. Gaskill, for defendant.

BARKER, J. The plaintiff's intestate was hurt by reason of the slipping of a ladder. At the time he and one other person only

were at work, and the particular thing then in hand was the nailing of a cleat upon a ladder which they were to use in painting a roof. He was upon the ladder nailing the cleat, and the other person was holding the foot of the ladder. Both of these two persons were in the employment of the defendant as painters, and both were expected to paint; but Donovan, the person who held the foot of the ladder, and caused the accident by letting the ladder slip, was in charge; and, when the plaintiff's intestate was taken to the place where the painting was to be done, the defendant took him there and told him that Donovan was there and had charge of the job, and would tell the plaintiff's intestate what to do, and that the defendant then went away. The evidence tended to show that Donovan procured the ladder, which had no hooks or cleat to hold it to the roof; that the two put it on the main roof; and that the plaintiff's intestate was to go up on the ladder and Donovan was to hold it at the bottom, and that plaintiff's intestate went up the ladder to nail on a cleat to hold the ladder to the ridge pole; also that this method of putting on the cleat was ordered by Donovan, who said that he was strong enough to hold the ladder, and that he could hold it; and also that Donovan let go his hold, and the ladder slipped for that reason. The case was tried upon one count only, for negligence of a superintendent under the employer's liability act (St. 1887, p. 899, c. 270). The count alleged that the plaintiff's intestate, by the direction of Donovan, was engaged in fastening a cleat upon a ladder which Donovan undertook to steady and hold while the plaintiff's intestate was at work upon it, and that Donovan carelessly released his hold upon the ladder and allowed it to slip. At the close of the evidence a verdict for the defendant was directed, and the case is before us upon a report.

We do not consider whether upon the evidence Donovan could be found to be a superintendent within the meaning of the statute. See *Adasken v. Gilbert*, 165 Mass. 443, 43 N. E. 199. Although in charge of the job at the time, he was expected to work as a painter. He was mixing paint when the plaintiff's intestate arrived. On other jobs for the same employer, although Donovan gave instructions, he worked by the side of the other painters, beginning work at the same time with the other men, working the same hours, taking his place beside them on ladder or staging, and painting with them whenever there was room. Whether his wages were higher does not appear. We think the verdict for defendant was ordered rightly, because Donovan's act in releasing his hold upon the ladder and allowing it to slip could not be found to be an act done in the exercise of superintendence. The work of arranging and putting in place ladders and stagings for doing outside paint-

ing, proper appliances and materials being furnished by the employer, is ordinarily the concern of the workmen themselves. Here there were two men who were expected to do the same kind of manual labor. The employer himself was absent, and had given no directions about ladders or stagings, leaving his employés to arrange them for themselves. Where one person acts both as a common laborer and a boss, and is expected to work with and as the other workmen, even his words of command are not necessarily acts of superintendence. See *Whitaker v. Bent*, 167 Mass. 588, 46 N. E. 121. We think that the act of Donovan in attempting to hold the ladder and letting it slip was not an act of superintendence, but of simple manual labor. See *Riou v. Rockport Granite Co.*, 171 Mass. 162, 50 N. E. 525; *Flynn v. Boston Electric Light Co.*, 171 Mass. 395, 50 N. E. 937. The plaintiff's allegation is that Donovan carelessly and negligently released his hold and let the ladder slip, not that he misjudged his strength or the strain which might come upon it. Therefore there was nothing to show that the order given by Donovan was negligent nor his plan defective, so as to bring his own manual labor within the statute as an act of superintendence. See *Joseph v. George G. Whitney Co.*, 177 Mass. 176, 58 N. E. 639; *Gibson v. International Trust Company*, 186 Mass. 454, 72 N. E. 70.

Judgment on the verdict.

(186 Mass. 577)

HAMPDEN TRUST CO. v. LEARY et al.

(Supreme Judicial Court of Massachusetts.
Hampden. Oct. 23, 1904.)

EXECUTOR'S ACCOUNT — EXPENSES — DEED — CONSTRUCTION.

1. On the same day that a testator executed his will he made a deed to a trust company, executor under the will, conveying all of his real estate on certain trusts. The ninth clause of the deed provided that after the testator's death the trustee "may" use as much of the income from the property, or the proceeds of its sale, as may be necessary in defending any proceedings brought to invalidate the trust. The will was made subject to the provisions of the deed, with a scheme for the disposition of the property conveyed by the deed if it should be set aside. Testator had a substantial amount of personal property which was disposed of by the will. No proceedings were brought to set aside the deed, except so far as its validity was involved in the controversy as to the validity of the will. *Held*, that a contention that items in the executor's account for payments made by the executor for expenses of defending the estate from claims which were deemed unjust, of proving the will, and resisting an attack on it should not be allowed out of the personality, because the word "may" in the ninth clause of the deed means "must," requiring such expenses to be paid from the trust estate, is untenable, in view of other clauses of the deed, in which the grantor drew distinctions between "may" and "shall."

Report from Supreme Judicial Court, Hampden County; John W. Hammond, Judge.

In the matter of the estate of Samuel D. Currier, deceased. On motion of the Hampden Trust Company, executor, for allowance of account. From a decree allowing the account, Frederick Leary and others appeal. Affirmed.

J. B. Carroll and W. H. McOintock, for appellants. S. S. Taft and Edmund P. Kendrick, for appellee.

KNOWLTON, C. J. This is an appeal from a decree of the probate court allowing an executor's account. The only items which are objected to by the appellants are for payments made by the executor for expenses of defending the estate from claims which were deemed unjust, and of proving the will, and of resisting an attack upon it by persons interested in preventing the allowance of it. No question is made in regard to the amount of the items if they were properly chargeable in the executor's account. Plainly they are of a kind that ordinarily are allowed in the accounts of executors, and are properly payable out of the personal estate of testators. *Rev. Laws, c. 140, § 3; Id. c. 146, § 1; Hewes v. Dehon*, 3 Gray, 205.

The objection to the allowance of them is founded entirely upon the fact that on the same day on which the will was executed the testator made a deed of his real estate to the trust company, which was named in the will as executor, conveying all his real estate upon certain trusts. The ninth clause of the deed is as follows: "After my death said trustee may use as much of the income from said property as may be necessary, or the proceeds of the sale of the property, in defending any proceedings brought to invalidate this trust, also for the sustaining of said trust, and the probate or sustaining of my will dated this day, and to defend any attack against said will." The will recites the provisions of the deed of trust, and is made subject to them, with a scheme for the disposition of the property conveyed by the deed in case the deed should be set aside. The testator had a substantial amount of personal property which was disposed of by the will. No proceedings were brought to set aside the deed, except so far as its validity was involved in the controversy as to the validity of the will. The account was rightly allowed, unless the ninth clause of the deed made the expenses of sustaining the will, in view of the objections to it, a charge upon the real estate conveyed in trust, which it was the duty of the trustee to pay out of the trust property. The appellants contend that the word "may" in the ninth clause of the deed, taken in connection with the will and the other parts of the deed, must be held to mean "must."

We will not pass upon the contention of the executor that, even if the trustee ultimately should pay these expenses under the deed, they should still be allowed first in the ex-

executor's account as primarily chargeable upon the estate left by the testator. But we will assume, without deciding, that, inasmuch as the same corporation is both trustee and executor, if these sums were to be paid out of the trust property the corporation would be chargeable in its executor's account for an amount as assets of the estate equal to the sum which it ought to have paid as trustee for the benefit of the estate held by the executor.

It is a familiar rule of law that the language of a written instrument is ordinarily to be construed according to its plain and natural meaning. This rule applies unless there is something in the particular case which obliges the court to give the words a different meaning. *Minor v. Mechanics' Bank*, 1 Pet. 46, 7 L. Ed. 47; *Moran v. Prather*, 23 Wall. 492-501, 23 L. Ed. 121; *Hill v. Hill* [1897] 1 Q. B. Div. 483-486; *Mallan v. May*, 13 M. & W. 511-517. The word "may," in its primary and common use, is enabling only, not imperative. *Com. v. Haynes*, 107 Mass. 194-197; *Com. v. Chance*, 174 Mass. 247, 54 N. E. 551, 75 Am. St. Rep. 306; *Newburg Turnpike Company v. Miller*, 5 Johns. Ch. 101-113, 9 Am. Dec. 274; *Williams v. People*, 24 N. Y. 405-409; *McIntyre v. McIntyre*, 123 Pa. 329, 16 Atl. 783, 10 Am. St. Rep. 529; *Lovell v. Wheaton*, 11 Minn. 92 (Gil. 57). A different meaning is sometimes given to it in the construction of statutes, where the rule seems to be "that the word 'may' means 'must' or 'shall' only in cases where the public or other persons have a claim de jure that the power should be exercised." *Newburg Turnpike Company v. Miller*, *ubi supra*; *State v. Sweetser*, 53 Me. 438-440; *Bolling v. Mayor*, 3 Rand. (Va.) 543-580. In view of these familiar rules of construction, and especially when we notice the difference in the meaning of the words "may" and "shall" in clauses 4, 5, 6, 7, 8, 9, and 11 of this deed, we think it quite plain that the deed does not require the trustee to pay these expenses out of the trust estate, and that, therefore, the items objected to were rightly allowed in the executor's account.

Decree affirmed.

(186 Mass. 540)

WESTCOTT v. CITY OF BOSTON.

(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 18, 1904.)

WATERS AND WATER COURSES—CONDUITS—CONSTRUCTION—MUNICIPAL CORPORATIONS—LIABILITY—STATUTES—REMEDIES—NEGLIGENCE—QUESTION FOR JURY.

1. Where a conduit was constructed not only for the drainage of certain streets, but to drain a large body of private land, as authorized by St. 1897, pp. 397, 398, c. 426, §§ 2-5, the city was not exempted from liability for injuries caused by negligence in the construction of such conduit on the ground that it would not be liable in tort for the construction of a sewer to

drain water from a highway for the purpose of keeping the same in a safe condition.

2. St. 1897, pp. 397, 398, c. 426, §§ 2-5, providing a remedy by petition to recover damages for any land or easement taken by commissioners in the construction of a conduit, or for any injury committed in doing any act with reference thereto under section 4 (page 397) did not deprive a property owner injured by the negligence of those in charge of the construction of such conduit from maintaining an action in tort against the city for the damages so sustained.

3. Where there was no possibility of damage to adjoining property by leaving a section of a conduit open in ordinary stages of the flow, nor except in very unusual conditions of weather, whether such conditions as those which caused the damage to plaintiff were reasonably to be expected and reasonably could have been provided against were for the jury.

Report from Superior Court, Worcester County; Francis A. Gaskill, Judge.

Action by Asa A. Westcott against the city of Boston. A verdict was directed in favor of plaintiff, and the case reported to the Supreme Court. New trial.

Geo. J. Tufts and Thos. G. Kent, for plaintiff. Philip Nichols, for defendant.

BARKER, J. In January, 1898, the street commissioners of Boston, under the provisions of St. 1897, p. 396, c. 426, authorized the relocation of the Oakland Garden branch of the Stony Brook sewer as a surface water conduit, and ordered its construction, which was begun early in the year 1898. The conduit was not intended to care for merely the surface water of streets, but to collect and carry off all the surface water, including that of streams, brooks, and natural water courses on a large body of land. This body of land lies between Franklin Park and a tract of about five acres belonging to the plaintiff, about a mile distant from the park, and lower than the park, the intervening land having a slope down to the plaintiff's land. His land was divided by streets which he had built, and on it were buildings which he had erected, and which he occupied or rented to others. The conduit was not completed until about June 27, 1900. The upper part of it toward the park was first built, and the lower end of that part near the plaintiff's land was left open and unconnected with any artificial means of carrying off the water which issued from it for more than a year prior to 1900 and for some months during the year 1900. The conduit was finished by building the lower portion of it in separate sections until all was completed, and not until then was the lower portion united with the section first constructed. In June and September, 1899, and to a much greater extent in February and March, 1900, the waters collected by the upper section of the conduit and so brought down to its open mouth ran onto and caused damage to the plaintiff's land by washing away the soil, tearing out the curbstones of his streets, filling cellars, injuring foundation walk, and in other like

ways. This upper section of the conduit was built in the bed of a natural water course. No more water, in the aggregate, came down this upper section or left it at the lower end than came down the water course immediately before the conduit was built, and no greater area was drained by it than was drained by the old water course; but the water was so confined by the conduit that it came out from its open end in greater volume than ever before, and with increased force, thereby causing the damage to the plaintiff's land.

The writ is in tort, and was sued out on January 3, 1903. There was a jury trial, at which, by agreement of counsel and direction of the court, the liability of the defendant was tried upon certain facts relied upon by one party or the other, and which are stated in the report by which the cause comes here. A verdict for the plaintiff was ordered in the court below. By the terms of the report, if the verdict was ordered rightly, it is to stand, and the plaintiff's damages are to be assessed by a jury. If the ordering of the verdict by the court was error, but the facts relied on by him would justify a jury in finding in his favor, a new trial is to be granted. If none of the facts would justify a verdict in his favor, judgment is to be entered for the defendant.

The statute cited provides that the street commissioners may widen, deepen, pave, or cover water courses, or construct open sewers or conduits for the drainage of lands, and may take lands for those purposes; and that the superintendent of streets shall carry out the orders of the commissioners, and do any act or thing deemed by him necessary in constructing or maintaining the work. It also gives a remedy by petition for all damages sustained by the owner of any land, water course, right, or easement taken by the commissioners, or injured in any manner or by any person in doing any act or thing under the section of the statute which requires the superintendent of streets to carry out the orders of the commissioners, and authorizes him to do anything deemed by him necessary in constructing or maintaining the works. See St. 1897, pp. 397, 398, c. 426, §§ 2-5.

1. The defendant contends that it is not liable in this action because the conduit was built for the purpose of carrying away surface water from streets, and a town or city is not liable in tort if, in performance of its duty to keep a highway safe and convenient for travel, it diverts water upon neighboring land; citing *Flagg v. Worcester*, 13 Gray, 601; *Holleran v. Boston*, 176 Mass. 75, 57 N. E. 220; and numerous other like cases. But the provisions of St. 1897, p. 396, c. 426, do much more than to enable the defendant to deal with surface water upon streets. The statute gives power to lay and construct works for the drainage of lands outside of streets, and such in great part was the work

now in question. The doctrine invoked is not here applicable, the conduit having been laid and built to drain a large body of land mostly in private ownership.

2. The defendant also contends that, even if the plaintiff's damages were not the necessary result of the work ordered by the commissioners, but were occasioned by tortious negligence in carrying out such orders, this action will not lie. In support of this contention the defendant calls attention to the peculiar wording of section 5 of the statute, giving a remedy by petition not merely for damages for any land, water course, right, or easement taken by the commissioners, but also when any land, water course, right, or easement "is injured in any manner or by any person in doing any act or thing" under section 4 of the statute. The defendant's argument is that the temporary nature of the plaintiff's damages would be no defense to a petition under section 5 (*Penney v. Commonwealth*, 173 Mass. 507, 53 N. E. 865, 73 Am. St. Rep. 312); that the damages are caused by some act or thing done by some person or persons under the provisions of section 4, and so are within the language of section 5; and that it is to be supposed that the Legislature, having in mind the inconvenience and injustice resulting from a doubtful or double remedy, has in this enactment provided for a single proceeding to cover injuries of every conceivable description. We do not so construe the statute. The right of every landowner to recover by the usual processes of law for tortious damages to his land is important, and one which we cannot hold the Legislature to have taken away in any instance, unless its language has no other reasonable meaning. In the absence of an explicit provision that the remedy by petition is to be exclusive, and is to extend to damages due to tortious and negligent acts done in carrying out the purposes of the statute, we hold that, notwithstanding the very general language of section 5, the remedy for such acts is by an action of tort, and not by petition.

3. We think, however, that upon the facts which were before the court whether the defendant was negligent in the construction of the conduit was a question of fact, rather than a question of law. It is true that the time was very long which elapsed between the building of the upper section and the providing of some suitable means for carrying away the water expected to be collected by it and discharged from its lower aperture. But there seems to have been no possibility of causing damage by so leaving that section of the conduit in ordinary stages of the flow, nor except in very unusual conditions of weather. Whether such conditions as those which caused the damage to the plaintiff in June and September of 1899 and in February and March of 1900 were reasonably to be expected and reasonably could have been provided against were not ques-

tions of law. We think the case should have been left to the jury to say whether, under all the circumstances bearing on the matter, the leaving of the upper section of the conduit as it was left for the period during which it was so left was negligent.

For this reason the verdict for the plaintiff must be set aside, and a new trial be granted. So ordered.

(126 Mass. 456)

MORRISON v. CITY OF LAWRENCE.

(Supreme Judicial Court of Massachusetts.
Essex. Oct. 18, 1904.)

**SCHOOLS—WRONGFUL EXCLUSION OF PUPIL—
HEARING OF CHARGES—FAIRNESS OF HEARING—
EXCLUSION OF EVIDENCE—POWER TO COM-
PEL WITNESSES TO APPEAR.**

1. In an action against a city for the wrongful exclusion of plaintiff from school, he was entitled to show that he was suspended by the superintendent, and that this suspension, which was confirmed by the committee, had followed immediately upon a statement made in his presence by the principal of the school, who had taken him for this purpose before the superintendent, and what was said at the time was admissible, although neither the superintendent nor the principal were parties to the suit.

2. In an action against a city for the wrongful exclusion of plaintiff from school, the cross-examination of the principal as to what he had said and done concerning the plaintiff, including a narration of the proceedings when plaintiff was taken before the superintendent by the principal, who then made a statement which resulted in plaintiff's suspension by the superintendent, was competent as indicating the nature of the relations between plaintiff and the principal, and affecting his credibility as a witness.

3. When a school committee acts in good faith in permanently excluding a pupil from school, no suit can be maintained by him because of their action.

4. Under St. 1898, p. 455, c. 496, § 9, requiring cities to furnish written reasons for excluding a child from the public schools, and making them liable for wrongfully doing so, as well as under the express provisions of Rev. Laws, c. 44, § 8, a school committee cannot lawfully permanently exclude a pupil for misconduct, without first giving him an opportunity to be heard.

5. Under Pub. St. 1882, c. 112, § 25, authorizing railroad commissioners, in all cases investigated, to summon witnesses, administer oaths, and take testimony, and chapter 169, §§ 7, 8; St. 1882, p. 211, c. 267; St. 1883, p. 494, c. 195; St. 1885, p. 778, c. 323, § 2; St. 1891, p. 745, c. 140; St. 1898, p. 314, c. 374; St. 1900, p. 194, c. 267, § 1; and Rev. Laws, c. 175, §§ 8-11—conferring power to summon witnesses to compel the giving of evidence on various special tribunals, not including school committees—on a hearing before such a committee of charges against a pupil to determine whether he shall be permanently excluded from school, the committee has no power to compel witnesses to attend or to testify.

6. When a school committee permanently excludes a pupil from school, after he has been given a fair trial, in which he is allowed to present the merits of his cause, mere errors in the admission or exclusion of evidence do not render the final decision invalid.

7. In an action against a city for the wrongful exclusion of plaintiff from the public school, the question of whether the committee acted in

good faith in excluding certain evidence offered by plaintiff is one of fact.

8. In an action against a city for the wrongful exclusion of plaintiff from the public school, evidence held to justify submission to the jury of the issue as to whether the committee had acted in good faith in excluding certain evidence at the hearing of the charges against plaintiff, and had given plaintiff a fair opportunity to be heard.

Exceptions from Superior Court, Essex County; William Cushing Wait, Judge.

Action by Wilbur F. Morrison, by next friend, against the city of Lawrence. There was verdict for plaintiff, and defendant excepts. Exceptions overruled.

Sweeney, Dow & Cox, for plaintiff. J. P. Kane, for defendant.

BRALEY, J. This is an action of tort to recover damages for the wrongful exclusion of the plaintiff as a scholar from the high school maintained by the defendant, and, the plaintiff having obtained a verdict, the case is here on exceptions taken by the defendant to the admission of evidence, and to adverse rulings as to its liability. If these are taken up in their order, the exception to the admission of certain evidence is to be first considered.

It was obligatory on the plaintiff to show that he did not voluntarily leave school. For this purpose it was open to him to prove that he left because suspended by the superintendent of schools, and that his suspension, which was confirmed by the committee, had followed immediately upon a statement made in his presence by the principal of the school, who had taken him for this purpose before the superintendent. It also became important to describe the character or show the object of the act which formed a part of the transaction in issue, and what was said at the time became admissible, although neither the superintendent nor the principal were parties to the suit. *Haynes v. Rutter*, 24 Pick. 242, 245; *Lund v. Tyngsborough*, 9 Cush. 86, 42.

Besides, after the plaintiff had testified, the statement containing the charges then made, and afterwards repeated by the principal before the committee, and who became a witness at the trial, was admitted without objection, and the defendant fails to show that it was prejudiced by the introduction of evidence claimed by it at one time to be irrelevant, and afterwards unopposed when introduced in another form, though covering the same subject. *Peebles v. Boston & Albany Railroad Co.*, 112 Mass. 498. Moreover, it is shown by the exceptions that the principal had been his accuser from the beginning, and his cross-examination of what he had said and done concerning the plaintiff, and which included a narration of the proceedings before the superintendent, was competent, in connection with the issue presented, as indicating the nature of the relations between them, and it would be for the

¶ 3. See *Schools and School Districts*, vol. 43, Cent. Dig. §§ 346, 347.

jury to determine how far, if at all, it affected his credit as a witness. *Commonwealth v. Jennings*, 107 Mass. 448, 491. See, also, *Proprietors of Liverpool Wharf v. Prescott*, 4 Allen, 22.

The remaining exceptions to the refusal to rule that upon all the evidence there was no issue of fact for the consideration of the jury, and the defendant was entitled to a verdict, present the principal questions raised and argued. It must be taken as settled in the management of the public schools that, when a school committee acts in good faith while exercising the plenary powers conferred upon them by statute, and order the permanent exclusion of a scholar therefrom, no suit can be maintained by him because of their action. *Watson v. Cambridge*, 157 Mass. 561, 563, 32 N. E. 864; *Bishop v. Rowley*, 165 Mass. 460, 462, 43 N. E. 191.

But before such an order can be considered final, under St. 1898, p. 455, c. 496, § 9, in force at this time, the pupil, if his parent or guardian desires, must be granted a hearing, otherwise such exclusion becomes unlawful. *Bishop v. Rowley*, *ubi supra*. See, also, in this connection, *Rev. Laws*, c. 44, § 8. And it was said in the former decision of this case, when discussing the action of the committee, which, it was then claimed, prevented the plaintiff from introducing evidence of certain witnesses at such a hearing held for the purpose of ascertaining the facts, that "it may or may not have had an important bearing upon the hearing, but it has not been contended that the committee acted otherwise than in good faith," and the verdict for the plaintiff was set aside and a new trial ordered. *Morrison v. City of Lawrence*, 181 Mass. 127, 131, 63 N. E. 400.

At the second trial the plaintiff rested his right to recover solely on the ground that after notice of his exclusion from school, though the committee granted to him an opportunity to be heard, they did not act in good faith, because they refused to allow him to fully present his side of the case, and he contends that their action was equivalent to a denial of a hearing, and his exclusion, which was treated by them as final, became unlawful, and it is therefore necessary to determine whether there was any evidence to be submitted to the jury in support of his contention. A hearing of this nature does not take on all the formalities of a trial usual in a court of law, nor is it necessarily governed by the strict rules of evidence, and a school committee is apparently not included among those special tribunals which have power to summon or compel the attendance of witnesses, or before whom witnesses may be compelled to attend and give evidence. *Pub. St.* 1882, c. 112, § 25; *Id.* c. 169, §§ 7, 8; *St.* 1882, p. 211, c. 267; *St.* 1883, p. 494, c. 195; *St.* 1885, p. 778, c. 323, § 2; *St.* 1891, p. 745, c. 140; *St.* 1898, p. 314, c. 374; *St.* 1900, p. 194, c. 267, § 1; *Rev. Laws*, c. 175, §§ 8-11; *Whitcomb's Case*, 120 Mass. 118,

123, 21 Am. Rep. 502; *First National Bank of Chicago v. Graham*, 175 Mass. 179, 55 N. E. 991. If the plaintiff had summoned witnesses, their attendance could not have been enforced, or, if voluntarily present, they might have refused to testify, and the committee could not have aided him, and, so far as his case depended on their evidence, he would have been remediless. Nevertheless, they were required to grant him a full opportunity to be heard upon the facts, to hear and consider the testimony of such witnesses as he might call, and permit him to fully present his case in such orderly manner as they might direct. The hearing afforded may be of no value if relevant evidence, when offered, is refused admission, or those who otherwise would testify in behalf of the excluded pupil prevented by the action of the committee. How far an administrative board clothed with quasi judicial powers, which has decided upon a definite course of action in a case, will be willing to review its decision, must depend largely upon the sound judgment and sense of justice of its members; but in granting this right to a pupil whom they propose to permanently exclude from the benefit of the public schools, the law presumes that when called upon to reconsider their purpose they will listen patiently to his case as fully as he wishes to present it, so long as such presentation does not range beyond the legitimate limits of the issue involved. When it appears that a fair trial has been given, and the pupil allowed to present the merits of his cause, mere errors committed in the admission or exclusion of evidence are not enough to make invalid a final adverse decision. See *Bishop v. Rowley*, *ubi supra*; *Morrison v. Lawrence*, *ubi supra*.

It was claimed by the plaintiff that the controversy between him and the principal arose out of an article derogatory to the latter, published in his father's newspaper, and that his exclusion was caused by the publication of this criticism, and not because of inattention to his studies or for want of correct deportment. After his "indefinite suspension" had been ordered, and remained unmodified, the plaintiff's father asked for a hearing before the committee, and, upon this being granted, the plaintiff appeared at the time and place designated by them. The principal of the high school was also present, and by vote of the committee each was permitted to have the assistance of counsel. The principal was allowed properly to go forward and make a detailed statement in writing of the plaintiff's standing and conduct as a student, and this was followed by an accusation that an article, either incited or written by him, criticising the management of the school, had appeared in a newspaper published by the plaintiff's father, and that upon investigation he had ascertained that the plaintiff had sought to instigate other pupils of the school to write similar articles,

and also had urged them to read those already published; and the pupils who had furnished him with this information were present, at his request, at the hearing. Although the school records brought by him, showing the plaintiff's deportment and his rank as a scholar, were neither read, examined, nor put in evidence, it appeared upon cross-examination that pupils were not suspended for deficiencies in their studies, while for 18 months before his suspension the monthly record of the plaintiff's behavior, sent to his father, showed his conduct to be satisfactory. This testimony of the principal was supplemented by a written statement of the teachers in the school that the plaintiff had sought to undermine his authority, and to incite other pupils to write articles for publication to influence the community against those "working for the good of our school." If to this is added his admission of language used by him when he sent the plaintiff home and told him not to return, and "that he had never made any charge before the school committee with reference to the plaintiff's studies, or his prior conduct, until after the suspension, and until he went before the meeting of the subcommittee which was held for the purpose of formulating charges against the plaintiff and giving reasons for his suspension," there was evidence from which it might be inferred that his action was taken, not for the sole reason that the plaintiff had neglected his studies or failed to conduct himself properly in school, but also, as stated later in the letter sent by the committee to the plaintiff's father giving the reasons for their action, because of "his incitement of his fellow pupils to write articles derogatory of the principal of the high school," tending "to subvert the authority of the principal and impair the discipline of the school, and was, moreover, such as to warrant his indefinite suspension." It therefore became vital for the plaintiff, if he was to meet this serious accusation, to show, if possible, not only that the offensive publication was not written or instigated by him, but that he had not incited other pupils to take similar action, or sought to raise a spirit of insubordination in the school, and that his fellow pupils had not given such information to the principal; and for this purpose he called one of them as a witness, to whom, apparently, the principal had referred. In what followed, the action of the chairman could be found to reflect the attitude of the committee, and might be open to more than one conclusion. It was plain that much friction had arisen between the plaintiff and the principal, and the disagreement between them had spread to some extent to the pupils of the school, and that to permit them to testify, presumably in contradiction of the principal, would tend to weaken his authority, impair his influence, and bring discredit upon the school itself. And with-

out any intention of taking an unconscionable advantage of the plaintiff, and perhaps not acting with cool deliberation, they took the position that in the sound management of the school, for the interest of the community, they ought not to permit a pupil to be examined on an issue of fact between the principal and the plaintiff, or to contradict him as a witness. Upon being informed that the only testimony which the plaintiff could present upon this part of the charge was that of his fellow students, this ruling was modified, so that "if any of the pupils wished to volunteer a statement in the matter, or contradict anything said of them by the principal, they might do so," and, if this view is taken, want of good faith had not been proved. Generally, in actions of tort at common law, intent or motive is material only on the measure of damages. *Hawes v. Knowles*, 114 Mass. 518, 19 Am. Rep. 383; *Rideout v. Knox*, 148 Mass. 368, 372, 19 N. E. 390, 2 L. R. A. 81, 12 Am. St. Rep. 560; *Burt v. Advertiser Co.*, 154 Mass. 238, 245, 28 N. E. 1, 13 L. R. A. 97. But, as in this case, it may be an element on which liability for a statutory tort finally rests, and when it is the subject of inquiry the issue raised is one of fact, and not of law, and often must be ascertained from results. See *Learock v. Putnam*, 111 Mass. 499.

Before the hearing began, counsel for the principal had stated to the committee the nature of the hearing, and accurately defined their powers and duties when sitting as a trial tribunal, and the presumption, until rebutted by proof, is that they intended the natural and probable consequences of their action on the rights of the plaintiff. The witness, when called, was apparently willing to testify, but after the ruling was announced declined to volunteer, and it could be found that he was prevented from giving evidence, or coerced to remain silent, by the action of the committee. As none of the pupils present offered themselves as witnesses, the legitimate effect of their decision was to cause the exclusion of lawful evidence that might have been introduced, and that was material to the plaintiff's defense, and could not be supplied from any other source. This method of procedure, when intelligently adopted by a tribunal charged with an impartial investigation of fact, to be followed by a determination of the rights of the plaintiff, cannot be considered a hearing in the accustomed sense, or to denote an inquiry of a judicial or quasi judicial character. If the course pursued was found to exhibit on their part either prejudice against the plaintiff, whose conduct was under investigation, or willful indifference to his rights, there would be evidence to support an allegation that they were not acting with a desire to meet the full requirements of such a hearing, but intentionally went outside of them for some purpose that, whether wrongful or lawful, equally resulted in a

wrong to him. See *Plant v. Woods*, 176 Mass. 492, 499, 57 N. E. 1011, 51 L. R. A. 339, 79 Am. St. Rep. 330; *Squires v. Wason Mfg. Co.*, 182 Mass. 137, 141, 65 N. E. 32; *Wills v. Noyes*, 12 Pick. 324, 328. And the adjudication of the committee becomes inconclusive in a suit of this nature. *Bishop v. Rowley*, ubi supra; *Morrison v. Lawrence*, ubi supra. It therefore became a question for the jury to determine if, in pursuing this course, they were actuated by a spirit of judicial fairness, or their conduct was susceptible of the other interpretation. *Londy v. Driscoll*, 175 Mass. 426, 427, 56 N. E. 598. The distinctions we have discussed must have been fully pointed out and presented in a manner satisfactory to the defendant, for the exceptions state that the case was submitted to the jury under instructions to which no objection was made. *Lane v. Old Colony & Fall River Railroad Company*, 14 Gray, 143, 147; *Townsend v. Hargraves*, 118 Mass. 325, 333.

In the opinion of a majority of the court, as no error of law is found, the order must be:

Exceptions overruled.

(136 Mass. 532)

BLANCHARD v. HOLYOKE ST. RY. CO.
(Supreme Judicial Court of Massachusetts.
Hampden. Oct. 28, 1904.)

TRIAL—VIEW—DISCRETION OF COURT—ORDER TO PERMIT PARTY TO TESTIFY IN RECLINING POSITION.

1. Since under Rev. Laws, c. 48, § 43, and Id. c. 176, § 35, the question whether a view shall be taken in any case except in eminent domain proceedings is within the discretion of the trial court, the refusal in a personal injury action to order a view of plaintiff in her own home in order to judge of the extent of her injuries is not an error of law.

2. In a personal injury action a motion to allow plaintiff to come into court to testify in a reclining position, supported on a stretcher, made previous to the trial, was denied. The counsel for plaintiff stated that she was unable to walk into court and testify standing or sitting. This was denied by defendant. At the trial the evidence of plaintiff tended to show that she was unable to come into court and testify otherwise than on a stretcher. Defendant's testimony tended to show that there was nothing the matter with her, and that she was able to walk into court. Held that, in the absence of a finding that plaintiff's representations were true, or of anything to show that she was unable to walk into court, it was not error to deny the motion.

Exceptions from Superior Court, Hampden County; Elisha B. Maynard, Judge.

Action by Carrie C. Blanchard against the Holyoke Street Railway Company. There was a judgment granting insufficient relief, and plaintiff excepts. Exceptions overruled.

N. P. Avery and Jas. B. Carroll, for plaintiff. Brooks & Hamilton, for defendant.

KNOWLTON, O. J. This is an action of tort, brought to recover damages for personal injuries. Before the trial the plaintiff's

counsel stated to the court that the plaintiff was unable to come into court to testify, unless upon a stretcher or in a reclining position, and moved that the jury might take a view of the plaintiff at her home. The first question arises upon the plaintiff's exception to an order denying this motion.

Except in suits for the recovery of damages for the taking of land for a public use, the question whether a view should be taken, in any case, is a matter peculiarly within the discretion of the court. Rev. Laws, c. 176, § 35; Id. c. 48, § 43; Com. v. Webster, 5 Cush. 295-298, 52 Am. Dec. 711; Com. v. Chance, 174 Mass. 247, 54 N. E. 551, 75 Am. St. Rep. 306. A motion that the jury take a view of the plaintiff in her home, in order to judge of the extent of her injuries, is very unusual, if not entirely unprecedented in this commonwealth. There was no error of law in the denial of this motion, and the discretion of the court seems to have been wisely exercised.

The plaintiff presented at the same time, with the same statement, a motion to be allowed to come into court to testify in a reclining position, supported on a stretcher or couch. Both of these motions had been made and denied at a previous sitting of the court, and the case had then been continued. They were renewed and denied again about a week before the trial of the case. The plaintiff did not at any time appear in court, neither was her deposition taken, nor was any attempt made to take it. The statement of the plaintiff's attorneys that the plaintiff was unable to walk into court and testify standing or sitting in the usual way was denied by the attorneys of the defendant. At the trial of the case evidence was introduced by the plaintiff that she was seriously injured and unable to sit up, or to come into court and testify otherwise than upon a stretcher or in a reclining position. Evidence was introduced by the defendant that there was nothing the matter with her, and that she was able to walk into court. Experts called by the plaintiff, and others called by the defendant, described in detail her physical appearance and condition. There is no doubt that courts may make reasonable rules and orders for the conduct of business, the preservation of order and decorum, and the prevention of unseemly exhibitions. In such matters much must be left to the discretion of the presiding justice. Whether, if the judge had found that the plaintiff was unable to testify except in a reclining position, and that she could testify in this way, it would have been his duty to permit her to be brought before the jury upon a stretcher rather than to testify by deposition, is a question which we need not decide in this case. It is enough for our decision to say that no evidence was introduced at the hearing, and that the statement made by the plaintiff's counsel was denied by the defendant's counsel. So far as

the bill of exceptions shows, the judge may have believed that the plaintiff was well able to walk into court and to testify in the usual way. With a dispute between the parties as to whether the plaintiff's injuries were real or pretended, and with the opportunities for deception as to her condition that might be afforded by a reclining position upon a stretcher in the courtroom, the judge might well decide that the testimony should be presented in the usual way. In the absence of any finding of fact by the judge in favor of the plaintiff's representation, or of anything to show that the plaintiff was unable to walk into court, it is plain that the exception to the denial of this motion is not well founded.

Exceptions overruled.

(186 Mass. 803)

In re BOUNTIES TO VETERANS.

(Supreme Judicial Court of Massachusetts.
Sept. 21, 1904.)

TAXATION—BOUNTIES TO VETERANS OF CIVIL WAR — CONSTITUTIONALITY — QUESTIONS TO SUPREME COURT.

1. St. 1904, p. 473, c. 458, directs payment of a certain sum to Civil War veterans of Massachusetts who received no bounty, and authorizes an appropriation to pay the same from money received from the United States for expenses incurred by the commonwealth in connection with the Civil War. By St. 1903, p. 506, c. 471, such money is to be paid into the treasury for the reduction of the public debt. *Held*, that since the effect of the statute was to take from the treasury, for the payment of the bounties, moneys which could ultimately be replaced only by taxation, and the proposed expenditure was for a use not public, but private, the statute was unconstitutional.

2. Though Const. c. 3, art. 2, requires the Supreme Judicial Court to give opinions on legal questions propounded by the Governor, it is the duty of the court to do so only so far as an opinion is desired as an aid in the performance of official duties in regard to a matter then pending.

Response of the Justices of the Supreme Judicial Court to questions propounded to them by the Governor concerning the validity of St. 1894, p. 473, c. 458.

The following are the questions propounded:

"Commonwealth of Massachusetts.

"Council Chamber.

"Boston, July 22, 1904.

"To the Honorable the Justices of the Supreme Judicial Court:

"At a meeting of the Governor and the Council held on the 20th day of July, 1904, it was ordered that the opinion of the Justices of the Supreme Judicial Court be requested upon the following important questions of law:

"(1) Whether the act of the Legislature of Massachusetts entitled 'An act to provide

for the payment of bounties to certain veterans of the Civil War,' being chapter 458, p. 473, of the Acts of the year 1904, has the force of a law; it appearing by the Journal of the House of Representatives, which is the branch of the Legislature in which said act originated, that less than two-thirds of the members of said House of Representatives agreed to pass the same notwithstanding the objections of the Governor thereto duly communicated to said house in writing, and it appearing further by said Journal that two-thirds of the members of said house who were present and voting did agree to pass the act over the executive veto.

"(2) Whether the phrase in part 2, c. 1, § 1, art. 2, of the Constitution of Massachusetts, 'two-thirds of the said Senate or House of Representatives,' means two-thirds of the members elected, two-thirds of the members living, two-thirds of the members present and voting, or two-thirds of a quorum, though more than a quorum are present and voting.

"(3) Whether, if, in the opinion of the Justices, said bill was duly enacted, it is a constitutional exercise of legislative power.

"Respectfully transmitted by order of his excellency John L. Bates, Governor.

"Edward F. Hamlin,

"Executive Secretary.

"[Copy.]"

To His Excellency, the Governor, and to the Honorable Council:

We, the Justices of the Supreme Judicial Court, have considered the questions upon which our opinion was required by the order, a copy of which is hereto annexed, and we respectfully answer as follows:

The three questions present in different forms, in reference to different conditions, the single general question, is chapter 458, p. 473, of the Acts of the year 1904, a valid law, under the Constitution of the commonwealth? The third question is in these words: "Whether, if, in the opinion of the Justices, said bill was duly enacted, it is a constitutional exercise of legislative power." As this relates to the substantive provisions of the statute, we will consider it first.

The statute directs payment "out of the treasury of the commonwealth" of "the sum of one hundred and twenty-five dollars to every veteran of the Civil War living at the date of the passage of this act, not being a conscript or a substitute, who served in the army or navy of the United States to the credit of Massachusetts during the Civil War, and who was honorably discharged from such service: provided, that he has not received a bounty from any city or town, or from the commonwealth for such service: and provided, that he makes application for the said bounty prior to the first day of November in the year 1906." Section 6 authorizes an issue of bonds of the commonwealth to provide for the payments to be

¶ 1. See Courts, vol. 12, Cent. Dig. § 492.

made under the act, and authorizes an appropriation of money to pay the bonds out of the sums that shall be received from the United States government for expenses incurred by the commonwealth in connection with the Civil War. Under St. 1903, p. 506, c. 471, these sums are to be paid into the treasury of the commonwealth for the reduction of the public debt, and the effect of the statute before us is to take from the treasury, for the payment of these bounties, money which ultimately can be replaced only by taxation. We are therefore brought to the question whether it is in the power of the Legislature to tax the people of the commonwealth to provide money for this purpose.

It is a familiar rule of law that, under the Constitution of the commonwealth, money can be raised by taxation only for public purposes. This rule has been stated and explained in many judicial opinions. See *Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 89, and cases hereinafter cited. Whether the use of money under the provisions of a particular statute is for a public purpose, or merely for the benefit of individuals, is sometimes a question difficult to answer, although usually it is easy of determination. In the present case, if the only object of the statute is to give gratuities to individuals of a certain class, without any benefit to the general public, the statute is unconstitutional. In *Mead v. Acton*, 139 Mass. 341, 1 N. E. 413, a case which arose in regular judicial proceedings and was argued by counsel, questions were decided by our predecessors which are identical in principle with those now before us. St. 1882, p. 72, c. 93, purported to authorize the town of Acton to raise money by taxation to pay a bounty of \$125 each to certain soldiers who had re-enlisted in the Twenty-Sixth regiment of Massachusetts volunteers, to the credit of the town, and who never had received any bounty for such re-enlistment. The court held the statute unconstitutional, saying in the opinion, among other things: "In the case at bar it seems to us clear that the object for which the town of Acton has raised this money is private, and not public. The town has made no promise to these soldiers, and is not under any obligation to pay them any bounties. The purpose is not to repay any sums advanced them as an inducement to enlist. * * * The war has been over for many years, and the payment of these bounties cannot encourage enlistments, or in any way affect the public service or promote the public welfare. The direct, primary object is to benefit individuals, and not the public." This case was approved and reaffirmed by the court in *Kingman v. Brockton*, 153 Mass. 255, 26 N. E. 998, 11 L. R. A. 123. In the opinion of the Justices, 175 Mass. 599, 57 N. E. 675, 49 L. R. A. 564, although a question was raised about some of the language of the court in *Mead v. Acton*, the

case was assumed to have been correctly decided. In the opinion last mentioned this language was used: "The ground of decision in *Mead v. Acton*, 139 Mass. 341, 1 N. E. 413, which certainly went very far, was not a distinction between the direct and indirect action of the Legislature, but was that, because the war had been over so long, it was manifest that the public welfare could not be promoted by the payment of the proposed bounties, and therefore a statute attempting to authorize such a payment by any one attempted to divert public funds to private uses and was void. Possibly other reasons could have been invoked." It is plain that there is no difference in principle between a statute purporting to authorize a town to raise money by taxation to pay bounties to soldiers who served on its quota in the Civil War, and a statute purporting to authorize the state to perform an act of the same kind. We cannot sustain the present statute without departing from the law of the decision in *Mead v. Acton*, and disregarding a precedent which hitherto has been held correct.

It is to be noted that the present statute, like the statute before the court in the former case, deals only with bounties. It is called "An act to provide for the payment of bounties." Under the language of the first section, the soldier must make "application for the said bounty." The kind of bounty is plainly indicated. It is such as many soldiers received from cities or towns or from the commonwealth for such service, for the act provides that soldiers who received a bounty either from a city or town or from the commonwealth shall receive nothing under this act. The manifest object of the statute is to give to soldiers, 40 years after their enlistment, bounties similar to those that others had at the time of their enlistment. Many statutes were enacted in Massachusetts in 1863, 1864, and 1865 in regard to the payment of bounties to volunteers. The ground on which they were held constitutional was not that cities or towns or the state had a right to make gifts to volunteers merely as gratuities, or as tokens of appreciation of their patriotism in volunteering to enter the military service of the United States. Bounties were not given in such a way or for such a purpose. They were given to help cities and towns to fill their quotas from time to time, under the calls of the President, "in the necessary defence and support of the government and the protection and preservation of the subjects thereof." This was the public purpose for which the money was raised, and which long ago was entirely accomplished. The reasons for the justification of the legislation as constitutional are stated in *Lowell v. Oliver*, 8 Allen, 247, 256, and in *Freeland v. Hastings*, 10 Allen, 586-589. These grounds of justification are wholly inapplicable to a statute giving gratuitous bounties many years after the

end of the war. Nor is the present statute like the early statutes of this and other states in favor of soldiers of the Revolutionary War, referred to in the opinion in 175 Mass. 599, 57 N. E. 675, 49 L. R. A. 564. Those soldiers were in the military service of the several states, which were then our only recognized governments, while the soldiers referred to in this statute enlisted and were mustered into the military service of the United States. When military pensions are granted, it is fitting that they should be given by the government in whose army the soldiers served.

But in this opinion we need not consider the subject of pensions to soldiers, for the statute does not purport to grant pensions or rewards for meritorious service, or money for the relief of present necessities. It purports to give bounties now only to those who did not receive them at the time of enlistment, which, if given then, would have been given as inducements to enlist in the service of the United States. Under the provisions of this statute, those who enlisted without a bounty, under other influences or upon other inducements, would receive now as a gratuity this sum of money representing an additional inducement. The object of the act, as disclosed by its provisions, is not to give rewards in recognition of valuable services, and thus to promote loyalty and patriotism, but to equalize bounties given to induce enlistments in a particular military service many years ago. Following the law as stated in *Mead v. Acton*, we are of opinion that the proposed expenditure of money is for a use which is not public, but private, and that therefore the statute is not in conformity with the Constitution of the commonwealth.

From our understanding of the object of the questions submitted to us, we infer that our negative answer to the third question, already given, will satisfy all requirements of the Governor and Council for information as to the law that should govern them in their official action in reference to this statute. We are always reluctant to give opinions upon legal questions of grave importance without the aid of arguments of counsel. It is our duty to do this when required, under chapter 3, art. 2, of the Constitution, but only so far as our opinion is desired as an aid in the performance of official duties in regard to a matter then pending. In the belief that this opinion meets all requirements of the Governor and Council upon the present occasion, we ask to be excused from answering the first two questions.

MARCUS P. KNOWLTON.
JAMES M. MORTON.
JOHN LATHROP.
JAMES M. BARKER.
JOHN W. HAMMOND.
WILLIAM CALEB LORING.
HENRY K. BRALEY.

72 N.E.—7

(179 N. Y. 335)

VIEMEISTER v. WHITE, President of Board of Education, et al.

(Court of Appeals of New York. Oct. 18, 1904.)

JUDICIAL NOTICE—VACCINATION—POLICE POWER—CONSTITUTIONAL LAW.

1. The courts will take judicial notice of the fact that it is a common belief of the people of the state that vaccination is a preventive of smallpox, so that Laws 1893, p. 1495, c. 661, as amended by Laws 1900, p. 1484, c. 667, § 2, being section 210 of the public health law, excluding children not vaccinated from the public schools until vaccinated, is a health law enacted in the reasonable exercise of the police power.

2. Laws 1893, p. 1495, c. 661, as amended by Laws 1900, p. 1484, c. 667, § 2, being section 210 of the public health law, excluding children not vaccinated from the public schools, is not in violation of Const. art. 9, § 1, providing for free common schools wherein all children of the state may be educated.

3. Laws 1893, p. 1495, c. 661, as amended by Laws 1900, p. 1484, c. 667, § 2, being section 210 of the public health law, excluding children not vaccinated from the public schools, is not a violation of Const. art. 1, §§ 1, 6, guarantying the citizen in the protection of his rights, privileges, and liberties.

Appeal from Supreme Court, Appellate Division, Second Department.

Application of Edmund O. Viemeister for writ of mandamus to Patrick J. White, president of the board of education of the borough of Queens, and others. From a judgment of the Appellate Division (84 N. Y. Supp. 712), affirming an order of the Special Term denying the writ, relator appeals. Affirmed.

John Leary and Edmund O. Viemeister, for appellant. John J. Delany, Corp. Counsel (James D. Bell, of counsel), for respondents.

VANN, J. The relator moved for a writ of mandamus to compel the officers having control of a public school in the county of Queens to readmit his child, a lad 10 years of age, to said school without requiring him to be vaccinated. It appeared from the moving papers that the boy had been in regular attendance at the school, and that the principal thereof, pursuant to the instructions of the board of education, had excluded him therefrom, because he refused to be vaccinated. It appeared from the papers read in opposition to the motion that when the relator's son was excluded from the school there was a regulation of the board of education in full force which provided that "no pupil shall be allowed to attend any school, nor shall any teacher be employed in the same, unless such pupil or teacher has been vaccinated." It further appeared that the lad had never been vaccinated, and that he refused to submit to vaccination; but it was not alleged that at the time of such exclusion smallpox was prevalent in

¶ 3. See Constitutional Law, vol. 10, Cent. Dig. § 705.

the neighborhood, or that there was any special danger, from recent exposure or other causes, of an immediate spread of the disease.

The Constitution requires the Legislature to "provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated." Const. art. 9, § 1. The public health law provides that "no child or person not vaccinated shall be admitted or received into any of the public schools of the state, and the trustees or other officers having the charge, management or control of such schools shall cause this provision of law to be enforced. They may adopt a resolution excluding such children and persons not vaccinated from such school until vaccinated." * * * Public Health Law, Laws 1893, p. 1495, c. 661, § 200, renumbered section 210 by Laws of 1900, p. 1484, c. 667, § 2. The same law provides for the free vaccination of children of suitable age who wish to attend the public schools, provided their parents or guardians are unable to procure vaccination for them. This is a re-enactment of a statute containing the same provisions in substance, passed in 1860, which remained in force until the passage of the public health law in 1893. Laws 1860, p. 761, c. 438.

The question presented is whether the Legislature is prohibited by the Constitution from enacting that such children as have not been vaccinated shall be excluded from the public schools. The appellant claims that the public health law places an unreasonable restriction upon the right of his child to attend school, and that it violates the section of the Constitution already quoted, as well as the general guaranties for the protection of the rights, privileges, and liberties of the citizen. Const. art. 1, §§ 1, 6. The respondents claim that the object and effect of such legislation is the protection of the public health, and hence that it is a valid exercise of the police power. The police power, which belongs to every sovereign state, may be exerted by the Legislature, subject to the limitations of the Constitution, whenever the exercise thereof will promote the public health, safety, or welfare. The power of the Legislature to decide what laws are necessary to secure these objects is subject to the power of the courts to decide whether an act purporting to promote the public health or safety has such a reasonable connection therewith as to appear upon inspection to be adapted to that end. A statute entitled a health law must be a health law in fact as well as in name, and must not attempt in the name of the police power to effect a purpose having no adequate connection with the common good. As we have recently said, it "must tend in a degree that is perceptible and clear towards the preservation of the * * * health * * * or welfare of the community, as those words

have been used and construed in the many cases heretofore decided." Health Dept. of N. Y. v. Rector, etc., 145 N. Y. 82, 39, 39 N. E. 833, 45 Am. St. Rep. 579. When the sole object and general tendency of legislation is to promote the public health, there is no invasion of the Constitution, even if the enforcement of the law interferes to some extent with liberty or property. These principles are so well established as to require no discussion, and we cite but a few out of many authorities relating to the subject. Matter of Jacobs, 98 N. Y. 98, 108, 50 Am. Rep. 636; People v. Marx, 99 N. Y. 377, 2 N. E. 29, 52 Am. Rep. 34; People v. Arensberg, 105 N. Y. 123, 11 N. E. 277, 59 Am. Rep. 483; People v. Gillson, 109 N. Y. 389, 17 N. E. 343, 4 Am. St. Rep. 465; People v. Ewer, 141 N. Y. 129, 38 N. E. 4, 25 L. R. A. 794, 38 Am. St. Rep. 788; People ex rel. Nechamcus v. Warden, etc., 144 N. Y. 529, 39 N. E. 686, 27 L. R. A. 718; People v. Havnor, 149 N. Y. 195, 43 N. E. 541, 31 L. R. A. 689, 52 Am. St. Rep. 707; People v. Adirondack Ry. Co., 160 N. Y. 225, 236, 54 N. E. 689; People v. Lochner, 177 N. Y. 145, 69 N. E. 373.

The right to attend the public schools of the state is necessarily subject to some restrictions and limitations in the interest of the public health. A child afflicted with leprosy, smallpox, scarlet fever, or any other disease which is both dangerous and contagious, may be lawfully excluded from attendance so long as the danger of contagion continues. Public health, as well as the interest of the school, requires this, as otherwise the school might be broken up and a pestilence spread abroad in the community. So a child recently exposed to such a disease may be denied the privilege of our schools until all danger shall have passed. Smallpox is known of all to be a dangerous and contagious disease. If vaccination strongly tends to prevent the transmission or spread of this disease, it logically follows that children may be refused admission to the public schools until they have been vaccinated. The appellant claims that vaccination does not tend to prevent smallpox, but tends to bring about other diseases, and that it does much harm, with no good.

It must be conceded that some laymen, both learned and unlearned, and some physicians of great skill and repute, do not believe that vaccination is a preventive of smallpox. The common belief, however, is that it has a decided tendency to prevent the spread of this fearful disease and to render it less dangerous to those who contract it. While not accepted by all, it is accepted by the mass of the people, as well as by most members of the medical profession. It has been general in our state and in most civilized nations for generations. It is generally accepted in theory and generally applied in practice, both by the voluntary action of the people and in obedience to the

command of law. Nearly every state of the Union has statutes to encourage or directly or indirectly to require vaccination, and this is true of most nations of Europe. It is required in nearly all the armies and navies of the world. Vaccination has been compulsory in England since 1854, and the last act upon the subject, passed in 1898, requires every child born in England to be vaccinated within six months of its birth. It became compulsory in Bavaria in 1807; Denmark, 1810; Sweden, 1814; Württemberg, Hesse, and other German states, 1818; Prussia, 1835; Roumania, 1874; Hungary, 1876; and Servia, 1881. It is aided, encouraged, and to some extent compelled, in the other European nations. 24 Enc. Brit. 80. It is compulsory in but few states and cities in this country, but it is countenanced or promoted in substantially all, and statutes requiring children to be vaccinated in order to attend the public schools have generally been sustained by the courts. *Abeel v. Clark*, 84 Cal. 226, 24 Pac. 383; *Bissell v. Davison*, 65 Conn. 188, 32 Atl. 348, 29 L. R. A. 251; *Blue v. Beach*, 155 Ind. 121, 56 N. E. 89, 80 Am. St. Rep. 195, 50 L. R. A. 64; *Morris v. City of Columbus*, 102 Ga. 792, 30 S. E. 850, 42 L. R. A. 175, 66 Am. St. Rep. 243; *State v. Hay*, 126 N. C. 999, 35 S. E. 459, 49 L. R. A. 588, 78 Am. St. Rep. 991; *Hazen v. Strong*, 2 Vt. 427; *In re Rebenack*, 62 Mo. App. 8; *Duffield v. Williamsport School District*, 162 Pa. 476, 29 Atl. 742, 25 L. R. A. 152; *Cooley's Cons. Lim.* (7th Ed.) 880; *Prentice on Police Powers*, 89, 132; 1 *Dillon's Mun. Corp.* § 355; *Parker & Worthington's Public Health and Safety*, § 123.

A common belief, like common knowledge, does not require evidence to establish its existence, but may be acted upon without proof by the Legislature and the courts. While the power to take judicial notice is to be exercised with caution, and due care taken to see that the subject comes within the limits of common knowledge, still, when according to the memory and conscience of the judge, instructed by recourse to such sources of information as he deems trustworthy, the matter is clearly within those limits, the power may be exercised by treating the fact as proved without allegation or proof. *Jones v. U. S.*, 137 U. S. 202, 216, 11 Sup. Ct. 80, 34 L. Ed. 601; *Hunter v. N. Y., O. & W. R. R. Co.*, 116 N. Y. 615, 623, 23 N. E. 9, 6 L. R. A. 246; *Porter v. Waring*, 69 N. Y. 250, 253; *Geist v. Detroit City R. R. Co.*, 91 Mich. 446, 51 N. W. 1112; *Greenleaf's Ev.* (14th Ed.) § 5; 1 *Wharton's Ev.* (3d Ed.) § 282; 1 *Starkie's Ev.* 211; 17 *Am. & Eng. Encyc.* (2d Ed.) 894. Common belief, in order to become such common knowledge as to be judicially noticed by us, must be common in this state, although in a matter pertaining to science it may be strengthened somewhat by the general acceptance of mankind. As was said by Mr. Justice Swayne in *Brown v.*

Piper, 91 U. S. 37, 42, 23 L. Ed. 200: "Courts will take notice of whatever is generally known within the limits of their jurisdiction, and, if the judge's memory is at fault, he may refresh it by resorting to any means for that purpose which he deems safe and proper. This extends to such matters of science as are involved in the cases brought before him." See, also, *People v. Lochner*, 177 N. Y. 169, 69 N. E. 373.

The fact that the belief is not universal is not controlling, for there is scarcely any belief that is accepted by every one. The possibility that the belief may be wrong, and that science may yet show it to be wrong, is not conclusive; for the Legislature has the right to pass laws which, according to the common belief of the people, are adapted to prevent the spread of contagious diseases. In a free country, where the government is by the people through their chosen representatives, practical legislation admits of no other standard of action; for what the people believe is for the common welfare must be accepted as tending to promote the common welfare, whether it does in fact or not. Any other basis would conflict with the spirit of the Constitution, and would sanction measures opposed to a republican form of government. While we do not decide and cannot decide that vaccination is a preventive of smallpox, we take judicial notice of the fact that this is the common belief of the people of the state, and with this fact as a foundation we hold that the statute in question is a health law, enacted in a reasonable and proper exercise of the police power. It operates impartially upon all children in the public schools, and is designed, not only for their protection, but for the protection of all the people of the state. The relator's son is excluded from school only until he complies with the law passed to protect the health of all himself and his family included. No right conferred or secured by the Constitution was violated by that law, or by the action of the school authorities based thereon. In view of the opinions below, we regard further discussion as unnecessary, and we affirm the order appealed from, with costs.

CULLEN, C. J., and O'BRIEN, HAIGHT, MARTIN, and WERNER, JJ., concur. GRAY, J., absent.

Order affirmed.

(179 N. Y. 253)

PEOPLE ex rel. MOYNIHAN v. GREENE,
Police Com'r.

(Court of Appeals of New York. Oct. 18, 1904.)

POLICE CAPTAIN—NEGLECT OF DUTY—EVIDENCE.

1. Testimony of a captain of police, charged with neglect of duty, that he had acquired considerable property after long service, which testimony was brought out by the prosecution to

create a suspicion that he had obtained the property dishonestly, does not, in the absence of any other evidence to that effect, support the charge.

Appeal from Supreme Court, Appellate Division, First Department.

Certiorari by the people, on the relation of Daniel O. Moynihan, against Francis V. Greene, as commissioner of police of the city of New York. From an order of the Appellate Division (87 N. Y. Supp. 1017) dismissing the writ and affirming proceedings of defendant in dismissing relator as captain of police in New York City, relator appeals. Reversed.

William C. De Witt and Hersey Egginton, for appellant. John J. Delany, Corp. Counsel (Theodore Connolly and Terence Farley, of counsel), for respondent.

O'BRIEN, J. The relator was removed from the police force of the city of New York upon charges which were in writing and appear in the record. The relator entered the army as a drummer boy in 1861, and served in the Union army during the war, and was honorably discharged as a major of his regiment. He was appointed to the police force in 1876 as a patrolman, was subsequently promoted to the grades of roundsman and sergeant, and finally, in 1896, was appointed a captain of police. During the 26 years that he served on the police force his record contains only two trivial charges against him, until the year 1902, when the present charges were made. The charge was for neglect of duty, and the alleged offense is based upon the following facts: It seems that in May preceding these charges one Beck had been detailed as a patrolman of the department at a recreation pier, and that the relator, without the consent of the police commissioner, withdrew him from duty at the pier and detailed him to perform certain repairs, or mechanical work, in or about the station house of the Twenty-Ninth Precinct. Beck was a carpenter, and the work which the relator detailed him to perform was the repairing of certain ballot boxes which were in his charge. It appears that the relator omitted to make a report of the removal of Beck from the pier to duty at the station house. This was substantially all that the charges contained, although the proof at the trial took a much wider range. There was some evidence to support the charge, and, if the trial was otherwise fair and regular, this court would perhaps feel bound by the determination of the commissioner upon the facts, although the charge embraced an offense purely technical only, without any intent on the part of the relator to defy or disregard the rules of the department or the authority of his superiors on the force.

On the trial the relator was a witness in his own behalf, and the counsel for the prosecution was permitted, under the relator's objection, to prove a great number of facts

that were entirely foreign to the issue. The evidence which the prosecution insisted upon putting into the case in this respect was clearly incompetent and grossly unfair to the relator. It was permitted to ask the relator what real estate he possessed, where it was located, its character and value. From this testimony it appeared that the relator owned various blocks, houses, or pieces of real estate in various parts of the city. He was then required to testify to the amount of his salary during the time he was upon the force, to the number of his children and to the expenses of his family, and other things equally foreign to the issue. This testimony could have but one purpose, and that was to create a suspicion or impression in the mind of the trial court that the relator must have obtained the moneys with which to acquire this property dishonestly; that is, by receiving bribes, or in some other way involving moral turpitude. He was not charged with anything of that kind, and hence should not have been required to answer such questions. It is quite true that in cases of this kind, where charges of misconduct on the part of an officer have been fairly established by the proofs, this court will not interfere for every technical error that may have been committed by the commissioner in the progress of the investigation; but where the errors are of such a character as to show that the trial was not fair, it is the duty of this court to review the case and to reverse the determination. *People ex rel. Shiels v. Greene*, 179 N. Y. 195, 71 N. E. 777. It was no doubt competent to require the relator to answer any questions that tended to discredit him as a witness in his own behalf, but the questions propounded were not at all of that character. He was not asked whether he had ever received any bribe, or taken money dishonestly or in violation of his duty. The questions were so framed as to create, by the answers merely, a prejudice or suspicion of wrongdoing on his part. The fact that the relator, after a long service on the force, had acquired considerable property, in no way tended to discredit him. The acquisition by a person in humble circumstances of property in his old age is not a badge of dishonesty which affects his credibility as a witness. We do not know how the relator acquired it, whether by inheritance, prudence, and economy, or otherwise. Upon a careful examination of the record it is very difficult to resist the conclusion that the relator was discharged from the force, not by reason of a technical violation of the rules, or a neglect of duty as described in the charges, but on the ground that he was so thrifty in acquiring property as to create a suspicion that he had been guilty of offenses of a much greater magnitude, with which he was not charged.

We think the order of the Appellate Division and the determination of the commis-

slower should be reversed, and a new trial granted, with costs to appellant in all courts.

OULLEN, O. J., and HAIGHT, MARTIN, VANN, and WERNER, JJ., concur. GRAY, J., absent.

Order reversed, etc.

(179 N. Y. 267)

PEOPLE v. BOGGIANO.

(Court of Appeals of New York. Oct. 25, 1904.)

MURDER—WHAT CONSTITUTES—APPEAL—REVIEW—INSTRUCTIONS.

1. To constitute murder in the first degree, there must be both an intent to kill and a deliberate and premeditated design to kill, which design must precede the killing by some appreciable space of time. It need not be long, but it must be sufficient for some reflection on the matter and a choice to kill or not to kill.

2. On a review under Code Cr. Proc. § 523, providing that where the judgment is death the Court of Appeals may order a new trial if satisfied that the verdict is against the evidence or law, or justice requires a new trial, it is not the province of the court to review conflicting evidence, and with the decision of the jury the court cannot interfere, unless it reaches the conclusion that justice has not been done.

3. On a trial for murder in the first degree, a refusal to charge that, if the jury is in doubt as to what actually happened in the room where the homicide was committed, they must bring in a verdict of not guilty, is not ground for reversal, as the request included any doubt, however slight, which the jury might have as to what actually occurred, especially where the court has charged fully as to the right of the accused to the benefit of every reasonable doubt.

Appeal from Supreme Court, Trial Term, Erie County.

Nelson Boggiano was convicted of murder in the first degree, and appeals. Affirmed.

Phillip V. Fennelly, for appellant. Edward E. Coatsworth, Dist. Atty. (William S. Jackson, of counsel), for respondent.

MARTIN, J. It was claimed by the people that the defendant had become infatuated with the decedent's wife, between whom and the decedent there had been domestic difficulties, and that ill feelings had arisen between the defendant and the decedent, which, together with such infatuation, constituted a motive on the part of the defendant to commit the alleged crime. He testified in his own behalf, admitting that he killed the decedent, but claimed that it was in self-defense. He also denied making the threats which were alleged and proved, or that he had any interest in the decedent's wife other than that of friendship. There was no eyewitness to the homicide, and hence the determination of the question of the defendant's guilt was dependent upon his testimony and the facts and circumstances proved in the case.

In determining the questions presented by

the appellant, it is unnecessary to review the evidence in detail, as it is manifest from the direct proof, and the facts and circumstances established, that the question whether the defendant killed the decedent under circumstances constituting the crime of murder in the first degree, or whether his act was justified upon the ground that it was in self-defense, was clearly a question of fact for the jury, which found against the defendant.

First. The appellant contends that no deliberate and premeditated design to effect the death of the decedent was proved. That it was necessary to establish premeditation and deliberation on the part of the defendant to justify the verdict, there is no question. By an examination of the evidence it is plainly disclosed that there was proof which, if believed by the jury, was sufficient to establish both premeditation and deliberation. This consisted of threats made by the defendant, and of facts and circumstances proved and admitted as to the relations of the parties, the time and manner in which the offense was committed, the conduct of the defendant, his relations with the decedent's wife, and other facts and circumstances which had a bearing upon that question. What is necessary to establish premeditation and deliberation has been so often considered by this court that further discussion seems unnecessary, except to state the rule applicable to this question as established by its decisions. "Under the statute, there must be not only an intention to kill, but there must also be a deliberate and premeditated design to kill. Such design must precede the killing by some appreciable space of time. But the time need not be long. It must be sufficient for some reflection and consideration upon the matter, for choice to kill or not to kill, and for the formation of a definite purpose to kill. And, when the time is sufficient for this, it matters not how brief it is. The human mind acts with celerity, which it is sometimes impossible to measure, and whether a deliberate and premeditated design to kill was formed must be determined from all the circumstances of the case." *Leighton v. People*, 88 N. Y. 117; *People v. Majone*, 91 N. Y. 211, 212; *People v. Conroy*, 97 N. Y. 62, 76; *People v. Hawkins*, 109 N. Y. 408, 17 N. E. 371; *People v. Johnson*, 189 N. Y. 853, 34 N. E. 920; *People v. Constantino*, 153 N. Y. 24, 47 N. E. 37; *People v. Kennedy*, 159 N. Y. 343, 54 N. E. 51, 70 Am. St. Rep. 557. It is also firmly established by the decisions of this court that where the proof is sufficient to justify the jury in finding that the homicide was intentional, and resulted from sufficient deliberation and premeditation to warrant a verdict of murder in the first degree, this court will not interfere with the determination of the jury upon the facts. *People v. Sutherland*, 154 N. Y. 345, 48 N. E. 518; *People v. Kennedy*, 159 N. Y. 343, 54 N. E. 51, 70

¶1. See *Homicide*, vol. 26, Cent. Dig. §§ 19, 20, 27, 28.

Am. St. Rep. 557. It follows, therefore, that the determination of the jury upon the question of premeditation and deliberation should not be disturbed by this court.

Second. The appellant contends that the verdict was against the weight of evidence, and that justice requires a new trial. It is apprehended that the intention of the defendant was practically to assert that he should have a new trial under the provisions of section 528 of the Code of Criminal Procedure, which in effect provides that, in a case where the judgment is of death, the Court of Appeals may order a new trial, if satisfied that the verdict is against the weight of evidence or against law, or justice requires a new trial, whether any exception shall have been taken or not. This section has been many times considered by this court, and it has uniformly held that it is not in the province of the court to review or determine controverted questions of fact arising upon conflicting evidence, but that the jury is the ultimate tribunal in such cases, and with its decision this court cannot interfere, unless it reaches the conclusion that justice has not been done. We are unable to reach any such conclusion in this case, and therefore cannot properly interfere with the result upon that ground.

Third. The only other question presented by the defendant arises upon his exception to the refusal of the court to charge that, "if this jury is in doubt as to what actually happened in that room [meaning a room in the house where the homicide was committed], that they must bring in a verdict here of not guilty." To this request the court, after having sought to ascertain the purpose of the defendant's counsel in making the request, finally declined to charge the defendant's request in that form. Therefore the only question of law presented is whether the defendant was entitled to the charge requested in the form or substantially as made. In passing, it may be observed that the charge in this case, as well as the rulings upon the trial, was pre-eminently fair to the defendant, and as favorable to him as he could properly ask. It is also manifest from the record that the court sought quite diligently to ascertain the precise point of the defendant's request, and thereby determine whether there was any proposition included therein which it could charge with propriety and justice. But it resulted only in the defendant's persistence in the request to charge the jury that, if it "was in doubt" as to what happened in that room where the offense was committed, it must bring in a verdict of not guilty. This request was not limited to a reasonable doubt, but included any doubt, however slight, which the jury might have as to the most trivial act or circumstance that occurred there. The effect of establishing such a rule would be to require the people in every criminal case to submit proof that would establish to an absolute certainty

all the ingredients of the crime before a conviction could be had, and would exclude circumstantial evidence altogether. Moreover, the court had already plainly and specifically charged that the defendant was presumed to be innocent until the contrary was proved, and that, in case of a reasonable doubt whether his guilt was satisfactorily shown, he was entitled to an acquittal; and also that when it appears that a defendant has committed a crime, and there is reasonable ground of doubt in which of two or more degrees he is guilty, he can be convicted of the lowest of those degrees only. Again, in charging upon the question of self-defense, the court said: "Of course, if what he [the defendant] did there was justifiable by way of self-defense, under the rule of law as I have given it to you, then your verdict should be a verdict of not guilty; and, if you have a reasonable doubt upon that subject, you should give it to the defendant—and that applies not only to that particular feature of the case, but to every other feature of the case, as well as to the question of the degrees of crime, if one has been committed." It was further charged: "If you reach the conclusion, beyond a reasonable doubt, that the defendant has committed a crime, then it will be your duty to say so by your verdict. If you reach the conclusion, beyond a reasonable doubt, that he is guilty of murder in the first degree, then your verdict will be simply, 'Guilty as charged in the indictment.'" The court then defined a reasonable doubt, and again repeated: "If you reach the conclusion that a crime has been committed, and that it is proven beyond a reasonable doubt, then it is your duty * * * that you shall say so by your verdict. Of course, if you reach the conclusion that it has not been proven beyond a reasonable doubt, and that the defendant is innocent of any crime, which of course follows if you find it has not been proved beyond a reasonable doubt, then it will be your duty * * * to report a verdict of not guilty." This was the end of the charge of the court, except that it charged certain requests made by the defendant. Immediately following was the request, to which we have already referred, to charge the jury that, if it "is in doubt as to what actually happened in that room, they must bring in a verdict here of not guilty." The court having charged fully, clearly, and properly as to the right of the accused to the benefit of every reasonable doubt upon the evidence, a denial of a request to charge the proposition in different language was not error. *People v. Pallister*, 138 N. Y. 601, 33 N. E. 741.

As we have already seen, the request here was to charge the jury that it must acquit if in doubt. Such is not the law. The request was incorrect. Moreover, it was vague and indefinite, and could not properly have been granted in that form or substance, and, besides, the court had fully and correctly

charged upon the subject. Hence it follows that the defendant's exception to the refusal of the court to so charge was not well taken.

Having considered all the questions presented to this court by the defendant, and finding none that would justify us in reversing the judgment or granting a new trial, the judgment appealed from must be affirmed.

CULLEN, C. J., and O'BRIEN, VANN, and WERNER, JJ., concur. GRAY and HAIGHT, J., absent.

Judgment of conviction affirmed.

(79 N. Y. 242)

PEOPLE ex rel. McCABE et al. v. MATTHIES et al., Town Auditors.

(Court of Appeals of New York. Oct. 18, 1904.)

MANDAMUS—TOWN BOARD OF AUDITORS.

1. Mandamus will not lie to compel the town board of auditors to re-examine and allow a claim against the town which has been rejected on the ground of its illegality, it being a quasi judicial determination, reviewable by certiorari only.

Bartlett, J., dissenting.

Appeal from Supreme Court, Appellate Division, Second Department.

Application by the people, on the relation of William F. McCabe and others, for writ of mandamus to Charles A. Matthies and others, as the board of town auditors of the town of White Plains. From an order of the Appellate Division (87 N. Y. Supp. 196) reversing an order of the Special Term granting a peremptory writ, relators appeal. Affirmed.

L. Laffin Kellogg and Alfred C. Petté, for appellants. Henry T. Dykman and Charles Wesley, for respondents.

MARTIN, J. Although there were many important and interesting questions presented upon the argument of this appeal which relate to the rights and liabilities of the parties, still, with our view of the case, its present determination rests upon the question of remedies rather than the ultimate rights of the parties. It seems quite plain that the appellants have mistaken their remedy, and that the court below properly so held. "The remedy by mandamus is of an exceptional character, and the writ issues only in that class of cases where a clear legal right is made to appear and there is no other adequate and legal means to obtain it." *People ex rel. McMackin v. Bd. of Police*, 107 N. Y. 235, 239, 13 N. E. 920. If a relator may obtain relief by appeal, writ of error, or certiorari, he will not be entitled to mandamus. 2 *Spelling on Extraordinary Remedies*, § 1374.

The town of White Plains entered into a

written contract with the relators for the improvement of certain roads in that town outside of the village of White Plains. In doing this work they used several thousand cubic yards of stone more than at the time of the contract they contemplated would be necessary. For the value of such stone they filed a claim with the town board of the town of White Plains, which by statute is the board of town auditors. This body refused to audit the claim, and the relators procured a peremptory writ of mandamus directing its examination and audit. Pursuant to the mandate of that writ, the respondents met as the town board of the town of White Plains, the town clerk produced the record touching the matter in controversy, together with the original notice of claim verified by the relators, and the terms of the contract between the relators and the town were then discussed and considered by the board. An examination of the papers presented disclosed that in the contract between the parties it was, among other things, agreed and recited that the quantities of materials stated in the estimate of the engineer were given with as much accuracy as possible; that such quantities were approximate only, and that bidders were required to form their own judgment of the quantities and character of the work by personal examination of the ground and of the specifications and drawings relating to such work; that the price agreed to be paid per lineal foot for the completed road must include the cost of all excavations, of all materials of whatever nature, and the furnishing of whatever labor was necessary for its full completion in the manner stated therein; that the prices named by the contractors were to cover the cost of furnishing all labor and materials, and performing all the work under the contract in accordance with the plans and specifications, and every expense incidental to the execution of the work; that there should be no allowance for extras in any account, or for any extra work or materials, except where there was a special agreement made before said extra work was done or materials furnished; that the contractors declared in writing over their signatures that the prices named in the contract were intended to cover all labor, materials, and expenses of every kind necessary to the completion of the contract, including all claims that might arise through damage or any other cause whatever, and they also agreed that they would make no claims on account of any variation between the quantities of the approximate estimate and the quantities of the work as done, nor on account of any misconception or misunderstanding of the nature and character of the work to be done or the character or place where it was to be done. At a meeting of the town board the bids of the appellants for such work were opened, their bids or proposals were accepted, and a

[1. See *Mandamus*, vol. 33, Cent. Dig. §§ 30, 312.

contract was ordered prepared for the completion of the work in the manner and form set forth in and by the said specifications, and the said contractors signified their willingness to accept such contract, and do and perform every act and thing, and furnish all labor and materials necessary, for the proper completion of the work in accordance with the plans and specifications as prepared by the engineer employed by the town board. The said contract was signed and executed by the said relators on August 8, 1899. The appellants thereby agreed to carry out and perform said agreement as set forth in their bid or proposal to the satisfaction of the engineer in charge of the work, and to the satisfaction of the town board of the town of White Plains, and agreed to furnish all labor and material necessary for the proper and complete performance of said work to the satisfaction of the board. It was likewise further agreed and distinctly understood between the parties that no claim for extra work of any kind should exist in favor of the appellants unless the same had been ordered by the town board at a meeting duly called for the purpose, or a regular meeting of such town board, and that no such claim should then exist until a certified copy of the resolution duly passed authorizing such extra work should have been served upon the appellants. This provision was never complied with as to the extra material claimed to have been furnished, and for which the relators recovered at Trial Term. It was also agreed that the work covered by the specifications and plans, not only during its progress, but on its final completion, must conform truly to the lines and levels as given by the engineer, and must be built according to the plans and specifications furnished.

This brief statement as to some of the material terms, conditions, and agreements which, under the contract, were to be kept and performed by the relators, discloses quite plainly that the question whether, under the contract, they had any legal claim against the town of White Plains for excess of material used by them, if the amount used was in excess of the amount originally contemplated, was presented to the board for its determination. On the presentation of the relators' claim to the board, it became its duty, especially under the mandate of the writ of mandamus first served, to examine that claim under and in view of the terms and provisions of the contract, and to first determine whether such claim was a proper one against the town, and, if so, then to determine the amount to be allowed thereon. So that the first question which the board was called upon to determine related to the propriety or legality of the claim against the town. That question the board of auditors passed upon, and held that under the provisions of the contract the relators had no valid or proper claim against the town, and

we are now called upon to determine whether that decision could be properly reviewed and reversed in a proceeding or action instituted by a writ of alternative mandamus.

In compelling the performance of a public duty by an inferior officer or tribunal, the question arises whether the duty is of a judicial or of a merely ministerial character. "If the duty be of a judicial character, a mandamus will be granted only where there is a refusal to perform it in any way; not where it is done in one way rather than another, erroneously instead of properly. In other words, the court will only insist that the person who is the judge shall act as such, but it will not dictate in any way what his judgment should be." *Shortt on Mandamus*, 276 (*256). "To audit is to hear, to examine an account, and in its broader sense it includes its adjustment or allowance, disallowance or rejection." *People ex rel. Myers v. Barnes*, 114 N. Y. 317, 323, 20 N. E. 609, 610; *People ex rel. Brown v. Board of Apportionment*, 52 N. Y. 224, 227.

The board of town auditors were authorized and required by statute to examine and decide as to the claims made and presented against the town by the relators. It is a statutory tribunal or court to hear and allow or reject any claims presented. "The examination of the account is the trial, and its allowance or disallowance is the judgment of this tribunal. As a general rule, no claim against a town is obligatory upon or is enforceable against the town until it has been audited or examined and allowed." *People ex rel. Van Keuren v. Bd. of Town Auditors*, 74 N. Y. 310. Moreover, the jurisdiction of such board over claims against the town is not only original, but its determination is conclusive until brought under direct review in another court in the manner prescribed by law. *People ex rel. Myers v. Barnes*, supra; *Osterhoudt v. Rigney*, 98 N. Y. 234. It was the duty of the board to decide as to the legality of the relators' claim, and whether it was a town charge. *Tenney v. Mautner*, 24 Hun, 840; *People ex rel. Everett v. Board of Supervisors*, 93 N. Y. 397, 403. The determination of the town auditors by which they decided that the claim presented by the relators was not a valid claim against the town and should be rejected was a judicial determination, and is conclusive until reversed or modified in proceedings by certiorari. A mandamus will not issue commanding the board to do over again what it has done, but with a different result. This would imply that the Supreme Court might dictate the judgment of the board. *People ex rel. Thurston v. Town Auditors of Elmira*, 82 N. Y. 80, 82; *People ex rel. Phoenix v. Supervisors of New York*, 1 Hill, 362; *People ex rel. Harris v. Commissioners of the Land Office*, 149 N. Y. 26, 30, 43 N. E. 418; *People ex rel. Vil. of Brockport v. Sutphin*, 166 N. Y. 163, 59 N. E. 770.

Again, it is well established that, where a

matter has been submitted to an authorized judicial tribunal, its decision is final between the parties until it has been reversed, set aside, or rejected; and the rule of *res adjudicata* applies to all judicial determinations, whether made in actions, or in summary or special proceedings, or by judicial officers in matters properly submitted for their determination. *Culross v. Gibbons*, 130 N. Y. 447, 454, 29 N. E. 839, citing *People ex rel. Myers v. Barnes*, 114 N. Y. 317, 20 N. E. 609, 21 N. E. 739; *Leavitt v. Wolcott*, 95 N. Y. 212; *People ex rel. Hatzel v. Hall*, 80 N. Y. 117; *Demarest v. Darg*, 32 N. Y. 281; *Sibley v. Waffle*, 16 N. Y. 180; *Supervisors of Onondaga v. Briggs*, 2 Denio, 33.

It is to be remembered that, before the application for the writ of alternative mandamus upon which the relators recovered judgment against the town in this action, they had presented their claim to the board of town auditors to be acted upon by it in pursuance of a mandamus which had been previously issued, and that the claim was rejected. This claim was first presented to the board November 4, 1901. The board refused to act on the ground that it did not come within its province. On December 27th of that year an application was made to a Special Term of the Supreme Court for a peremptory writ compelling the board to audit the claim. It was granted on January 18, 1902, and a peremptory writ issued directed to such board commanding it to examine and audit the relators' account. On the 22d of that month the board met for that purpose. At that meeting the town clerk produced before the board the records relating thereto, including the relators' claim and contract, as well as the original notice of claim dated October 1, 1901, made by the relators to the supervisor of the town of White Plains, and also presented the contract between the relators and the town, dated August 8, 1899, and filed in the town clerk's office on the next day, whereupon the terms of this contract were examined, discussed, and considered by the board, and thereupon it was moved that the claim be rejected on the ground that it was not a legal claim against the town of White Plains, and that, if any extra work was done, the claim for it was in violation of the express terms of the contract. This motion was carried, and the claim thereby rejected. Subsequently, on March 13, 1902, an order was obtained by the relators requiring the respondents to show cause why an alias writ of peremptory mandamus should not issue commanding the respondents to audit and examine and allow the relators' claim. After argument, an order was made for the issuance of an alias or alternative writ, which was issued. The return thereto was filed on July 30, 1902, and the final order in this action was based upon the trial of the issues of fact raised by this return. The jury found for the relators, and awarded them the sum of \$19,984.25. A mo-

tion for a new trial was made and denied, and judgment was entered for the amount thus awarded. An appeal was subsequently taken to the Appellate Division from the order allowing the alias or alternative writ, from the final order for the peremptory writ, and from the order denying the respondents' motion for a new trial upon the minutes. After hearing the arguments of counsel, the court reversed the order granting a peremptory writ of mandamus, and dismissed all the proceedings had in that action, including the order denying the respondents' motion for a new trial.

The respondents contend, and the court below held, as we think correctly, that the trial court had no power to issue the alias or alternative writ of mandamus herein, as, at the time this writ was obtained, there had already been an audit and determination of the relators' claim by the board of town auditors. It is not denied that at the time of such audit the board had before it the claim of the relators, the contract between the parties, and all the records relating to the transaction, and that, after an examination and discussion of the questions involved, the relators' claim was rejected upon the ground that it was not a proper claim against the town, and that, even if the work was done, the claim was in violation of the express terms of the contract. As we have already seen, the authorities are to the effect that what was done by the board was an auditing of the relators' account. It heard the claim which was presented, examined it, and disallowed and rejected it. It was its duty to determine the legality of the claim, and whether it was a proper charge upon the town. "The statute has created a board of town auditors to examine and decide upon claims made and presented against a town. * * * Such board is a statutory tribunal or court to hear and to allow or reject any claims presented against the town. The examination of the account is the trial, and its allowance or disallowance is the judgment of this tribunal," and the determination of the board, like the determination of all courts, is conclusive until reversed or modified under proceedings properly instituted for its review. *People ex rel. Myers v. Barnes*, supra. A second mandamus could not properly issue commanding the board to do over again what it had already done, but with a different result. Any other conclusion would result in a dictation by the court as to the judgment the board might render, which clearly could not properly be done. We think the claim presented, when examined in the light of the contract between the parties, presented a question to be determined by the board of town auditors, and that its determination was final until reversed or modified on review by an appellate court. "The rule which forbids the reopening of a matter once judicially determined by a competent jurisdiction applies as well to the decisions of

special and subordinate tribunals as to the decisions of courts exercising general judicial powers." *Osterhoudt v. Rigney*, 98 N. Y. 222, 234. It was there said by Andrews, J.: "The question is therefore presented as to the power of a board of audit to audit and allow claims which have been passed upon and rejected by a prior board. * * * *Van Wormer v. Mayor, etc., of Albany*, 15 Wend. 262; *White v. Coatsworth*, 6 N. Y. 137. The decisions of boards of audit have been considered as embraced within the principle. *Supervisors of Chenango v. Birdsall*, 4 Wend. 453; *People ex rel. Thomson v. Supervisors of Schenectady County*, 35 Barb. 408; *People v. Stocking*, 60 Barb. 573; *Supervisors of Onondaga v. Briggs*, 2 Denio, 26. There is no express power conferred on a board of town auditors to reverse the decisions of a prior board. The system of town audit contemplates an annual or semiannual adjustment of town accounts. The supervisors are required to cause the amounts specified in the certificate of the auditors to be levied upon the town, and they cannot reverse or review the action of the auditors. Laws 1840, p. 252, c. 305, § 4. All the arrangements of the statute look to a summary and complete determination by the auditors in respect to claims presented for audit. It would certainly occasion great inconvenience, and open the door to fraudulent practices, if an account once considered and rejected on the merits could be presented to any subsequent board of audit for readjudication."

As we have already seen, a board of town auditors, in passing upon an account presented to it, acts judicially. An audit may properly be directed by mandamus, and, when made, it is reviewable by certiorari. *People ex rel. Hamm v. Town Auditors*, 43 App. Div. 22, 59 N. Y. Supp. 615; *Colby v. Town of Day*, 75 App. Div. 211, 215, 77 N. Y. Supp. 1022. In the latter case it was held that the town board alone had jurisdiction to determine the claim against the town, and it was there said: "If a claim of which the town board only has jurisdiction has been by it ignored, the remedy is by mandamus to compel it to audit the same; if the claim has been rejected, the remedy is by certiorari to review its action." While this case was reversed by the Court of Appeals, the doctrine referred to was not questioned, it being reversed upon the ground that there was no specific exception sufficient to present any question of law for review by the Appellate Division. There was no such defect in this case. At the conclusion of the relators' evidence the respondents moved for a nonsuit and dismissal of the complaint, among others, upon the ground that the engineer had no power or authority to vary the terms of the contract, to change the grade or cross-sections, or increase or decrease the amount of the work, and, if extra work was done by the relators in the absence of any resolution being passed by the town

board authorizing it, no recovery could be had. This motion was denied, and the respondents excepted. At the close of all the testimony this motion was renewed upon the grounds stated at the close of the plaintiffs' evidence, and upon the ground that neither the engineer nor the inspector had any authority to increase the liability of the town beyond the amount fixed by the act authorizing the improvement; also upon the ground that, before the application for the writ of alternative mandamus, the claim was presented to and acted upon by the board of town auditors in pursuance of the mandamus issued to them for that purpose, and that this determination of the board, like the determination of all courts, was conclusive until reversed or modified in proceedings in certiorari, and that a mandamus would not lie commanding the board to do over again what it had done, but with a different result; likewise on the further ground that, where a body like a board of town auditors is clothed with a discretion, it may do or omit to do the act or thing according to the judgment of the body authorized to act; that a mandamus can only issue to compel action in case of a refusal to act, and when a decision is made the remedy by mandamus ends, and that the court is powerless on mandamus to review the decision or compel a decision the other way, because the court may disagree as to the justness or propriety of the questions reached; and on the further ground that the determination of the board of town auditors was conclusive until reversed. This motion was denied, and the respondents duly excepted. This exception brought up for review by the Appellate Division all the questions discussed. Our conclusion is that the exceptions were well taken, that the Appellate Division properly reversed the order of the Special Term, and that the decision of the Appellate Division should be affirmed, with costs to the respondents in all the courts.

PARKER, C. J., and O'BRIEN, VANN, CULLEN, and WERNER, JJ., concur. BARTLETT, J., dissents.

Order affirmed.

(179 N. Y. 281)

KING v. ASHLEY.

(Court of Appeals of New York. Oct. 23, 1904.)

COURTS OF APPEAL—JURISDICTION—FINAL ORDER—WITNESS—PRIVILEGE OF ATTORNEY.

1. An order punishing a witness for contempt for failure to answer questions in proceedings under Code Civ. Proc. §§ 2707, 2709, for discovery as to property of a decedent's estate, is a final order, and appealable to the Court of Appeals.

2. The privilege of an attorney under Code Civ. Proc. § 835, in relation to communications

† 2. See *Witnesses*, vol. 50, Cent. Dig. §§ 747, 769-765.

from a client, does not extend to everything coming to his knowledge while acting as attorney, and does not include information derived from other persons or other sources.

Appeal from Supreme Court, Appellate Division, Third Department.

Proceeding by H. Prior King, executor of William Moore, against Eugene L. Ashley, for discovery. From an order of the Appellate Division (89 N. Y. S. 482) affirming an order punishing the defendant for contempt, he appeals. Affirmed.

Henry W. Williams, for appellant. Edward M. Angell, for respondent.

PER CURIAM. This was a proceeding instituted under sections 2707 and 2709 of the Code of Civil Procedure for the examination of the appellant to obtain a discovery of his information concerning property belonging to the estate of William Moore, deceased. The appellant attended in answer to a citation, but declined to answer certain questions put to him on the ground that by section 835 of the Code of Civil Procedure he was forbidden to disclose the information sought, having been the attorney and counsel of the deceased. The sole object for which the proceeding was instituted was to obtain the disclosure of information. We think that the order punishing the witness for failure to answer is the final order in the proceeding, and therefore appealable to this court. People ex rel. Grant v. Warner, 51 Hun, 53, 3 N. Y. Supp. 768, affirmed on opinion below 125 N. Y. 746, 27 N. E. 407; Matter of Strong v. Randall, 177 N. Y. 400, 69 N. E. 721.

On the merits we think the order should be affirmed. It is not necessary to consider whether, by the execution and publication of a will disposing of his interest in the estate of William Van Rensselaer, the testator withdrew any communications he may have made to the witness as to the identity and location of that estate from the seal of confidence and the protection of section 857 of the Code. The questions for failure to answer which the appellant was punished are, as required by sections 11 and 2267 of the Code, specifically set forth in the order adjudging the appellant guilty of contempt. These questions do not call for communications from the deceased to the appellant, but for information which he had obtained from other sources as appears by his own testimony. It was settled in the cases which arose before the enactment of the Code provisions on the subject that the privilege of the attorney (or rather that of the client, for it is such) does not extend to everything which comes to his knowledge while acting as attorney or counsel, and does not include information derived from other persons or other sources. Crosby v. Berger, 11 Paige, 377, 42 Am. Dec. 117; Bogert v. Bogert, 2 Edw. Ch. 399; Coveney v. Tannahill, 1 Hill, 33, 37 Am. Dec. 287. The section of the Code is a mere re-enactment of the common-law

rule. Hurlburt v. Hurlburt, 128 N. Y. 420, 28 N. E. 651, 26 Am. St. Rep. 482. The appellant was, therefore, properly required to give all his information or knowledge on the subject that did not involve communications with the deceased.

The order appealed from should be affirmed, with costs.

CULLEN, C. J., and O'BRIEN, MARTIN, VANN, and WERNER, JJ., concur. GRAY and HAIGHT, JJ., absent.

Order affirmed.

(179 N. Y. 261)

In re UNION TRUST CO.

(Court of Appeals of New York. Oct. 18, 1904.)

WILLS—CONSTRUCTION—"UNMARRIED."

1. The word "unmarried," as used in a testamentary provision directing that in case of the death of his daughter without issue that portion of the estate bequeathed to her should go to such person or persons as would "receive the same were I to die in and an inhabitant of the state of New York, unmarried and intestate," means not married at the time of testator's death, not as never having been married; and in such event the property bequeathed passes to the descendants, and not to the collateral relatives of the testator.

Appeal from Supreme Court, Appellate Division, First Department.

In the matter of the accounting of the Union Trust Company, trustee under the will of Richard M. Hoe. From a decision in favor of Emily A. Lawrence, Emma B. Hoe, executrix, and others, appeal. Affirmed.

See 86 N. Y. Supp. 1149.

R. Burnham Moffat, Morris J. Hirsch, Charles R. Hickox, and Hector W. Thomas, for appellants. Edward B. Whitney, Lucien Oudin, Charles C. Burlingham, and Charles Lowell Barlow, for respondents Emily A. Lawrence et al. Robert E. Deyo, for respondents Mary S. Harper et al.

CULLEN, C. J. The sole question presented by this appeal is the construction to be given to the will of Richard M. Hoe, who died leaving a widow and four daughters and the issue of a deceased daughter. Tersely stated, the testator gave all his residuary estate to his executors in trust to pay the income to his widow for life and upon her decease to divide said estate into five shares, to hold one in trust for each of the four daughters, and on the death of such daughter he gave the share so held in trust to the issue of said daughter then surviving in the same manner and to the same effect as if the daughter had died an inhabitant of the state of New York intestate, leaving no husband, and had herself owned the share. Then follows in the gift in favor of the testator's daughter Annie C. Hoe this provision: "If however there shall be no such issue then surviving then upon the death of

the said Annie or upon the death of my said wife or my death, whichever last occurs, I give, devise and bequeath the said 'Third Residuary Portion' unto such person or persons as would by law receive the same were I to die in and an inhabitant of the state of New York, unmarried and intestate as to said portion." Precisely similar provisions are made as to two of the other shares and as to the share which on the death of his widow is given absolutely to the issue of his deceased daughter if any be then living. In the gift of a share to one of his daughters the word "unmarried" before "intestate" is omitted. Annie Hoe died a few months after the testator, unmarried, without issue. On the death of the widow, which occurred subsequent to that of the daughter, this controversy over the disposition of Annie's share, or what would have been her share if she had survived, arose between the collateral relatives of the testator, who are the appellants here, and his descendants, the respondents.

The claim of the appellants is based on the provision by which, in the contingency which has actually occurred, the testator gave the share to the persons who would have received the same under the laws of this state had he died unmarried and intestate. The whole controversy turns upon the construction of the word "unmarried." The appellants contend that the primary meaning of that word is "never having been married," and that, had the testator never been married, he could have had no lawful descendants entitled under our law to share in his estate, and the estate would go to his collateral relatives. The word "unmarried" has been the subject of judicial interpretation in a number of English cases. These cases may be divided into three classes: First. Where there has been a gift to a class of women described in a will as unmarried. In such cases it is held that the term did not include widows, though there are decisions to the contrary (*Hall v. Robertson*, 4 De G., M. & G. 780), and the opposite rule has been held in Pennsylvania (*Conway's Estate*, 181 Pa. 156, 37 Atl. 204). In the second class the question arose where there was a gift over in case of the death of a primary devisee or legatee unmarried. In this class of cases there has been a disposition to adopt the same construction, and to hold that, where the primary devisee had married, but left neither wife nor husband surviving, the gift over did not take effect. In such cases, however, the effect of the construction given to the term was to favor, not exclude, the heirs or issue of the testator or of the primary devisee or legatee. The third class, and by far the most numerous, is that of marriage settlements. A very common form of such settlements has been a trust income payable to the wife during life, with or without a power of appointment over the remainder, to be exercised by will; and, in case

of default in appointment, the trust estate to be distributed as if the wife had died unmarried and intestate. The great weight of authority is to the effect that in such cases "unmarried" is to be construed as "not being married at the time," and that it operates to exclude a husband, but not descendants, from sharing in the estate. *Hoare v. Barnes*, 3 Brown, C. C. 316; *Hardwick v. Thurston*, 4 Russ. 380; *Maugham v. Vincent*, 9 L. J. [N. S.] Ch. 329; *Norman's Trust*, 3 De G., M. & G. 964; *Pratt v. Mathew*, 8 De G., M. & G. 522; *Saunders' Trust*, 3 Kay & J. 152; *Clarke v. Colls*, 9 H. L. C. 601. The learned counsel for the appellants practically concedes that this is the rule in the construction of marriage settlements, but insists that the contrary interpretation prevails in the construction of wills. We think not. In *Clarke v. Colls*, supra—the case of a marriage settlement—Lord Cranworth said: "It is impossible to suppose that the framers of the settlement intended to use the word in a sense which would exclude the possible issue of the wife in favor of her collateral relatives." It is elementary law that in the construction of wills an intention to disinherit an heir will not be imputed to a testator by implication, or when he uses language capable of a construction which will not so operate. 2 *Jarman on Wills*, 841, rule 5; *Areson v. Areson*, 3 Denio, 458; *Scott v. Guernsey*, 48 N. Y. 106; *Low v. Harmony*, 72 N. Y. 408; *Matter of Brown*, 93 N. Y. 295. Where the circumstances and result are the same, and reasons for a rule are the same, we cannot see why the rule itself should not be the same, whether the instrument to be construed is a will or a marriage deed. The only ground I find for the notion that a different rule prevails in the construction of wills from that obtaining in marriage settlements is that in the former the questions presented have been whether a particular legatee answered the description of an unmarried person, or whether a gift over on death of the primary legatee unmarried took effect. We have not been referred, however, to any case arising under a will where "unmarried" has been construed so as to exclude the heirs or descendants of the testator or of the primary legatee or devisee in favor of collaterals.

It is urged by the learned counsel for the appellants that under the terms of the will the next of kin of the testator were to be ascertained not at his death, but at the widow's death, and hence that it was unnecessary to use the term "unmarried" for the purpose of excluding the widow from any interest in the share. I think very probably the counsel is correct in the proposition as to the time when the testator's next of kin and heirs at law were to be ascertained. Still the point is not entirely free from doubt, and a prudent lawyer might well have inserted this provision to remove all question as to the testator's intention. It is far more nat-

ural to ascribe the provision to this motive than to an intent to disinherit descendants. To me the argument of Lord Cottenham in *Maugham v. Vincent*, *supra*, seems unanswerable. If the testator meant to exclude his descendants, why did he not say so? In this state two words, "without issue," in England possibly three, "without issue surviving," would have been sufficient for the purpose. Why did he leave the disinheritance of his descendants as a matter of inference from a term of doubtful meaning? It cannot be said that the primary meaning of "unmarried" is "never having been married." The most that can be said is that, while either use of the word is correct and justified, not only by the lexicographers, but by the decisions, the term is more frequently employed as referring to people who have never been married than to widows or widowers or divorced persons.

It may be suggested that the argument of the learned counsel for the appellants would, in the case of recent wills in this state, lack the foundation on which it now rests. Since 1897 illegitimate children take the personal estate of their mother in default of legitimate issue. Since the enactment of our statute of adoption in 1887, the most chaste spinster or bachelor may have children, who inherit from them in case of intestacy.

We are of opinion, therefore, that the testator did not intend to disinherit his descendants, and that the order of the courts below should be affirmed, with separate bills of costs to the several respondents who appeared in this court and filed briefs.

O'BRIEN, HAIGHT, MARTIN, VANN, and WERNER, JJ., concur. GRAY, J. absent.

Order affirmed.

(179 N. Y. 285)

In re O'BERRY.

(Court of Appeals of New York. Oct. 28, 1904.)

TRANSFER TAX—INTEREST ON REFUNDING.

1. Where, under the Transfer Tax Act (Laws 1896, p. 871, c. 908) § 225, as amended by chapter 382, p. 916, of the Laws of 1900, and chapter 173, p. 380, of the Laws of 1901, the State Comptroller is required to refund the transfer tax after the surrogate has reversed the order under which it is collected on the ground that the tax paid was illegal, a right to interest follows, though there is no express provision in the act on that subject, and section 256, relating to repayment of illegal taxes, does not expressly provide for interest in such case.

Cullen, C. J., and Gray and Martin, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, Second Department.

In the matter of the appraisal of the transfer tax act of a trust estate under the will of Loftis Wood, deceased. From an order of the Appellate Division (86 N. Y. Supp. 269) affirming an order of the Kings county

surrogate's court directing the State Comptroller to refund a transfer tax to Mary J. Howey, the Comptroller appeals. Affirmed.

Jabish Holmes, Jr., Leonard B. Smith, and Frank Julian Price, for appellant. Robert H. Wilson, for respondent.

O'BRIEN, J. The petitioner, Mary J. Howey, acquired a vested remainder in the estate of Loftis Wood under the provisions of his will, admitted to probate May 6, 1884. A transfer tax was imposed upon this remainder in a proceeding by the trustees under the will, and the tax was adjusted upon the remainder at \$1,172.88 and paid to the Comptroller for the state December 7, 1901. Subsequently this court held that a transfer tax upon remainders vested prior to the passage of the law taxing such interests was void, as in conflict with the Constitution. *Matter of Pell*, 171 N. Y. 48, 63 N. E. 789, 59 L. R. A. 540, 89 Am. St. Rep. 791.

By section 225, of the law under which the tax was imposed (Laws 1896, p. 871, c. 908) as amended by chapter 382, p. 916, of the Laws of 1900, and chapter 173, p. 380, of the Laws of 1901, the Comptroller was required to refund a tax of this character after the surrogate had reversed the order under which it was collected. In this case the surrogate has reversed his original order, and directed the Comptroller to refund the tax so paid, with interest. The Appellate Division has affirmed the order, and the comptroller has appealed to this court, but only from that part of the order which requires the payment of interest, and hence the only question presented by the appeal is whether that part of the order which requires the payment of interest is erroneous.

The tax in question was imposed and collected by the state under color of a law that was absolutely void. It was a void tax, and not merely voidable for some irregularity or error, and had no support except an unconstitutional statute. Such a law is simply void. It confers no rights, imposes no duties, confers no power, and, in legal contemplation, is as inoperative for any purpose as if it had never been passed. *Norton v. Shelby County*, 118 U. S. 425, 6 Sup. Ct. 1121, 30 L. Ed. 178; *Matter of Brenner*, 170 N. Y. 185, 194, 63 N. E. 133. So that the only question before us is whether the Comptroller, having received the money without right, and used it for the purposes of the state, under a promise to refund it, was properly charged by the court with interest.

The only contention on the part of the state is that, since the statute providing for refunding taxes in such cases makes no mention of interest, the order, to that extent, was made without legal authority, and therefore is erroneous. The general law for the assessment and collection of taxes upon real and personal property provides that in case of payment of an illegal or excessive tax, subsequently corrected by the courts, it shall

be repaid to the taxpayer, with interest. Section 256. This would seem to express the general policy of the state as to the refunding of taxes improperly collected. But it is said that this rule does not apply to taxes upon transfers, since the very section directing such taxes to be refunded, when the order imposing them is reversed, is silent as to interest, and, being silent, no interest can be allowed. If this contention be correct, it follows that the state, when restoring illegal or excessive taxes to the living taxpayer, must pay interest, but, when doing justice to the estates of the dead or to the widow and children of the dead, no interest can be allowed. This anomaly is produced, as it seems to me, by exaggerating the importance of the word "interest" in the one statute, and its omission in the other. In this case the state has promised to refund the tax; that is, to make the party good who paid it. The state, having received the money without right, and having retained and used it, is bound to make the party good, just as an individual would be under like circumstances. The obligation to refund money received and retained without right implies and carries with it the right to interest. Whenever money has been received by a party which *ex æquo et bono* ought to be refunded, the right to interest follows, as matter of course. *Barr v. Haselton*, 10 Rich. Eq. 53.

In the *Scrimgeour* Case the surrogate, under the same statute, reversed the order imposing the tax, as he did in this case, and directed that it be refunded, with interest. That order was affirmed at the Appellate Division (80 App. Div. 388, 80 N. Y. Supp. 636) and in this court (175 N. Y. 507, 67 N. E. 1089).

The case of *Woerz v. Schunacher*, 161 N. Y. 530, 56 N. E. 72, is quite in point. The only question in that case was the right to interest under a written agreement which, like the statute in this case, made no mention of interest, but one party agreed to reimburse the other for certain outlays. It was held that the obligation to reimburse carried with it, *ex vi termini*, the right to interest on the sums paid. The discussion in that case shows that there are many cases in which interest is properly allowed, other than those cases embraced within the general rule; that is to say, cases where interest is given by express contract or as damages. The doctrine of that case is decisive of the case at bar, unless there is some difference or distinction between an obligation to reimburse a party for outlays, and an obligation to refund money received and retained without right. If such a distinction exists, I am not able to perceive it. If the parties now before us were to be reversed, and the case was one where *Mrs. Howey* had received and retained the money of the state without right, and was sued to recover it, and the court had charged her with interest, I venture to say that this

court would not think of disturbing the judgment simply because she had been charged with interest. When the state assumes an obligation to return money collected under an unconstitutional law, the obligation is subject to the same construction as all like obligations of private parties. Indeed, the obligations of the state are often measured by even broader rules of justice and honor than are applied to private persons.

The rule in this respect was well stated in the early case of *People ex rel. Bank of Monroe v. Canal Commissioners*, 5 Denio, 401, as follows: "The state, as such, is not liable to pay either principal or interest, as it cannot be sued by a citizen, and, of course, cannot be compelled to pay any debt. But where questions of public indebtedness come before the judicial tribunals through the agency of public officers over whom the court has jurisdiction, they do not hesitate to dispose of them upon the same legal and equitable principles which govern judicial decisions as between individuals. They apply the settled rules of law to such cases, and adjudicate upon the payment of both principal and interest in the same manner as in other cases. It is only in such cases that the judicial tribunals can direct the payment of a public debt, and there is no reason why, in directing such payment, the public agents should not be directed to do as ample justice as an individual would be required to do. Hence, if the question of the liability of the state to the payment of a claim for damages comes properly before a judicial tribunal, whether so brought by the public officer or the other party, the tribunal, in adjudicating upon the question, will, if it determines the claim against the state to be just, in addition to directing its payment, also direct the payment of interest thereon, where it would in other cases direct such interest to be paid. * * * Indeed, there can be no reason why the state, refusing or unable to pay a just debt, should not pay interest thereon in the same manner as individuals."

It will be noted that the present case comes before this court through the agency of a public officer, to wit, the State Comptroller, over whom the court has complete jurisdiction.

In the case of *Ætna Ins. Co. v. Mayor*, etc., of N. Y., 7 App. Div. 145, 40 N. Y. Supp. 120, the plaintiff recovered the amount of the tax held to be illegal and void, with interest from the date of payment. The judgment in that case was affirmed in this court, after full discussion, in an opinion by Judge Martin; and it was held that, since the tax was illegal and void, no demand was necessary in order to put the defendant in default. 153 N. Y. 331, 47 N. E. 593.

In *Tift v. City of Buffalo*, 25 App. Div. 376, 49 N. Y. Supp. 489, the plaintiff recovered judgment for the amount of a void assessment paid with interest, and the recovery was affirmed in that court and in this court. 164 N. Y. 605, 58 N. E. 1003. So it was decid-

ed in the case of *B. & S. G. Co. v. City of Boston*, 45 Mass. (4 Metc.) 181, in which it was held that interest was properly awarded to a party who had paid an illegal tax. *Boott Cotton Mills v. City of Lowell*, 159 Mass. 383, 34 N. E. 367.

In the case of *Boston & Maine Railroad v. State*, 63 N. H. 571, 4 Atl. 571, practically the sole question was with respect to the right to interest, not for a tax paid that was illegal and void, but simply excessive, and it was held that a taxpayer who has paid more than his share of the public expense may be entitled to interest on the excess abated by such an order as justice requires.

The same rule was announced by the same court, and even in a broader way, in a subsequent case. *Amoskeag Mfg. Co. v. Manchester*, 70 N. H. 336, 47 Atl. 74. There are numerous other authorities and cases to the same effect, all holding, in effect, that the taxpayer from whom an illegal or void tax is collected is entitled to interest on the amount. *City of Grand Rapids v. Blakely*, 40 Mich. 367, 29 Am. Rep. 539; *County of Galveston v. Galveston Gas Co.*, 72 Tex. 509, 10 S. W. 583; *Southern Railroad Co. v. Greenville*, 49 S. C. 449, 27 S. E. 632.

In none of these cases was the right to interest claimed under any statute expressly providing for it, but upon general principles of law, where money is received without right, and the party receiving it is bound, in equity and good conscience, to refund it. It was only an exercise of the general power to compel a party to an action or legal proceeding to refund or make restitution of money collected under an illegal order or some other authority, which in the end was held to be void, and this is such a case.

Enough has been stated to prove that when either the state or one of its cities or political divisions becomes liable, by statute or otherwise, to refund a tax paid which was illegal or void, the right to interest follows, without any express provision on the subject. There cannot be one law for political divisions, to whom the power of imposing and collecting taxes is delegated by the state, and another law for the state itself when it receives the illegal tax directly, and places it in its own treasury.

The contention of the learned counsel for the state that the payment of the tax was voluntary, and hence not recoverable, needs no answer, since a tax collected and paid under a void law can never be deemed a voluntary act on the part of the taxpayer. The opinion of Judge Martin in the case of *Ætna Ins. Co. v. Mayor, etc., of N. Y.*, 153 N. Y. 331, 47 N. E. 593, concurred in by this court, furnishes a complete answer to that contention. It was there held that an action for money had and received would lie for the recovery of money paid upon a void tax, and it may be safely asserted that the right to interest is one of the incidents of a claim in such an action. Moreover, there is no ap-

peal before us, except from that part of the order relating to interest. Of course, no one contests the point that the state cannot be sued or impleaded in its own courts without its consent. The state has authorized the Surrogate, upon the reversal of the order imposing the tax, to direct that the Comptroller refund the same to the proper party, and hence the principle of the exemption of the state from being sued has no application. The state has elected to confer the power to impose and collect this class of taxes upon the courts, and is bound by the rules of law and equity as to interest and otherwise that prevail in its own tribunals. It was the state that brought the petitioner into the surrogate's court upon a claim for taxes. It procured what, in effect, was a judgment in its own favor for the tax, and it gave its statutory promise to refund the money if the judgment was wrong. It is therefore in the same position as any other litigant who collects from his neighbor a void or erroneous judgment, and who subsequently is required to make restitution. The sole question, then, is as to the nature of the obligation to make restitution of money received without right, and to refund money received upon a void tax. Do these obligations carry with them the right to interest, or at least confer upon the court the power to allow it, as was done in this case? I think that, upon principle and authority, that question must be answered in the affirmative. In this case no one has sued the state, or is trying to sue it. The state passed a law under which it brought the petitioner into one of its own courts, namely, the surrogate's court, upon an allegation that there was due to the state from the petitioner a sum of money in the form of a transfer tax. The state was successful, and procured an order requiring the petitioner to pay this claim, and she did pay it. Subsequently the courts held that there was no valid law to uphold the claim of the state, and the same court that made the order reversed it, and directed the state to make restitution of the money received without right, including interest. These plain and simple facts cannot very well be distorted into a claim that the petitioner is seeking to sue the state for interest. The sole question is whether, in a legal controversy between the state and the petitioner, the surrogate in whose court the proceeding was pending exceeded his power and jurisdiction in directing restitution of money received by the state without any right to it, and allowing interest on the sum so paid. When the courts order a private litigant to make restitution of money paid to him on a judgment reversed for want of authority to render it, I assume that the power to allow interest as part of the restitution will not be questioned.

That the order of the learned surrogate in this case rests firmly upon justice and legal precedent is a proposition that would seem

to be so plain that it is superfluous to extend the argument. The petitioner paid a considerable sum of money to the state, and it was demanded and received without any legal authority. To the extent of the sum so received, the public burdens upon others were diminished, and so the public, represented by the state, have had the use and benefit of the money. If there is any good reason why the public, represented by the state, should not make her good, and return to her the money so paid, with its incidents, which is interest, I have not been able to perceive it. The only answer that the petitioner is met with is a very narrow one to apply to such a case, and that is that the word "Interest" is not found in this section of the statute. Interest is not nominated in the law, we are told. What the state agreed to do, it is said, was to refund, and it complies with its promise by restoring the bare sum received, without interest. I can only add that this contention is not only contrary to principle and to all authority on the question, but is unworthy of a great state.

I think that the order of the surrogate, affirmed at the Appellate Division, was right, and should be affirmed by this court, with costs.

HAIGHT, VANN, and WERNER, JJ., concur. CULLEN, C. J., and GRAY and MARTIN, JJ., dissent.

Order affirmed.

(179 N. Y. 273)

STEEFEL et al. v. ROTHSCHILD.

(Court of Appeals of New York. Oct. 25, 1904.)

LANDLORD AND TENANT—DEFECTS IN BUILDING—FRAUDULENT CONCEALMENT—LIABILITY TO LESSEE.

1. Where a lessor concealed defects in a building which the lessee could not discover by reasonable diligence, it constituted a fraud; and, where the lessee was compelled to remove from the building by reason of a judgment obtained by the municipal authorities declaring the building unsafe, he could recover from the lessee the rent paid in advance, and the loss occasioned by such removal.

2. Where a building constitutes a public nuisance, and the lessor has knowledge thereof before the lessee takes possession, he must abate the nuisance; and where he permits, with such knowledge, the lessee to take possession, damages resulting to the latter therefrom are the direct results of the lessor's violation of law in maintaining such nuisance, and he is liable to the lessee therefor.

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Bernard L. Steefel and others against Jacob Rothschild. From a judgment of the Appellate Division (82 N. Y. Supp. 1116) affirming a judgment in favor of defendant, plaintiffs appeal. Reversed.

See 72 N. Y. Supp. 171.

Edwin Countryman and Moses J. Harris, for appellants. John J. Crawford and Charles H. Brush, for respondent.

CULLEN, C. J. This action was brought—tenants against landlord—for damages occasioned under the following circumstances: In 1894 the defendant had erected a large structure at the corner of Fulton and Jay streets in Brooklyn, eight stories high above the street, with a cellar and subcellar below that level. The walls for the first two stories consisted principally of iron arches supported by columns of the same material, which rested on brick piers. The building presented a handsome and imposing appearance. The greater portion of it had never been occupied until the lease made to the plaintiffs. On June 21, 1898, the plaintiffs rented of the defendant, by a written lease, three of the six stores on the ground floor, with a portion of the next floor above, for the term of six months from September 1st, with the privilege of renewal for an additional term of five years, to be used as a store for the sale of clothing, men's furnishing goods, and similar articles, at a specified rent, payable monthly in advance. On September 1st the plaintiffs entered into possession of the demised premises under the lease, placing in the stores the necessary fixtures and appliances, as well as their stock of goods. On the 2d of December the municipal authorities, under the provisions of the charter, instituted an action in the Supreme Court to compel the defendant to secure or take down said building, alleging it to be unsafe and dangerous to the public, and at the same time took possession of the premises, and prevented the public from having access to the same, or passing along the sidewalk adjacent to the same. On December 5th the plaintiff vacated the demised premises. On December 19th, after a trial, judgment was entered in the action declaring said building unsafe and in imminent danger of falling, and directing the commissioner of buildings to remove the four upper stories of the building, and to take down and remove the brick walls on Fulton and Jay streets, from the roof down to and including the concrete foundation. The demolition thus adjudged was at once carried out. For the loss occasioned to the plaintiffs' fixtures and stock by their enforced removal, and for rent paid in advance, this action has been brought.

As the verdict was directed for the defendant, the plaintiffs are entitled to have the evidence considered in its most favorable aspect, and all disputed questions of fact and the inferences therefrom must be resolved in their favor. The evidence tended to show, if it did not conclusively establish, that the building had been in an unsafe and dangerous condition for some time prior to the lease to the plaintiffs; that these defects, which did not appear in the parts of the building leased to the plaintiffs, were wholly unknown to them, and were of such a character as reasonable diligence and inspection on their part would not have discovered. The complaint charged that at the time of

the execution of the lease the defendant knew of the dangerous character of the structure, and concealed that condition from the plaintiffs. As to this allegation, it is claimed by the defendant that there was no proof that such knowledge was brought home to the defendant until in the latter part of July, after the lease had been signed, though it is clear that he knew that in some respects the building was weak before that time. However that may be, it was clearly shown that in July the defendant was apprised by his architect that by the defects in the foundations, by the cracking and subsidence of the piers, and from the improper character of the work, the building was in imminent danger of collapse. The architect advised the defendant of the measures necessary to remedy the defects and insure the safety of the building. The defendant, however, took no steps in the premises, but allowed the building to remain in its then present state. He in no manner apprised the plaintiffs of his information concerning the character of the structure, and nothing developed in its appearance to warn them of its insecurity until the proceedings taken by the municipal authorities.

The learned court below held the general rule of caveat emptor applied; that there was no covenant, express or implied, on the part of the landlord either to repair, or that the premises were suitable for the purpose for which they would be used; and, that the only effect of the premises becoming untenable was to permit the plaintiffs, under the provisions of chapter 345, p. 592, of the Laws of 1860, to quit and surrender the premises, and relieve themselves from further payment of rent. The learned court said: "We find no suggestion that the landlord may be held liable for damages resulting to the tenant by reason of the building being untenable." In answer to these views, it is first to be observed that the action is not for damages for eviction against the landlord, by suffering the premises to become untenable. The fault, if any, which rendered the defendant liable, lay back of that. Doubtless the general rule is, as stated in *Jaffe v. Hartean*, 56 N. Y. 398, 15 Am. Rep. 438, that "a lessor of buildings, in the absence of fraud or any agreement to that effect, is not liable to the lessee or others lawfully upon the premises for their condition, or that they are tenantable, and may be safely and conveniently used for the purposes for which they are apparently intended." This doctrine has repeatedly been cited with approval. *Edwards v. N. Y. & Harlem R. R. Co.*, 98 N. Y. 245, 50 Am. Rep. 659; *Franklin v. Brown*, 118 N. Y. 110, 23 N. E. 126, 6 L. R. A. 770, 16 Am. St. Rep. 744; *Daly v. Wise*, 132 N. Y. 306, 30 N. E. 887, 16 L. R. A. 236. But the cases distinctly recognize the qualification that, to relieve the landlord from liability, there must be an absence of fraud. Thus in the *Edwards Case* Judge

72 N.E.—8

Earl said: "If he [the landlord] demised premises knowing that they are dangerous and unfit for the use for which they are hired, and fails to disclose their condition, he is guilty of negligence which in many cases imposes liability upon him." In the *Franklin Case*, Judge Vann said: "It is not claimed that any deceit was practiced or false representations made by the plaintiff as to the condition of the house in question, or of its fitness for the purpose for which it was let. The defendant thoroughly examined the premises before she signed the lease, and she neither ceased to occupy, nor attempted to rescind, until the last quarter of the term. Neither party knew of the existence of the offensive odors when the contract was made. They were not caused by the landlord, and did not originate upon his premises, but came from an adjoining tenement." In the *Daly Case*, Judge Follett said: "In case the owner of a dwelling knows that it has secret defects and conditions rendering it unfit for a residence, and fraudulently represents to one who becomes a tenant that the defects and conditions do not exist, or if he fraudulently conceals their existence from him, the lessee, if he abandons the house for such cause, will not be liable for subsequently accruing rent." These cases thus also recognize that concealment of secret defects may constitute fraud, and the point has been expressly decided in other cases. In *Cesar v. Karutz*, 80 N. Y. 229, 19 Am. Rep. 164, the landlord let apartments infected with the smallpox, of which he had notice, but did not notify his tenant, in consequence of which the latter caught the disease. The landlord was held liable. In the opinion delivered by this court in that case there is no review of the earlier decisions, or discussion of the principle on which the liability was placed; Judge Rapallo confining himself to saying: "There can be no doubt that, if the facts were as alleged by the plaintiff in the complaint, she had a good cause of action." It was also held that the charge of the trial court, "that if a landlord lets premises to a tenant, and they are infected and he knows it, it is his duty to let the tenant know it," was correct. So in Massachusetts it was held that an action in deceit would lie, of tenant against a landlord, for leasing an infected dwelling, of the condition of which he had knowledge, but the tenant had not. *Cutter v. Hamlen*, 147 Mass. 471, 18 N. E. 397, 1 L. R. A. 429. It was there said by Judge Holmes: "It is settled that a landlord may be liable for not disclosing a concealed source of danger, known by him to be such, and not discoverable by the tenant." See, also, *Wallace v. Lent*, 1 Daly, 481. So far as relates to the danger to the lessee or occupants of the building, I do not see that the case at bar can be distinguished from those arising from contagious diseases. The danger to life and limb from the collapse of a large building would certainly be as great as that from contagion, and, from

the proof in this case as to the condition of the building, the jury might have found that it was just as imminent. We think, also, that on the evidence the jury might have found that the defects in the structure were concealed, and that the plaintiffs could not by reasonable diligence have discovered them. Under these circumstances, it is reasonably clear that, had the defendant known of the dangerous condition of the premises at the time he leased them to the plaintiffs and concealed it, he would have been liable; and this liability, as pointed out by Judge Earl in the *Edwards Case*, *supra*, arises, not *ex contractu*, but *ex delicto*.

It is contended, however, by the defendant that to such claim of liability it is a complete answer that the defendant was not shown to have known the dangerous condition of the building when he executed the lease to the plaintiffs, though he acquired such knowledge prior to the commencement of the demised term. It is said that the rights of the parties became fixed at the date of the lease, and that, whatever may have been his ethical duty, he was under no legal obligation to apprise the plaintiffs of the facts which had come to his knowledge. Assuming, though only for the purposes of this discussion, that such may be the general rule, we think this case does not fall within it. The structure was not in a field distant from the public highway. It abutted the most traveled public street in the borough of Brooklyn. It was eight stories high. If in danger of immediate collapse, as the jury might have found, it was a menace to travelers passing along the street, and constituted a public nuisance. *Wood on Nuisances*, § 119; *Mullen v. St. John*, 57 N. Y. 567, 15 Am. Rep. 530. From the time that the defendant knew that such was its condition, it was his duty to have abated the nuisance. He was in possession of the structure until the demise of the plaintiffs took effect. Whatever may have been his obligation to the plaintiffs under the lease to give them possession, he, under his paramount duty to the public, was bound to violate that obligation, if necessary (remaining liable for the breach), and either make the building secure, or remove it altogether. At least from the time that he knew of the danger the defendant was maintaining an illegal structure. The decree of the court in December did not create the duty to take down the walls of the building, but simply enforced the performance of a duty which had existed long before. Had the defendant discharged his legal duty, there would have been no building in which it would have been possible for the plaintiffs to enter and take possession. It was therefore the direct consequence of the defendant's continuous violation of law, in the maintenance of an illegal structure from July to the commencement of the demised term, that allured the plaintiffs into entering upon the premises. Their damage was the natural consequence of his unlawful

act, and we think the decision in the present case can be safely placed on that ground. If the plaintiffs, however, knew or should have known of the danger, no liability would arise.

The judgment should be reversed, and a new trial granted; costs to abide the event.

VANN, J. I dissent from the conclusion that the defendant, "under his paramount duty to the public, was bound to violate," if necessary, his covenant in the lease that the plaintiffs should "peaceably have, hold, and enjoy the said premises for the" term of the demise, because I regard the proposition as doubtful, and it is unnecessary to pass upon it in deciding this appeal. I concur in the result, however, because the evidence permitted the jury to find that the defendant knew that the premises were in a dangerous condition when he executed the lease, and that hence he was guilty of fraudulent concealment. He erected the building, and had been in possession of it for four years. Two years after it was built he received a notice from the building department which should have led a prudent man to investigate, and investigation would have led to discovery. If the structure was never safe, as the jury could have found, they could also have found that he knew it was unsafe when he entered into the lease without disclosing that vital fact.

GRAY, BARTLETT, MARTIN, and WERNER, JJ. (and VANN, J., in memorandum), concur with CULLEN, C. J.

Judgment reversed, etc.

(179 N. Y. 303)

CITY OF NEW YORK v. BROWN et al.

(Court of Appeals of New York. Oct. 28, 1904.)

INJUNCTION—ACTION ON BOND—EXCLUSIVE REMEDY—WHARVES—UNLAWFUL OCCUPANCY—DAMAGES.

1. That plaintiff continued the unlawful occupancy of a pier in the city of New York under an injunction restraining the city from interfering with such occupancy until the lawfulness thereof could be adjudged did not confine the city, after judgment in its favor, to an action on the bond, but the damages arising out of such unlawful occupation, and not out of the granting of the injunction, are recoverable in an action therefor.

2. Where a pier of a city was unlawfully occupied by defendant for dumping purposes, and the claim for damages by the city was based solely on such use, and defendants, who were licensees of the pier, had incurred a large expense in adapting it to such use, the measure of damages is the annual rental of the pier for dumping purposes, deducting therefrom the expense of construction.

Appeal from Supreme Court, Appellate Division, First Department.

Action by the city of New York against Charles A. Brown and others. From a judgment of the Appellate Division (85 N. Y. Supp. 1127) affirming a judgment in favor of

plaintiff and an order denying a motion for new trial, defendants appeal. Reversed.

On December 31, 1901, the dock department of the city of New York granted a permit to the defendants during the pleasure of the department to use and occupy "200 feet of the south side of Old Slip Pier East, East river, and to construct a dumping board thereon," at an annual fee or rental of \$1,000. Within a few days thereafter the defendants commenced the erection of a dumping board on the pier, and the same had been nearly completed on January 24, 1902, when the work on it was stopped by order of the commissioner of docks, who had then succeeded to the powers of the former department of docks. At this time the defendants had expended about \$6,000 in the construction of the dumping board, and it would have required only about \$100 more to complete it. On April 23, 1902, the commissioner of docks revoked the permit referred to, and notified the defendants that their use of the pier was illegal because in violation of section 845 of the Greater New York Charter, which provided, in substance, that no dumping board should be erected on a pier which had theretofore been used for the loading or unloading of sailing vessels employed in foreign commerce and having a draught of more than 18 feet. The pier in question came within the provisions of that section, and the defendants were notified to remove their dumping board within 15 days. Upon receipt of this notice the defendants commenced an action to restrain the plaintiff from interfering with their occupancy of the pier, and on May 3, 1902, procured an injunction, which was thereafter continued during the pendency of the suit. The injunction suit was tried in October, 1902, and resulted in favor of the city. On November 18, 1902, a judgment was entered dismissing the complaint. On the succeeding 24th of December the commissioner of docks took down and removed the dumping board of the defendants. Thereafter this action was commenced by the city to recover damages from the defendants for their alleged unlawful use and occupation of the pier from May 9 to December 24, 1902. Upon the trial evidence was adduced on behalf of the plaintiff to show that the rental value of the pier for dumping purposes was \$12,000 a year, and on this evidence the jury rendered a verdict in favor of the plaintiff for \$5,000. The judgment entered upon this verdict was affirmed by the Appellate Division.

L. Lafin Kellogg and Alfred C. Petté, for appellants. John J. Delany, Corp. Counsel (Theodore Connolly and Terence Farley, of counsel), for respondent.

WERNER, J. (after stating the facts). The defendants' first contention is that the plaintiff has mistaken its remedy in seeking to recover damages for the unlawful use and

occupation of the pier in question, and that it should have brought an action on the undertaking given by these defendants in the action wherein they were plaintiffs and the city was defendant and in which the injunction above referred to was procured. We think the cases relied upon by the defendants to support that contention have no application here, because this is not a case in which the plaintiff's right to damages arises out of the granting of an injunction, but is based wholly upon the claim of a wrongful use and occupation of its property. The use of the pier for dumping purposes was contrary to the provisions of section 845 of the charter (Laws 1897, p. 303, c. 378, as amended by Laws 1901, p. 362, c. 466), and defendants' occupation thereof was, therefore, unlawful. *Brown v. City of New York*, 78 App. Div. 361, 79 N. Y. Supp. 943, affirmed 176 N. Y. 571, 68 N. E. 1115. Under these circumstances the plaintiff has the undoubted right to recover such damages as it may have sustained by reason of such unlawful use and occupation.

In the effort to prove the plaintiff's damages, its commissioner of docks was permitted to testify that the use of the pier for dumping purposes was worth \$12,000 a year, and upon this evidence the jury rendered a verdict of \$5,000 for such use during the period from May 9 to December 24, 1902. In various forms the defendants' counsel requested the learned trial court to charge the jury that upon the facts alleged and proved the plaintiff was not entitled to recover damages based solely upon the rental value of the pier for dumping purposes, and that the recovery should be limited to the rental value of the pier for general purposes. These requests were refused, and the court charged, in substance, that the plaintiff was entitled to recover for the use of the pier for dumping purposes. The exceptions to the rulings of the learned trial court in that behalf present the only question that we deem it necessary to discuss upon this appeal.

Under familiar principles two distinct and separate measures of damages were open to the plaintiff. It had the right either to base its claim upon the rental value of the pier for general purposes, or to demand the damages growing out of the particular use to which it was subjected by the defendants. Under the first alternative all the uses to which the pier could ordinarily be devoted would have been proper subjects of consideration in determining the measure of damages. *Reisert v. City of New York*, 174 N. Y. 198, 66 N. E. 731. Under the second alternative chosen by the plaintiff, the use of the pier for dumping purposes was the sole and specific ground upon which its claim to damages was based. In order to adapt the pier to this particular use, the defendants necessarily incurred an expense of \$6,000, which, in the nature of things, should have been deducted from the gross annual

rental value of the pier for dumping purposes in admeasuring the damages to which the plaintiff, under this theory of the case, claimed to be entitled; in other words, the usable value of the pier for the specific purpose was what it was worth for that purpose after deducting the cost of adapting it thereto. This essential feature of the measure of damages sought to be applied to this case was apparently overlooked by the learned trial court, and for this reason we think the judgment herein should be reversed, and a new trial had, with costs to abide the event.

CULLEN, C. J., and O'BRIEN, BARTLETT, MARTIN, and VANN, JJ., concur. HAIGHT, J., absent.

Judgment reversed, etc.

(179 N. Y. 234)

MILLER v. QUINCY et al.

(Court of Appeals of New York. Oct. 23, 1904.)

FOREIGN CORPORATIONS—DIRECTORS—ACTION FOR ACCOUNTING.

1. Under Code Civ. Proc. §§ 1781, 1782, authorizing an action against directors or officers of a corporation to compel an accounting and payment to the corporation of any money or property which they have acquired themselves or transferred to others by violation of their duties, a director of a foreign corporation transacting business and having its principal office in the state may sue former directors for an accounting and restoration of the moneys of the corporation alleged to have been misapplied by them, and such right of action is not restricted to domestic corporations only.

Haigh and Martin, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Theodore S. Miller against Josiah Quincy and others. From a judgment entered on an order of the Appellate Division (85 N. Y. Supp. 310) reversing an interlocutory judgment of the Special Term overruling a demurrer to the complaint, plaintiff appeals. Reversed.

Frank P. Ufford and Philip Carpenter, for appellant. Sumner B. Stiles, for respondents.

O'BRIEN, J. The question of law presented by this appeal is of considerable practical importance, and arises upon a demurrer by one of the defendants to the complaint. There are three grounds of demurrer specified in the pleading: (1) That it appears upon the face of the complaint that the court has not jurisdiction of the subject of the action; (2) that it appears upon the face of the complaint that it does not state facts sufficient to constitute a cause of action; (3) that upon the face of the complaint there is a defect of parties plaintiff. If the complaint is defective for any reason stated in the demurrer, the defect must appear upon

the face of the complaint. Of course, there may be omissions in the pleading, or defenses in fact may exist to the cause of action. But, generally speaking, these are matters of defense, and the court, upon the decision of the demurrer, can look only to defects which appear upon the face of the complaint. All other defenses, if any, must be interposed by answer, and, if not so interposed, are deemed to be waived. Hence the review in this case must be confined entirely to what appears upon the face of the complaint, and, unless it can be demonstrated from the facts stated either that the court has no jurisdiction of the action or that the complaint does not state sufficient facts against the demurring defendant to constitute a cause of action, then the demurrer is bad. All the facts stated in the complaint are admitted by the demurrer, and the question is whether those facts constitute a cause of action in favor of the plaintiff and against the demurring defendant. It is therefore necessary to get a clear conception of the case which is made by the complaint. The plaintiff alleges that he is one of the directors of a business corporation created by the laws of West Virginia, and that the corporation now, and ever since its organization, has had its principal place of business and office for the transfer of stock in the city of New York, and that it is engaged in business in this state. It then alleges that prior to September 20, 1898, the defendants were elected directors of this corporation, and continued as such until May 16, 1899; that on or about the 15th of December, 1898, certain parties named paid to the corporation the sum of \$25,000 as the consideration of a certain business transaction between those parties and the corporation; that subsequently these defendants, being then directors, wrongfully appropriated the said money to their own use, or wasted and misapplied it with other funds of the corporation. The relief demanded is that the defendants, and each of them individually, be required to account for their official conduct in the management and disposition of the funds and property of the corporation; that the defendants, and each of them, be compelled to pay to the corporation, or to the receiver thereof that may be appointed in the action, such sum as may be found to be due from them upon such accounting, and any money and the value of any property which the defendants have acquired by themselves or transferred to others, or lost or used in violation of their duties as such directors and officers or otherwise, including the said sum of \$25,000. It should be noted here that the corporation itself is made a party defendant in the action, although, so far as the record discloses, it does not appear or make any defense to the charges contained in the complaint.

It may be observed here, in order to clear away some things that create confusion in

the discussion, that this is not an action by or against either a foreign or a domestic corporation, except so far as the corporation in question is made a nominal defendant upon the record. It is an action by an individual director against individuals who were formerly directors to recover from the latter money belonging to the corporation which they had misappropriated or wasted in violation of their duties as directors, and the sole question is whether the plaintiff is entitled to sue the defendants in the courts of this state to compel them to restore to the corporate treasury the funds that they have received and retained or wasted, contrary to the duties of their trust. We do not know from the complaint itself where either the plaintiff or the individual defendants reside. I am not aware that that question is of any importance. The complaint does show that the business of the defendant is in this state, that its principal place of business is here, and that it has an office in this state for the transfer of its stock. If the residence or citizenship of any of the defendants is of any importance in the case, then the defect, if any, in that respect, is not disclosed by the complaint, but is matter of defense. It is not even suggested in the demurrer, or in the argument at the bar, that that question enters into the case at all, or is of any consequence, and it seems to me that it is not.

Although the demurrer is based upon the three grounds stated, no question has been discussed at the bar in support of the judgment, or in the court below, except the right of the plaintiff to maintain the action. That proposition is made very plain by a paragraph in the prevailing opinion of the learned court below, as follows: "The question here presented relates solely to the right of the plaintiff to maintain this action. The right of a foreign corporation to sue its defaulting directors or officers, or the right of a stockholder suing on behalf of himself and all other stockholders to enforce such a right on behalf of the corporation when it neglects and refuses to enforce it, is not presented." So it will be seen that the question in this case is a narrow one, and it is desirable that it should be confined within the limits which the inquiry naturally suggests. The learned judge at Special Term overruled the demurrer, but his decision was reversed at the Appellate Division by a divided court, and the demurrer was sustained. The learned court thereupon certified to us the single question whether the complaint stated facts sufficient to constitute a cause of action. It is plain, therefore, from the history of the case and the condition of the pleadings, that the question involved is simply this: Has the plaintiff stated facts sufficient to enable him to procure from the courts in this state the relief demanded, or any relief whatever? It is admitted that the plaintiff is a director of the corporation; that the defendants are

former directors who have gone out of office, but while in office wrongfully appropriated the corporate funds, and still retain them. It would seem to be quite plain that these facts would constitute a cause of action against the defendants in favor of some one, and we have to deal only with the question whether this plaintiff is authorized by law to institute and prosecute the action.

By the statute of this state (Code Civ. Proc. § 1781), an action may be maintained against one or more trustees, directors, or managers, or other officers of a corporation, to procure a judgment, upon various grounds therein stated. Among the grounds stated are: (1) To compel the defendants to account for their official conduct in the management and disposition of the funds and property committed to their charge; (2) to compel them to pay to the corporation which they represent, or to its creditors, any money and the value of any property which they have acquired themselves, or transferred to others, or lost or wasted, by a violation of their duties. The charges contained in the complaint against the defendants are manifestly within the scope of this section. The next question is whether the plaintiff is the proper party to move the court for the relief therein provided. That question, I think, is very plainly answered by the succeeding section (1782), which declares that an action for the purposes above specified may be brought by the Attorney General in behalf of the people of the state, or "by a creditor of the corporation, or by a trustee, director, manager or other officer of the corporation, having a general superintendence of its concerns." It cannot be doubted that this general language covers this case.

But this proposition is attempted to be answered or avoided by the argument that the provisions of the statute referred to do not include actions by or against foreign corporations, or by or against defaulting directors of such corporations. Upon that argument, and no other, the plaintiff has been defeated in this case. The learned court below refused to apply the general language of the statute, but restricted it to particular cases and to a certain class of directors. In other words, it has been held that when our statute permits a director of a corporation to bring an action against defaulting codirectors, or parties who have once been directors, for their misconduct, the statute means all the time a director of a domestic corporation, and not a director of a foreign corporation. It will be seen that the word "director" is used in the same way in the section that the words "trustee," "manager," or other officer of the corporation, having a general superintendence of its concerns, are used. Of course, the argument, if sound, must go to the extent of asserting that a creditor cannot maintain an action against defaulting trustees unless he shows that he is a creditor of a domestic corporation. Neither can a

manager or other officer maintain an action unless he happens to be a manager or officer of a domestic corporation. It would necessarily follow from this argument that the directors of a foreign corporation transacting business and having its principal office in this state may plunder the corporation with impunity, and the courts of this state are without power to redress such wrongs as appear upon the face of the complaint in this case. If they cannot be sued here, they cannot be sued in a foreign state, unless they come within its jurisdiction. There is no good reason, I think, for holding that the right of a director to bring an action of this character is confined to cases arising with respect to domestic corporations. The language of the statute is broad and general. The purpose of the law and the remedy prescribed is just as applicable to the case at bar as to any other.

Moreover, it seems to me that the restriction which the learned court below has placed upon the word "director," as used in the statute, is not only unauthorized by the whole scope and policy of the preceding section, but is contrary to justice and sound policy. It is a matter of common knowledge that hundreds of corporations in this state are organized under the laws of New Jersey or some adjoining state, but the business and all the operations of the corporation are conducted here, except possibly, once a year, there may be a meeting of the stockholders in the state creating the corporation, for the purposes of a new election. In all other respects these corporations stand upon the same footing as though organized here under the laws of this state, and what reason can be given for denying to a director of such a corporation the right to bring an action such as might be brought and maintained by a director of a domestic corporation? The distinction between the two classes of corporations in this respect is simply arbitrary, and rests upon no sound reason, or any principle of public policy.

It should be observed that the two sections of the Code referred to have been supplemented by three subsequent sections (1809, 1810, 1811). By section 1812 these three sections are made applicable to an action or special proceeding against either a domestic or a foreign corporation. Bearing always in mind the fact that this is an action by an individual director of a foreign corporation in the courts of this state to compel other individuals, who, while directors, had become wrongfully possessed of the corporate funds and property, to account for the same, it is difficult to suggest any sound reason for denying to the plaintiff the relief which he seeks to obtain. I do not think that there is any well-considered authority to support the judgment in this case, and it would seem that a sound public policy would require the application of the provisions of the Code referred to to the facts stated in the com-

plaint. That would certainly seem to have been the view of Judge Cullen when discussing a similar case in the Supreme Court. *Ernst v. Rutherford & B. S. Gas Co.*, 38 App. Div. 388, 56 N. Y. Supp. 403. It is there said: "We do not suppose that it was intended by this section of the Code to give our courts any greater jurisdiction in the case of actions against foreign corporations than they have against natural persons. But the basis of an action for an accounting and restoration against offending officials of a corporation is the trust relation which such officials bear to the corporation and to its stockholders. This gives a court of equity jurisdiction of the subject-matter wherever it can obtain jurisdiction of the persons of the defendants, even though the subject-matter might be real estate lying without the state (*Chase v. Knickerbocker Phosphate Co.*, 32 App. Div. 400, 53 N. Y. Supp. 220), which is not the fact here. The right of the plaintiffs, as stockholders, to compel a restoration by the officers of the corporation, is coextensive with the right of the corporation itself. Surely the corporation would not be confined to the courts of the state which created it, but could pursue its officers in whatever jurisdiction it might find them; otherwise it would be remediless if those officers remained without the state. The learned judge, however, was of opinion that this action was more than for a restoration and accounting; that it was, in effect, an action to control the internal management of the corporation itself. Concerning an action of the last character, he was of opinion that the corporation could only be called to account in the tribunals of the state which created it. We are not prepared to admit the correctness of the proposition as broadly as stated by the learned justice. If the illegal acts of the directors or of the corporation offended solely against the majesty of the state to which it owed its life—in other words, constituted only public wrongs—the proposition is probably correct, for we are not compelled to, nor should we, entertain actions simply to redress the outraged dignity of foreign governments. But if such illegal acts also cause injury to the property rights of individual stockholders who are citizens of this state, we cannot see why they are not entitled to obtain full relief in our courts, so far as such relief can be accomplished by acting directly on the persons of the defendants. A contrary rule would, in our judgment, be unfortunate at this time, when, for some reason, the majority of corporate enterprises in this state (those of a quasi public nature, such as railroads, etc., excepted) are carried on under incorporations effected under the laws of other states. We are of opinion, however, that this action is strictly for restoration and an accounting, and therefore that the court had jurisdiction of the subject-matter." In the case at bar the action is for the same purpose; that is, for an accounting and restora-

tion. The plaintiff has summoned the defendants to appear in the courts of this state to answer for their misconduct in misappropriating or wasting the money of a corporation of which he is a director or trustee. The courts of this state have, I think, the power to require the defendants, at the suit of the plaintiff, to make good to the corporation the money taken from its treasury, and by them misappropriated or wasted.

It may well be that some of the provisions of these sections of the Code to which I have referred are applicable only to domestic corporations or their directors, but we are concerned now only with the one action, such as this is, for an accounting and restoration; and to such actions, we think, they apply not only by reason of the general language employed, but on grounds of justice and sound policy, as well as the impossibility of any other form of redress.

It follows that the judgment of the Appellate Division should be reversed, and that of the Special Term affirmed, with costs, and the question certified should be answered in the affirmative.

CULLEN, C. J., and VANN and WERNER, JJ., concur. HAIGHT and MARTIN, JJ., dissent. GRAY, J., absent.

Judgment reversed, etc.

(163 Ind. 422)

SELLERS v. HAYES et al. (No. 20,285.)

(Supreme Court of Indiana. Oct. 27, 1904.)

BANKRUPTCY — PREFERENCES — FRAUDULENT CONVEYANCES—CONVEYANCES VOID BY STATE LAW—RIGHT OF TRUSTEE TO ATTACK—CONSTITUTIONAL LAW—EQUAL PROTECTION OF LAWS.

1. The fact that a seller is known by the buyer to be deeply indebted or insolvent is not of itself enough to charge the buyer with a want of good faith in making the purchase.

2. Nothing can be added to a special finding by inference or intendment.

3. Under the express provisions of section 60a of the bankruptcy act of July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], the effect of a transaction, in order to constitute it a preference, must be to enable the creditor preferred to obtain a greater percentage of his debt than any other creditor of the same class.

4. A trustee in bankruptcy cannot complain of the fraudulent character of a mortgage given by a purchaser from the bankrupt to a third party, unless he can impeach the sale from the bankrupt to the purchaser on other grounds.

5. Notwithstanding any provisions which are found in the bankruptcy act relative to the right of the trustee to avoid particular transactions of the debtor, the whole act must be read in the light of the predominating purpose of Congress with reference to the distribution of the assets, which was to prevent any inequality of payment among the unsecured creditors.

6. Section 70 of the bankruptcy act of July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451], gives the trustee the title of the bankrupt to property transferred by him in fraud of creditors, and to property which the bankrupt could have transferred prior to the

filing of the petition, or which might have been sold under judicial process against him. Subdivision "e" of the same section provides that the trustee may avoid any transfer by the bankrupt which any creditor might have avoided. Section 67 (30 Stat. 564 [U. S. Comp. St. 1901, p. 3449]) makes all conveyances made by the debtor while insolvent, and at any time within four months prior to the filing of the petition, which are void as against the creditors of the debtor by the laws of the state in which the property is situated, void against creditors of the debtor if he be adjudged a bankrupt. Acts 1901, p. 505, c. 118 (Burns' Ann. St. 1901, § 6637a et seq.), makes a sale of any portion of a stock of merchandise otherwise than in the ordinary course of trade, or a sale of an entire stock in bulk, fraudulent and void as against creditors whose claims arose from the sale of some part of such stock of merchandise, unless certain conditions are observed. *Held*, that construing the act of 1901 as it must be construed in order to be upheld, i. e., as merely giving a creditor a lien analogous to a vendor's or materialman's lien, enforceable by appropriate legal proceedings in the event of a sale in violation of the provisions of the act, and not as enabling any creditor to treat the sale as a nullity and proceed with the collection of his entire debt, a sale made in defiance of the act is not such a one as may be impeached by the trustee in bankruptcy of the seller, for the general estate of the seller can derive no benefit from such impeachment.

7. Under Const. U. S. Amend. 14, prohibiting the state from denying to any person within its jurisdiction the equal protection of the laws, and guarantying due process of law, the state cannot, through any of its agencies, exercise arbitrary and capricious power over persons' or property; and while legislation according to every person or class of persons the same right which is enjoyed by other persons or classes in the same place and in like circumstances is ordinarily valid, a statute which contains inequalities in fact cannot be upheld on the theory of classification, where the lines of division between persons or classes appear clearly to have no just relation to the subject-matter.

8. Acts 1901, p. 505, c. 220 (Burns' Ann. St. 1901, § 6637a et seq.), declaring sales of any portion of a stock of merchandise otherwise than in the ordinary course of trade, or sales of an entire stock in bulk, fraudulent and void as against creditors whose claims arise from the sale of some part of such stock of merchandise, unless certain conditions are observed, is, if construed to permit the creditor to subject the whole stock to liability to satisfy the indebtedness to him, no matter how small a remnant of the stock sold by him may remain, repugnant to Const. U. S. Amend. 14, prohibiting the state from denying to any person the equal protection of the laws, and guarantying due process of law.

Appeal from Circuit Court, Tipton County; J. F. Elliott, Judge.

Action by Henry C. Sellers, trustee in bankruptcy, against James A. Hayes and another. Defendants had judgment, and plaintiff appeals. Affirmed.

Blackledge, Shirley & Wolf, for appellant. H. C. Sheridan, for appellees.

GILLET, J. Appellant, as trustee in bankruptcy of Rufus Laymon, brought this action against the appellees Hayes & Hayes and the Farmers' Bank of Frankfort, Ind., to recover the value of a stock of merchandise. The attempt was to charge appellees as trustees, on the theory that Laymon had fraudulently conveyed the stock to them, and

¶ 1. See *Fraudulent Conveyances*, vol. 24, Cent. Dig. § 507, 508.

that they had converted it to their own use. Two of the paragraphs of complaint seek to avoid the conveyance on the ground that it was void under that subdivision of section 87 of the bankruptcy law of July 1, 1898, c. 541, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449], relative to conveyances made by the bankrupt within four months prior to the filing of the petition in bankruptcy with intent to hinder, delay, or defraud creditors. There were two further paragraphs of complaint, under which it was sought to avoid the conveyance under that subdivision of the section above mentioned authorizing the setting aside of conveyances which are void under the laws of the state, if made within four months of the filing of the bankruptcy petition. There was a general denial filed by each of the appellees. Pursuant to request, the court found the facts specially, and stated its conclusion of law thereon. The conclusion was in favor of appellees. There was a judgment that appellant take nothing. It is assigned as error that the court erred in its conclusion of law.

The first question which is presented for our consideration is whether, in view of the issues tendered by the paragraphs of complaint first above mentioned and the facts found by the court, the conclusion should have been in appellant's favor.

Stated in their boldest outlines, the facts relative to the conveyance complained of are that within four months of the time that the petition in bankruptcy was filed said Laymon sold a stock of groceries of the value of \$3,500 to Hayes & Hayes, and that the consideration of said conveyance was the extinguishment of a debt of \$200, due from Laymon to one of the purchasers, the assumption by Hayes & Hayes of a debt of \$800, which Laymon was owing to a third person, and the payment to him of \$2,500, which was advanced, as a part of the transaction, by the bank. The money so received by Laymon was afterwards used by him in the payment of certain of his creditors. Passing for the present the question whether the findings of the court show an intent and purpose on the part of the seller to hinder, delay, or defraud his creditors by said sale, the inquiry arises whether it appears from the findings that appellees were not in the position of purchasers in good faith and for a present fair consideration.

A number of facts are found as to the knowledge of appellees of the financial condition of Laymon at the time of the sale, and facts are found to have been within the knowledge of Hayes & Hayes which were sufficient to have put them on inquiry as to whether it was the purpose of Laymon to make preferences with the money received by him. Findings 49 and 50 are as follows:

"(49) That at and prior to the time of said sale it was the purpose of said Laymon, and the defendants Hayes & Hayes knew that it was the purpose of said Laymon, to pay

some of his creditors in full, and that he was not able to pay others in full.

"(50) That by the exercise of ordinary care it could have been discovered by defendants, at the time of said sale of the said Rufus Laymon, it would hinder and delay his creditors on behalf of whom this suit is brought by preferring certain other creditors and paying their claims in full."

It seems scarcely necessary to say that the fact that a seller is known by the buyer to be deeply indebted, or even insolvent, is not enough, per se, to charge the purchaser with a want of good faith. It will be observed that finding No. 49 is not a finding that Hayes & Hayes knew that it was the purpose of Laymon to pay some of his creditors in full out of the money received by him from said sale. The statement in finding 50 relative to the exercise of ordinary care is a mere conclusion, and it is further to be observed that that finding does not go to the question as to what appellees might have discovered as to the intent of Laymon, but only as to what would be the effect of preferences in his financial circumstances. Nothing can be added to a special finding by inference or intendment. *Craig v. Bennett*, 148 Ind. 574, 45 N. E. 792. It is not within the functions of an appellate tribunal to supply any fact. Whether appellees did or did not inquire of Laymon as to what disposition he intended to make of the proceeds of the sale does not appear, and there is no finding as to their opportunity of ascertaining his purpose, or that an inquiry of him would have revealed a purpose on his part to pay certain creditors in full with said money. In fact, there is room for the inference, notwithstanding all of the facts found, that at the time the sale was made it was not the intent and purpose of Laymon to thereby hinder, delay, or defraud his creditors or any of them.

Appellant's counsel insist, however, that the appellees are not to be treated as purchasers in good faith and for a present valuable consideration, because, it is asserted, there were preferences provided for in the sale itself to the extent of \$1,000. On the other hand, appellees' counsel contends that, if an unlawful preference is given as a part of a contract for the conveyance of property, the transaction cannot be reached on the ground that the conveyance is thereby rendered fraudulent, but that it is the business of the trustee, under section 60 of the bankruptcy act, to bring suit to avoid the preference and to recover the money or property constituting the preference.

There is no finding as to whether the two items of indebtedness of Laymon, which were elements in the transfer sought to be avoided, were secured or unsecured. To constitute a preference, the effect of the transaction must be to enable the creditor preferred to obtain a greater percentage of his debt than any other creditor of the same

class. Section 60a, Bankr. Act, July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]; *Peterson v. Nash*, 7 Am. Bankr. Rep. 181, 112 Fed. 811, 50 C. C. A. 260, 55 L. B. A. 344; *Matter of Read*, 7 Am. Bankr. Rep. 111; 5 Cyc. 869, and cases cited; *Loveland, Law & Pro. in Bankr.* 576.

The last point made by counsel for appellant with reference to the sufficiency of the findings to authorize a conclusion of law in his favor under the first-mentioned paragraphs of complaint is that the chattel mortgage given by Hayes & Hayes to the bank was fraudulent, because it authorized the mortgagors to make sales of the property. This is not a case where creditors of Hayes & Hayes are complaining. So far as Laymon was concerned, the \$2,500 of the purchase price, which was raised by mortgage, was paid to him in cash, and it does not lie in the mouth of the trustee of his creditors to impeach the mortgage, unless he can otherwise impeach the sale. Laymon received all that he bargained for, and, unless the trustee can avoid the principal transaction, we fail to perceive what concern he has with the validity of a mortgage which was executed on the property sold.

We now come to the question as to whether the sale can be impeached on the ground that it was void under the laws of the state. It is provided in section 67 of the bankruptcy act that "all conveyances, transfers, or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the state, territory, or district in which such property is situated, shall be deemed null and void under this act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt."

It appears from the findings that in the making of the sale which is attacked in this action the parties thereto did not observe the various provisions of the act of March 11, 1901 (Acts 1901, p. 505, c. 220; section 6637a et seq., *Burns' Ann. St.* 1901). The first section of that act (omitting the enacting clause) is as follows: "That a sale of any portion of a stock of merchandise otherwise than in the ordinary course of trade in the regular and usual prosecution of the seller's business, or a sale of an entire stock of merchandise in bulk, will be fraudulent and void as against the creditors of the seller, unless the seller and purchaser shall, at least five days before the sale, make a full detailed inventory showing the quantity and, so far as possible with the exercise of reasonable diligence, the cost price to the seller of each article to be included in the sale, and unless such purchaser shall at least five days before the sale, in good faith,

make full, explicit inquiry of the seller as to the name and places of residence or places of business of each and all of the creditors of the seller and the amount owing each creditor; and unless the purchaser shall at least five days before the sale, in good faith notify or cause to be notified personally or by registered mail, each of the seller's creditors of whom the purchaser has knowledge, or can, with the exercise of reasonable diligence, acquire knowledge of said proposed sale and of the said cost price of the merchandise to be sold and of the price proposed to be paid therefor by the purchaser. The seller shall, at least five days before such sales, fully and truthfully answer in writing each and all of said inquiries: provided, that the word creditors as used herein shall apply only to such creditors whose claims arose from the sale of some part of such stock of merchandise."

Appellees' counsel challenges the validity of the above act on the ground that it is an unwarranted restriction upon the right of contract, and he further contends that if the act is valid the creditors mentioned therein are alone authorized to bring the action. We may omit to decide the constitutional question stated, but a consideration of the second of said points appears unavoidable.

In taking up the latter question, we shall first consider the nature of the trustee's title. Section 70 of the bankruptcy act of July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3451] provides: "The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all * * * (4) property transferred by him in fraud of his creditors; (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him." In 5 Cyc. 341, it is said of the trustee: "He stands in the place of the bankrupt, with power to do what the bankrupt ought to have done; that is, pay the debts out of the assets. He becomes vested with the same kind of a title as though he were a purchaser, but such title is subject to all the rights and equities existing in favor of third persons against the bankrupt, except as to fraudulent conveyances, and transfers, preferences, and other transactions in fraud of the bankruptcy act." While it is true that under subdivision "e," section 70, of the said act, it is provided that "the trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided," yet we think that where the right of a particular creditor is in the nature of that of a mere lienor the trustee

tee cannot represent him. Where, by force of a statute, the effect of a conveyance is to create a statutory lien in favor of a particular creditor, and the conveyance is otherwise valid and sufficient to pass a title to the purchaser, our opinion is that such a transfer cannot properly be denominated a fraudulent conveyance, or a conveyance which is "held null and void as against the creditors of such debtor by the laws of the state."

Notwithstanding any provisions which are found in the bankruptcy act relative to the right of the trustee to avoid particular transactions of the debtor, yet the whole act must be read in the light of the predominating purpose of Congress with reference to the distribution of the assets, namely, to prevent any inequality of payment among the unsecured creditors. In *re Hammond*, 3 Am. Bankr. Rep. 466, 490, 98 Fed. 845. If a creditor has acquired a lien or security which does not constitute a preference within the meaning of the law, he need not come into the bankruptcy court for the purpose of procuring an allowance of his claim there. Should he, however, prove up as a secured creditor, he can only participate *pro rata* in the general fund to the extent of the overplus, and if he proves up as an unsecured creditor the general rule is that he must surrender his security. But in a case where he has only a lien on property which has passed out of the bankrupt, by a conveyance otherwise valid, so that the general estate would derive no benefit from the surrender, it would seem that if he sought to prove up as an unsecured creditor the court might properly require a marshaling of the assets. In any event, we are unable to perceive how a creditor so situated can be represented by the trustee in the enforcement of his claim, or, indeed, how the creditor could be bound by such a litigation waged on his behalf. See *Eyster v. Gaff*, 91 U. S. 525, 23 L. Ed. 403; *McHenry v. La Société Franciase*, 98 U. S. 58, 24 L. Ed. 370; *Dudley v. Easton*, 104 U. S. 99, 26 L. Ed. 668; *Loveland, Law & Proc. in Bank.* 606; *Runner v. Dwiggins*, 147 Ind. 238, 46 N. E. 580, 36 L. R. A. 645. We assume, without deciding, that, if the claim of such a creditor is a lien or special right, it is a statutory right, and not one where a preference has been obtained by the timely institution of legal proceedings.

It remains to consider, at least to some extent, the legal effect of the act of 1901 relative to the sale of merchandise. The act is somewhat ambiguous. From a mere reading of its words, there is room for the interpretation that any creditor who has a claim against the original owner, on account of sales of goods at wholesale which have gone into the stock, is entitled, by means of such remedy as the law will imply as an adjunct to the statute, to subject the whole stock to liability to satisfy the indebtedness

to him, no matter how small a remnant of the stock sold by him may remain.

Passing over without consideration possible intermediate shades of interpretation, it may also be said that the act is so framed that the conclusion might be reached that the purpose of it was to give to creditors what would amount to a lien or particular right by statute, enforceable by legal proceedings, to recover against the goods involved in a particular sale the amount due him on account of that sale. In the latter view, notwithstanding the terminology of the statute with reference to the sale being fraudulent and void as against the creditor, it would be evident that in its essence the effect of the enactment would not necessarily be to enable any creditor to proceed with the collection of his entire debt, treating the sale as a nullity as against him, but the effect of the statute would be to create, *ex proprio vigore*, from the making of the sale in defiance of the provisions of the act, a lien, or special statutory right, enforceable by appropriate legal proceedings to the extent suggested. Such a right would be analogous to a vendor's lien or to the lien of a materialman. So it may also be stated that if the latter interpretation of the act were adopted, the sale as a whole would not necessarily be subject to impeachment by any one creditor. We are persuaded that a right so limited as this is not a right to impeach a sale which is "null and void as against the creditors (our italics) of such debtor by the laws of the state." In *re Hammond*, 3 Am. Bankr. Rep. 466, 98 Fed. 845. Under section 67e of the bankruptcy act, which involves provisions relative to fraud, it is enough to avoid the sale if it be fraudulent as to any one creditor. In such a case there is an appropriateness, in order to provide for the general creditors, whom the trustee represents, that what were assets in the hands of the debtor and conveyed away in fraud should be returned to his general estate for distribution. Such a construction of the bankruptcy act as would enable a sale made without fraud in fact to be impeached for the benefit of the bankrupt's general estate because of an omission to comply with a statute which only permitted a particular creditor to assert what would amount to a particular lien for each sale ought not to be indulged in, since the transaction is without the letter and without the spirit of the bankruptcy act.

In discussing the question as to the legislative purpose in the enactment of the act of 1901, counsel for appellant state: "The evil aimed at by this legislation was that many retailers would buy goods and obtain credit from wholesale houses, and then sell out the stock without giving any notice to the wholesalers, and the wholesalers would then have no recourse upon the stock of goods or the business of the retailer. The purpose of the law was to remedy this evil,

and to give the wholesalers recourse upon the stock of goods for their claims which had arisen because of their dealings with the retailer in his retail business. The intention of the law was to include all wholesalers. If this be the purpose of the law (and we believe the history of the legislation fully bears us out in this statement), then it would have been in this case only necessary to find that the creditors, whose claims amounted to \$556.56 as found by the court, were mercantile creditors, and that their claims arose from dealings with Rufus Laymon in his retail business at Frankfort, Ind." If this construction of the act were permissible, there would be a greater degree of appropriateness in holding that the trustee might sue, since none of the creditors would have any specific right in the stock which could be called a security, and, if the trustee might not bring the action, in the case of a mercantile failure there would be likely to be a scramble among that class of creditors for advantage by means of legal proceedings, a condition which it was the purpose of the bankruptcy act to avoid. See *In re Hammond*, supra. In view of this, we feel called upon to consider whether the statute would be constitutional if it were impressed with the interpretation contended for by counsel for appellant.

To so interpret the statute would mean that as to a certain class of property, which has been disposed of without complying with the provisions of the statute, the General Assembly has given to a certain class of creditors the monopoly of a remedy, which enables them to impeach the transaction irrespective of fraud, and that other creditors would be left remediless, so far as the statute is concerned. While there might be some reason in natural justice for giving a creditor a lien upon, or a special right in, an article of personal property sold by him, for the unpaid purchase price, yet as there is no essential unity in a stock of goods, so that it can in all cases be said that the creditor's contribution to the stock is inseparable, and must therefore be held by him as a whole or lost to him as a whole, what justice is there in giving to mercantile creditors an extraordinary right to follow the stock because they have contributed to build it up, or because some portion of the goods sold by them remains on hand? It will be observed that the remedy which the statute purports to give is not made in any wise dependent upon the question as to whether there is in fact a confusion of goods. Whatever the remedy, it applies to all stocks. It may therefore be considered whether this statute, if it is to be construed as counsel for appellant contend, has been laid out on lines which represent admissible classification.

Why should a mercantile creditor be given a right as against that portion of a stock which is paid for which is denied to

all others? If the indebtedness is in part for goods which have been sold and the proceeds have gone into the corpus of the debtor's estate, why has the favored debtor the right to secure his pay in full, when the banker, who also extended credit, the unpaid clerk, who aided in the transaction of the business, and the creditors generally of the merchant are denied a remedy under the statute? The upholding of such an enactment would be to invite the effort of the influential classes to obtain legislative privileges for themselves which should be common to all, if they are permitted to exist, and it would be to divide up the citizenship of the state in respect to rights so that equality before the law would be but a sounding phrase. There is an especial degree of appropriateness in enforcing the right of equality as respects statutes which relate to the administration of justice.

The business of legislating for the people of a state is a complex undertaking, and, where classification is permitted at all, due consideration should be given to the legislative determination that a particular classification is necessary; yet it is evident that if no limit can be put upon the authority to classify, where the power is not bound down by specific constitutional provision, it would be possible, under that guise, to enact laws which would grossly offend against the fundamental right of equality.

The fourteenth amendment to the Constitution of the United States prohibits the state from denying to any person within its jurisdiction the equal protection of the laws. Both as respects this guaranty and that of due process of law it is settled that the state cannot, through any of its agencies, exercise arbitrary and capricious power over persons or property. *Ex parte Virginia*, 100 U. S. 339, 25 L. Ed. 676; *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220; *Dent v. West Virginia*, 129 U. S. 114, 9 Sup. Ct. 231, 32 L. Ed. 623; *Duncan v. Missouri*, 152 U. S. 377, 14 Sup. Ct. 570, 38 L. Ed. 485; *Gulf, etc., R. Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666; *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780. As was said in *Barbier v. Connolly*, 113 U. S. 27, 31, 5 Sup. Ct. 357, 359, 28 L. Ed. 923: "The fourteenth amendment, in declaring that no state 'shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the

enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition; and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses." It was said in *Yick Wo v. Hopkins*, supra, that the guaranty of "the equal protection of the laws is a pledge of the protection of equal laws." The requirement is ordinarily satisfied with legislation that accords to every person or class of persons the same right which is enjoyed by other persons or other classes in the same place and in like circumstances. *Missouri v. Lewis*, 101 U. S. 22, 31, 25 L. Ed. 989. It is apparent, however, that a statute which contains inequalities in fact cannot be upheld, on the theory of classification, where the lines of division between persons or classes appear clearly to have no just relation to the subject-matter, since the amendment is a shield against the arbitrary exercise of the powers of government.

It was said by Mr. Justice Brewer, speaking for the court, in *Gulf, etc., R. Co. v. Ellis*, 165 U. S. 150, 159, 17 Sup. Ct. 255, 258, 41 L. Ed. 686: "But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the fourteenth amendment forbids this. No language is more worthy of frequent and thoughtful consideration than these words of Mr. Justice Matthews, speaking for this court, in *Yick Wo v. Hopkins*, 118 U. S. 356, 369, 6 Sup. Ct. 1064, 1071, 30 L. Ed. 220: 'When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.' The first official action of this nation declared the foundation of government in these words: 'We hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness.' While such declaration of principles may not have the force of organic law, or be made the basis of judicial decision as to the limits of right and duty, and while in all cases reference must be had to the organic law of the nation for such limits, yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government." The above

language was quoted with approval by the court in *Cotting v. Kansas City, etc., Co.*, 183 U. S. 79, 22 Sup. Ct. 30, 46 L. Ed. 92. The latter case forcibly points out the viciousness of legislation which, under the cloak of an exercise of the police power, attempts to lay burdens upon some and to exempt others, by means of a statute that is framed on lines which clearly evince the fact that the classification was purely arbitrary. In the course of that opinion the court quoted with distinct approval the following language of one of its former members, Mr. Justice Catron, in *Van Zant v. Waddel*, 2 Yerg. 260, 270: "Every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were this otherwise, odious individuals and corporate bodies would be governed by one rule, and the mass of the community, who made the law, by another."

In *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679, what is popularly termed an anti-trust act, denying to offending corporations the right to enforce their contracts by suit, was condemned because of a section by which it was sought to exempt persons and corporations in certain lines of business from the operation of the act. The court, after pointing out the fact that certain cases which it had decided, and which were urged upon it as precedents for the upholding of the legislation before it, involved the validity of taxation acts, said: "Different considerations control where the state by legislation seeks to regulate the enjoyment of rights and the pursuit of callings connected with domestic trade. In prescribing regulations for the conduct of trade, it cannot divide those engaged in trade into classes, and make criminals of one class if they do certain forbidden things, while allowing another and favored class engaged in the same domestic trade to do the same things with impunity."

Judge Cooley says: "Every one has a right to demand that he be governed by general rules, and a special statute which, without his consent, singles his case out as one to be regulated by a different law from that which is applied in all similar cases, would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free governments. Those who make the laws are to govern by promulgated, established laws, not to be varied in particular cases, 'but to have one rule for rich and poor, for the favorite at court and the countryman at the plow.' This is a maxim in constitutional law, and by it we may test the authority and binding force of legislative enactments." *Const. Lim.* (7th Ed.) 539.

Our attention has been called to the rulings of this court upholding what is termed "labor legislation." We do not regard such

cases as in point. There are reasons for much of such legislation that make the classification adopted admissible. *International Text-Book Co. v. Weissinger*, 160 Ind. 349, 65 N. E. 521, 98 Am. St. Rep. 334; *Knoxville Iron Co. v. Harblson*, 183 U. S. 13, 22 Sup. Ct. 1, 46 L. Ed. 55.

We are satisfied that to construe the act of 1901 as counsel for appellant insist that it should be construed would lead to its overthrow. Whether it will bear the narrowest construction suggested above is not a question which we are called on to decide, but it is our view that if the act is upheld it must be on the latter theory. This leads to the conclusion that the trustee cannot avoid the conveyance by reason of the combined effect of the bankruptcy act and the act of 1901 concerning sales of merchandise. Judgment affirmed.

(163 Ind. 413)

CLUPPER v. CLUPPER. (No. 20,170.)

(Supreme Court of Indiana. Oct. 28, 1904.)

WILLS—CONSTRUCTION—PLEADING.

1. One asking the construction of a will must exhibit the whole instrument with his complaint, to enable the court to determine the testator's intention from a consideration of all parts of the will.

Appeal from Circuit Court, Wabash County; H. B. Shively, Judge.

Action by Christian Clupper against Lewis Clupper, administrator of the estate of George Clupper, deceased. From a judgment for plaintiff, defendant appeals. Transferred from Appellate Court under Burns' Ann. St. 1901, § 1337u. Reversed.

Charles Flinn, Fred I. King, and Austin S. Flinn, for appellant. Alfred H. Plummer, Benj. F. Williams, and Walter G. Todd, for appellee.

HADLEY, J. Construction of will. Appellee prosecutes this action to enjoin the enforcement of a judgment against property bequeathed to him by his father upon the ground that the debt was forgiven him by the will. From his complaint the following meager facts are to be gathered: George Clupper, brother of appellee, died intestate in the early part of 1901, leaving his father, Christian Clupper, Sr., and presumably brothers and sisters and their descendants, as his heirs at law. Lewis Clupper was appointed administrator of George's estate, and as such on the 8th day of February, 1901, recovered a judgment in favor of the estate against Christian Clupper, Jr., appellee, for \$1,150, one-half of which judgment descended to Christian Clupper, Sr., as the surviving father and heir to the said George Clupper, deceased. The father, Christian Clupper, Sr., died testate some time in 1902; three items of his will being as follows:

"Item 3. I will and devise to my son Christian Clupper the 40 acres of land on

which I live [here follows a minute description], the same being my old homestead, provided always that said land shall not be liable for any debt, or obligation contracted by my son Christian Clupper, prior to my decease, and that this shall not be charged against said Christian Clupper as an advancement to him in the settlement and distribution of my estate.

"Item 4. I also give and bequeath to my son Christian Clupper the sum of \$300 to be paid out of the first money on hands, or proceeds of my personal property after payment of my just debts and funeral expenses, said money never to be subject to payment of any debts or obligations of said Christian Clupper prior to my death.

"Item 5. It is my will, and I devise and bequeath to all my children, share and share alike, all my property real and personal, (the children and heirs of my deceased children to take the share of my deceased child), not herein devised and disposed of. No charge to be made against any of my children for advancements, and none of said property shall be liable, or subject to payment of any debt or obligation contracted, or made by them, or either of them, prior to my death."

The will was duly probated. The property bequeathed to appellee by his father was all the property subject to execution owned by him. In November, 1902, Lewis Clupper, as administrator of George Clupper, deceased, caused an execution to issue on the judgment recovered by him against appellee, and the sheriff is threatening to, and will, if not enjoined, levy the same upon, and sell the real estate so devised to him by his father as aforesaid. It is also averred that the collection of the judgment is not necessary to pay the debts of the estate of George Clupper, nor is it necessary to pay the debts against the estate of Christian Clupper, deceased. It is further alleged as follows: "That as one-half of said judgment belongs to the estate of Christian Clupper, deceased, and as his said will provides that no charge shall be made against any of his children for advancements, Lewis Clupper, administrator, as aforesaid, has no right to collect by execution or otherwise one-half of such judgment, or levy upon any of his property, real or personal, to satisfy more than one-half of the same; and plaintiff has tendered said administrator one-half of the sum due on said judgment, and now brings the same into court for the use of said George Clupper's estate;" and prays an injunction against the sale of his property, and that said judgment be entered satisfied as to the half remaining unpaid. Appellant's demurrer to the complaint was overruled, and, he declining to plead further, judgment of injunction and an order for satisfaction were entered. From this judgment appellant appeals, and submits the sufficiency of the complaint as the only question for decision. The judgment in controversy was render-

ed against appellee in February, 1901. His father died in 1902. So the judgment was a debt contracted by appellee prior to the testator's death. It is obvious, however, that the case was tried and determined upon the theory that the condition written in each of the exhibited items of the will attempting to exempt the bequests to appellee from liability for his prior debts was void, except as to the testator, for appellee concedes in his complaint that the land devised to him is liable for one-half of the judgment. Under the complaint, however, it is impossible for us to determine whether or not appellee's contention is true. One asking the construction of a will must exhibit the whole instrument with his complaint to enable the court to determine the testator's intention from a consideration of all parts of the will in relation to each other and in relation to the testamentary act as an entirety. *John v. Bradbury*, 97 Ind. 263, 265; *West v. Rasmann*, 135 Ind. 278, 294, 34 N. E. 991; *Fenstermaker v. Holman*, 158 Ind. 71, 74, 62 N. E. 699. This appellee has not attempted to do. Except the three items quoted above, no part of the will is set out with the complaint; nor is there any averment as to what the absent parts contain or do not contain. To entitle a plaintiff to an injunction, he must make out a clear case. The facts alleged in the complaint are not sufficient to entitle appellee to an injunction, or to call for any construction of Christian Clupper's will, and the demurrer thereto should have been sustained.

Judgment reversed, with instructions to sustain the demurrer to the complaint.

(163 Ind. 700)

NOBLESVILLE HYDRAULIC CO. v. EVANS et al. (No. 20,278.)

(Supreme Court of Indiana. Oct. 26, 1904.)

CONSTRUCTION OF DAM—CONDEMNATION PROCEEDINGS—RIGHT OF APPEAL.

1. No appeal lies from an order of the circuit court refusing to appoint appraisers in proceedings under Burns' Ann. St. 1901, §§ 4833, 4834 (Rev. St. 1881, §§ 3702, 3703; Horner's Ann. St. 1901, §§ 3702, 3703), to condemn land for the construction of a dam, and dismissing such proceedings.

Appeal from Circuit Court, Boone County; S. R. Artman, Judge.

Proceedings by the Noblesville Hydraulic Company against Adolphus L. Evans and others for the condemnation of land. The proceedings having been dismissed, plaintiff appeals. Dismissed.

Shirts & Fértig, for appellant. Gavin & Davis, W. S. Christian, J. L. Gavin, and C. M. Gentry, for appellees.

MONKS, J. This proceeding was commenced by appellant in the Hamilton circuit court under sections 4833, 4834, Burns' Ann. St. 1901 (sections 3702, 3703, Rev. St.

1881, and sections 3702, 3703, Horner's Ann. St. 1901), to condemn certain land for constructing a dam across White river, in Hamilton county, Ind. On application of appellees, the venue of said cause was changed to the court below, where, on their motion, the court refused to appoint appraisers, and dismissed the instrument of appropriation. Appellant appeals, and assigns for error the sustaining of said motion to dismiss.

It is insisted by appellees that no appeal will lie from said decision of the court below, for the reason that no provision is made for an appeal from such an order; citing *Lafayette, etc., Ry. Co. v. Butner*, 162 Ind. 460, 70 N. E. 529. In the case cited it was held by this court that a proceeding to condemn lands under section 5160, Burns' Ann. St. 1901 (section 3907, Rev. St. 1881, and section 3907, Horner's Ann. St. 1901), was not in its early stages, before an appeal from the award of the appraisers, a civil action, but was a statutory proceeding of a special nature; that the provisions of the Code for an appeal in civil actions to this or the Appellate Court do not apply to any ruling or action in such proceeding during this period, and, as no provision is made therefor by statute, none will lie. The provisions of the sections involved in this appeal are substantially the same as those of section 5160, supra, and contain no provision for an appeal. This case is therefore ruled by *Lafayette, etc., Ry. Co. v. Butner*, supra. Upon the authority of that case, the appeal is dismissed.

(163 Ind. 395)

MOORE v. FERGUSON et al. (No. 20,400.)
(Supreme Court of Indiana. Oct. 25, 1904.)

APPEAL—PARTIES.

1. Where the judgment or order of the circuit court entered on the report of an administrator was favorable to the estate, and unfavorable to the administrator as an individual, in that it refused certain allowances asked by the administrator, charged him with costs, and ordered the allowance made him for his services to be set off against a debt due from him to the estate, an appeal by the administrator from such judgment or order should be taken by him as an individual, and the estate, represented by him as administrator, should be made an appellee and not joined as appellant.

2. Under Burns' Ann. St. 1901, § 2546, permitting any person interested in the administration of an estate to except to and contest the correctness of the accounts of the administrator, an exceptor does not stand for nor represent the estate in such a manner as to be a sufficient appellee, and to dispense with the necessity of joining the administrator in an appeal from an order favorable to the estate.

Appeal from Circuit Court, Boone County; Samuel R. Artman, Judge.

In the matter of the estate of Willis E. Moore, deceased. From the judgment entered on the report of Jonathan J. Moore, administrator of said estate, Robert J. Ferguson and others, exceptors, said Moore, individually and as administrator, appeals.

Transferred from the Appellate Court under section 1337u, Burns' Ann. St. 1901. Dismissed.

Ira M. Sharp, for appellant. C. D. O'Rear, Dutch & Wilhoite, Higgins & Holloman, Mahan & Kelsey, Clodfelter & Fine, B. F. Batcliff, and C. M. Zion, for appellees.

JORDAN, C. J. Jonathan J. Moore, in his individual capacity, and Jonathan J. Moore, administrator of the estate of Willis E. Moore, deceased, are joined as co-appellants in this appeal. Robert J. Ferguson and others, who were exceptors in the lower court, are the only persons who have been made appellees. Neither Jonathan J. Moore, nor any other person as administrator of the estate of the said Willis E. Moore, deceased, has been made a party appellee. The facts disclosed by the record, among others, may be said to be as follows:

On February 16, 1903, Jonathan J. Moore, as the administrator of the aforesaid estate, filed in the Boone circuit court what is denominated his "third current report." Notice of the filing thereof, and that the same would be heard by the court at a time fixed, was given to the heirs and creditors of the decedent. The appellees herein, heirs and creditors of the decedent, appeared in the lower court, and filed objections and exceptions to said report. The matters and things therein called in question by the exceptions came on for hearing before the court at the April term, 1903. Upon hearing and considering the report and exceptions thereto the court found that the first and second current reports of the administrator should be approved and confirmed, except as to certain credits claimed therein by the administrator, and ordered and adjudged accordingly. The third current report was disapproved by the court as to certain items with which the administrator had charged himself, and the court ordered and adjudged that the charges therein against him be increased to the amount of \$100. A credit of \$712.52 in the report which he claimed should be allowed to him personally as a partial payment for his services rendered in the administration of the estate was wholly disapproved and rejected by the court. Other credits mentioned in the report to which he claimed to be entitled were also disallowed and rejected. The court further found that the entire estate of the decedent, both real and personal, had been converted into cash, and that the total amount with which the administrator was chargeable was \$11,518.16, and that no claims were pending for allowance against the estate. The court also found that a claim to the amount of \$1,013.78 had been filed and allowed against the estate, upon which claim or obligation Moore, in his individual capacity, was the principal, and the estate of the decedent was his surety. The court's finding further discloses that said Jonathan J. Moore is wholly in-

solvent, and is the owner of no property whatever, and that the estate will be compelled to pay said claim of \$1,013.78 out of the assets thereof. The court, among other things, ordered and adjudged as follows: "It is further ordered by the court that the administrator be, and is hereby, allowed the sum of \$600 in full payment for all his services as administrator in this estate, including services for making final report and settlement. And it is further ordered and adjudged by the court that said administrator shall not pay to himself personally said sum of \$600, but that an equal amount of the indebtedness and claim filed against the estate upon which the administrator personally is principal be set off against said allowance of \$600 to said administrator, and that said administrator is hereby ordered to pay said sum of \$600 to the clerk of this court to apply on said claim." It was further ordered and adjudged that the administrator pay all costs arising out of the administration of the estate within ten days from date, and that within said period, he file his final report, and pay to the clerk of the court the entire balance of funds in his hands belonging to the estate, including said sum of \$600 allowed him for his services, to be applied to the payment of the claims filed and allowed against the estate of the decedent, and that the surplus, if any, be distributed, after the payment of all claims, to the heirs of said Willis E. Moore. Jonathan J. Moore, as the administrator, unsuccessfully moved the court for a new trial, and also to modify its judgment. He also filed in his individual capacity a motion whereby he sought to obtain a modification of the judgment. This motion the court denied. Errors have been separately assigned by each of the appellants herein. As administrator, Moore, under a separate assignment, complains of the ruling of the court in denying the motion for a new trial and in overruling the motion to modify the judgment. In his individual capacity he separately assigns that the court erred in overruling his motion to modify the judgment. Appellees have filed a motion to dismiss the appeal upon the grounds, among others: (1) That no appeal bond has been filed by Moore as appellant in his individual capacity; (2) that he was not a party in his said capacity to the judgment from which he seeks to appeal; (3) that the appeal is not prosecuted in the interests of the estate of the decedent, but is prosecuted solely for the individual interest and benefit of Moore.

It is manifest that the order or judgment from which this appeal has been taken is "a decision of the circuit court growing out of a matter connected with a decedent's estate," and the appeal is therefore based on sections 2609, 2610, Burns' Ann. St. 1901. Of course, where one prosecutes an appeal under the provisions of these sections in his representative capacity as administrator or executor,

he is exempted by statute from filing an appeal bond. As this appeal, however, must be dismissed for another reason, we pass, without deciding, the contention of counsel for appellee that it should be dismissed because Moore, in taking an appeal in his own behalf, has failed to file the required bond. It is evident that the judgment or order of the court below was, in effect, wholly unfavorable to and against the interests of Jonathan J. Moore as an individual. Upon the contrary, however, it was certainly favorable to and in the interest of the estate which he represented as administrator. The court, as shown, ordered that credits to which the administrator claimed he was entitled should be disallowed, and further ordered that the charges of assets received in his trust capacity should be increased to the amount of \$100. The claim of \$712.52, which he requested the court to allow him as a partial payment for services rendered as administrator of the estate, was wholly disapproved and rejected. The court, however, allowed him the sum of \$600 in full payment of all his services as administrator, but ordered that said sum be by him turned over to the clerk of the court as money in his hands belonging to the estate to be applied in payment of the claim allowed against the estate upon which he was the principal debtor. It is certainly clear that by the order of the court the interests of the estate in effect were promoted. Especially is this true in regard to the \$600 allowed to the administrator as compensation for his services, which amount, as shown, the court required him to turn over to the estate, to be applied in payment of the claim or obligation in question. It appears that he is wholly insolvent, and that the estate will be compelled to pay out of its assets the claim upon which he is the principal debtor. By the order of the court the estate virtually secured the benefit of \$600 in money, and to this amount, at least, the assets thereof for the payment of claims may be said to have been increased. The judgment or order of the court, considered either in part or as a whole, was certainly, under the circumstances, in the interest of the estate; and the latter, as previously said, was thereby promoted. The estate certainly, under the circumstances, can have no grounds of complaint, and no reason for appealing from the judgment below. Jonathan J. Moore, personally, is the only person, under the facts, interested in securing a reversal of the judgment; while, upon the other hand, the estate of Willis E. Moore is interested in maintaining it as rendered in the lower court. Under these circumstances the interest of Moore as an individual and the interest of the estate which he seeks to represent as administrator are antagonistic to each other. Moore as administrator of the estate and Moore in his own right or person in a legal sense are two separate and distinct persons. The appeal manifestly is to protect his in-

dividual interest, and cannot in any manner conduce to the interest of the estate of the decedent. This certainly is obvious. *Case, Adm'r, v. Nelson*, 22 Ind. App. 22, 52 N. E. 176. Under the facts the respective interests are wholly adverse to each other. Therefore, under the circumstances, the estate, by its administrator, should not be made to occupy the position of appellant, but should have been made an appellee. It is true that section 2546, Burns' Ann. St. 1901, permits any person interested in the administration of the assets of an estate to except to and contest the correctness of the accounts of an administrator or executor; still such exceptor does not stand for nor represent the estate. The administrator of the decedent's estate herein not having been made an appellee in this appeal, the motion to dismiss must be ruled by the decisions of *Abshire v. Williamson*, 149 Ind. 248, 48 N. E. 1027, and cases there cited; *Kreuter v. English, etc., Co.*, 159 Ind. 372, 65 N. E. 4, and cases there cited; *Haymaker v. Schneek*, 160 Ind. 443, 67 N. E. 181; and *Kuhn v. American, etc., Co.*, 160 Ind. 336, 60 N. E. 890. In the case last cited the court said: "It is settled law in this state that, unless all parties adverse to appellant in the court below are made appellees in this court, the case cannot be determined on its merits." By reason of the failure to make the administrator of the estate of Willis E. Moore, deceased, a party appellee herein, we are compelled, under the rule asserted, to dismiss the appeal.

Appeal dismissed, at the cost of appellant, Jonathan J. Moore.

(163 Ind. 438)

BARRICKLOW v. STEWART et al. (No. 20,214.)

(Supreme Court of Indiana. Oct. 28, 1904.)

CONTEST OF WILL—ATTESTING CLAUSE—REVIEW—INSTRUCTIONS—BRIEF.

1. On appeal from an order denying a new trial for insufficiency of evidence, the fact that there is in the record evidence which supports the verdict precludes further review.
2. The form of the attesting clause of a will is not material; the signature of the witnesses being all that is necessary, under Burns' Ann. St. 1901, § 2746.
3. The exclusion of evidence will not be considered where appellant's brief does not contain an abstract of such evidence, as required by Sup. Ct. Rule No. 22, specification 5 (55 N. E. vi).
4. On the contest of a will on the ground of incompetency of testator and undue influence, evidence as to the inventory and appraisement of testator's property was properly excluded.
5. The refusal of an instruction is not error where its substance has already been given by the court.
6. On the contest of a will, contestant asked the court to instruct the jury, if testator at the time of executing the will had sufficient strength of mind to know the extent and value of his property, the names of the natural objects of his bounty, their deserts, their capacity and necessity, and a sufficiently active memory to retain all these facts in his mind long enough to have

¶ 2. See *Willis*, vol. 49, Cent. Dig. § 218.

his will prepared and executed, to find for defendants, but, if he was lacking in any of the above particulars, to find for plaintiff. *Held*, that the instruction was properly refused, as requiring too rigid a test.

7. Though undue influence was alleged in a contest of a will, where there was no evidence thereof it was proper to instruct that the evidence should be considered only on the question of soundness or unsoundness of testator's mind.

8. An instruction, the substance of which is not set out in appellant's brief as required by Sup. Ct. Rule No. 22, specification 5 (55 N. E. vi), will not be reviewed.

9. The sufficiency of the attesting clause of a will cannot be reviewed where appellant's brief does not contain a copy thereof.

Appeal from Circuit Court, Ohio County; N. S. Givan, Judge.

Action by Ruth E. Barricklow against Stephen H. Stewart, executor, and others. Defendants had judgment, and plaintiff appeals. Affirmed.

John B. Coles, Cynthia Coles, W. W. Williams, and C. B. Matson, for appellant. S. H. Stewart, R. L. Davis, Roberts & Johnston, and McMullen & McMullens, for appellees.

DOWLING, J. This action was brought by the appellant, who was a niece and one of the heirs at law of one Presley Gregg, deceased, to contest the will of the said Gregg. The grounds of contest were the alleged unsoundness of the mind of the testator, that the execution of the will was procured by undue influence, and that the will was unduly executed. The answer was a general denial. Upon a trial by the jury, a verdict was returned for the defendants, and judgment was rendered upon the verdict.

The ruling of the court on a motion for a new trial is assigned for error. The first reason for a new trial set out in the motion was that the verdict was not sustained by sufficient evidence. As is usually the case in proceedings of this kind, there was some evidence from which, if standing alone, the jury might have found a different verdict. But upon the other hand, there was much which sustained the verdict. It is not our province to compare the testimony of one witness with that of another, or to determine the weight of the evidence. This was the especial duty of the jury, and the fact that there is in the record evidence which supports the verdict precludes any further investigation of that question by this court. Erroneous views of the law of descents or of wills entertained by a testator generally constitute very slight grounds, if any, for an inference of unsoundness of mind. Even gentlemen learned in the law of these subjects, and possessing unquestionable ability to comprehend and apply it, often differ in opinion or fall into error. It is not strange, therefore, that persons destitute of professional learning should have mistaken notions in regard to the effect of certain words in the creation of estates and the legal consequences of inconsistent devises or bequests of property.

72 N.E.—9

The objection that the attesting clause signed by the witnesses to the will was defective in form is unimportant. No clause of this kind is essential, and none is required by the statute. The signatures of the witnesses constitute a sufficient attestation. Section 2746, Burns' Ann. St. 1901. When the will is offered for probate, the manner of its execution and the circumstances attending it may be shown. Section 2754, Burns' Ann. St. 1901. The validity of the execution of the will depends, not on the attestation clause, but on the conformity of such execution to the requirements of the statute; and the testimony of the subscribing witnesses, if they are produced or examined. 1 Underhill, Law of Wills, § 200; Herbert v. Berrier, 81 Ind. 1.

Counsel for appellant complain of the exclusion of evidence, but no abstract of the evidence proffered is given in their brief. We are referred to certain pages and lines of the transcript, but this is not in accordance with the rules and practice of this court. The fifth specification of rule 22 (55 N. E. vi) provides that the brief of appellant shall contain "a concise statement of so much of the record as fully presents every error and exception relied on, referring to the pages and lines of the transcript." If counsel neglect to incorporate such statement in their briefs, they cannot expect the court to supply their omission by searching the transcript, and reading, perhaps, the whole of the evidence.

The refusal of the court to admit in evidence the inventory and appraisement of the property of the testator, in connection with proof of alleged delinquencies of the executor with respect to such property, was entirely proper. These facts had nothing to do with the competency of the testator to execute the will, or the circumstances under which it was executed.

The action of the court in refusing to give certain instructions, and in giving others, is the next error discussed by counsel. Even if instruction numbered 1 requested by appellant was correct, we think its substance was fully covered by instruction numbered 6 given by the court. Instruction numbered 1 was in these words: "If you believe from a fair preponderance of the evidence that Presley Gregg, at the time of executing the will in controversy in this action, had sufficient strength of mind and memory to know the extent and value of his property, the number and names of those who were the natural objects of his bounty, their deserts with reference to their conduct and treatment toward him, their capacity and necessity, and that he had sufficient active memory to retain all these facts in mind long enough to have his will prepared and executed, you should find a verdict for the defendants; but if you believe from such fair preponderance of evidence that Presley Gregg, at the time of executing said will, was lacking in any

one of the above particulars, it is your duty to find and return a verdict in favor of the plaintiff." The only difference between the two instructions pointed out by counsel for appellant is that in No. 6 the court used the words "sufficient mental capacity to know the extent or value of his property," while in No. 1, offered by appellant, the statement was, "sufficient strength of mind and memory to know the extent and value of his property." As a statement of a rule of testamentary capacity, and as applicable to the proof which might be made in certain cases, either might be proper. But *Teegarden v. Lewis*, 145 Ind. 98, 40 N. E. 1047, 44 N. E. 9, from which a portion of the instruction offered is copied, does not purport to fix an invariable standard by which the competency of all persons to make wills is to be determined. It merely declares that, if certain facts are found to exist, they may be sufficient to authorize the conclusion that the testator was of unsound mind, within the meaning of the statute of wills. In that case, however, neither the words "sufficient mental capacity," nor "strength of mind and memory to know the extent," etc., are used. The language of that decision is " * * * that he was unable to know the extent," etc. The law does not arbitrarily pronounce a person incompetent to make a will who is unable to know both the extent and value of his property. In most cases, if he could comprehend either the extent or value, that fact would be entitled to considerable weight in determining the question of testamentary capacity. *Roller v. Kling*, 150 Ind. 159, 164, 49 N. E. 948.

The objection that the court used the words "mental capacity" in place of "sufficient strength of mind and memory" is not well founded. The former phrase, while more general, and perhaps less definite, necessarily includes the idea expressed by the latter.

Finally, we doubt the correctness of the conclusion in the instruction tendered by the appellant that if the testator, at the time of executing said will, "was lacking in any one of the above particulars, it is your duty to find and return a verdict in favor of the plaintiff." The "particulars" referred to enumerated in the preceding part of the instruction were (1) sufficient strength of mind and memory to know the extent and value of his property; (2) sufficient strength of mind and memory to know the number and names of those who were the natural objects of his bounty, their deserts with reference to their conduct and treatment toward him, their capacity and necessity; and (3) sufficient active memory to retain all these facts in mind long enough to have his will prepared and executed. It is easy to conceive of a person whose faculties of memory and judgment had been weakened and impaired to some extent by age, disease, or accident, yet who is neither imbecile nor of

unsound mind. Inability to recall proper names is frequently a result of advancing years. Lapses of memory concerning particular persons are too frequent and too familiar to require comment. Forgetfulness of the unkindness and evil behavior of children or other relatives, and an increasing tenderness toward those who were objects of affection and solicitude in earlier years, are tendencies which very often accompany old age, bodily weakness, and a contemplation of approaching death. Testators are not required by law to mete out equal and exact justice to all expectant relatives in the disposition of their estates by will, and the motives of partiality, affection, or resentment by which they may naturally be influenced are not subject to examination and review by the courts.

The fourth instruction given by the court is complained of on the ground that "it withdraws all the issues from the jury, except the question of the soundness or unsoundness of the testator's mind, and tells the jury that the evidence relating to undue influence over the testator can only be considered upon the question as to whether the testator was of unsound mind." No evidence proving or tending to prove the exercise of undue influence by any one over the testator is set out in the brief, and, in the absence of such statement, we must presume that no such evidence was given. In that case it was entirely proper for the court to inform the jury that the evidence in the case should be considered only upon the question of the soundness or unsoundness of the mind of the testator. *Stevens v. Leonard, Executor*, 154 Ind. 67, 71, 56 N. E. 27, 77 Am. St. Rep. 446.

The tenth instruction given by the court is not set out in the brief, nor is its substance given, and for this reason we decline to examine the objections to it. Rule 22, Sup. Ct., specification 5; *Cleveland, etc., Ry. Co. v. Stewart*, 161 Ind. 242, 248, 68 N. E. 170.

The last point made by counsel for appellant is that the fifteenth instruction is incoherent and erroneous, "because the jury were told that, if they found that Presley Gregg signed said will, its validity would not be affected by failure of the witnesses to attest the signature of the testator, instead of the declaration of the executor that it was his will." Counsel for appellant have failed to set out in their brief a copy of the concluding paragraph of the will, nor does the brief contain a copy of the attesting clause which was signed by the witnesses. By reason of these omissions, we are left in the dark on this branch of the case, and can only conjecture what the facts were regarding the place where the attesting witnesses subscribed their names. But as we have stated elsewhere in this opinion, it is generally immaterial whether a formal attesting clause is added to the will or is omitted. Attestation by two witnesses is all that is required by the statute; and where an attestation clause

is written out, but the witnesses fail to subscribe their names to it, and place them elsewhere on the will, the omission to attach the names to such clause is a mere informality, and does not affect the validity of the will. The copy of the will in the bill of exceptions shows that it was properly subscribed by the testator and attested by the witnesses. The use of the word "executor" in the attestation clause by the witnesses, and in this instruction, instead of "testator," was so plainly a clerical mistake that it could mislead no one.

We find no error in the record. Judgment affirmed.

(164 Ind. 238)

HALL v. BROWNLEE et al. (No. 20,416.)*

(Supreme Court of Indiana. Oct. 28, 1904.)

WILLS—CONSTRUCTION—GIFTS IN REMAINDER—TITLE OF FIRST TAKER—DESIGNATION OF REMAINDERMEN—RIGHTS OF REPRESENTATIVES.

1. A gift over in the case of the death of the first taker without issue, expressly limited to take effect after such death, imports a definite failure of issue at the death of the first taker, and not an indefinite failure.

2. A will gave to testator's son certain bonds, which another was to hold in trust for him, and provided that, if the interest on the bonds would more than support such son, the overplus of interest should be paid to certain grandchildren of testator, who, in case of the death of the son without issue, should receive the principal of the bonds and whatever should remain of the interest. *Held*, that only the interest on the bonds was subject to be used for the support of the son, and the son did not take title to the bonds themselves in any way inconsistent with the validity of the gift over.

3. Where the person designated by a will to take a contingent and executory interest is certain, and does not depend upon the happening of a contingency, such interest is descendible to the heirs, or passes to the personal representatives of the donee, according as it is real or personal property.

Appeal from Circuit Court, Gibson County; O. M. Welborn, Judge.

Action by Paul S. Brownlee and others against John B. Hall. From a judgment for plaintiffs, defendant appeals. Transferred from Appellate Court under section 1337u, Burns' Ann. St. 1901 (Acts 1901, p. 590, c. 259). Affirmed.

Buskirk & Brady, for appellant. A. P. Twineham and John R. McGinnis, for appellees.

MONKS, J. Samuel Hall died testate in Gibson county, Ind., in 1862, the owner of real estate and personal property. The first clause of his will makes provision for his widow. The second clause is as follows, to wit: "To my son, Walter M. Hall, I give and bequeath three thousand dollars in bonds on Vanderburg county bonds at par value, which bonds draw six per cent. interest per annum payable on the 1st day of February each year, at the treasurer's office

in Evansville. Said bonds to be held by my son John B. Hall in trust for Walter, which is in full of his share in my estate. If the interest on said bonds, and Walter's services, will more than support him (as I suppose it will), I direct such overplus of interest to be paid to the children of Catherine Hall by my son William P. Hall, Dec'd. And after the death of Walter (if he dies without issue) the principal of said bonds and whatever remains of the interest thereon (if any) I will to the said children of Catherine. Walter's services are fully worth his board, and it will not likely take more than half of the interest on said bonds to clothe him. In that event there will be 90 dollars a year during Walter's lifetime to be paid to the said children of Catherine Hall. But wishing to make ample provision for Walter, this bequest to the said children of Catherine Hall is to be dependent on the contingency above referred to." After thus providing for his widow and making said provision for his son Walter, the testator, by the third clause of his will, gives all the residue of his estate to his children "(except Walter who has already been provided for)," in equal parts, taking advancements into consideration, and giving to children of his deceased children their parents' equal share. The children of William P. Hall by Catherine H. share equally with John B. Hall, and receive their deceased father's portion of the testator's estate. Walter M. Hall, named in said will, was and had been for years prior to the making thereof a person of unsound mind, without any estate or means of support, aside from his expectancy as heir or legatee of his father. The testator was possessed of a large estate, in which Walter's interest as an heir would have amounted to more than \$6,000. Said Walter lived 35 years after his father's death. John B. Hall, appellant, received, as trustee, the bonds mentioned in the second clause of the will. All the children of Catherine Hall to whom the gift over was made died during the lifetime of Walter M. Hall. After the death of said Walter, appellees, the only heirs at law of the children of Catherine Hall by the testator's son William P. Hall, brought this action against the appellant to recover the legacy given to the children of said Catherine Hall by said second clause. A trial of said cause resulted in a finding and judgment in favor of appellees.

Appellant insists that the bequest over to the "children of Catherine Hall" was void (1) because the same was only to take effect after an indefinite failure of issue of Walter M. Hall; (2) because the first taker, Walter M. Hall, had the right, if it became necessary, to use the entire principal of said legacy, as well as the income thereof; (3) because all the children of Catherine M. Hall died during the lifetime of the first taker, Walter M. Hall, and therefore neither their heirs nor personal representatives are enti-

*1. See Wills, vol. 49, Cent. Dig. §§ 1219, 1212, 1214, 1217.

*Rehearing denied February 15, 1905.

tled to recover said legacy; (4) because the absolute title to said bonds was given to said Walter M. Hall, and there was no subsequent language sufficient to cut the same down to a less estate. It will be observed that the gift over, if the first taker, Walter M. Hall, dies without issue, is expressly limited to take effect after his decease, which imports a failure of issue at the death of the first taker; that is, a definite failure of issue, and not an indefinite failure of issue, as contended by appellant. 17 Am. & Eng. Ency. of Law (2d Ed.) 565, and cases cited in notes; 24 Am. & Eng. Enc. of Law (2d Ed.) pp. 436, 437, 442, 443, 444, 445; 3 Jarman on Wills (Randolph & Talcott's Ed.) pp. 328-330; 2 Jarman on Wills (6th Am. Ed. by Bigelow) p. 475, pp. *1334, *1335; 2 Roper on Legacies, 1449 et seq.; Smith on Executory Interests, § 557, p. 281; Blackstone's Comm. bk. 2, p. 173, et seq.; Rood on Wills, §§ 588, 648, 649; 2 Underhill's Law of Wills, §§ 851, 852; Pinbury v. Elkin, 1 P. Wms. 563, 2 Vernon, pt. 2, p. 766; Glover v. Condell, 163 Ill. 566, 45 N. E. 173, 35 L. R. A. 360, 368-370, and authorities cited.

Appellant's second and fourth contentions are in conflict with the provisions of the will, for by its terms the gift of the \$3,000 in bonds was without any power of disposal on the part of Walter M. Hall or the trustee, John B. Hall. The gift over of said bonds was not void, therefore, for the second reason urged. Hooper v. Bradbury, 133 Mass. 303, 306, et seq.

The intention of the testator, as shown by the terms of the will, was to give the absolute property in said bonds to said children of Catherine Hall after the death of the first taker without issue. Only the interest on said bonds was subject to be used for the support of said first taker. It is clear that it was not the intention of the testator to give, and that he did not give, to Walter M. Hall a title to said bonds in any way inconsistent with the validity of the gift over. Homer v. Shelton, 43 Mass. 194. It is settled that all contingent and executory interests, where the person to take is certain—that is, where it does not depend upon the happening of the contingency to determine who is to take the same—are descendible to the heirs or pass to the personal representatives of such person, depending on whether the same is real or personal property. 24 Am. & Eng. Enc. of Law (2d Ed.) 455, 456, and cases cited in notes 1 and 2, p. 456; Underhill on the Law of Wills, §§ 49, 50, 855; Hopkins on Real Property, 308; Blackstone's Comm. bk. 2, p. 290; 1 Schouler's Personal Property, p. 185; 4 Kent's Comm. (13th Ed.) *261, *262, *284; Rood on Wills, § 80; Kean's Lessee v. Hoffecker, 2 Har. 103, 29 Am. Dec. 336, and cases cited; Moore v. Hawkins, 2 Eden, 342; Barnes v. Allen, 1 Brown, Chanc. (Perkins' Ed.) 167, 168; Pinbury v. Elkin, 1 P. Wms. 563; Smith v. Hunter, 23 Ind. 580.

In the will under consideration the happening of the contingency upon which the gift over depended was not necessary to the determination of who was to take, but the persons to take were certain from the terms of the will. It follows that none of the objections urged by the appellant is tenable. The judgment is therefore affirmed.

(163 Ind. 379)

PENN MUT. LIFE INS. CO. OF PHILA.
DELPHIA v. NORCROSS. (No. 20,359.)
(Supreme Court of Indiana. Oct. 25, 1904.)

LIFE INSURANCE—POLICIES—EXECUTION—DELIVERY—DENIAL—ACTIONS—PLEADING—EVIDENCE—INSTRUCTIONS—APPEAL—HARMLESS ERROR—BRIEFS—WAIVER OF ERROR.

1. A complaint on a policy of insurance was not objectionable for failure to have attached thereto as an exhibit a copy of the application on which the policy purports to have been issued.

2. Civ. Code, § 115 (Burns' Ann. St. 1901, § 367), provides that, when a pleading is founded on a written instrument, such instrument may be read in evidence without proving its execution, unless such execution is denied under oath and declares that there can be no waiver of the objection that such an answer is not verified by failing to move to strike it out. *Held*, that where each paragraph of the complaint in an action on a life insurance policy charged that defendant executed the policy, and defendant did not deny such execution under oath, defendant was estopped to claim that the policy had never in fact been delivered with intent that it should become operative.

3. Where a life insurance policy was delivered, and a note taken by the agent delivering the same for the first premium, such delivery constituted a waiver of a provision in the policy that it should not take effect until the first premium should be actually paid; the company not having repudiated the agent's act after it had knowledge thereof.

4. In the absence of any averment on the subject, it will be presumed that the common law is in force in Pennsylvania.

5. In an action on a policy of insurance alleged to be a Pennsylvania contract, an allegation that the laws of that state provide, and the courts construe the law to be, that the beneficiary of the assured in a mutual insurance company has no interest in the policy until assured's death, etc., as set out in a certain case cited, which was a mere nisi prius decision of the court of common pleas, sitting in equity, was insufficient.

6. Where a policy in a mutual life insurance company has been delivered and gone fully into effect, the beneficiary had an interest therein which could not be divested by the insured, who was her husband, without her consent.

7. The fact that an insurance company issued a policy exacting a fixed rate of premium for a fixed amount of insurance, and contracted that the policy should participate annually in the surplus earnings of the company in accordance with the regulations adopted by the company's board of trustees, did not place the contract on the footing of a mere benefit certificate, in so far as the rights of the beneficiary were concerned.

8. Where, in an action on a policy, the general theory of one of the paragraphs of the answer was that the policy was a Pennsylvania contract, and subject to a particular law, attempted to be alleged, under which plaintiff had no present right in the policy, a further allega-

§ 1. See Insurance, vol. 28, Cent. Dig. § 1523.

tion of such paragraph that there was an oral agreement at the time the policy was delivered to insured that it should be surrendered if the note given for the first premium was not paid, should be rejected as in conflict with the balance of such paragraph.

9. Where a paragraph of the complaint in an action on a policy was sufficiently broad to admit the introduction of all evidence necessary to uphold a verdict in favor of plaintiff, and a general denial was pleaded thereto, the sustaining of a demurrer to a special paragraph of the answer pleading a default in the payment of premiums was harmless.

10. Where the issue under which evidence is admissible is formed by a general denial, it is immaterial whether it is on file at the time of the ruling, or is filed afterwards.

11. Where an insurance company delivered the policy under such circumstances that it became operative at once, and accepted in lieu of cash the note of insured, made payable to the company, for the first premium, and the note was delivered and accepted as payment, insured's failure to pay the note would not constitute a forfeiture of the policy.

12. Where a correct result was reached in ruling on the sufficiency of the pleadings, the form of the demurrer interposed was immaterial.

13. A declaration of the supervisor of death claims of an insurance company relative to the ground on which the company refused to pay the loss sued for was not objectionable as hearsay, but was competent evidence tending to prove a waiver of proof of loss.

14. Where the substance of the instructions given and refused is not set out in appellant's brief as required by Sup. Ct. Rule 22 (55 N. E. v), all questions relative to instructions will be deemed waived.

Appeal from Superior Court, Vanderburgh County; John H. Foster, Judge.

Action by Ida A. Norcross against the Penn Mutual Life Insurance Company of Philadelphia. From a judgment in favor of plaintiff, defendant appeals. Transferred from Appellate Court, as authorized by Burns' Ann. St. 1901, § 1337u. Affirmed.

George W. Pepper, George D. Hellman, and A. J. Clark, for appellant. G. F. Denby, R. C. Wilkinson, and F. C. Gore, for appellee.

GILLETT, J. This was an action upon an instrument purporting to be a policy of insurance insuring the life of George A. Norcross in favor of his wife, the appellee, if she survived him; but, if not, the policy provided that it should be payable to the executors, administrators, or assigns of said George A. Norcross. The instrument purports to be signed by the president and secretary of the company. In part, it reads: "In consideration of the application for this policy, hereby made a part of this contract, the Penn Mutual Life Insurance Company of Philadelphia insures the life of George A. Norcross," etc. It is recited in said instrument that it is issued upon the condition of "the payment in advance to the company at its home office of the sum of sixty-eight and ⁵⁰/₁₀₀ dollars at the date hereof," and of the payment of the stipulated annual premiums as they thereafter mature. Provision was made in said instrument for the conversion of the policy into one of certain other forms of insurance upon the applica-

tion of the "legal holders." The policy also contained the following provisions and conditions:

"(1) This contract is absolutely incontestable from date of issue for any cause except nonpayment of premium."

"(3) This policy does not take effect until the first premium shall actually have been paid during the good health of the assured. All premiums are due and payable at the home office of the company in the city of Philadelphia, but they may be paid to agents, on or before the dates when due in exchange for receipts signed by the president, vice president, secretary, treasurer or actuary. If not paid when due the policy shall be null and void. From any sum payable under this policy there shall be deducted the unpaid portion of the year's premium, if any, and any indebtedness to the company on account of this contract."

"(8) Pursuant to law, a copy of the application for this policy is attached hereto. No alteration of this contract or waiver of any of its conditions shall be valid unless made in writing and signed by an officer of the company."

The complaint was in two paragraphs, to each of which a demurrer was overruled. Appellant filed six paragraphs of answer, to some of which a demurrer was sustained. There was a general denial filed. None of the answers was verified. There was a trial by jury, and a verdict and judgment for appellee. Appellant filed a motion for a new trial, but its motion was overruled.

It is first contended by appellant's counsel that each paragraph of the complaint was insufficient, for the reason that there was no exhibit of the application on which the policy purports to have been issued attached to the complaint. There is no merit in this objection. *Continental Life Ins. Co. v. Kessler*, 84 Ind. 310; *Penn Mut. Life Ins. Co. v. Wiler*, 100 Ind. 92, 50 Am. Rep. 769; *Phoenix Ins. Co. v. Stark*, 120 Ind. 444, 22 N. E. 413. And see *Carnahan v. Campbell*, 158 Ind. 226, 63 N. E. 384.

We shall endeavor to set out at least the substance of the paragraphs of answer to which a demurrer was sustained: The second paragraph of answer to the first paragraph of complaint charges, in terms, that the defendant is a mutual insurance company, organized and existing under and by virtue of the laws of the state of Pennsylvania; that the contract sued on was executed in, and subject to the laws of, said state; that by the laws of Pennsylvania the beneficiary of the insured in a mutual insurance company, and particularly the defendant company, does not take and hold a vested interest in the policy on the life of the insured; that no premium was ever paid upon the policy or for the execution of the policy sued on; that said George A. Norcross executed his note for the full amount of the first premium, payable four

months after date; that the note matured in his lifetime, and he defaulted the payment of the same; that afterwards he executed to the defendant, in consideration of the surrender of the note to him, an instrument in writing assigning said policy to it. This instrument, which is set out in said answer, purports to be an assignment of a policy answering the description of the policy in suit, executed on behalf of said Norcross, and as attorney in fact for all of the beneficiaries under the policy, in consideration of the surrender of a four-months note for \$68.50 given in settlement of the first annual premium of said policy; and the instrument concludes with an attempted release of the company from any obligation on account of said note. The second paragraph of answer to the second paragraph of complaint seems to be the same in effect as the one stated in substance above, except that it sets out provision 8 of said policy, and also an application which it is alleged that said George A. Norcross made in writing for said policy. The body of the application is as follows: "I hereby warrant and agree * * * that the company shall incur no liability until this application has been received, approved, the policy issued thereon by the company and delivered and paid for during my lifetime and good health; and that the policy applied for shall be in the form now in use by the company; and that the place of contract shall be in the city of Philadelphia, state of Pennsylvania." The third paragraph of answer to the second paragraph of complaint charges that the defendant is a mutual insurance corporation existing under the laws of the state of Pennsylvania. The paragraph then sets up the application and provision 8 of said policy. It charges that the laws of the state of Pennsylvania provide, and the courts of said state so construe the law of said state to be, that the beneficiary of the assured in a mutual insurance company, and particularly the defendant company, has no interest in the policy until the death of the insured, and that the insured is authorized to surrender the policy without the consent of the beneficiary, and the paragraph concludes with the same allegations relative to the taking out and surrender of the policy as are found in the answer first mentioned above. The fourth paragraph of answer relies on the law of Pennsylvania as a factor in the contract; it being alleged that at the time of the issuing of said policy it was, and ever since has been, "the law of Pennsylvania, as the same is reported and set out in 3 Wkly. Notes Cas. 513, in the case of Penn Mutual Ins. Co. v. Watson, Executor, et al.," that the beneficiary had no interest in such a policy of insurance, and that the assured might surrender it. From that point the paragraph proceeds along the lines of some of the answers that we have referred to. The fifth paragraph of answer is like

the fourth, except that it sets out the application, and contains some rather obscure allegations relative to a contemporaneous agreement between the agent and the insured that if he did not pay the note he would execute the policy surrender contract which we have mentioned above.

It may be said of each of said answers that it possesses the fault of commingling matters of fact that have no relation to each other. As was said in the opinion in *Platter v. City of Seymour*, 86 Ind. 323, 326, and in substance often reiterated by this court: "To permit an isolated statement to control the scope and meaning of a long and involved pleading would be destructive of all certainty in pleading, result in injury to litigants, and impose upon the trial court the burden of looking into out of the way places to discover if disconnected and irrelevant allegations existed which might change the drift of the general averments of the complaint. Such a system would make pleadings mere traps for the ensnaring of the adverse parties, and would give to pleadings a protean character which all rules of practice condemn." We are greatly at a loss, because of the manner in which the pleadings under review have been prepared, to determine what the leading theory of each of said answers is. We have concluded, however, that we may reach the merits of this appeal, so far as concerns the assignments of error which draw in question the sustaining of the demurrer to said answers, without attempting to stamp a definite theory upon each of them. So proceeding, we may observe that they attempt to plead matters that it is claimed prevented the contract from having any inception, or else they set up matters relied on to avoid the continuance in force of the policy by reason of its terms. Of these matters in their order:

Each paragraph of the complaint charged that the defendant "executed" the policy. Section 115 of the Civil Code provides: "When a pleading is founded on a written instrument, or such instrument is therein referred to, * * * such instrument or assignment may be read in evidence on the trial of the cause without proving its execution, unless its execution be denied by pleading under oath, or by an affidavit filed with the pleading denying the execution." Section 367, Burns' Ann. St. 1901. There can be no waiver of the objection that such an answer is not verified by failing to move to strike it out, for the Code contemplates that the effect of failing to deny the execution of the instrument under oath is to preclude the defendant from giving evidence upon the trial for the purpose of drawing the execution of the instrument into controversy. *Cincinnati, etc., Co. v. Chenoweth*, 22 Ind. App. 685, 54 N. E. 403, and cases there cited. It has been directly held by this court that the sustaining of a demurrer to an answer which in effect denies the execution of the instru-

ment sued on is a harmless error, since a right result is reached. *Allen v. Studebaker Bros. Mfg. Co.*, 152 Ind. 406, 53 N. E. 422; *Pittsburgh, etc., R. Co. v. Hawks*, 154 Ind. 547, 55 N. E. 258. In *Home Ins. Co. v. Gilman*, 112 Ind. 7, 13 N. E. 118, where an insurance company had filed an answer questioning the right of the agent to deliver the policy, this court said: "There was no answer of non est factum, nor was the seventh paragraph of answer verified. So far, therefore, as the allegations of the answer go in denial of the execution of the policy prior to the date of the fire, they are immaterial. The answer presented no issue relating to the execution of the policy." In *Phoenix Ins. Co. v. Rowe*, 117 Ind. 202, 20 N. E. 122, a question arose as to the effect of answers to interrogatories tending to show, among other things, that, if the insurance policy sued on had been delivered by the agent, he had no authority to do so without first collecting the premium; the premium not having been paid until after the loss. In passing on the matter, *Mitchell, J.*, speaking for the court, said: "A failure to deny the execution of an instrument which is properly set out as the foundation of the action, by a pleading under oath, has been held to be so far an admission of its execution as to preclude further controversy on that subject. 'The defendant ought to know better than anybody else whether he executed the note in suit or not, and if he will not deny it under oath, by a general or special non est factum, there is no hardship in holding the execution admitted.' *Evans v. Southern Turnpike Co.*, 18 Ind. 101; *Home Ins. Co. v. Gilman*, 112 Ind. 7, 11, 13 N. E. 118; *Carver v. Carver*, 97 Ind. 497; *Woolen v. Whitacre*, 73 Ind. 198." See, also, in this connection, *Terry v. Provident Fund Soc.*, 13 Ind. App. 1, 41 N. E. 18, 55 Am. St. Rep. 217; *Prudential Ins. Co. v. Sullivan*, 27 Ind. App. 30, 59 N. E. 873.

There being no effectual denial of the fact of delivery, the question arises whether the pleading of a breach in the conditions contained in the application and in the policy prevented the latter from having any inception. It is obvious that, no matter how resolutely a party declares beforehand that he will not be bound except by a contract of a specified character, yet, if he afterwards makes a contract in disregard of his declaration, his prior provision will avail him nothing. As applied to a corporation placing such a restriction in its undertaking, it is only a question whether there was a waiver by an agent competent to bind the corporation. Somewhere within the corporate body there must reside authority sufficient to modify by a new undertaking the most solemn contractual engagement that the corporation has entered into, for it cannot by contract totally preclude itself from afterwards entering into an intra vires agreement providing for a change in the original contract. *Lamberton v. Conn. Fire Ins. Co.*, 39 Minn. 129, 39 N. W. 76, 1 L. R. A. 222. The power to

abrogate or change a contract involves the power to waive conditions therein. If a court is called on to interpret a writing purporting to be a contract, and the evidence shows that it was actually delivered as such by the person whose instrument it is, the court will not fail to consider the fact of delivery, if it be material, as an element in the intent of the parties. The provisions of a formal contractual writing, which a corporation has caused to be signed and placed in the hands of an agent for delivery, may be waived by the act of the agent himself, if he have sufficient power in the premises, or such waiver may be the result of silence upon the part of the officers of the corporation after it had constructive knowledge of its agent's act in delivering the contract, at least where resolute good faith required a timely disavowance of his act.

Notwithstanding the limitations contained in the policy in suit, it purported to be a present contract; and if such a policy had been executed by a natural person, and delivered by his own hand, the holder would have been warranted in indulging the inference that the limitations which it contained were not intended to be operative as conditions precedent to delivery, or else that, as conditions precedent, they had been waived. In *Trustees of First Baptist Church v. Brooklyn Fire Ins. Co.*, 19 N. Y. 305, we find the following language: "A provision in a policy already executed and delivered, so as to bind the company, declaratory of a condition that premiums must be paid in advance, manifestly has no effect, except to impart convenient information to persons who may wish to be insured. As such a provision in the policy in question could have no effect upon the delivered and perfect contract in which it was contained, so it could have none to prevent the same parties from making such future contract as they pleased. In any subsequent agreement for a renewal or continuation of the risk, it was competent for the parties to contract by parol, and to waive the payment in cash of the premium, substituting therefor a promise to pay on demand or at a future day. Proof of such an agreement would have no tendency to contradict or to change the written policy already in force between the parties, and which would be wholly spent before the new agreement could take its place." A valuable discussion of the subject is found in *Van Schoick v. Insurance Co.*, 68 N. Y. 434, where it was said that it "has been thought that the fact that the insurer delivered to the insured the written contract as the consummated agreement between them, and did not then exact present payment of the premium as a necessary precedent to delivery, was too plainly in contradiction with the condition for prepayment for it to be supposed by either party that it was intended to make that condition a potent part of the contract. Such a provision, it is said, could have no effect upon the delivered and perfect contract in

which it was contained. It would be imputing a fraudulent intent to the defendant in this case to say or to think that they did not mean, when they delivered this policy to the plaintiff, to give him a valid and binding contract of insurance, or that they did not mean that he should believe that he had one, or that they did not suppose that he did so believe. And such imputation can be avoided only by supposing that it had overlooked this condition, and so forgotten to express the fact as to the building in writing upon the policy, or that it waived the condition, or held itself estopped from setting it up. The condition of prepayment of premium is, like this under consideration, at the threshold of the making of the contract, and, if it is not observed, no valid contract is made, unless it is stepped over or thrust aside. It is consistent with fair dealing and a freedom from fraudulent purpose to hold that one or the other was done; that is, that there was waiver or estoppel." In a later New York case the court stated: "It is so obviously just that a party to a written contract should be precluded from defeating it by asserting conditions contained in it which would prevent its inception, and which he knew, at the time he delivered it and accepted the benefits, were contravened by the actual facts, that any statement of the reasons upon which the rule rests is no longer necessary." See *Wood v. American Fire Ins. Co.*, 149 N. Y. 385, 44 N. E. 81, 52 Am. St. Rep. 733.

In view of the fact that the pleadings of appellant present no question as to the delivery of the policy, it must be presumed that it was delivered by some officer or agent who represented the power of the company to waive all conditions precedent, or else that the circumstances were such that as against appellee the company had become estopped to deny the validity of the instrument. The indulgence of either of these presumptions as against answers setting up conditions intended to precede a delivery of the policy makes it necessary to hold that the pleading of matter of that character, unsupported by an oath, cannot avail.

We shall now consider the effect of those allegations which do not go to the question of execution. The charges in the answers relative to what was the law of Pennsylvania were insufficient, since they were mere conclusions. In the absence of any averment upon the subject, the courts of this state indulge the presumption that the common law is in force in Pennsylvania, and therefore they will judge what that law is for themselves, where there is no controlling averment upon the subject. It is not, therefore, proper merely to allege what the law of Pennsylvania was at the time of making a Pennsylvania contract. *Irving v. McLean*, 4 Blackf. 52. If a pleader relies on a decision by one of the higher courts of another state as establishing the law of that state, he cannot rely on an averment of the exist-

ence of a decision that for aught that appears may have been rendered by a trial court. As a matter of fact, the publication known as the *Weekly Notes of Cases* is unofficial; and the report of the case of *Penn Mutual Insurance Co. v. Watson, Executor, et al.*, as set forth in said publication, shows merely that the court of common pleas, sitting as a court of equity, under the averments of a declaration tending to make out a case in which the interest of the beneficiary never attached, ultimately entered a decree of cancellation against the beneficiary. In ordinary insurance contracts, which are not merely benefit certificates, it is held by the courts of the several states, almost without exception, that, once the policy has gone fully into force, the beneficiary has an interest which is only subject to divestiture to the extent provided for in the policy. See 3 Am. & Eng. Ency. of Law, 980, and cases there cited. This is certainly the law of Indiana. *Pence v. Makepeace*, 65 Ind. 345; *Wilburn v. Wilburn*, 83 Ind. 55; *Kline v. National Ben. Ass'n*, 111 Ind. 462, 11 N. E. 620, 60 Am. Rep. 703; *Mason v. Mason*, 160 Ind. 191, 65 N. E. 585. And this we judge to be the law of Pennsylvania. See *Entwistle v. Travelers' Ins. Co.*, 202 Pa. St. 141, 51 Atl. 759. A leading writer on the Law of Insurance says: "While the beneficiary lives, no surrender of the policy without his assent, or nonpayment of premium after such surrender, will defeat his right. A surrender of the policy by the husband for the wife is ineffectual, if without her authority." *May on Insurance*, § 399p. And see, particularly, *Matter of Booth*, 11 Abb. N. C. 145; *Garner v. Germania Life Ins. Co.*, 110 N. Y. 236, 18 N. E. 130, 1 L. R. A. 256; *Manhattan Life Ins. Co. v. Smith*, 44 Ohio St. 156, 5 N. E. 417, 53 Am. Rep. 806.

We realize that the observations that we have indulged in concerning the rights of the beneficiary as a matter of general law are not strictly called for, since the paragraphs of answer under consideration, viewed as paragraphs setting up the law of another state, stand condemned for the lack of sufficient averments as to what was the Pennsylvania law; but we have thought it not improper to indulge in some further observations relative to said answers, for the purpose of showing that there was probably no merit in the attempt to inject the law of Pennsylvania into the case.

The charge which is found in said answers to the effect that the defendant was a mutual corporation, if not a mere conclusion, will not avail to show that the beneficiary was without right in the policy. The question is largely one as to the nature of the contract. The fact that an insurance company, issuing a policy exacting a fixed rate of premium for a fixed amount of insurance, provides in its policy, as was done in the agreement in suit, that "this policy shall participate annually in the surplus earnings of the com-

pany in accordance with the regulations adopted by the board of trustees," does not place the contract on the footing of a mere benefit certificate.

As to the allegations of the fifth paragraph of answer, to the effect that there was an oral agreement at the time the policy was delivered that it should be surrendered if the note was not paid, we are persuaded that they must be rejected, as in conflict with the general theory of that paragraph that the policy was a Pennsylvania contract. A pleader cannot be permitted to draft his answer for the purpose of presenting the proposition that the law of the place of the contract was such that the person suing never had any present right in the contract, and then, when he finds that his charge as to what was the foreign law is insufficient, fall back on the theory that there was an agreement contemporaneous with delivery which limited the rights of the plaintiff under the law of the forum. The allegation found in said answers that no premium was paid on the policy, or for its execution, cannot be segregated from its associated averments, and treated as a general denial of the allegation of performance. Disregarding for the moment the charges concerning the law of Pennsylvania, and it would appear that the purpose of the pleader was to rely either upon the fact that the note was not paid at its maturity, or else that, in view of the application or the conditions of the policy, the contract could not go into force until the first premium was paid in cash. But in view of the condition of the issues, we think that for another reason the existence of said allegation in the answers under consideration does not furnish cause for reversal. Section 370 of the Civil Code provides: "In pleading the performance of a condition precedent in a contract, it shall be sufficient to allege, generally, that the party performed all the conditions on his part. If the allegations be denied, the facts showing a performance must be proved on the trial." Section 373, Burns' Ann. St. 1901. The purpose of this section was to simplify pleadings in actions upon contracts by rendering it unnecessary for the pleader to allege how he performed those conditions which are precedent to the right of recovery. This is the effect of the holdings of this court in a number of insurance cases. *Ætna Ins. Co. v. Kittles*, 81 Ind. 90; *Modern Woodmen v. Noyes*, 158 Ind. 503, 64 N. E. 21; *Security, etc., Ass'n v. Lee*, 160 Ind. 249, 68 N. E. 745. "Payment is a question of intention between the creditor and the debtor, and there is no reason why a promissory note may not be given and accepted as payment, as well as other kinds of property which are not money. The word 'payment' is not a technical term. It has been incorporated into law proceedings from the exchange, and not from law treatises." 2 Greenl. Ev. § 516." *Bradway v. Groenendyke*, 153 Ind. 508, 55 N. E. 424. And see

Willcuts v. Northwestern Mut. Life Ins. Co., 81 Ind. 800. The legal effect of a transaction is to be pleaded, and not the evidence of it, and it must be held that the effect of the general allegation of performance found in each paragraph of the complaint tendered an issue upon the matter of payment. In this view, since the general denial was pleaded to the second paragraph of the complaint, which was broad enough to admit the introduction of all evidence necessary to uphold the verdict, the sustaining of a demurrer to special paragraphs of answer pleading a default in the payment of the premiums was harmless. In *Elliot's Appellate Procedure*, § 669, it is said: "In holding a defective paragraph good, the court adjudges that, if the party by whom it is pleaded proves it, he will be entitled to recover. No such thing is adjudged where a demurrer is sustained to one paragraph of several. It is true that it is adjudged that the paragraph is insufficient, but no harm can result from such a ruling if in fact no competent evidence is excluded, and it is not excluded if other paragraphs are left standing which entitle it to admission." Where the issue under which the evidence is admissible is formed by a general denial, it makes no difference whether it is on file at the time of the ruling, or is filed afterwards, since no additional burden is put on the appellant. See *Field v. Noble*, 154 Ind. 357, 58 N. E. 841. If an insurance company delivers a policy under such circumstances that it goes into force at once, and accepts in lieu of cash the promissory note of the person insured, made payable to the company, and the note is delivered and accepted as payment, the failure to pay the note will not forfeit the policy. *Kline v. National Ben. Ass'n*, 111 Ind. 462, 11 N. E. 620, 60 Am. Rep. 703; *Stewart v. Union Mut. Life Ins. Co.*, 155 N. Y. 257, 49 N. E. 876, 42 L. R. A. 147.

The posture of this case is not such that it is necessary to consider the question as to what extent insurance agents may waive payment in cash. The requirement of "actual payment" in the policy does not exclude all other methods of payment which are not made in cash. The premium may be paid by the credit of the assured, if so accepted.

Appellant seeks to raise a further question based on the form of the demurrer which the court sustained to said special paragraphs of answer. As a right result was reached in ruling upon the sufficiency of said pleadings, the form of the demurrer has now become immaterial. *Wray v. Fry*, 153 Ind. 92, 62 N. E. 1004; *Hall v. Campbell*, 161 Ind. 406, 68 N. E. 892.

Appellee pleaded a waiver of proof of loss, and the evidence tended to show that there was such a waiver. *Germania Fire Ins. Co. v. Pitcher*, 160 Ind. 392, 64 N. E. 921, 68 N. E. 1003. The declaration of appellant's supervisor of death claims relative to the ground of the company's refusal to

pay said loss was not hearsay, but was competent evidence tending to prove a waiver of proof of loss.

A few further points remain concerning the introduction of evidence, but, as the rulings relative thereto appear to us to have been harmless, we do not pause to discuss those matters.

There was no counterclaim based on the right which the policy reserved to deduct all indebtedness on account of the policy, and therefore the amount of the recovery was not too large.

No question is made in the points in appellant's brief as to the sufficiency of the evidence to sustain the verdict, and the substance of the evidence given upon the trial has not been set out in appellant's brief. We may therefore omit any consideration as to the sufficiency of the evidence.

Because of the failure of appellant's counsel to comply with rule 22 of this court (55 N. E. v) in their omission to set out in their brief the substance of the instructions given and refused, all questions relative to instructions must be treated as waived. Chicago, etc., R. Co. v. Wysox Land Co. (Ind. Sup.) 69 N. E. 546.

We find no error. Judgment affirmed.

(163 Ind. 457)

GILLESPIE v. RUMP, Sheriff. (No. 20,391.)
(Supreme Court of Indiana. Nov. 2, 1904.)

HABEAS CORPUS—WHEN LIES—SCOPE OF INQUIRY.

1. Burns' Ann. St. 1901, § 1133, denies to every court or judge the power to inquire into the legality of any judgment or process, whereby the person applying for a writ of habeas corpus is in custody and held "on a warrant issued from the circuit court on an indictment or information." Held, that on a petition for discharge on habeas corpus by one held by a sheriff the only inquiry is whether petitioner is in custody on such warrant.

2. Even if it was error for the court to discharge a jury in a criminal case and impanel a second jury, such act did not ipso facto deprive the court of its jurisdiction, and render its subsequent proceedings void.

3. Former jeopardy or proceedings in the case equivalent to an acquittal are matters for defense to a subsequent trial, under Burns' Ann. St. 1901, § 1832, and not ground for a petition for discharge on habeas corpus.

4. A writ of habeas corpus cannot be used as a substitute for a writ of certiorari, error, or an appeal.

Appeal from Circuit Court, Ohio County;
Geo. E. Downey, Judge.

Application by James Gillespie for writ of habeas corpus against Harry Rump. There was judgment for defendant, and petitioner appeals. Affirmed.

Jno. B. Coles, Cynthia Coles, and F. M. Griffith, for appellant. Charles W. Miller, Atty. Gen. (William C. Geake, C. C. Hadley, and L. G. Rothschild, of counsel), for appellee.

DOWLING, J. The appellant, James Gillespie, who was in the custody of the appellee, Harry Rump, as the sheriff of Ohio county, in this state, and confined in the jail of that county, on June 4, 1904, filed in the office of the clerk of the Ohio circuit court his verified petition for a writ of habeas corpus. The petition stated that the appellant was unlawfully restrained of his liberty by the appellee at the jail of said Ohio county; that the pretense for such restraint was that on December 22, 1903, the grand jury of said Ohio county returned to the circuit court of that county, at its December term, 1903, an indictment against the petitioner and against Belle Seward, Carrie Barbour, and Myron Barbour, charging them with murder in the first degree, in that they on the 8th day of December, 1903, with intent to kill and murder one Elizabeth Gillespie, did feloniously, purposely, and with premeditated malice shoot at and against said Elizabeth Gillespie with a deadly weapon called a shotgun, then and there loaded with gunpowder and leaden balls, and did then and there purposely, feloniously, and with premeditated malice mortally wound the said Elizabeth Gillespie, of which mortal wound the said Elizabeth Gillespie, on the 10th day of December, 1903, died; that the petitioner was arrested on said charge, and had since been, and then was, confined in said jail; that the said restraint was illegal in this: that on May 2, 1904, at the May term of the Ohio circuit court the petitioner and his codefendants were arraigned in open court, and pleaded not guilty to said charge; that the said cause was called for trial, and on May 10, 1904, a jury of 12 competent jurors (naming them), not related to any of said defendants, being in the jury box, were duly and legally impaneled, charged, and sworn to try said cause, and a true verdict render according to the law and the evidence; that afterwards, on May 11, 1904, the state, by its attorneys, moved to set aside such submission on the ground that one of the jurors sworn to try said cause, to wit, one Oscar Jones, when examined in regard to his qualifications as a juror, had stated that he was not related by blood or marriage to any of the defendants in said cause, when in truth and fact he was so related, the mother of the said Jones being a first cousin of William Seward, the deceased husband of Belle Seward, one of the said defendants; that none of the attorneys for the state knew of such relationship, and that they had had no opportunity to ascertain the existence of the same. The court having adjourned immediately after said juror was sworn to try said cause; that said juror made answer that he was not related to any of the defendants, and thereby misled counsel for the state, who would have challenged him for such cause had said relationship been disclosed; that shortly after the adjournment of the court on May 10, 1904, counsel for the state ascertained the

fact of such relationship, and on the next day, May 11, 1904, immediately on the reconvening of the court, presented its motion, supported by affidavit, to set aside such submission with a view to the re-examination of said juror, and to give the state an opportunity to challenge him for the cause above stated; that in truth and in fact said juror was not then and there and is not related to the defendant Belle Seward, and that, if any relationship ever existed, it ceased upon the death of William Seward, the late husband of the said Belle Seward; that the said motion to set aside the submission of said cause to the jury was sustained by the court, to which decision the petitioner and his codefendants excepted; that thereupon the attorneys for the state proceeded to examine the said juror Oscar Jones, who testified that he and the husband of the defendant Belle Seward never considered themselves related, and were not related that he knew of; that the state then peremptorily challenged said juror, to which challenge the petitioner and his codefendant each objected for the reasons that the answers of the said juror showed that he was not related to either of the defendants, and that said submission was set aside only on account of the said supposed relationship, and not for the purpose of enabling the state to exercise its right to peremptorily challenge said juror; that the objection was overruled by the court, and that the petitioner and each of his codefendants excepted to such ruling; that the said juror was excused by the court, and that each of the defendants excepted to such decision; that thereupon the said defendants, and each of them, moved the court that they be discharged, for the reason that they had once been in jeopardy for the offense charged in the indictment, and that the impaneling of another jury placed them in jeopardy a second time for the same offense; that the said motion of the defendants was overruled by the court, to which decision each of them excepted; that other persons were summoned and examined touching their competency to sit as jurors in said cause; that thereupon the petitioner and his codefendants, and each of them, filed a special answer in bar, alleging that each of them has been once in jeopardy, and asking to be discharged from arrest in said cause; that the state, by its attorneys, filed a demurrer to said answer for want of sufficient facts, which demurrer was sustained, to which ruling the petitioner and his codefendants excepted; that, thereupon a second and subsequent jury (naming the members thereof) were impaneled, charged, and sworn to try said cause, who, after hearing the evidence, the argument of counsel, and the charge of the court, retired on May 27, 1904, to deliberate on their verdict; that on Sunday, May 29, 1904, they reported to the court that it was impossible for them to agree upon a verdict, and that the said jury were thereupon discharged by the court

from further consideration of said cause. The petition concluded with a prayer for a writ of habeas corpus and for the discharge of the petitioner. The writ was issued and served, and the respondent moved to quash the same for the reasons that the petition did not state facts sufficient to entitle the petitioner to the writ, that the court had jurisdiction of the person of the defendant and of the subject-matter of the action, and that its acts could not be questioned collaterally, and that the rulings of the Ohio circuit court could not be reviewed in this proceeding. The objections to the petition were sustained, and the prisoner was remanded to the custody of the sheriff.

The statute provides that: "No court or judge shall enquire into the legality of any judgment or process whereby the party is in custody, or discharge him when the term of imprisonment has not expired, in either of the cases following: * * * Fourth. Upon a warrant issued from the circuit court upon an indictment or information." Section 1133, Burns' Ann. St. 1901. The only inquiry necessary or permissible in this case is, was the petitioner in custody upon such a warrant? The jurisdiction of the Ohio circuit court over the subject of the action and the person of the petitioner at the time he was brought into court to answer the indictment and a jury was first impaneled to try him and his codefendants upon it is not questioned. That indictment is still pending against the petitioner, and no final judgment has been rendered in the cause. If it should be conceded that the appellant is correct in his contention that he has been once in jeopardy upon the charge contained in the indictment, and that the setting aside of the submission after the jury had been sworn to try the cause, the discharge of one of the jurors upon a peremptory challenge by the state, and the impaneling of a second jury—all without his consent and over his objections duly presented—was equivalent to an acquittal, still the facts of such jeopardy and acquittal would, at most, constitute a defense in bar of the action, and would require proof upon a second trial as any other fact or facts which might entitle the defendant to a verdict of not guilty. Even if the proceedings of the court in setting aside the submission and discharging the juror were unauthorized and illegal, they were errors only, which, if proved upon a subsequent trial of the cause, might or might not amount to a defense to the action. But these supposed errors did not deprive the court of its jurisdiction over the subject of the action or the person of the defendant. Certainly, they were not such as to render all further proceedings in the cause void. If, as counsel for appellant insist, their legal effect was to bar a prosecution of the case under the indictment, the most that could be claimed for them would be that the facts were admissible in evidence under the plea

of not guilty or a special answer, and were to be considered as other facts constituting the defense. Section 1832, Burns' Ann. St. 1901; *Clem v. State*, 42 Ind. 420, 13 Am. Rep. 369. But if, upon sufficient proof, a former acquittal, or facts tantamount to such acquittal, should be established, and yet the defendant should be found guilty, the question of the sufficiency of such facts to constitute a defense would necessarily be presented to the trial court by a proper motion or objection, and upon final judgment against him the decision could be reviewed by this court on appeal.

The fact that the act of the court in discharging a juror and impaneling a second jury, even if erroneous, did not, ipso facto, deprive it of jurisdiction in the cause, and render its subsequent proceedings void, and the further fact that for any supposed error of the court in the proceedings complained of the defendant had a complete and speedy remedy by appeal, conclusively settle this controversy against him. The writ of habeas corpus cannot be used as a substitute for the writ of certiorari, the writ of error, or an appeal. In this state, in all cases where the proceedings or judgment of the court under whose process or orders the petitioner was held were not void by reason of matter apparent on the face of the record, the remedy of a defendant in a criminal cause who complains of error in the proceedings and rulings of the court has been held to be by appeal. An inquiry upon a writ of habeas corpus into the validity of those proceedings, and the correctness of the decisions of the court would be a collateral attack upon the proceedings and orders, and as such it has been repeatedly declared unavailing and inadmissible.

Upon the question which we consider and decide on this appeal, and to that extent only, *Wright v. State*, 5 Ind. 290, 61 Am. Dec. 90, is directly in point. In that case the judge of the circuit court in which the defendant was on trial upon an indictment for murder, over the objection of the defendant, discharged the jury on the last day of the regular term of the court, before the trial was finished, and continued the case until the first day of the succeeding term. The defendant contended that the discharge of the jury was unnecessary, and was equivalent to an acquittal. He sued out a writ of habeas corpus before the judge of the court of common pleas, and upon a hearing, in which the foregoing facts were shown, the judge remanded the petitioner to jail. An appeal was taken, and in deciding the case this court said: "The facts in this case show that the prisoner was in custody awaiting his trial under an indictment for murder, and we are clearly of opinion that, although the discharging of the jury by the circuit court was equivalent to a verdict of acquittal, yet, as the case was not finally disposed of, and as there was no release of the prisoner by any

judgment of the court, he must be regarded as in custody under the indictment. Had there really been a verdict of acquittal rendered by the jury, without further action by the circuit court, the judge of the court of common pleas could not have discharged him. If he could at this stage of the case, why not at any other? Why not take the case from the hands of the jury in the midst of their investigation? Such is not the object or true meaning of the writ of habeas corpus. See *State v. Sheriff*, 15 N. J. Law, 68; *Johnson v. The United States*, 3 McLean 89 [Fed. Cas. No. 7,418]." "In the case of the Commonwealth v. Deacon, 8 Serg. & R. 47, the prisoners, Roosevelt and Eddy, were indicted for forgery, acquitted on some of the counts of the indictment, and upon the others the jury failed to return a verdict. The mayor's court committed them for trial on these counts, and the question as to the legality of their commitment was raised by habeas corpus. The court, in delivering the opinion, said: 'The indictment is still pending in the mayor's court. No judgment has been given on the verdict, nor do we know what judgment will be given. But we know that the mayor's court has jurisdiction over the offense with which the prisoners are charged, and, if they should give an erroneous judgment, remedy may be had by writ of error, which will bring the case properly before us. Prisoners remanded.'" "The judge of the court of common pleas was compelled by statute, upon the petition, to award the writ; but upon the return of the facts above set forth it was his duty to remand the prisoners to the circuit court. He has done so. That court has still jurisdiction over the prisoner, and may discharge him on motion, or he may plead the discharge of the jury in bar to a second trial. Commonwealth v. Clue, 3 Rawle, 501; *Weinzorpfen v. State*, 7 Blackf. 194."

An attempt is made by counsel for appellant to distinguish the case of the petitioner from *Wright v. State*, 5 Ind. 290, 61 Am. Dec. 90, for the reason that immediately upon the setting aside of the submission of the cause to the jury and the dismissal of the juror who was challenged by the state the petitioner moved for his discharge from custody, and that upon the overruling of this motion he filed a special plea setting up the facts supposed to show that he had once been in jeopardy, to which a demurrer was sustained. But it is clear that neither of these steps, nor the rulings of the court thereon, even if erroneous, operated to oust the jurisdiction of the court, or to render its further proceedings void. As was said in *Wright's Case*, "As there was no release of the prisoner by any judgment of the court, he must be regarded as in custody under the indictment." The principle upon which *Wright v. State*, supra, was decided was affirmed in *Wright v. State*, 7 Ind. 324, where the court said: "While the case is still

pending in the Johnson circuit court, we have no jurisdiction. 2 Rev. St. 195, 196. The prisoner is clearly entitled to his discharge, but the motion to that effect should be made in the court where the indictment is pending." In *Wentworth v. Alexander*, 66 Ind. 39, the defendants were jointly indicted for murder in the second degree. The jury returned a verdict of "Guilty as charged," and fixing their punishment at confinement in the state's prison for two years. The trial court, being of the opinion that the verdict was a nullity, after a statement by the defendants that they waived none of their rights, and had motions to make, discharged the jury. The defendants thereupon moved for their discharge, and their motion was overruled. The court then continued the case until the next term. A writ of habeas corpus was issued upon the petition of the defendants, and on the hearing they were remanded to the custody of the sheriff. On appeal to this court it was held that the defendants had been once in jeopardy, but that they were in custody by the order of a court of competent jurisdiction upon an indictment presented by a grand jury, and that the circuit court had no power to inquire by a writ of habeas corpus into the legality of the order under which they were committed. The facts in *Smith v. Hess, Sheriff*, 91 Ind. 424, were these: The petitioner had been indicted for grand larceny. He pleaded guilty to the charge. The record entry following the entry of the plea was, "Sentence withheld." The prisoner was an adult. He was permitted to depart from the court without recognizance or requirement that he should at any time return. Two months afterward he was arrested without a new warrant or other proceeding, and was taken before the judge of the criminal court, sentenced, and remanded to the custody of the sheriff. On appeal in a proceeding for his discharge upon a writ of habeas corpus this court, by *Zollars, J.*, said: "What we decide is that the judgment of the criminal court under which appellant is imprisoned cannot be overthrown in the collateral attack here made upon it. For all irregularities and errors that may intervene in the trial and progress of a criminal cause the statute of this state provides a direct, easy, cheap, and speedy remedy by appeal. The doctrine of the cases is that, where such remedy is provided, defendants imprisoned under judgments, and seeking to overthrow them for reasons which do not render them absolutely void, and which are not apparent upon the record, will be driven to seek a remedy by appeal or other direct proceeding. A judgment by a court of competent jurisdiction, valid upon its face, and a valid commitment under it, is an unanswerable return to a writ of habeas corpus. A large number of the states have statutes providing that a prisoner shall not be discharged under a writ of habeas

corpus where it appears that he is in custody by virtue of the judgment or decree of a court of competent jurisdiction, or by virtue of a warrant issued upon such judgment or decree. This state is one of them. The writ of habeas corpus is not to take the place of a writ of error or a court of appeals." *McGuire v. Wallace*, 109 Ind. 234, 10 N. E. 111, was an appeal from an order upon habeas corpus remanding the prisoner to custody. In the course of the opinion by *Mitchell, J.*, it was said: "It is enough to say that both the petition and the return before us show that the appellant is in custody in pursuance of the order of a court of competent jurisdiction, such order being final so long as it is permitted to stand. When this point in the investigation is reached, all further inquiry is at an end." It was declared in *Koepke v. Hill*, 157 Ind. 172, 176, 60 N. E. 1039, 87 Am. St. Rep. 161, a proceeding upon a writ of habeas corpus, that "in this state * * * the holdings have been to the effect that whenever a court is confronted with a question which it has a right to decide correctly its erroneous judgment will not be subject to a collateral attack, irrespective of whether the mistake of law concerned the common statutory, or constitutional law." *Winslow v. Green*, 155 Ind. 368, 389, 58 N. E. 259, decides that "the law is firmly established that, jurisdiction being once obtained over the person and subject-matter, no error or irregularity in its exercise will make the judgment void." See, also, *Williams v. Hert*, 157 Ind. 211, 60 N. E. 1067, 87 Am. St. Rep. 203; *Pritchett v. Cox*, 154 Ind. 108, 56 N. E. 20; *Turner v. Conkey*, 132 Ind. 248, 31 N. E. 777, 17 L. R. A. 509, 82 Am. St. Rep. 251; *Kinningham v. Dickey*, 125 Ind. 180, 24 N. E. 1048; *McLaughlin v. Etchison*, 127 Ind. 474, 27 N. E. 152, 22 Am. St. Rep. 658; *Lee v. McClelland*, 157 Ind. 84, 60 N. E. 692; *Cruthers v. Bray*, 159 Ind. 685, 65 N. E. 517; *Willis v. Bayles*, 106 Ind. 363, 5 N. E. 8; *Lowery v. Howard*, 103 Ind. 440, 3 N. E. 124; *Farmer v. Lewis*, 92 Ind. 444, 47 Am. Rep. 153. 15 Am. & E. Ency. Law, 172, has an exhaustive collection of English and American cases, which see.

The decision in *Maden v. Emmons*, 83 Ind. 331, sustains the views expressed by counsel for appellant. That case, however, seems to have been decided without regard to the principles asserted and maintained in the numerous opinions cited herein, and without any notice taken of those preceding it. We have carefully examined it, but we cannot reject the authority of the well-considered cases both before and subsequently rendered, with which it is directly in conflict, and we are compelled to overrule it.

It is to be observed that the same section of article 40 concerning the writ of habeas corpus (section 1133, *Burns' Ann. St.* 1901; section 1119, *Rev. St.* 1881), which denies to any court or judge the power to inquire into the legality of any judgment whereby

the party petitioning for the writ is in custody, equally denies to every such court and judge the power to inquire into the legality of any process whereby the party is held, where such process is a warrant issued from the circuit court upon an indictment or information. The reasoning in the cases in this state where the validity of the judgment is sought to be questioned applies with equal force to a case where the petitioner is held upon a warrant issued on an indictment or under an order made by the court in which the indictment is pending. The same general doctrine relative to the limitations upon the power of the court upon habeas corpus to inquire into the legality of the judgment or process by which the petitioner is held in custody where a writ of error or appeal will lie has been recognized constantly by the Supreme Court of the United States. In *re Swan*, 150 U. S. 637, 648, 14 Sup. Ct. 225, 37 L. Ed. 1207, it was said by Fuller, C. J., who delivered the opinion of the court, that: "We reiterate what has so often been said before, that the writ of habeas corpus cannot be used to perform the office of a writ of error or appeal." Again, in *Ornelas v. Ruiz*, 161 U. S. 502, 508, 16 Sup. Ct. 689, 40 L. Ed. 787, the court held that "by repeated decisions of this court it is settled that a writ of habeas corpus cannot perform the office of a writ of error." See, also, *Church on Habeas Corpus* (2d Ed.) § 364, p. 505.

It appears from the petition that the appellant is in custody upon a warrant issued from the Ohio circuit court on an indictment which is still pending and undisposed of, and under the orders of the court in that cause. This being so, no inquiry can be made by any court or judge in a proceeding by writ of habeas corpus into the legality of that process or the detention of the prisoner pursuant to it. If errors have intervened in the determination of any questions arising in the cause, the remedy of the prisoner is by appeal, and not by petition for his discharge upon a writ of habeas corpus.

Notwithstanding some expressions found in several decisions referred to in this opinion, we have not thought it proper to consider the question of the effect of the discharge of the juror by the trial court and the impaneling of a second jury to try the cause. On that subject we intimate nothing. The fact that every attack by writ of habeas corpus in cases of this character is collateral furnishes a sufficient reason why the court should, under no circumstances, express its views upon the merits of the defense to the main case sought to be presented, and anything said upon that subject must necessarily be purely obiter. Our conclusion is that the court did not err in quashing the writ and remanding the prisoner.

Judgment affirmed.

(163 Ind. 401)

FATIC v. MYER. (No. 20,407.)

(Supreme Court of Indiana. Oct. 26, 1904.)

ADVERSE POSSESSION—SUBSEQUENT SURVEY—INSTRUCTIONS.

1. An instruction on adverse possession requiring plaintiff's possession and his claim of ownership to have been "open, notorious, visible, adverse, and under claim of right" for 20 years, was not erroneous for failure to require the possession to have been continuous, since the phrase quoted excluded the idea of an interrupted or intermittent possession.

2. Where plaintiff had acquired title to the land in controversy by adverse possession, a subsequent survey, made to find the true south line of the land, on plaintiff's consent and agreement that the survey should be made, could not operate to prejudice his title.

Appeal from Circuit Court, Henry County; John M. Morris, Judge.

Action by Isaac Myer against Henry Fatic. From a judgment in favor of plaintiff, defendant appealed to the Appellate Court, by which the case was transferred to the Supreme Court, as authorized by Burns' Ann. St. 1901, § 1337u (Act March 13, 1901; p. 590, c. 259). Affirmed.

Forkner & Forkner, for appellant. Wm. A. Brown and F. C. Gause, for appellee.

DOWLING, J. This is an action for trespass upon land alleged to belong to the plaintiff, and the cutting of a tree growing thereon. It was commenced before a justice of the peace. The answer consisted of a denial, and a second paragraph setting up title in the defendant. The title to land being in issue, the cause was certified by the justice to the circuit court, under section 1501, Burns' Ann. St. 1901. A trial by a jury resulted in a verdict and judgment for the plaintiff. The only decision complained of is the overruling of a motion for a new trial. The reason assigned for a new trial was the supposed error of the court in giving instructions numbered 10 and 10½. By the tenth instruction the jury were told that if they found that a public highway was located on and across the lands of either of the parties, and had been so located and used for more than 20 years, and that if the plaintiff and his predecessors in interest had occupied and used the lands immediately south of and up to the south line of such highway for the full period of 20 years prior to the alleged trespass, and that if such occupancy had been open, notorious, visible, adverse, and under claim of right "for such length of time," then the plaintiff's title to the lands would extend to the center of the highway. The objection to this instruction pointed out in the brief of counsel for appellant is that it failed to tell the jury that such possession and occupancy must have been continuous. It is true that, where title to land is founded upon an adverse possession and claim of title, such possession and claim

¶ 2. See *Adverse Possession*, vol. 1, Cent. Dig. §§ 629, 631.

must have been continuous, and not interrupted. We think, however, that if the possession of the appellee of the land in question, and his claim to the same, were shown to have been "open, notorious, visible, adverse, and under claim of right for such length of time" (i. e., 20 years), they must have been continuous. The phrase used by the court excluded the idea of an interrupted or intermittent possession and claim of title as plainly as if it had been stated that such possession and claim must have been continuous.

Instruction numbered 10½ is objected to because it informed the jury that, if the plaintiff had acquired a good title to the land in controversy by adverse possession under a claim of title for more than 20 years, a subsequent survey, made for the purpose of finding the true south line of the land, upon the consent and agreement of the plaintiff that the survey should be made, would not affect his title to the said land. This statement of the law is in accordance with all the decisions of this court upon the subject of the legal effect of surveys made under such circumstances. *Palmer v. Dosch*, 148 Ind. 10, 47 N. E. 176; *Wood v. Kuper*, 150 Ind. 622, 50 N. E. 755; *Williams v. Atkinson*, 152 Ind. 98, 52 N. E. 603; *Spacy v. Evans*, 152 Ind. 431, 52 N. E. 605.

We find no error in the record. Judgment affirmed.

(22 Ind. App. 650)

HEDEKIN v. GILLESPIE. (No. 4,855.)

(Appellate Court of Indiana, Division No. 1.
Oct. 13, 1904.)

LANDLORD AND TENANT—DEFECTIVE CONDITION
OF PREMISES—PERSONAL INJURIES—
ACTION FOR TORT—SURVIVAL.

1. An action in tort does not survive against the personal representative of the tortfeasor.

2. A tenant having knowledge of defects in a sidewalk on the premises, which the landlord had promised to repair, cannot recover from him for damages for personal injuries caused by the defective condition of the sidewalk.

Appeal from Circuit Court, Allen County;
E. O'Rourke, Judge.

Action by Elinore Gillespie against Margaret C. Hedekin, administratrix. From a judgment for plaintiff, defendant appeals. Reversed.

Zollars & Zollars, for appellant. Samuel K. Ruick, for appellee.

HENLEY, J. This action was commenced against one Thomas B. Hedekin. The appellee averred in her complaint that prior to October 19, 1901, she and her husband became tenants of Thomas B. Hedekin, and occupied the house and premises until the last-named date; that at the time they rented the house there was a walk leading from the house to

an outhouse in the rear of the lot, which walk was dangerous by reason of the boards of which it was constructed being broken and warped; that many of the boards constituting said walk were smooth and apparently safe upon their upper side, but said boards were in fact rotten and decayed on their under surface, which fact was known to the appellee; that the said Thomas B. Hedekin, at the time the place was rented, agreed with appellee's husband that he would from time to time, as required, make all necessary repairs to said premises, and keep the same in good repair, and that in consideration of said promise appellee and her husband entered into and took possession of the premises, and occupied them. It is further alleged that the said Thomas B. Hedekin negligently failed and refused to keep the walk in repair, and that the appellee on the 19th of October, 1901, in walking over the walk, stepped upon a board, which, by reason of it being rotten, broke with her, causing her to fall, and injuring her without any fault on her part. After the complaint was filed, and before the cause was tried, the said Thomas B. Hedekin died, and upon appellee's suggestion the administratrix of his estate was substituted as a party defendant.

The judgment in this cause has no ground upon which to stand. The complaint does not state a cause of action, whether regarded as proceeding on the theory of tort or contract. If in tort the action would not survive against the personal representative of the deceased lessor, and if regarded as an action on contract the measure of damages would be the amount paid for making the repairs. And it was incumbent upon appellee to make the repairs upon the refusal of the landlord to do so, and look to the landlord for the cost of the same. But the complaint seeks to recover damages solely for a personal injury to appellee growing out of the alleged failure of the appellant decedent to repair the premises which appellee and her husband occupied as tenants.

The decided cases in the courts of appeal cover every feature of this case.

In *Hamilton et al., Ex'rs. v. Feary*, 8 Ind. App. 615, 35 N. E. 48, 52 Am. St. Rep. 485, this court said: "The appellee admits in her complaint that she knew of the existence of the excavation even before she took possession of the premises, and with such knowledge continued to occupy the property for the period of six months, though the appellant had, upon demand, failed and refused to make the repair which he had covenanted to make. The appellant could not have given the appellee any more information of the defect than she admits she possessed. To avoid this dilemma she undertakes to aver that the hidden portion of the defect consisted in the ruinous condition of the banks of the excavation, and not in the excavation itself, and she insists that it was the duty of the appellant to have disclosed these to her. She does

¶ 1. See *Abatement and Revival*, vol. 1, Cent. Dig. § 257.

not aver that the appellant had any peculiar knowledge of these other than she had herself; at least the facts pleaded show that she had ample time and opportunity for investigation, and there is no pretense that the appellant practiced any fraud or deception upon her in connection with the condition of the walls of the excavation. It must be clear, therefore, that if the cause of the injury was a latent, and not a patent, danger, it was no more patent to the owner than to the lessee, and it does not appear wherein he violated any duty in failing to apprise her of the same. If we should treat the complaint, therefore, upon the theory of a latent defect, we encounter the insurmountable obstacle that it fails to show the appellant guilty of any negligence; and hence, whether the appellee was guilty of contributory negligence or not, there is no right of action. See *Buswell, Pers. Inj.* § 84; *Taylor, Landlord & Tenant*, § 175a. But if we take the other end of the dilemma, and say that the particular duty which the appellant owed the appellee here was not to disclose to her the existence of the latent defect of the banks of the excavation, but to fill up the latter and place the premises in safe condition, we then come back to the other obstacle, already mentioned in reviewing the complaint as upon contract, that the appellee has failed to reduce or moderate the damages, as she could have done by making the repairs herself and charging them to the appellant."

After the judgment in the above-cited case was reversed and remanded it was again tried, and an appeal taken to the Supreme Court of this state. See *Feary v. Hamilton et al.*, Ex'rs, 140 Ind. 45, 39 N. E. 516. In the last-cited case the court, by Monks, J., after stating the facts showing that the landlord had died pending the action, said: "Counsel for appellant earnestly contend that this is an action upon contract; that, the decedent having contracted in his lifetime against the injuries complained of, his contract cannot be avoided by reason of his death. They admit that actions in tort die with the person of either party, but say that actions upon contract do not so die, but may be enforced against the legal representatives. Counsel do not cite any authority to sustain this broad proposition, and we have been unable to find any going to that extent. On the contrary, it is settled law that actions arising out of contracts, expressed or implied, will not survive where the damages sustained by such breach are for injuries to the person, as mental anguish, pain of body, or injury to character. *Boor, Adm'r, v. Lowrey*, 103 Ind. 468, 3 N. E. 151, 53 Am. Rep. 519; *Wolf v. Wall*, 40 Ohio St. 111; *Stebbins v. Palmer* (Mass.) 1 Pick. 71, 11 Am. Dec. 146; *Vittum v. Gilman*, 48 N. H. 416; *Smith v. Sherman*, 4 Cush. 406; *Wade v. Kalbfelsch*, 58 N. Y. 282, 17 Am. Rep. 250; *Chase v. Fltz*, 132 Mass. 359; *Jenkins v. French*, 38 N. H. 532; *Hess v. Lowrey*, 122 Ind. 225,

23 N. E. 156, 7 L. R. A. 90, 17 Am. St. Rep. 355. It is true, as a general proposition, that actions in form *ex contractu* survive, but this is due rather to the substance of the action than its form. The nature of the damage sued for, and not the nature of its cause, determines whether or not it will survive. *Cutler v. Hamlen*, 147 Mass. 471, 18 N. E. 397, 1 L. R. A. 429; 1 Chitty, Pl. 101. The rule is that where the injury complained of affects primarily and principally property and property rights, and the injury to the person is mere incidental, the cause of action survives. The action must involve the injury to the estate, and not to the person. *Boor, Adm'r, v. Lowrey*, supra, and authorities cited; *Hess v. Lowrey*, supra. But where the action is brought primarily to recover for injury to the person, and the injury to the property is merely an incident, as loss of time while sick and expenses incurred in endeavoring to be cured, the same does not survive. *Boor, Adm'r, v. Lowrey*, supra; *Hess v. Lowrey*, supra. In such case the loss of property—that is, the loss of time and the expenses incurred in endeavoring to be cured—was caused by the personal injury, and would not have occurred but for such injury. In this case the appellant's loss of time and inability to attend to and manage her store, and the expense incurred for the services of a physician, were all caused by the personal injury alleged, and would not have been sustained but for such personal injury. This question has been fully considered by this court in the cases of *Boor, Adm'r, v. Lowrey*, supra, and *Hess v. Lowrey*, supra, and decided against the appellant. The authorities cited by appellant were examined, distinguished, and explained in those cases, and, after a careful consideration, we see no reason to depart from the rule there stated. Under the foregoing propositions it makes no difference in this case whether the action is on the contract or in tort; the result is the same. It is not, therefore, necessary for us to decide, nor do we decide, whether it is an action sounding in contract or in tort. Neither do we wish to be understood as holding the complaint otherwise sufficient. There are a number of authorities which declare that the covenant to repair does not include any liability for personal injury or death resulting from nonrepair."

Appellee's complaint shows that she knew of the dilapidated condition of the walk upon which she was injured for more than two years prior to her injury. Her means of knowing of the defect was, at least, equal to that of the landlord, and, regardless of the holding that the action died with the person of the defendant, the opinions above quoted from furnish abundant reasons and authority for holding that an action based on the facts stated in the complaint could not have been maintained against the landlord in his lifetime.

The judgment is reversed.

(33 Ind. App. 648)

LIPSCHITZ v. STATE. (No. 5,193.)(Appellate Court of Indiana, Division No. 1.
Oct. 11, 1904.)**NUISANCE—INFORMATION—SUFFICIENCY—
STATUTE.**

1. An information charging defendant with unlawfully using a building as a slaughterhouse, and for rendering the entrails and offal of beasts therein, at and near certain public highways, and with unlawfully permitting the slaughterhouse to become offensive from decayed animal matter, so that the air thereabouts was contaminated, and whereby the enjoyment of life of the inhabitants there living was prevented, and their health and the health of the public passing along such highways endangered, sufficiently charges the maintenance of a public nuisance under Burns' Ann. St. 1901, § 2154, providing that whoever maintains any building for the exercise of any business or for the keeping any animal which, by occasioning noxious exhalations or offensive smells, becomes injurious to the health, comfort, or property of individuals or the public, or suffers any filth or noisome substances to be collected or to remain in any place to the damage of others or the public, shall be guilty of a misdemeanor.

2. Such information does not charge two separate offenses.

Appeal from Circuit Court, Elkhart County; Jos. D. Ferrall, Judge.

Casper Lipschitz was prosecuted for maintaining a public nuisance, and from a judgment overruling a motion to quash the information he appeals. Affirmed.

Harman & Zigler, for appellant. Wm. B. Hille, Chas. W. Miller, W. C. Geake, C. C. Hadley, and L. G. Rothschild, for the State.

HENLEY, J. The appellant was tried and convicted upon affidavit and information for the violation of section 2154, Burns' Ann. St. 1901, which provides a penalty for maintaining a public nuisance. The question presented by this appeal arises upon the action of the trial court in overruling appellant's motion to quash the affidavit. The affidavit upon which this prosecution was based is as follows: "Harlow Snow Manning swears that on or about the 23d day of April, 1903, at the county of Elkhart and state of Indiana, and from thence to the filing of this presentment, one Casper Lipschitz did then and there unlawfully use and maintain a certain building at said county as a slaughterhouse and place for killing animals to be used for food, and for the purpose of boiling and rendering the entrails and offal of beasts therein, said slaughterhouse and rendering establishment being at and near certain public highways along and through which divers inhabitants of said county and state were continually passing; and did then and there and during said time, and still does, unlawfully permit said slaughterhouse and rendering establishment to be and remain filthy and offensive from decayed animal matter there being, so that the air thereabouts is contaminated, and noxious exhalations and noisome and offensive smells are emitted there-

from, whereby the comfortable enjoyment of life of the inhabitants there living is prevented, and their health and the health and comfort of the public there passing along and upon such highways there situate endangered, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the state of Indiana."

It is provided by section 2154, supra, that: "Whoever erects, continues, uses or maintains any building, structure or place for the exercise of any trade, employment or business, or for the keeping or feeding of any animal which by occasioning noxious exhalations, or noisome or offensive smells, becomes injurious to the health, comfort or property of individuals or the public, or causes or suffers any offal, filth or noisome substances to be collected, or to remain in any place to the damage or prejudice of others or the public; etc., etc., shall be fined not more than \$500.00, nor less than \$10.00." The affidavit charges an offense under the above-cited statute, and does not charge two separate offenses. The charge is substantially in the language of the statute, and was sufficiently certain to definitely inform the court and jury upon what charge, and for what crime, appellant was to be tried. See Gillett on Criminal Law (2d Ed.) 123. This being true, the substantial rights of appellant could not be prejudiced, and the motion to quash was properly overruled. *Ellis v. State*, 141 Ind. 357, 360, 40 N. E. 801; *State v. Windstandley et al.*, 151 Ind. 318, 319, 51 N. E. 92, 93.

Judgment affirmed.

(33 Ind. App. 625)

**INDIANAPOLIS & G. RAPID TRANSIT CO.
v. ANDIS. (No. 4,736.)**(Appellate Court of Indiana, Division No. 1.
Oct. 11, 1904.)**STREET RAILROADS—EMPLOYEES—FELLOW SERV-
ANTS—NEGLIGENCE—EMPLOYERS' LIABILITY
ACT—APPLICABILITY—PLEADINGS—COM-
PLAINT—ALLEGATIONS—SUFFICIENCY—
CHANGE OF VENUE—RECORD—AMENDMENT.**

1. Burns' Ann. St. 1901, § 417, requires the clerk of the court from which a change of venue is taken to transmit the papers and a transcript of the proceedings to the clerk of the court to which the venue is changed, and makes it the duty of the latter to docket the action in its order. The clerk of the court to which a case had been sent upon a change of venue certified that the record on appeal contained a full and true transcript of all papers filed, including pleadings. It did not affirmatively appear that the original papers were filed in the court to which the case was sent, nor did it affirmatively appear that they were not so filed. *Held*, to sufficiently appear that the record contained a copy of all the pleadings in the case.

2. Where, after a change of venue, the parties appeared in the court to which the case was sent, and the court overruled demurrers to the complaint, and the cause proceeded to trial and final judgment without any objection that the original pleadings were not on file, the appellate

court is authorized to treat the copy of the pleadings set out in the copy of the transcript made on the change of venue as a sufficiently certified copy of the original pleadings.

3. On a motion for a nunc pro tunc entry showing the actual ruling of the court on separate demurrers to the different paragraphs of a complaint and the exceptions taken thereto, there was a written memorandum of the court's action stating, "Demurrer to complaint overruled; answer filed." There was no demurrer to the whole complaint. Held sufficient to admit parol proof showing the actual ruling of the court.

4. The court to which a cause was transferred on a change of venue has jurisdiction after the expiration of the term in which the judgment was rendered to amend the record on motion for a nunc pro tunc entry on notice being served on the adverse party.

5. A motion to correct a judgment by a nunc pro tunc entry need not be filed before the notice of the motion is served on the adverse party, nor at any specified time preceding the date named in the notice for making the motion.

6. An employé of an interurban electric railway company, repairing its tracks, when carried to and from his work, or from point to point along the line in a car of the company, is not a passenger, but an employé, and a fellow servant of those in charge of the car.

7. Where the complaint in an action by an employé of a street railway company, repairing the tracks, to recover for injuries sustained while riding on a car, showed that when he was injured he was a fellow servant of the motorman in charge of the car, the allegation that the work in which the employé was engaged was not connected with the employment of the motorman, did not change the legal effect of the fact that he was at the time of the injury a fellow servant with the motorman.

8. Employers' Liability Act March 4, 1893, p. 295, c. 130, § 1 (Burns' Ann. St. 1901, § 7083), providing that every railroad or other corporation shall be liable for damages for personal injuries suffered by an employé, where the injury was caused by the negligence of any employé having charge of any signal, telegraph office, "locomotive engine, or train upon a railroad," does not apply to employés operating electric cars, such a car not being a "locomotive engine" or a "train upon a railroad," within the meaning of the statute.

9. The complaint in an action by an employé of an electric railway company for injuries sustained while on a car of the company, which proceeds on the theory that the injury was caused by the negligence of a boy, whom the company had placed in charge of a switch, and which avers that the boy was inexperienced, and of insufficient age and discretion to be intrusted with such work, is insufficient for failing to aver that the employé had no knowledge of the incompetency of the boy prior to the injury.

10. Employers' Liability Act March 4, 1893, p. 295, c. 130, § 1 (Burns' Ann. St. 1901, § 7083), providing that every railroad shall be liable for a personal injury suffered by an employé where the injury was caused by the negligence of any person in the employ of the company in charge of any signal, telegraph office, "switch yard, shop," etc., creates no liability for injuries to employés caused by negligence of persons in charge of a switch.

11. A complaint in an action for personal injuries sustained by an employé of a street railway company while riding on a car, which avers that the car was old and dangerous, which was known to the company and unknown to the employé, is defective for failing to show that the condition of the car was the proximate cause of the injury.

Appeal from Circuit Court, Henry County. Jno. M. Morris, Judge.

Action by Charles Andis against the Indianapolis & Greenfield Rapid Transit Company. From a judgment for plaintiff, defendant appeals. Reversed.

Elmer J. Binford, Jonas P. Walker, and Wm. A. Brown, for appellant. Mason & Jackson and Forkner & Forkner, for appellee.

ROBINSON, J. Action by appellee for damages for personal injuries. The suit was brought in the Hancock circuit court, and the venue changed to the Henry circuit court. It is first claimed by appellee that the pleadings are not properly in the record. The caption of the transcript of the clerk of the last-named court recites that on a day named there was filed in his office "the following transcript from the clerk of the Hancock circuit court, in these words, to wit." This is followed by the transcript of that clerk containing what purports to be a transcript of the proceedings in that court, and also the six paragraphs of complaint and separate demurrers. Appellant's praecipe directed to the clerk of the Henry circuit court asks for "a full and complete transcript of all rulings * * * had in said court in said cause as the same appear of record, * * * and of all papers filed therein, including all pleadings." His final certificate states that the record contains "a full, true, and complete transcript * * * of all papers filed therein including all pleadings." Upon a change of venue the clerk of the court from which the change is taken is required to "transmit all the papers and a transcript of all the proceedings to the clerk of the court of the county to which the venue is changed." This statute (section 417, Burns' Ann. St. 1901) further makes it the duty of the clerk to receive the papers and transcript and docket the action in its order among the other causes of the court. It was the duty of the clerk of the Henry circuit court to copy the complaint and demurrers into his transcript as the original papers received by him. It does not affirmatively appear that the original papers were filed in the Henry circuit court, nor does it affirmatively appear that they were not so filed. But the clerk certifies that the record here contains a full and true transcript "of all papers filed therein, including all pleadings." We think it sufficiently appears that the record contains a copy of all the pleadings in the case, and it is not claimed that it does not contain a correct copy. Moreover, after the venue was changed, there was an appearance in the Henry circuit court by both parties, and the court overruled the demurrers to the complaint, and the cause proceeded to trial and final judgment without any objection that the original pleadings were not on file in that court. If the originals were not filed, we think we would be authorized, from the whole record, to treat the copy of the plead-

¶ 6. See Carriers, vol. 9, Cent. Dig. § 976; Master and Servant, vol. 24, Cent. Dig. §§ 501-505.

ings set out in the copy of the transcript made on the change of venue as a sufficiently certified copy of the original pleadings. See *Cox v. Pruitt*, 25 Ind. 90; *Smith v. Jeffries*, 25 Ind. 376; *Southern Indiana R. Co. v. Martin*, 160 Ind. 280, 66 N. E. 886.

There was a separate demurrer to each of the six paragraphs of complaint. An order-book entry recites: "Come the parties by counsel; thereupon the court, being advised, overrules the demurrer to the complaint, to which ruling of the court the defendant at the time objected and excepted." At the second succeeding term after final judgment was rendered appellant moved for a nunc pro tunc entry showing the actual ruling of the court upon the separate demurrers to the different paragraphs of complaint and the exceptions taken thereto by appellant. Notice was given that the motion would be heard February 17, 1903, and on that day proof was made to the court that the motion was served on one of the appellee's attorneys on February 13th, and on the appellee on February 14, 1903. Appellee, by his counsel, appeared specially on the day set for the hearing, and by plea in abatement objected to the notice as insufficient on grounds stated in the plea and to the jurisdiction of the court over his person, appellee then being a resident of Hancock county, and that the court could obtain jurisdiction after the term only by proper petition and summons. This plea was struck out on motion. The motion was thereupon submitted to the court, and upon a hearing the court ordered that the nunc pro tunc entry should be made. It is unnecessary to discuss the evidence offered in support of the motion. It was not contradicted, and we think was sufficient to authorize the order that the entry should be made. There was a written memorandum of the court's action, stating, "Dem'r. to complaint overruled; answer filed." As we have seen, there was a separate demurrer to each paragraph of the complaint. There was no demurrer to the whole complaint. The memorandum shows there was a ruling by the court upon one or all the paragraphs of complaint. This was sufficient to admit parol proof.

Nor do we think jurisdiction could be obtained only by petition and summons. Such a proceeding is not an independent action, but is auxiliary to the preceding record in the case. A proceeding by complaint and summons as in ordinary actions has been held irregular. *Jenkins v. Long*, 23 Ind. 460. The purpose of such a proceeding is not to alter or amend the court's action, but to have recorded what the court actually did. Making a ruling and the entry of such ruling are separate and distinct. The former cannot be altered or amended; the latter may be. The purpose is, not to supply any omission from the court's order or ruling, but to supply an omission from the record of such order or ruling. The court had the inherent power to make its record speak the truth as to what

was actually done—to have its order and ruling as actually made correctly recorded. This power did not cease to exist at the close of the term of court at which the order or ruling was made. Nothing new was to be introduced into the prior proceedings had when all the parties were before the court. The motion need not be filed before the notice is served, nor at any specified time preceding the date named in the notice for making the motion. *Makepeace v. Lukens*, 27 Ind. 435, 92 Am. Dec. 263. The correction sought must necessarily be made in the court where the mistake was committed. No other court could acquire jurisdiction of the subject-matter. No claim seems to have been made that the notice did not give appellee ample time. See *Latta v. Griffith*, 57 Ind. 329. The court had jurisdiction of the subject-matter, and we think the notice given was sufficient to give the court jurisdiction of the person. See *Smith v. State*, 71 Ind. 250; *Rely v. Burton*, 71 Ind. 118; *Bales v. Brown*, 57 Ind. 282; *Newhouse v. Martin*, 68 Ind. 224; *Miller v. Royce*, 60 Ind. 189; *Makepeace v. Lukens*, supra; *Chisson v. Barbour*, 100 Ind. 1; *Jenkins v. Long*, supra.

Appellant owns and operates an interurban railway line from Irvington to Greenfield, carries passengers and freight for hire, and operates its cars by electricity, which is the only power used in propelling its cars over its line. On May 27, 1901, appellee was in the employment of appellant as a laborer, and, with other employes of appellant, was engaged in common labor in and along appellant's tracks, at different places, in repairing the same. Appellant carried appellee and such employes to and from their work and from point to point along the line in a car known as a "work car," controlled by one of appellant's motormen. While appellee was returning from work in the evening in this car, it was run in on a switch, which was in charge of a switchman, to permit passenger cars to pass on the main track, and while standing on the switch a passenger car in charge of a motorman and conductor, was run in on the switch and against the work car, injuring appellee. The first and fourth of the six paragraphs of complaint charge the negligence in operating the passenger car which ran into the work car upon the motorman in charge of the passenger car. These two paragraphs are similar, except that the fourth paragraph avers that the work in which appellee was engaged was upon and along appellant's tracks, repairing the same, and was not connected with or incident to or a part of the employment or work of the motorman. The second paragraph charges the negligence in operating the passenger car upon the conductor thereof. Against the demurrers it is argued that these paragraphs are sufficient under the rules of the common law and under the employers' liability act of 1893 (Acts 1893, c. 130, p. 294). It is now well settled that appellee, while being car-

ried by appellant in its work car to and from his work, is to be regarded, not as a passenger, but as an employé, and that while being so carried he is a fellow servant with those in charge of and operating appellant's cars. *Bowles v. Indiana R. Co.*, 27 Ind. App. 672, 62 N. E. 94, 87 Am. St. Rep. 279; *Capper v. Louisville, etc., Ry. Co.*, 103 Ind. 305, 2 N. E. 749; *Ohio, etc., R. Co. v. Tindall*, 13 Ind. 366, 74 Am. Dec. 259; *Indianapolis, etc., Co. v. Foreman (Ind. Sup.)* 69 N. E. 609. It is quite true that, if appellant undertook to carry appellee to his home, whether as a passenger or an employé, it owed to him a duty, and, if appellee's status while in the car was that of employé, appellant owed to him the duty of exercising ordinary and reasonable care for his safety. But the negligence charged is not negligence of appellant, but negligence of the motorman and conductor. The facts averred show that appellee, when injured, was not a passenger, but was a fellow servant with the motorman and conductor; and these facts, specially averred, cannot be controlled by the pleader's conclusion that the work in which he was engaged was not connected with or incident to or a part of the employment or work of the motorman.

Counsel for appellee cite the cases of *Gillenwater v. The Madison, etc., Ry. Co.*, 5 Ind. 389, 61 Am. Dec. 101, and *Fitzpatrick v. New Albany, etc., R. Co.*, 7 Ind. 436, as establishing the doctrine that a laborer employed by a railroad company in work not connected with the operation of the road is not a co-employé with the servants of the company operating the road. These cases do so hold, but a different holding was announced in *Ohio, etc., Ry. Co. v. Tindall*, 13 Ind. 366, 74 Am. Dec. 259. And the case of *Slattery's Adm'r v. Toledo, etc., Ry. Co.*, 23 Ind. 81, after referring to these cases, follows the doctrine of the *Tindall* Case, and quotes with approval the following language from *Wright v. N. Y. Cent. R. Co.*, 25 N. Y. 562: "Neither is it necessary, in order to bring a case within the general rule of exemption, that the servants—the one that suffers and the one that caused the injury—should be at the time engaged in the same operation or particular work. It is enough that they are in the employment of the same master, engaged in the same common enterprise, both employed to perform duties and services tending to accomplish the same general purposes—as in maintaining and operating a railroad, operating a factory, working a mine, or erecting a building. The question is whether they are under the same general control." And in the case of *Columbus, etc., Ry. Co. v. Arnold*, 31 Ind. 174, 99 Am. Dec. 615, the *Gillenwater* and *Fitzpatrick* Cases are disapproved; the court saying: "But this limitation of the exemption of the company from liability in such cases is not recognized in any of the subsequent cases, and it is now settled in this state that the employer is not liable for an injury to one employé occasioned by the

negligence of another engaged in the same general undertaking." The doctrine of the *Arnold* Case is approved in *Evansville, etc., R. Co. v. Barnes*, 137 Ind. 306, 36 N. E. 1092. In *Capper v. Louisville, etc., Ry. Co.*, supra, appellant was a laborer working at removing loose and projecting pieces of stone from the sides and roof of a tunnel and placing timbers to support the sides and roof thereof, and while attempting to get upon a freight train of appellee to go to another tunnel to work the engine and servants of appellee in charge of the engine, without warning to appellant, violently forced the car forward with great violence, throwing appellant under the car. "This case," said the court in its opinion, "is that of a servant engaged in the work of constructing and repairing tunnels upon the line of the railroad, and receiving an injury while being carried from one point to another upon the line of his employer's road. The decisions of our courts are that one who is employed to do work upon the track of a railroad is a co-servant with the engineer and others in charge of the train that carries him to and from his work." It seems clear that the case at bar falls within the rule declared in these later cases that appellee was a fellow servant with the motorman and conductor, and that at common law appellant is not liable for injuries suffered by appellee through the negligence of such fellow servants. See *Wilson v. Madison, etc., R. Co.*, 18 Ind. 226; *Thayer v. St. Louis R. Co.*, 22 Ind. 26 (29), 85 Am. Dec. 409; *Ohio, etc., R. Co. v. Hammersley*, 23 Ind. 371; *Sullivan v. Toledo, etc., Ry. Co.*, 58 Ind. 26; *Gormley v. Ohio, etc., Ry. Co.*, 72 Ind. 31; *Spencer v. Ohio, etc., Ry. Co.*, 130 Ind. 181, 29 N. E. 915; *Justice v. Pennsylvania Co.*, 180 Ind. 321, 30 N. E. 303; *Clarke v. Pennsylvania Co.*, 132 Ind. 199, 31 N. E. 808, 17 L. R. A. 811; *Bowles v. Indiana Ry. Co.*, supra; *Indianapolis, etc., Co. v. Foreman*, supra; *Gilman v. Eastern R. Co.*, 10 Allen, 233, 87 Am. Dec. 635; *Ewald v. Railway Co.*, 70 Wis. 420, 36 N. W. 12, 591, 5 Am. St. Rep. 178; *Manville v. Cleveland, etc., R. Co.*, 11 Ohio St. 417; *Keystone, etc., Co. v. Newberry*, 96 Pa. 246, 42 Am. Rep. 543; *Vick v. New York, etc., R. Co.*, 95 N. Y. 267, 47 Am. Rep. 36; *Cunningham v. International, etc., R. Co.*, 51 Tex. 503, 32 Am. Rep. 632; *Chicago, etc., R. Co. v. Moranda*, 93 Ill. 302, 34 Am. Rep. 168; *Holden v. Fitchburg, etc., R. Co.*, 129 Mass. 263, 37 Am. Rep. 343.

The question remains whether a cause of action has been stated under the first clause of the fourth subdivision of section 1, c. 130, p. 295, of the employers' liability act of March 4, 1893 (section 7083, *Burns' Ann. St.* 1901): "That every railroad or other corporation, except municipal, operating in this state, shall be liable for damages for personal injury suffered by any employé while in its service, the employé so injured being in the exercise of due care and diligence, in the

following cases. * * * Fourth. Where such injury was caused by the negligence of any person in the service of such corporation who has charge of any signal, telegraph office, switch yard, shop, round-house, locomotive engine or train upon a railway. * * * Each of the cars of appellant, one of which the motorman and conductor had charge of when this accident occurred, "is what is known as an electric car—that is, cars which are operated and run by electricity alone; and each of said cars is so constructed that they can be and are controlled by a motorman, who takes the place of and discharges the duty which corresponds to that of the engineer and fireman of a locomotive used upon steam railways." We do not think the electric car in this case comes within the definition of a "locomotive engine" adopted by the Supreme Court in the case of *Jarvis v. Hitch*, 161 Ind. 217, 67 N. E. 1057. In that case it is said that "by the term 'locomotive engine,' used in said clause, the Legislature only intended an engine constructed and used for traction purposes on a railroad track." In that case the machine—a pile driver—consisted of a steam engine placed on a flat car at one end and the driver at the other end. The engine was used to lift the hammer and let it drop on the pile. A chain ran from the engine to a sprocket wheel on the axle under the boiler, and by this means the machine and cars belonging to it were moved from place to place. The same reasoning through which in that case it was held that the machine was not a locomotive engine, within the meaning of that term as used in the employers' liability act, precludes the holding in this case that the electric car is a locomotive engine. Neither can it be said that an electric car, such as that described in the pleading, comes within the meaning of the term "train upon a railway," as used in the act. An examination of the various earlier statutes concerning railroads discloses that in the general provisions concerning the organization, construction, and operation of railroads the Legislature has used simply the term "railroad," and that it has used it in the generally accepted sense of "steam railroad." It is no doubt true that if the language used in a statute is sufficiently comprehensive to cover unknown conditions, and the same language would probably have been used to cover certain conditions had those conditions existed at the time of the enactment, it should be held to apply to such conditions arising subsequent to the enactment. That is, if interurban railways and electric railways had been in operation generally at the time the employers' liability act became a law, and the Legislature would probably have used the language it did use in that act, the act should be held to apply to such roads, though not in operation generally until after its enactment. But the scope intended to be given the earlier legislation may to an extent, at least, be indi-

cated by subsequent legislation upon the same general subject-matter. Since the earlier statutes were passed the Legislature has itself concluded, as indicated by the language used, that the general term "railroad" does not include "interurban street railroad," or "suburban street railroad" (section 5468a, Burns' Ann. St. 1901), or "electric roads" (sections 5158b, 5158d, Burns' Ann. St. 1901), or "street railroads" (section 5450 et seq., Burns' Ann. St. 1901). Thus section 5158b, Burns' Ann. St. 1901, provides that "when in case two or more railroads, or a railroad and an electric road crossing each other at a common grade, or any railroad crossing a stream"—providing for a system of interlocking switches. In that statute the word "railroad" is clearly distinguished from "electric road," and the Legislature must have taken it for granted, by not adding any qualifying word, that the word "railroad" would be understood to mean "steam road." The general railroad law gave railroads (section 5160, Burns' Ann. St. 1901) the right to appropriate lands. Another statute (section 5468e, Burns' Ann. St. 1901) gives the same power to "any street railroad company heretofore or hereafter organized under the laws of the state of Indiana, and desiring to construct, or having heretofore constructed, any interurban street railroad or any suburban street railway." It will be noted that the statute last cited classes an interurban street railroad under and as a part of a street railroad. See *Mordhurst v. Ft. Wayne, etc., T. Co.* (Ind. Sup.) 71 N. E. 642. Other instances might be given to show that when the Legislature intended a statute to apply to a street railroad or an electric road the road was so designated in the act, and that when steam railroad is intended the word "railroad" only is used. Moreover, we must assume that when the Legislature passed the employers' liability act of March 4, 1893, it was dealing with and acting upon existing facts within its knowledge. The mischief felt and intended to be remedied was then certainly known. It cannot be assumed that the statute was passed before there was an apparent necessity for its enactment. When that act was passed, aside from street railroads in cities, steam railroads were the only railroads in operation generally, and the dangers arising from the operation of railroads were to a very large extent only such dangers as arose from the operation of steam railroads. At that time there were few, if any, electric roads, as now known, in existence in this state. The reasons for changing the law relating to master and servant, as that act changed it, were at that time to be found in the many dangers to which the numerous persons engaged in operating steam railroads were exposed, and the many different departments of labor in which the workmen were employed. It is quite true that an electric railroad, as we now know such roads, might be called a railroad; but,

as said in *Bridge Proprietors v. Hoboken Co.*, 1 Wall. 116, 17 L. Ed. 571: "It does not follow that when a newly invented or discovered thing is called by some familiar word which comes nearest to expressing the new idea, that the thing so styled is really the thing formerly meant by the familiar words. The track upon which the steam cars now transport the traveler or his property is called a 'road'; sometimes—perhaps generally—a 'railroad.' The term 'road' is applied to it, no doubt, because in some sense it is for the same purpose that the road had been used. But until the thing was made and seen, no imagination, even the most fertile, could have pictured it from any previous use of the word 'railroad.' Some call the inclosure in which passengers travel on a railroad a 'coach,' but it is more like a house than a 'coach,' and is less like a coach than are several other vehicles which are rarely, if ever, called 'coaches.'" See, also, *Funk v. St. Paul St. Ry.*, 63 N. W. 1099, 61 Minn. 435, 29 L. R. A. 208, 52 Am. St. Rep. 608; *Sams v. St. Louis, etc., R. Co.*, 73 S. W. 686, 174 Mo. 53, 61 L. R. A. 475. In *Fallon v. West End St. Ry. Co.*, 171 Mass. 249, 50 N. E. 536, in determining whether a street railway car operated by electricity upon a street railway track was a "locomotive engine or train upon a railroad," the court said: "But we think that by the words 'locomotive engine or train upon a railroad' must be understood a railroad and locomotive engine and trains operated and run or originally intended to be operated and run in some manner and to some extent by steam. This undoubtedly was the sense in which the words were used by the Legislature when the statute was enacted, and we do not feel justified now in giving to them the broad construction for which the plaintiff contends. Possibly a railroad, where the motive power had been changed in part or altogether from steam to electricity, or some other mechanical agency, but which retains in other respects the characteristics of a steam railroad, would come within the province of the act. It is not necessary, however, to decide that question now. The defendant is a street railway operated by electricity, and running the usual street car in the usual manner. We think that the car belonging to it, and operated in the manner in which cars upon street electric lines usually are, cannot be said to be a locomotive engine or a train upon a railroad within the meaning of the statute in question." In discussing the expression "upon a railway," as used in the act, the author of *Dresser's Employers' Liability*, § 80, says that the expression "means a steam railway, or one originally operated as such. This section of the act was passed to meet the dangers arising from steam railroads, and it was enacted at a time before electric railways had been adopted, or street ways had become a source of peculiar

danger." See, also, *Whatley v. Zenida Coal Co.*, 122 Ala. 118, 26 South. 124; *Jarvis v. Hitch*, supra.

The fifth paragraph of the complaint proceeds on the theory that the injury was caused by the negligence of a boy whom appellant had placed in charge of the switch. It is averred that the boy was young and inexperienced, and not of sufficient age or discretion to be intrusted with such duties, which appellant knew. If this paragraph sufficiently charges the incompetency of the switch boy, it is still insufficient for failing to aver that appellee had no knowledge of such incompetency prior to the injury. See *Bowles v. Indiana R. Co.*, supra, and cases cited; *Indianapolis, etc., Co. v. Foreman*, supra, and cases cited.

The fifth paragraph is insufficient under the employers' liability act, as it is held that no liability is created by the act for injuries caused by the negligence of persons in charge of a switch. *Baltimore, etc., R. Co. v. Little*, 149 Ind. 167, 48 N. E. 862; *Indianapolis, etc., Co. v. Foreman*, supra.

The sixth paragraph of complaint avers that the work car was old, worn, and defective, and in such condition as to be dangerous to human life, which was known to appellant and unknown to appellee. But the pleading fails to show that this defective condition of the car was the proximate cause of the injury. No facts are averred showing any causal connection between the defective condition of the car and the injury. It is not that because of this defective condition of the car the injury occurred. Facts are averred showing that because of the defective condition of the car it was run in on the switch, and that appellant's agents in charge of the work car negligently and carelessly failed to communicate that fact to the train dispatcher; "that while said defective work car was so placed on switch No. 2, with plaintiff and other laborers thereon, through the negligence of defendant's agents, the east-bound passenger car was carelessly and negligently run into and upon said side track at a high and dangerous rate of speed, to wit, 35 miles per hour, and the same collided with said work car so containing plaintiff, mashing and breaking said work car, and throwing plaintiff against seats and timbers," injuring him. If these averments mean that the work car was placed on the switch through the negligence of appellant's agents, it does not appear by whom the passenger car was run in on the switch; and, if the language means that the agents in charge of the passenger car negligently ran the same upon the switch and into the work car, what we have already said upon other paragraphs is applicable.

The separate demurrer to the first, second, fourth, fifth, and sixth paragraphs of complaint should have been sustained.

Judgment reversed.

(34 Ind. App. 386)

INDIANA BAPTIST PUB. CO. v. AYER et al. (No. 4,989.)¹

(Appellate Court of Indiana, Division No. 2, Oct. 14, 1904.)

DEPOSITIONS—NOTICE—SUFFICIENCY.

1. Under the statute requiring that a party desiring to take a deposition shall give notice to the adverse party stating that the deposition will be taken at a fixed place and at a definite time, a deposition taken at the office of W. C. S., 727 Walnut street, on a notice stating that it would be taken at the office of H. C. S., 725 Walnut street, will be suppressed.

Appeal from Superior Court, Marion County; Vincent Clifford, Special Judge.

Action by F. Wayland Ayer and others against the Indiana Baptist Publishing Company. From a judgment for plaintiffs, defendant appeals. Reversed.

Wilborn Wilson, for appellant. Chas. O. Roemler, for appellees.

WILEY, J. The only question presented by the assignment of errors is the overruling of appellant's motion for a new trial. The questions to be considered may properly and concisely be stated under three heads: First, that the decision of the court is contrary to law, and not supported by sufficient evidence; second, that the trial court erred in overruling appellant's motion to suppress the deposition of Albert G. Bradford; and, third, that the court erred in allowing appellees to file an amended complaint after the conclusion of the evidence and arguments of counsel.

We will consider and determine first the second question above stated. There are two reasons assigned in the motion to suppress the deposition, the first of which is that it was not taken at the place indicated and specified by the notice. The deposition was taken by appellees, and by the notice it was to have been taken at the office of "H. C. Stover, 725 Walnut St., City of Philadelphia, County of Philadelphia and State of Pennsylvania," on the 6th day of June, 1903, between the hours of 8 o'clock a. m. and 6 p. m. of said day. The certificate of the notary public before whom the deposition was taken shows that it was taken at the office of William C. Stover, at No. 727 Walnut street, in said city, county, and state, on the day specified in the notice, and between the hours of 10 a. m. and 12 o'clock noon of said day. The certificate further shows that the appellant was not present at the taking of the deposition, either in person or by attorney. There are two reasons why this motion should have been sustained: First, the deposition was not taken at the office of the person named in the notice, nor was it taken at the place therein indicated. H. C. Stover and William C. Stover are entirely two different persons. The notice given was to take the deposition at the office of H. C. Stover, 725 Walnut street, while the certificate shows

¹Petition to withdraw waiver denied.

that the deposition was taken at the office of William C. Stover, 727 Walnut street. So far as is disclosed by the record, H. C. Stover may have an office at 725 Walnut street, while William C. Stover has an office at 727 Walnut street. It may be that appellant was not present either in person or by attorney at the taking of the deposition because it was present at the time and place indicated in the notice. The statute requires that a party desiring to take a deposition shall give notice to the adverse party, and in such notice, among other things, it must be stated that such deposition will be taken at a fixed place and at a definite time. There is such a variance between the place where the deposition was actually taken and where the notice required it to be taken that the motion to suppress should have been sustained.

The deposition was the only evidence on behalf of the appellees. Counsel for appellant has discussed at some length the action of the court in permitting the amended complaint to be filed after the close of the evidence and the conclusion of the argument, but the conclusion we have reached upon the overruling of the motion to suppress the deposition renders it unnecessary for us to decide this question.

The judgment is reversed, and the trial court is directed to sustain appellant's motion for a new trial.

(33 Ind. App. 655)

MAHONEY v. STATE. (No. 5,200.)

(Appellate Court of Indiana, Division No. 1, Oct. 13, 1904.)

CONTEMPT—STATEMENT FILED BY JUDGE—PRESUMPTION—POWER OF COURT—POWER OF LEGISLATURE—ARRAIGNMENT—STATUTE—CONSTRUCTION—APPEAL—RECORD—PRESENCE OF ACCUSED BEFORE COURT—MOTION TO SET ASIDE JUDGMENT—RECITAL—EFFECT AS STATEMENT OF FACT.

1. A statement, filed by a judge and entered of record, relating to an alleged contempt in the presence of the court, imports absolute verity.

2. Where the conduct of an attorney is disorderly, and his demeanor toward the court insulting, the court has power of its own motion to punish the guilty person summarily for contempt.

3. Aside from any power conferred by the Legislature, courts possess inherent power to punish direct contempts and to ascertain whether a particular act does or does not constitute a contempt.

4. The Legislature has, within limits, power to regulate the procedure in contempt cases.

5. In Burns' Ann. St. 1901, § 1023, providing that, whenever any person shall be arraigned for a direct contempt, no affidavit, charge in writing, or complaint shall be required to be filed against him, the word "arraigned" is used synonymously with "accused" or "charged," and not in the sense in which that term is used in criminal law.

6. When the court adjudges acts or conduct to be a contempt, its adjudication is a conviction.

7. Under the direct provisions of Burns' Ann. St. 1901, § 1023, relating to contempt, the ac-

§ 2 See Contempt, vol. 12, Cent. Dig. §§ 2, 141, 142

cused may except, and appeal, when the punishment inflicted is a fine of \$50 or more, or imprisonment.

8. Where the record in a contempt proceeding does not affirmatively show that the accused was present, or that he was not present, in court when the contempt was committed, the presumption that he was present will be indulged on appeal.

9. On appeal in contempt proceedings a motion to set aside the judgment was incorporated in a bill of exceptions. The bill contained nothing but the motion. *Held*, that a recital in the motion, as one of the grounds for setting aside the judgment, that it was rendered without any notice or appearance, and without giving accused any opportunity to be heard, is not equivalent to a statement of fact incorporated in a bill of exceptions; the bill itself containing no evidence of any irregular proceeding.

10. Under Burns' Ann. St. 1901, § 1023, relating to direct contempts of court, providing that the charge shall be reduced to writing and substantially set forth in the order of court on the same, the court has power to make a charge orally when the acts complained of are committed, and on a subsequent day put the charge in writing and cause it to be recorded.

11. On appeal in contempt proceedings the record showed that the order book entry recited that on December 21, 1903, "the following proceedings were had and entered of record in the order book," giving the number of the book and pages. This was followed with a statement of the court to the effect that during the trial of a criminal case, on December 16, 1903, owing to certain disorderly conduct and insulting demeanor toward the court, appellant had been fined \$50 for contempt. It did not appear from the statement when it was reduced to writing. *Held*, that statement does not necessarily show that the court did not, on December 16th, when appellant was present, adjudge his acts and conduct to be a contempt, though there may have been no judgment until December 21st, when the statement was reduced to writing.

Appeal from Circuit Court, Cass County; Jno. S. Lairy, Judge.

Michael F. Mahoney was fined for contempt of court, and appeals. Affirmed.

M. Winfield and M. B. Lairy, for appellant. O. W. Miller, L. G. Rothschild, C. C. Hadley, W. C. Geake, and G. W. Walters, for the State.

ROBINSON, J. Appellant appeals from a judgment assessing a fine of \$50 against him for a direct contempt of court. From a statement filed by the judge and entered of record December 21, 1903, it appears that during the trial of a criminal case, on December 16, 1903, in which appellant was an attorney for the accused, after the court had overruled an objection by appellant to a question asked a witness by the prosecuting attorney, appellant commenced to argue the question, when the court stated that the ruling had been made, and he did not care to hear further argument, whereupon appellant, in a rude and offensive manner and in a loud tone, said to the court, "I want to know whether I am going to be heard in this case in the interest of my client or not." Whereupon the court replied that he would hear him when he desired to hear argument; otherwise, not. Afterwards, during the examination of a witness, a question was asked by

appellant, which the court remarked the witness had already answered, whereupon the appellant referred to the reporter, saying, "I want to see whether the court is right or not." Afterwards, when the court had ruled on the admission of certain evidence, appellant said there was no principle of law that would support such a proposition, and there was no reason in it, whereupon the court stated to appellant that such remarks were improper, and that his conduct on several occasions during the trial had been improper and unbecoming a member of the bar. Appellant then rose to his feet and interrupted the court, and in an insulting and insolent manner said, "Now the court is talking again," and continued in substance to say that the court, not only in this trial, but in other trials, had taken exceptions to his conduct, that the court had permitted an examination of the jury contrary to an old and well-established rule of court, and on its own motion had intervened and had not permitted a witness to answer a question, and then began to argue about the merits of the case on trial. The court replied that the merits of the case on trial were not under discussion, but that appellant's conduct as an attorney was, that appellant's conduct had at different times during the trial been disrespectful to the court, that the court would require him to maintain a respectful demeanor towards the court, and that if he did not, he would not hear him in the trial, and, if it became necessary, would cause him to be removed from the courtroom. At this point appellant interrupted the court, and in an insulting manner stated that he was ready to quit practice in that court whenever proper proceedings were brought to disbar him. The court replied that it did not deem it necessary to wait for such proceedings. Whereupon appellant turned to the court, and said in an insulting and insolent manner that "whenever the court was ready he was ready." "Upon the foregoing facts the court finds Mr. Michael F. Mahoney guilty of contempt of court, and fixes his fine to the state of Indiana in the sum of \$50. He stands committed until the fine and costs are paid or replevied, and the sheriff will see that the judgment of the court is executed." Afterwards, on December 23, 1903, appellant moved to set aside the judgment on the ground that the judgment is illegal and void, that it was rendered without any notice to appellant, and without any appearance or arraignment, and without giving appellant any opportunity to be heard or file any counter statement in explanation, denial, or extenuation, which motion was overruled.

As the statement filed is confined to matters that occurred in the presence of the judge and in open court, we must treat it as importing absolute verity. *Holman v. State*, 105 Ind. 513, 5 N. E. 556. We think the statement shows that the appellant was guilty of conduct which tended to interrupt

and embarrass the proceedings of the court and to impede the due administration of justice. His conduct was disorderly, and his demeanor towards the court was insulting, and was such that the court might and should, on its own motion, have noticed and punished summarily. *Dodge v. State*, 140 Ind. 284, 39 N. E. 745. The only question is whether the fine was imposed through proper legal procedure. Appellant's counsel argue that the statute provides for arraignment, charge, answer, finding, and judgment, and that the record does not disclose that these steps were followed. Aside from any power the Legislature may attempt to confer, courts possess inherent power to punish direct contempts. It is a purely judicial power, an essential auxiliary to the prompt and efficient administration of the law. It springs from the nature and constitution of a court, is of the essence of a court's existence. It is a power as old as courts themselves. It exists independent of any legislation, and can neither be destroyed nor materially abridged by the Legislature. See *Brown v. Brown*, 4 Ind. 627, 58 Am. Dec. 641; *Ex parte Smith*, 28 Ind. 47; *Little v. State*, 90 Ind. 338, 46 Am. Rep. 224; *Rudolph v. Landwerlen*, 92 Ind. 34; *Rapalje on Contempts*, § 1; *Holman v. State*, 105 Ind. 513, 5 N. E. 558; *Hawkins v. State*, 125 Ind. 570, 25 N. E. 818; *Fishback v. State*, 131 Ind. 304, 30 N. E. 1088; *Ex parte Terry*, 128 U. S. 280, 9 Sup. Ct. 77, 32 L. Ed. 405.

While it is not necessary to look to any statute to ascertain whether a particular act does or does not constitute a contempt, still the Legislature may, within limits, regulate the procedure in such cases. *Hawkins v. State*, supra; *Little v. State*, supra; *Cheadle v. State*, 110 Ind. 301, 11 N. E. 426, 59 Am. Rep. 199. The statute (section 1023, Burns' Ann. St. 1901) makes the following provision for trial for direct contempt: "When any person shall be arraigned for a direct contempt in any court of record in this state, no affidavit, charge in writing, or complaint shall be required to be filed against him, but the court shall distinctly state the act, words, signs or gestures, or other conduct of the defendant which is alleged to constitute such contempt; and such statement shall be reduced to writing, either by the judge making it or by some reporter authorized by him to take it down when made; and the same shall be substantially set forth in the order of the court on the same, together with any statement made in explanation, extenuation or denial thereof which the defendant may make in response thereto; and the court shall thereupon pronounce judgment, either acquitting and discharging the defendant or inflicting such punishment upon him as may be consistent with the provisions of this act; and if found guilty, the defendant shall have the right to except to the opinion and judgment of the court. And in all cases where

the defendant may be adjudged to pay a fine of fifty dollars or more, or to be imprisoned for such contempt, he shall have the right, either before or after the payment of such fine or undergoing such imprisonment, to move the court to reconsider its opinion and judgment of the case, upon the facts before it, or upon the affidavits of any or all persons who were actually present and heard or saw the conduct alleged to have constituted such contempt." This section further provides that upon these affidavits and the original statement the accused may move for a new trial and rescission of the judgment, and if the motion is overruled the accused may except and file a bill of exceptions as in other criminal cases. Provision is also made for an appeal.

We cannot agree with counsel that this statute expressly provides for arraignment, in the sense of that term in criminal procedure. Under the Criminal Code the arraignment of the accused consists of the reading of the indictment or information to him by the clerk. Section 1831, Burns' Ann. St. 1901. And if the record in such case shows an arraignment, it necessarily shows the reading of the indictment or information to the accused. *Clare v. State*, 68 Ind. 17. But section 1023, supra, expressly states that no affidavit, charge in writing, or complaint shall be required to be filed against the accused. It is true the section uses the word "arraigned," but it is used synonymously with "accused" or "charged." Webster; Soule's Synonyms. He could not be arraigned, within the meaning of the Criminal Code, where no affidavit, written charge, or complaint had been filed against him. The statute clearly contemplates that the court may make the charge orally, which is afterwards reduced to writing and the substance of it set out in the order of the court on the same. In *Holman v. State*, supra, it is said to be very doubtful whether the Legislature has power to require the judge to make any formal written charge, where the act constituting a direct contempt is committed during an open session of court and in the presence of the judge. The statute does not require that the statement made by the accused in explanation or denial of the charge shall be in writing. It cannot be doubted that conduct in the presence of the court might be of such character that the court could impose punishment summarily. In such case a trial is not contemplated. No issue is to be formed. When the court adjudges the acts or conduct to be a contempt, its adjudication is a conviction. The accused may except and appeal; and if the punishment inflicted is a fine of \$50 or more, or imprisonment, provision is made for a motion for a new trial and rescission of the judgment and an appeal.

We agree with counsel that such proceedings should not be taken against the accused

in his absence. But we cannot presume that the court did this. The record does not show that this was done. It does not affirmatively appear that appellant was present. It does not affirmatively appear that he was not present. It has been held time and again, both in civil and criminal cases, that the appellate tribunal must presume in favor of the regularity and validity of the proceedings of the trial court, and, until the contrary is made to appear by the record, this presumption must control. Thus in *Lillard v. State*, 151 Ind. 322, 50 N. E. 383, a reversal was asked because the record did not show that the trial court, before pronouncing its judgment sentencing the defendant, informed him in regard to the verdict and called upon him to show legal cause why judgment should not be pronounced, under section 1923, Burns' Ann. St. 1901, which provides that, "when the defendant appears for judgment, he must be informed by the court of the verdict of the jury, and asked whether he has any legal cause to show why judgment should not be pronounced upon him." The court said: "If the lower court, however, failed to discharge its duty toward the defendant in the manner required by the statute, in not informing him of the verdict and calling upon him to show cause, if any he had, the burden is upon him, on appeal, to show affirmatively such failure by the record; and, in the absence of such showing, we must, under the well-affirmed rule, presume that the trial court discharged its duty as the law exacted. The mere silence of the record, as in the case at bar, does not suffice to present the question which appellant seeks to have reviewed under his third assignment of error." See, also, *Campbell v. State*, 148 Ind. 527, 47 N. E. 221; *McCorkle v. State*, 14 Ind. 39; *Porter v. State*, 17 Ind. 415; *Ayers v. State*, 88 Ind. 275; *Shoffner v. State*, 98 Ind. 519; *Houk v. Barthold*, 73 Ind. 21. It is true it is held that upon appeal in a criminal case the record must show affirmatively that the accused was arraigned, or waived it, and that he pleaded to the indictment or information, or that, standing mute and refusing to answer, a plea was entered for him by the court. *McJunkins v. State*, 10 Ind. 140; *Tindall v. State*, 71 Ind. 814; *Hicks v. State*, 111 Ind. 402, 12 N. E. 522; *Bowen v. State*, 108 Ind. 411, 9 N. E. 378; *Miller v. State*, 26 Ind. App. 152, 59 N. E. 287; *Manhattan Oil Co. v. State*, 26 Ind. App. 693, 60 N. E. 732. This ruling is based upon the positive terms of the statute. *Weir v. State*, 115 Ind. 210, 16 N. E. 631.

The motion to set aside the judgment is incorporated in a bill of exceptions. The bill contains nothing except the motion. One of the grounds of the motion is that the judgment was rendered without any notice or appearance, and without giving appellant any opportunity to be heard. But this recital in the motion cannot perform the office of a statement of the fact incorporated in a bill of exceptions. The bill itself contains no evi-

dence of any irregular proceedings. See *Masterson v. State*, 144 Ind. 240, 43 N. E. 133; *Elliott's App. Proc.* §§ 294, 815.

What we have said is upon the assumption that the record itself does not in any way show that appellant was present when charged with the contempt. But we do not think it can be said that the record conclusively shows that the alleged contempt was committed on December 16th and no action taken thereon until December 21st. The order book entry recites that on the 21st day of December, 1903, "the following proceedings were had and entered of record in Order Book 42, pages 150, 151, 152, and 153, as follows, to wit." This is followed with the statement, the substance of which we have already given, and the statement is followed immediately by the court's finding and judgment thereon, as already set out in full. As the court is not required to make the charge in writing, we do not think it can be said that the record conclusively shows that no action was taken by the court as to the alleged contempt until December 21st. It does not appear from the statement itself when it was reduced to writing. It only appears that the statement was not entered in the order book until December 21st. The statute does not require that the charge shall be reduced to writing immediately upon its being made, but it requires that the charge (which may have been previously made orally) shall be reduced to writing, and "the same shall be substantially set forth in the order of the court on the same." The court could have made the charge orally on December 16th, when the acts complained of were committed, and when it appears appellant was present, and on that date could have adjudged appellant guilty of contempt, and afterwards put the charge in writing and caused the same to be recorded on December 21st. There may have been no judgment until December 21st, when the statement was entered of record; but the statement does not necessarily show that the court did not, on December 16th, when appellant was present, adjudge the acts and conduct to be a contempt.

Judgment affirmed.

(36 Ind. App. 164)

BOARD OF SCHOOL COM'RS OF CITY OF INDIANAPOLIS v. BENDER. (No. 5,012)*

(Appellate Court of Indiana, Division No. 2
Oct. 11, 1904.)

CONTRACT—MISTAKE IN BID FOR WORK—RIGHT TO RESCIND.

1. Where a bidder for a public building, having very little time after notice of the letting of the contract and before the filing of the bids, in making up his bid from his estimate book, in which he had estimated the different parts of the work separately, by mistake turned two leaves and omitted an estimate on one part of the work, in consequence of which his bid as submitted was several thousand dollars lower than he intended or than the work could be

*Rehearing denied. Transfer to Supreme Court denied.

done, the acceptance of such bid did not create a contract, for want of the meeting of the minds of the parties; and, the mistake being an excusable one, a complaint setting up such facts, and that he promptly notified the board having charge of the work of the mistake, and the contract was let to the next higher bidder, states a cause of action in equity for the rescission of his bid and the recovery of a deposit made as a guaranty that he would enter into a contract if his bid was accepted.

Appeal from Superior Court, Marion County; Vinson Carter, Judge.

Action by Conrad Bender against the board of school commissioners of the city of Indianapolis. From a judgment for plaintiff, defendant appeals. Affirmed.

Albert Baker and Edward Daniels, for appellant. A. F. Denny, for appellee.

WILEY, J. This cause was transferred from the Supreme Court. Appellee was plaintiff below, and his complaint was held good on a demurrer for want of sufficient facts, and the only question presented by the assignment of error is the sufficiency of the complaint.

The substantial averments of the complaint are: That appellant had advertised for competitive bids for the erection of an addition to one of its school buildings. That the notice published for such bids contained the following clause: "Each proposal must be accompanied by a certified check for the sum of \$300 as a guaranty that the bidder will enter into a contract and file a satisfactory bond with the board of school commissioners of the city of Indianapolis, within the time specified. A failure on the part of the contractor to enter the contract will forfeit the said amount or amounts deposited." It was further averred: That all bids and proposals should be at the office of appellant on or before 4 o'clock p. m. of February 25, 1902. That the appellee did not see the notice as published, but that after its publication appellant's architect notified him to make estimates, and to make a bid and proposal for the work according to the plans and specifications. That on the 22d day of February, 1902, he furnished appellee such specifications, and informed him that his bid must be accompanied with a certified check for \$300, and must be in at or before 4 o'clock p. m. of February 25, 1902. That the plans, specifications, and addenda to the specifications for the construction and erection of said building contained the following provisions, to wit: "Notice to Bidders. Sealed proposals will be received for an addition to school building No. 33, corner Sterling and Twelfth streets, until 12 o'clock noon, the 25th day of February, 1902, at the office of the board of school commissioners (Library Building) of the city of Indianapolis, Indiana." That the addenda to said specifications were prefixed thereto, and contained on the first page thereof the following, to wit: "Bids to be opened 8 p. m. Feb. 25, instead of noon, as specified."

That appellee examined said specifications for no other purpose than to ascertain the description of the materials and of the work required, and that he did not read at any time the provisions in the specifications and addenda above quoted as to the time of opening said bids. That he did not know until after the 25th day of February that he might have had until 8 o'clock p. m. of said day in which to prepare and present his bids and proposals as aforesaid. That appellee did examine the plans and specifications, and made his estimate for all the work and material, and returned the same to the architect on said 25th day of February, 1902, after having carefully placed his estimates in his book, known and designated as his "estimate book." That the plans and specifications further provided that bidders should make several and separate bids on certain work and material, which would be obligatory and peremptory on the bidders and appellant, and were afterwards described by appellant as "general or regular bids," and on certain other material and work therein specified, which was designated therein as "alternate basement and foundation plan"; the adoption and use of bids last aforesaid to be optional with appellant. That the material and work described in said "alternate and foundation plan" was not to be required of the bidder, except at the option of appellant. That on the 25th day of February, 1902, exactly at 4 o'clock p. m., he delivered his bid in writing, signed by him, to appellant at the place designated in the notice, which bid was in the following words and figures, to wit: "Indianapolis, February 25th, 1902. Board of School Commissioners: I, the undersigned, propose to build addition to No. 33, according to plans and specifications, for the sum of \$11,337. Also, additional for alternate, \$3,349."

The complaint further avers that appellee relied upon and believed the architect's statement aforesaid that said bids must be in at or before 4 o'clock of said day; that in making his said bid and proposal he intended to include therein his estimates for all material and work, including that which was optional, as well as that which was obligatory, and that he made and placed in his "estimate book" all such estimates accordingly; that the placing of his bid and estimate was delayed without any fault or negligence on his part, but solely through the delay of two of his sub-bidders, until the hour of 3:30 p. m. of said day, and that in order to get his bid and proposal filed at 4 p. m., as he understood was requisite, there was no sufficient opportunity for verification of his bids; that he erroneously submitted his bid as aforesaid for the obligatory and peremptory part of said work; that his bid and proposal, in order to cover and include all of said work and material, should have embraced, and was intended to embrace, his estimate for the obligatory and peremptory material and work, as aforesaid, the sum of

\$3,349, and the further sum of \$1,064, each of said amounts being on separate pages of his "estimate book," in addition to said sum of \$11,837, which was on a separate and distinct page thereof; that appellee's bid and proposal, in order to embrace all the material and work, should have been in the sum made up of the three amounts last aforesaid, to wit, \$15,750. It is further averred that appellee's estimates for his bid on the optional and alternate work and material aforesaid were in said "estimate book" on a fourth and distinctly separate page, and that his bid on said branch of said erection was intended by him to have been, and should have been, in the sum of \$1,172, instead of the sum of \$3,349, as aforesaid. It is then averred that, in putting into writing his form of bid and proposal, owing to the limit of time as he understood it, it was necessary that said bid and proposal be forwarded and delivered in great haste, and that he, in so hastily making up said bid, mistook the totals on the first page of his "estimate book;" to wit, \$11,337, as and for his estimate for all the obligatory work and material, or, in other words, in the sum of \$4,418 less than his estimates, and in that amount less than he intended and understood. It is further averred that in his haste in drafting and submitting his bid and estimate appellee mistook the amount, \$3,349, which was a part of his estimate on the work and material of the obligatory part of such erection, for the amount of his estimate on said "alternate basement and foundation plan," optional with appellant, and erroneously made his bid and proposal for said optional material and work for the said sum of \$3,349, instead of for the sum of \$1,172, or, in other words, in a sum \$2,177 greater than he intended and understood. It is then averred that he delivered his said bid as aforesaid without any knowledge on the part of the appellee that he might have delayed such delivery, without detriment, until 8 o'clock p. m. of the same day. It is then averred that at 8 o'clock p. m. on February 25, 1902, appellant opened and examined the bid and proposal of appellee, and those of others, and found appellee's bid to be the lowest and best for the obligatory and optional work and material combined, and formally accepted the said bid; that on the following day appellant, through its architect, notified appellee of such acceptance, but that he, having discovered his mistake and error so made and committed, forthwith informed said architect concerning the same, and on the same day notified John E. Cleland, appellant's business director, that because of said mistake and error he would not and could not accept or enter into a contract for the construction of said addition; that on the 26th day of February appellee further notified appellant in writing to the same effect, and requested the return of the certified check, and that on the 11th day of March following he again demanded of appellant the return of said cer-

tified check, or its equivalent in money; and that appellant wholly refused and still refuses to return said certified check, but has cashed the same, and has converted the proceeds thereof to its own use. It is then averred that appellee never assented to the making of the bid and proposal for the construction of said addition for any amount less than his estimates placed in his "estimate book," and that his mistake and error was material and ruinous, if enforced by contract, and that it is inequitable and unconscionable in appellant to take advantage of appellee's mistake and error.

The complaint then sets out a summary of the eight bids made for the construction of the addition, and such bids on obligatory and material work vary from \$11,337, appellee's bid, to \$22,409; and on bids on optional material and work they vary from \$3,349, appellee's bid to \$885. It is then averred that the great discrepancy between appellee's bid and proposal, and those of others, and especially the discrepancy between his bid and those of all others as to the optional material and work, were sufficient and reasonable notice to appellant, at the time of opening and considering said bids, that appellee had made a material and ruinous mistake in making his bid and proposal, and that by reason thereof appellant had notice sufficient to put it on its guard that his bid and proposal were such that he had not in fact assented thereto. It is then averred that if appellant had returned the certified check aforesaid, or the proceeds thereof, it would be and remain in the same condition as if appellee had not made his said bid and proposal, containing, as it did, the aforesaid material and ruinous mistake and clerical error, and that appellant has suffered no legal wrong or damage from appellee's failure to enter into contract and file bond; the work, both compulsory and optional, having been let after appellee's said notice of February 26, 1902, to Schumacher Company at \$14,500 and \$1,070, respectively, or in the aggregate \$15,570, being the bid and proposal next higher than appellee's. It is then averred that appellee is not informed and does not know whether appellant holds and retains the certified check and the avails thereof as a forfeiture or penalty, or as and for appellant's damages for appellee's failure to enter into the contract and file bond, but that the withholding and the refusal to return said check or avails, under whatever claim of appellant, is wholly inequitable and unconscionable, and that in equity and good conscience appellee's erroneous bid and proposal, and appellant's acceptance thereof, should be wholly rescinded and held for naught.

The prayer of the complaint is that appellee's bid and proposal, and appellant's acceptance thereof, be rescinded, and that appellee's check, or the proceeds thereof, be returned or paid to appellee.

Under the facts pleaded we must deter-

mine the sufficiency of the complaint, not upon the theory of a mutual mistake, but a mistake of appellee alone. The averment in the complaint, that the discrepancy between appellee's bid and those of others was sufficient and reasonable notice that appellee had made a material and ruinous mistake, and that by reason thereof appellant had notice sufficient to put it on its guard that appellee had not assented thereto, is not sufficient to show that the mistake was mutual. The remaining question is: Do the facts pleaded entitle appellee to relief by reason of his own mistake?

The facts show a material and ruinous mistake in appellee's bid as submitted to appellant, and the facts constituting the mistake are specifically stated, and by them it appears that appellee's bid was \$4,413 less than that made by his aggregate estimates. The mistake from which he asks relief is that by his hurry in submitting his bid, and which he understood had to be submitted by a definite and fixed time, he omitted to include in his aggregate bid estimates upon certain parts of the work, which he has made and placed upon different pages of his "estimate book." As the demurrer admits the facts well pleaded, it is clear that appellee's bid was not what he intended it to be. In other words, he did not intend to submit a bid by which he agreed to do the work for the amount designated. Under the facts appellee never entered into a contract by which appellee was to do the work for a fixed compensation. By the very terms under which the bid was submitted, it was contemplated that, if appellee's bid was accepted, a contract between the parties was to be entered into. By advertising for bids, and by appellee's submission of a bid, and acceptance of it by appellant, it might properly be said that a tentative or preliminary contract was made; but it was not the contract contemplated by the parties. If there was not an *aggregatio mentis*, then there was no binding obligation. Certain it is that appellee had no intention to submit a bid for acceptance, by which he was to furnish the material and do the work for \$4,000 less than the estimates he made. From the complaint it is evident that in making and submitting his bid he did not rely upon the published notice, but upon the invitation and statements of appellant's engineer. So far, therefore, as the notice for competitive bids is concerned, it can have but little, if any, influence in this connection. The complaint shows that appellant complied with the statute, and hence it was not at fault. The complaint also shows that appellee acted in good faith, for he relied upon the statements of the architect, and from the time he was invited to submit a bid his time was limited. The manner in which appellee made the mistake is specifically described, and it was one that could easily occur. He placed his estimates upon different portions of the work on separate

pages of his "estimate book," and in his hurry he turned two pages, instead of one, and thus omitted to carry forward, in his aggregate bid, a material portion of his estimate. There is one thing clear, and that is that in his own mind and judgment he did not agree to enter into a contract to furnish the material and do the work according to the plans and specifications furnished him by the architect, for the amount designated by his bid. According to the facts pleaded, appellee was not negligent and careless in submitting his bid as he did.

This is not an action to reform, but to cancel, what appellant assumes was a contract. In 2 Kent, Comm. § 477, the following rule is declared: "Mutual consent is requisite to the creation of the contract, and it becomes binding when a proposition is made on one side and accepted on the other; and, on the other hand, it is no contract if there be an error or mistake of a fact, or in circumstance, going to the essence of it. This is a clear principle of universal justice. *'Non videntur qui errant consentire'*" It is an equitable rule declared by Mr. Kent "that he who errs is not considered as consenting." In this case the appellee erred by what appears to be an excusable mistake. Mr. Justice Story, in his work on Equity Jurisprudence at section 1381, speaking of mistakes as affecting contracts, says: "But where the mistake is of so fundamental a character that the minds of the parties have never in fact met, or where an unconscionable advantage has been gained by mere mistakes or misapprehension, and there was no gross negligence on the part of the plaintiff, either in falling into the error or in not sooner making redress, and no intervening rights have accrued, and the parties may still be placed in statu quo, equity will interfere, in its discretion, in order to prevent intolerable injustice." In line with the above it is declared to be the rule "that no contract of sale is reciprocally obligatory upon parties thereto, if it be founded upon an injurious mistake of a material fact forming the basis of the contract." Story on the Law of Sales, § 145.

A case illustrative of the principle here involved is that of *Harra v. Foley*, 62 Wis. 584, 22 N. W. 837. In that case the plaintiff claimed to have purchased of defendant some cattle for \$161.50. The defendants claimed to have intended to state the price at \$261.50, and accepted \$20 on the purchase price. When he was informed that the plaintiff understood the price to be \$161.50, he tendered back the \$20 paid. In the decision of the case, the court said: "It is evident that the minds of the parties never met upon the question of the price to be paid for the cattle, and therefore there was in fact no sale. The pretended purchase having been repudiated by the defendant before the cattle were in fact delivered to the plaintiff, and the earnest money tendered back to him, the plaintiff acquired no title to the cattle, and

the judgment was properly rendered against him." So here it is evident that the minds of the parties never met, and hence appellant acquired no rights under appellee's erroneous or mistaken bid.

It is not equitable, therefore, for appellant to profit by the mistake, and under the facts pleaded appellee is entitled to relief. The demurrer to the complaint was properly overruled. Judgment affirmed.

COMSTOCK, J., concurs in result.

(34 Ind. App. 420)

UNION TRACTION CO. OF INDIANA v.
BUCKLAND. (No. 4,958).*

(Appellate Court of Indiana, Division No. 1.
Oct. 28, 1904.)

MASTER AND SERVANT—INJURIES TO SERVANT—
OMISSION TO SAND TRACKS—ASSUMPTION
OF RISK—PROXIMATE CAUSE—PLEADING.

1. In an action against a street railroad for injuries to a motorman, a complaint alleging that defendant was in the habit of roughing the rails on a grade by sanding them, but on a certain date negligently failed to do so, or to take any means or precaution to prevent the cars from slipping, sufficiently averred defendant's dereliction of duty, without further stating what other means could have been used to make the track safe.

2. The omission of a street railroad to roughen or sand its track at a place where a steep grade makes sanding necessary in order to make the track safe for the operation of cars is negligence.

3. The negligent omission of a street railroad to sand its track, in consequence of which a car became unmanageable, and collided with another car, injuring a motorman, was the proximate cause of such injury.

4. A motorman on a street car assumes the usual and ordinary risks incident to his employment, so far as such risks are known to him, or could be known by the exercise of ordinary and reasonable care.

5. Where a street railroad had recognized its duty to make the track safe for the operation of cars by roughing or sanding the same, a motorman who knew this fact had a right to rely upon the performance of such duty by the railroad, in the absence of knowledge that the custom of sanding the track had been changed, and at a time when, by reason of darkness, he could not see whether the track was sanded or not.

Appeal from Superior Court, Madison County; H. C. Ryan, Judge.

Action by James F. Buckland against the Union Traction Company of Indiana. From a judgment for plaintiff, defendant appeals. Affirmed.

J. A. Van Osdol, W. A. Kittinger, and W. S. Diven, for appellant. Bagot & Bagot and Ellison & Ellis, for appellee.

ROBINSON, J. Appeal from a judgment in appellee's favor for damages for a personal injury. The complaint avers that on appellant's road is a grade so steep, and of such character, that, in order to operate cars

with reasonable safety, and prevent the cars from sliding down the grade beyond the control of the person in charge, it was necessary to, and appellant did, up to November 10, 1899, roughen the rails by sanding the same; that appellant on that day, knowing the track was not sanded and was in a dangerous condition, "negligently and carelessly failed and neglected to sand or in any way roughen said track upon said grade or to take any means or precaution of any kind to prevent the cars from slipping upon said grade, or render the said grade reasonably safe for the operation of cars on the same"; that on the date above mentioned appellee was in the employment of appellant as a motorman, and while in charge of a motor car with trailers attached, all heavily loaded with passengers, started down the grade, without knowing the track had not been sanded nor made safe, and being unable to see the condition by reason of darkness, and believing it had been made safe and had been sanded, as it had at all times previously; that because of appellant's failure to sand and roughen the track and make the same reasonably safe the cars became unmanageable, and the same did, by reason of the dangerous condition of the track, slip downward on the grade, colliding with another car, injuring appellee. Appellant's motion to make the complaint more specific by averring specifically what precaution should have been taken by appellant to have prevented the injury was overruled. It is said in argument that appellant was apprised of the fact, if it was a fact, as to how the car became unmanageable, or why appellee could not control it, but that as the cause of complaint is an alleged omission of duty, the pleading should state definitely of what the omission consisted. In support of their argument counsel cite Tipton, etc., Co. v. Newcomer, 156 Ind. 348, 58 N. E. 842. In that case the charge was that appellant company had negligently permitted its high-pressure line to become "defective, insufficient, and out of repair," and it was held error to overrule a motion to make more specific. The company certainly had the right to know how and in what way the line was defective, insufficient, and out of repair, and the court so held. But in the case at bar the complaint avers that up to the day in question the company did roughen the rails at that place by sanding them, and that at the time of the injury it is averred that the company negligently failed to sand or in any way roughen the rails, or to take any measure or precaution of any kind to prevent cars from slipping. It cannot be said that the complaint should state what other means could have been used to make the track safe after it was averred that it had been the custom of the company, to make the track safe, to roughen the rails by sanding them. Appellant had recognized the necessity of making the track safe, and had employed certain means, and the com-

*Rehearing denied January 10, 1905.

¶ 4. See Master and Servant, vol. 34, Cent. Dig. § 550.

plaint avers that it negligently failed to use such means or any other to make the track safe. The track was defective and the pleading shows sufficiently how it was defective. Appellant was called upon to answer for injuries caused by a defective track, knowledge of which it had, and of which the injured party was ignorant. See *Heltonville, etc., Co. v. Fields*, 138 Ind. 58, 36 N. E. 529; *Indiana, etc., Co. v. Stewart*, 7 Ind. App. 563, 34 N. E. 1019.

It is also argued that the demurrer for want of facts should have been sustained. The pleading shows the steep grade; that it was necessary to roughen or sand the track to make it safe; the previous custom of sanding the track to make it safe for the operation of cars, appellant's failure to sand the track, or to take any precaution to make it safe, on the morning of the injury; appellee's reliance on this custom, and his ignorance of the condition of the track, and the reason he could not see the track; that, if the track had been in proper condition for use, he could have controlled the car; and that by reason of the negligent failure to roughen or sand the track the car became unmanageable, and appellee was unable to manage or control the same. If it was necessary, because of the steep grade, to roughen or sand the track to make it safe for the operation of cars, appellant's omission to do so was negligence, and if, because of this negligent omission, the cars became unmanageable, and collided with another car, causing the injury, such negligent omission was the proximate cause of the injury, because it was the efficient cause. Appellee assumed the usual and ordinary risks incident to his employment as motorman, so far as such risks were known to him, or could have been known to him by the exercise of ordinary and reasonable care. He had no knowledge of the fact that the custom of sanding the track to make it safe had been changed, and he gives a sufficient reason for not discovering at the time that the track was not safe. The company had previously recognized its duty to make the track safe for the operation of cars by roughing or sanding the same, which appellee knew, and there is nothing in the pleading to show that appellee had no right to rely upon the performance of this continuing duty. See *Brazil, etc., Co. v. Hoodlet*, 129 Ind. 327, 27 N. E. 741, and cases cited; *Louisville, etc., Co. v. Hanning*, 131 Ind. 528, 31 N. E. 187, 31 Am. St. Rep. 443.

The only remaining error assigned is overruling appellant's motion for a new trial, and the only questions raised under this assignment are that the verdict of the jury is not sustained by sufficient evidence, and is contrary to law. Counsel on both sides have set out in their briefs copious extracts from the evidence, which is quite voluminous, and is conflicting. No good purpose would be subserved by setting out the evidence upon these disputed questions. An examination

of the record discloses that there is evidence to sustain the jury's conclusion upon the material questions in the case. We cannot disturb this conclusion without weighing the evidence. We find no reversible error in the record.

Judgment affirmed.

(33 Ind. App. 675)

TAYLOR v. SCHOOL TOWN OF PETERSBURGH. (No. 5,089.)

(Appellate Court of Indiana, Division No. 2.
Oct. 25, 1904.)

**SCHOOLS AND SCHOOL DISTRICTS—TEACHERS—
EMPLOYMENT—STATUTES—CONSTRUCTION
—CONTRACTS—INDEFINITENESS.**

1. It is not conclusive against the validity of a contract for the employment of school-teachers, required to be in writing by Burns' Ann. St. 1901, § 5989a (Acts Gen. Assem. 1899, p. 173, c. 111), that it consists of more than one instrument.

2. Plaintiff's identity as the party referred to in a contract for the employment of school-teachers being a subject of legitimate averment and proof, it was immaterial that she was referred to therein only by her surname, and that no Christian name was given.

3. The provision of Burns' Ann. St. 1901, § 5989a (Acts Gen. Assem. 1899, p. 173, c. 111), requiring all contracts for the employment of school-teachers to be in writing and signed by both parties, is mandatory.

4. A teacher cannot recover from a school corporation for breach of an executory contract of employment, unless the contract is so definite as to be capable of specific enforcement.

5. Plaintiff filed her application for a position as a teacher in the public schools of defendant school corporation, and the minutes of the board showed that the board met in regular session, whereupon a motion was carried to employ plaintiff and certain others as teachers for the ensuing year, on condition that each of the teachers named should attend at some place of learning a teachers' summer training school. The order of the board, however, was silent as to when the schools were to begin for the ensuing year, and also as to the day or month and grade plaintiff was to teach, nor was there any writing fixing her compensation. Plaintiff attended a training school as required, but was not permitted to teach. *Held*, that such contract was not sufficiently definite, within Burns' Ann. St. 1901, §§ 5989a, 5989b (Acts Gen. Assem. 1899, p. 173, c. 111), requiring such contracts to be in writing signed by the parties to be charged, etc., to entitle plaintiff to recover for breach thereof.

Appeal from Circuit Court, Pike County;
E. A. Ely, Judge.

Action by Frank R. Taylor against the School Town of Petersburg. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

E. P. Richardson, A. H. Taylor, and J. E. McCullough, for appellant. J. W. Wilson, for appellee.

OOMSTOCK, J. Appellant, who was the plaintiff below, filed her amended complaint in one paragraph, in which she alleged:

"That on the 24th day of May, 1901, she was a resident of the town of Petersburg, in said county and state, and had been employ

ed as a teacher in the schools of said town for ten years prior thereto. That at said time she was a regular licensed teacher of said county, and had and held and now holds the necessary license and certificate from the county superintendent of schools of said county, which authorized her to be employed in any of the schools of said county. That the defendant is a school corporation under the corporate name of the 'Town of Petersburg, Indiana.' That on the 24th day of May, 1901, Leslie Lamb, Simeon J. Haines, Sylvester Thompson were duly elected the qualified and acting board of trustees of said school corporation, and Simeon J. Haines was the secretary of said board of trustees. That on the 24th day of May, 1901, the plaintiff, by the style of 'F. R. Taylor,' made her application in writing to the defendant for a position as teacher in the public schools of said town for the ensuing year in the words and figures following: 'Petersburg, Ind., May 24, 1901. Mr. S. J. Haines, Secretary School Board—Dear Sir: Will you please place this, my application for the position of teacher in the Petersburg public schools for the ensuing year, before the Board of Trustees at their annual meeting? Acting on the suggestion of Prof. W. H. Foreman, I wish to say to the Board that I will take advantage of a course in some educational institution during the coming vacation. I have not decided yet just where or when, but will give the subject my attention as soon as possible. Hoping this will be satisfactory, I remain, Yours respectfully F. R. Taylor'—which application was duly received by said board. That said trustees met in said regular session on the 25th day of May, 1901, when all were present, at which time they passed an ordinance and contract, entered of record, employing the superintendent and teachers for said defendant to teach in all of the departments of said school of said town for the then ensuing school year, and, after having duly considered the application of the plaintiff, employed her in writing as a teacher in said school for the ensuing school year, as follows: 'Petersburg, May 25, 1901. School Board met in regular session. Members present: S. Thompson, Leslie Lamb and S. J. Haines. It is moved and seconded that William H. Foreman and J. H. Risley be elected Superintendent and High Principal, respectively, for the ensuing year—carried. Moved and seconded that the following teachers be employed for the ensuing year: Misses Serepta Dean, Grigsby, Coats, Higgins, Thirza Dean, Taylor, and Bassinger—carried. The above teachers are to be retained on condition that each attend at some place of learning the summer, a teachers' training school. Motion made and seconded that teachers employed in public schools are forbidden from dancing, card playing and using tobacco—carried. S. J. Haines, Secretary.' That in making the record of employment the secretary of said board omitted to insert the

given name of the plaintiff in said record, but that she was the person referred to, and the one who was intended to be and was employed by said board. That pursuant to her application and the order of said board the plaintiff attended a teachers' training school at the city of Terre Haute, Indiana, and expended the sum of fifty dollars in expenses and tuition therefor. That the plaintiff fully complied with all the conditions of her said contract, and did not engage in any of the acts forbidden by said defendant. That afterwards, after the beginning of said school year, Wm. H. Foreman, superintendent of said schools, and while acting as such, assigned the plaintiff to the eighth grade or grammar department of said school, which position the plaintiff accepted as the teacher thereof. And the plaintiff says that on the — day of August, 1901, the said defendant, by said board of trustees, repudiated said contract hereinbefore set forth, and employed another teacher in the place of the plaintiff, without her consent, and refused to recognize the plaintiff as a teacher in said school, although she was ready, able, and willing to perform her said contract with the defendant, and so informed said board of trustees of the defendant, but the defendant refused to perform its part of said contract. That the defendant brought against her no charges or accusations of immorality or incompetency, but without any cause whatever violated said contract as aforesaid. That when she learned that said defendant had repudiated said contract it was at a season of the year when she could not obtain similar employment as a teacher elsewhere, although she made diligent effort to obtain such employment. That she was compelled to and did lose from her said business as a teacher all of the time of said school year as aforesaid. That at the beginning of said school she was present and tendered her services as teacher in said schools, and offered to teach therein, as she had agreed to, and the defendant refused to accept her said services as such teacher. That her services as such teacher as fixed by law is fifty dollars per month, or two dollars and fifty cents per day for each day's service as teacher in any and all of the schools of said county. That the school of the defendant for the school year 1901 continued nine months, being one hundred and eighty days of school taught therein. That plaintiff is damaged in the sum of five hundred dollars, which is due and unpaid. Wherefore, the plaintiff demands judgment," etc. The court sustained the defendant's demurrer for want of facts to the complaint. Failing to plead further, judgment was rendered against the appellant for costs. The ruling upon the demurrer is assigned as error.

The General Assembly of the state of Indiana (Acts 1899, p. 173, c. 111; sections 5989a, 5989b, Burns' Ann. St. 1901) passed an act to provide for contracts between teachers

and school corporations. Section 1 is as follows: "That all contracts hereafter made by and between teachers and school corporations of the state of Indiana shall be in writing, signed by the parties to be charged thereby and no action shall be brought upon any contract not made in conformity to the provisions of this act." Section 2. "For the purpose of carrying this act into effect the school trustees of the several school corporations of this state shall provide a public record of uniform blank contracts to be carefully worded under the direction of the Superintendent of Public Instruction and cause such contracts to be signed therein, which record shall be deemed a public record open to inspection of the people of their several school corporations." This act was in force at the time that the alleged contract was made. Is the contract valid and enforceable under the statute? It is not conclusive against the validity of the contract that it consists of more than one instrument of writing. *Leach v. Rafns et al.*, 149 Ind. 152, 48 N. E. 868. Nor do we regard the fact that the order of the school board mentions "Taylor" as one of the teachers, giving no Christian name, as a serious omission. The identity of a party referred to in a contract is the legitimate subject of averment and of proof. *Zann et ux. v. Haller*, 71 Ind. 137, 36 Am. Rep. 193. The language of the act is free from ambiguity. Its enactment doubtless had origin in the opinion of the Legislature of the importance to prevent misunderstandings in contracts between school boards and teachers. It is a matter of judicial history that much litigation has grown out of verbal contracts for teaching in the public schools. The writer of the opinion, Davis, C. J., in *Jackson School Township v. Shera*, 8 Ind. App. 332, 35 N. E. 842, says: "The writer not only agrees with Judge Elliott that 'there is much reason for scrutinizing with care contracts made so far in advance of the school year as was that here sued on, and sound policy requires that the terms should be so definitely fixed and made known that all interested may have full and reliable information,' but is also of the opinion that sound policy requires that the lawmaking power should prescribe that, when the minds of the parties meet as to the terms of such contract, the same should be reduced to writing and signed, before the school corporation shall be held liable in damages for the subsequent violation thereof by the officer." It is not improbable that this expression, added to the growing litigation upon teachers' contracts, had much to do with the enacting of the law under consideration. The purpose of the Legislature is apparent. The language of the statute is clear. It is not open to construction. It furnishes the best means of its own exposition. *Board of Commissioners, etc., v. Davis*, 136 Ind. 503, 36 N. E. 141, 22 L. R. A. 515; *Boyd, Adm'r v.*

72 N.E.—11

Brazil, etc., Co., 25 Ind. App. 161, 57 N. E. 732. The provisions that the contract shall be in writing and signed by both parties are mandatory. *Stuart v. City of Cambridge*, 125 Mass. 102; *Starkey v. City of Minneapolis, etc.*, 19 Minn. 203 (Gil. 166). A teacher cannot recover from a school corporation for the breach of an executory contract unless it is so full and definite as to be capable of specific enforcement. *Fairplay School Township v. O'Neal*, 127 Ind. 95, 26 N. E. 686. The application of appellant for employment and the resolution of the school board as set out in the complaint do not tell when the schools in the town of Petersburg began in the year 1901—neither the day nor the month—nor the grade appellant was to teach, nor the pay she was to receive. It cannot be claimed that they are definite in these essentials to a complete contract. "It is frequently provided by statute that all public contracts shall be in writing. This being a mandatory provision and restrictive of the power of the corporation to contract it must be complied with else the contract is invalid." *Beach on Public Corporations*, § 253. See, also, sections 251, 252, 691, 697, 1136. A township trustee is a special agent possessing statutory powers only, and is without general authority to bind the township. He can bind it when he does what the statute authorizes, and does it in the manner prescribed. *Peck-Williamson, etc., Co. v. Steen, etc.*, 30 Ind. App. 639, 66 N. E. 909, and authorities. A school trustee, like the board of county commissioners, whose duties are defined and prescribed by statute, cannot do any act which is not either expressly or impliedly authorized by statute. *Board, etc., v. Fertich*, 18 Ind. App. 1, 46 N. E. 699; *Gavin v. Board, etc.*, 104 Ind. 201, 3 N. E. 846; *Board, etc., v. Barnes*, 123 Ind. 403, 24 N. E. 137; *First Nat. Bank of Marion v. Adams School, etc.*, 17 Ind. App. 380, 46 N. E. 832; *Board of Commissioners v. Gillies*, 138 Ind. 667, 38 N. E. 40.

It is a well settled rule of law that, where the statute prescribes the manner of exercising power, the manner prescribed must be adopted. *Wrought Iron Bridge Co. v. The Board*, 19 Ind. App. 676, 48 N. E. 1050; *Dillon's Munc. Corporations*, § 449; *Platter v. Board, etc.*, 103 Ind. 360, 2 N. E. 544. In *Platter v. Board, supra*, it is said that, where a statute prescribes a mode of exercising a power, that mode must be adopted, for there is no inherent right of discretion in corporate bodies. Persons contracting with school trustees are bound to take notice that their powers are limited by law. *Honey Creek Township v. Burns*, 119 Ind. 212, 21 N. E. 747; *Bloomington School, etc., v. National School Co.*, 107 Ind. 48, 7 N. E. 760; *City of Laporte v. Gamewell, etc., Co.*, 146 Ind. 475, 45 N. E. 588, 35 L. R. A. 686, 58 Am. St. Rep. 359; *State ex rel. Shuler v. Board of Com'rs*, 147 Ind. 225, 46 N. E. 525. The following cases by analogy hold the con-

tract in suit indefinite and incomplete. *Fair-play School v. O'Neal*, supra. The trustee promised to pay "good wages." The court held that such a contract was not sufficiently definite to enforce. The case of *Atkins v. Van Buren School Township*, 77 Ind. 447, was a suit by a teacher on what he claimed as a contract to teach a school, against appellee's school township. The contract on which suit was brought is in words and figures as follows: "It is hereby contracted and agreed, between John Steed, township trustee of the township of Van Buren, County of Clay, and State of Indiana, and William H. Atkins, a regularly licensed teacher of said county, that the said William H. Atkins shall superintend the school in Harmony, and teach Grade No. 1 in said school in said township, for the term of — weeks, of five days each, for the sum of \$4.50 per day, commencing on the — day of September, 1877. And the said William H. Atkins agrees faithfully," etc. "The said John Steed, township trustee, agrees to keep the school house in said district in good repair, * * * and pay the said William H. Atkins the sum of — dollars, the same being the amount of wages at \$4.50 per day, as above agreed upon, to be paid upon the receipt of his report as teacher of said school," etc. Signed by the township trustee and teacher. The court said: "The complaint shows on its face that neither verbally nor in writing had the parties come to a complete understanding." Held not to be error to sustain demurrer to complaint based on that contract. The case of *Jackson, etc., v. Grimes* (Ind. App.) 56 N. E. 724, was by a teacher (Grimes), to recover damages for an alleged breach of contract. He averred that he contracted with the trustee of said Jackson township to teach No. 4 in said township for and during the school year 1897-98 upon the same terms and conditions as those upon which he taught during the school year 1896-97. The court said that a contract, to be enforceable, or sufficient upon which an action for damages for its breach may be based, must be so full and definite as to be capable of specific performance. * * * A contract between a township trustee and a teacher by which the latter agrees to teach a certain school implies that he is to receive compensation for such service; but, if the contract is silent as to what that compensation is to be, it is not such a contract as can be enforced either against the teacher or the trustee. The court said: "It is clear that the minds of the parties never met as to the terms of the contract, and that no contract was ever made between them." The case of the *Wrought Iron Bridge Company v. Board of Commissioners*, supra, forcefully illustrates the rule that corporate bodies deriving their authority from the statute must observe the methods prescribed by the statute. It was an action against the board of commissioners for balance due

on a bridge claim, where the bridge was built across a stream forming a boundary line between two counties. The question grew out of the irregularity of the proceedings in letting the contract to build the bridge. In the course of the opinion the court say: "If the statute prescribes a mode in which the power shall be exercised, and the method prescribed is disregarded or not substantially followed, and a contract entered into, such contract is void; and, although the bridge may have been built, and been worth the price agreed upon, and was accepted and used by the two counties, yet the contract, being void, could not be ratified and made binding." Illustrative cases might be multiplied, and particulars pointed out in which the instruments of writing made the basis of action failed to show a meeting of the minds of the contracting parties, but further elaboration is not deemed necessary. The facts do not show a substantial compliance with the statute. See *Claude Lee v. York School Tp.* (present term of the Supreme Court) 71 N. E. 956.

Judgment affirmed.

(33 Ind. App. 687)

BOWEN v. WOODFIELD. (No. 4,866.)

(Appellate Court of Indiana, Division No. 1.
Oct. 27, 1904.)

**BILLS AND NOTES—ACTIONS—PLEADINGS—AL-
TERATION—SUFFICIENCY OF AVERMENT—AP-
PEAL—DISPOSITION OF CASE—REVERSAL.**

1. In an action on a note, an answer admitting that defendant "signed" the note sued on, but averring that thereafter, without his knowledge or consent, the note was materially altered, is insufficient as a statement of a defense, as the averment of the signature is not equivalent to an allegation of execution, which includes delivery, and, for anything in the answer to the contrary, defendant may have consented to the alteration after signature, but before delivery.

2. Plaintiff, by replying, does not waive an exception reserved to the court's action in overruling his demurrer to a paragraph of the answer.

3. A reversal of a judgment for error in overruling a demurrer to an answer alleging an alteration of the note sued upon, after its signature by defendant, but failing to allege whether the note had been delivered or not, is not within the statutory inhibition against a reversal, where the merits of the case have been fairly tried and determined.

Appeal from Superior Court, Tippecanoe County; Henry H. Vinton, Judge.

Action by Abner T. Bowen against John Woodfield. From a judgment for defendant, plaintiff appeals. Reversed.

Leander D. Boyd, Frank B. Everett, and Thomas Everett, for appellant. Wilson & Quinn, for appellee.

ROBINSON, J. Suit by appellant, as assignee, on the following note: "Montmorenci, Ind., Oct. 14, 1890. One year after date I promise to pay to the order of Bernard and

¶ 2. See Pleading, vol. 39, Cent. Dig. §§ 1403, 1406.

Hunter, one hundred and forty-four dollars at the First National Bank, Lafayette, Ind. Value received interest at eight per cent per annum after due until paid. [Signed] John Woodfield, Chas. Woodfield. \$144.00 due 10/14-17/91." Indorsed: "Without recourse. Bernard and Hunter." It is averred that the payees, for a valuable consideration, and before maturity, indorsed and delivered the note to appellant. The action was afterwards dismissed as to Charles Woodfield. Appellee answered in eight paragraphs, the first being the general denial. Separate demurrers were overruled to each paragraph of answer except the first, and to the second and third paragraphs of reply demurrers were sustained. The first paragraph of reply, the general denial, was withdrawn, and, appellant refusing to plead further, judgment was rendered in appellee's favor.

It is first argued that the demurrer to the third paragraph of answer should have been sustained. Appellee's verified third paragraph of answer "admits that he signed the note sued on, but says that thereafter, and without the knowledge or consent of the defendant, said note was materially altered, in this: that the following words appearing in said note, to wit, 'First National Bank, Lafayette, Ind.,' were written on the face of the said note after defendant had signed the same; wherefore" he asks judgment for costs. All this paragraph of answer undertakes to do is to allege that the alteration was made after appellee had signed the note. This is not equivalent to an allegation that the alteration was made after the note was executed, which includes both the signing and the delivery. The alteration may have been made after he signed it, without his knowledge or consent, but when the note was delivered he may have known the alteration had been made, and consented that it might stand in that form, as the signing and delivery of the note were separate and distinct acts. A similar paragraph of answer was held insufficient in *Emmons v. Meeker*, 55 Ind. 321. See, also, *Prather v. Zulauf*, 38 Ind. 155.

The error in overruling the demurrer to this paragraph of answer was not cured by any averments contained in the reply. The case is here on the pleadings. An exception was reserved to the court's action in overruling the demurrer to this paragraph of answer. By replying appellant did not waive his right to still question this ruling. This is not a case where the demurrer was sustained to a good paragraph while the same defense could have been made under another paragraph that remained in. The facts averred were not sufficient to bar appellant's action. Nor is this a case within the statutory inhibition against a reversal where the merits of the case have been fairly tried and determined. The question presented is one of law, not of fact. When the court overruled the demurrer to this

paragraph of answer it held as matter of law that, if appellee should establish the fact that the alteration was made after he signed the note, he would be entitled to judgment. The word "signed" is not synonymous with the word "executed," although the word "executed" in a pleading which expressly avers that the instrument was not delivered may be synonymous with the word "signed." *Ricketts v. Harvey*, 78 Ind. 152.

Judgment reversed.

34 Ind. App. 14)

COVAULT et al. v. SANDERS. (No. 4,949.)

(Appellate Court of Indiana, Division No. 1.
Nov. 3, 1904.)

APPEAL—REVIEW OF ORDER DENYING MOTION TO SET ASIDE DEFAULT JUDGMENT—INSUFFICIENCY OF BILL OF EXCEPTIONS.

1. Upon an application to set aside a judgment taken by default, counter affidavits and other evidence given by deposition or orally may be considered on the question of the applicant's right to the relief asked, and an order denying the motion cannot be reviewed on appeal where the record fails to show that it contains all the evidence on such issue.

Appeal from Circuit Court, Wells County; E. C. Vaughn, Judge.

Action by Nancy Sanders against William M. Covault and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Dailey, Simmons & Dailey, for appellants. Mock & Sons, for appellee.

ROBINSON, J. Appellee sued appellants to recover a sum of money averred to be purchase money, and asked that the same be declared a lien upon land. Appellants were served with process September 25, 1902. On November 17, 1902, they were defaulted, and on February 2, 1903, judgment was rendered against them, the amount declared a lien upon certain lands, and the lands ordered sold in default of payment of the sum found due. On February 9, 1903, appellants filed their affidavit and motion to set aside the default and judgment. This motion was overruled, as was also a motion for a new trial, afterwards filed. The only question argued is the denial of the motion to set aside the default and judgment. A bill of exceptions contains appellants' affidavit and motion to set aside the default, but does not state, nor is it otherwise shown, that that was all the evidence given. For this reason appellee's counsel argue that no question is presented.

In an application to be relieved from a judgment taken by default counter affidavits or countervailing evidence as to the truth of the facts relied on as a defense are not admissible, but in respect to the grounds on which relief is asked evidence may be heard on both sides, and the application may be tried upon affidavits, depositions, or oral testimony. *Lake v. Jones*, 49 Ind. 297; *Dob-*

bins v. McNamara, 113 Ind. 54, 14 N. E. 887, 3 Am. St. Rep. 626. Whether the party making the application is entitled to the relief asked was a question for the determination of the court from all the evidence given for and against the application. We cannot presume that the affidavit set out in the bill was the only evidence given. In the absence of an affirmative showing to the contrary, we are bound to presume, in favor of the court's ruling, that other evidence was heard contradicting the affidavit. If, in fact, the affidavit was all the evidence given, the bill should so state, but this it fails to do. We cannot review the evidence upon which the application was denied unless the record affirmatively shows that it contains all the evidence given below. See *Beatty v. O'Connor*, 106 Ind. 81, 5 N. E. 880; *Williams v. Grooms*, 122 Ind. 391, 24 N. E. 158; *Nash v. Cars*, 92 Ind. 216; *Wells v. Bradley, etc., Co.*, 3 Ind. App. 278, 29 N. E. 572; *Masten v. Indiana Car, etc., Co.*, 25 Ind. App. 175, 57 N. E. 148; *Dobbins v. McNamara*, supra.

Judgment affirmed.

(33 Ind. App. 669)

FOSTER v. LEININGER. (No. 4724.)

(Appellate Court of Indiana, Division No. 2.
Oct. 25, 1904.)

CONTRACTS — CONDITIONS PRECEDENT — NECESSITY OF PERFORMANCE — REPUDIATION — ACTIONS — PARTIES — STRANGERS BENEFICIALLY INTERESTED — PLEADING — AVERMENT OF ACCEPTANCE.

1. Where defendant agreed to construct a telephone line to plaintiff's residence, provided plaintiff erected at his own expense suitable poles upon which to attach the line from the highway to his residence, but afterwards repudiated the contract, it was not necessary for plaintiff, in order to maintain an action for damages for breach of the contract, to allege or prove that he had erected the poles.

2. Where a contract for the release of a right of way to erect a telephone line was given in consideration of the placing of telephones in the houses of the persons giving the release, and also in plaintiff's house, plaintiff could sue for failure to place a telephone in his house, although he was not a party to the contract, and no consideration passed from him to the parties bound.

3. It is not necessary for a party for whose benefit a contract has been made to aver an acceptance thereof in order to maintain suit thereon, since an acceptance is implied from bringing the suit.

4. An election to exercise an option in a contract by virtue of which plaintiff was entitled to have a telephone placed in his house at any time he should designate, prior to a certain date, was sufficiently manifested by a demand of performance of the contract.

Appeal from Circuit Court, Jackson County; T. B. Buskirk, Judge.

Action by John Q. Foster against Charles Leininger. From a judgment for defendant, plaintiff appeals. Reversed.

O. H. Montgomery, for appellant. Seba A. Barnes, for appellee.

WILEY, J. The only question presented by this appeal is the sufficiency of appel-

lant's amended complaint, to which a demurrer was sustained in the trial court. The material facts pleaded are that in February Oliver M. and Edward E. Foster were the owners of a body of real estate in Jackson county, through and along which a public highway ran; that on said day they conveyed and released in writing to appellee the right to construct, maintain, and operate a telephone line along and upon the said highway; and that appellant was on said day, and still is, the owner of a farm, with dwelling house thereon, in which he resided and still resides, in said county, which farm is situate near to the Seymour, Uniontown, and Crothersville public highway. It is alleged that on said day appellee was the owner and operator of a telephone exchange in the city of Seymour, with a franchise and right to operate the same, and was engaged in operating said telephone exchange, which was connected with the principal business houses and private residences in said town, and was also connected with other telephone lines, extending to various towns in said counties, and to many other cities and towns in the state of Indiana; that the patrons of said telephone system were entitled to communication, by means thereof, with all patrons of the city of Seymour and the patrons of all other lines in said county without payment of any additional charges, other than regular monthly rates, which right and privilege was then and there of great value. It is further averred that on said day, as a part of the consideration for the grant executed by Oliver M. and Edward E. Foster to appellee, he executed and delivered to them a certain instrument in writing, whereby he agreed to place in the residence of appellant a telephone, and connect the same with said Seymour Telephone Exchange, and granted to him all the rights and privileges of other patrons and subscribers, and agreed to maintain and keep it in good repair, together with the connections therefor, for a period of five years, for which service appellant was to pay \$1 per month at the expiration of each month; that he agreed to put in said telephone for appellant and make said connection on or before June 1st of said year, and that, for a valuable consideration passing from appellee to the said Oliver M. and Edward E. Foster, they executed said agreement for the use and benefit of appellant, and that appellee received from them said grant and release in writing, and that he accepted all the provisions of said contract so made for the use and benefit of appellant; that on the 13th day of May, and afterward, appellant notified appellee of his acceptance of the terms of said contract, and requested appellee to place said telephone in his residence, and to connect the same with the said telephone exchange, as he had agreed to do, and appellant thereupon expressed his readiness and willingness to pay the telephone rentals agreed upon, and that he was

on the 1st day of June, and at all times before, ready and willing to comply with all the terms and conditions of said contract on his part, but that the defendant refused to comply with the conditions imposed upon him, and repudiated said agreement, and would not perform the conditions therein provided for him to perform, and refused to place said telephone in appellant's residence, or to make connection between the same and the telephone exchange in Seymour, and that he still so refuses to do; and that, by reason of appellee's refusal to perform the conditions of the contract to be performed by him, appellee will be deprived of the privileges and benefits accruing to him under said contract for the term of five years, all to his damage in the sum of \$500.

The contract relied upon is made an exhibit to the complaint, and is as follows: "As a part of the consideration for a release of a right of way to erect and maintain a telephone line along a public highway adjoining the premises of Oliver M. Foster and Edward E. Foster in Jackson and Vernon townships in Jackson county, Indiana, executed on this date by them to the undersigned, the undersigned Charles Leininger hereby agrees to place in each of the residences of said Oliver M. Foster and Edward E. Foster and John Q. Foster a telephone, and connect the same in proper manner with the Seymour Telephone Exchange, and grant to each of them all the rights and privileges of other subscribers of the Seymour Telephone Exchange, and to maintain and keep in good repair said telephones, with their connections for a period of five years from this date in consideration of the payment on the part of each of them to him of the sum of one dollar per month to be paid at the end of each calendar month, such telephone to be placed and connected at any time designated by either or all of said parties on or before the 1st day of June, 1902, provided that said John Q. Foster shall at his own expense erect suitable poles upon which to attach telephone lines, extending from the main line of the Seymour, Uniontown and Crothersville Highway to his present residence, dated this 13th day of February, 1902. Charles Leininger."

One of the objections urged by counsel for appellee to the complaint is that it is not enforceable at the suit of appellant, because it is not averred that he had erected, at his own expense, poles upon which to string wires. In this connection it is argued that the erection of the poles was a condition precedent to his right to demand the placing of the telephone in his house, and connecting it with wires leading to the exchange. This would certainly be a correct statement of the law, if appellee had performed all the conditions of the contract on his part. But it is averred that appellee repudiated the contract, and refused to put in the telephone and properly connect it. The law does not

require a useless thing to be done, and it would have been useless for appellant to have erected the poles, in the face of the fact that appellee had repudiated the contract. The complaint does allege that appellant was ready and willing to perform all the conditions imposed upon him. It is a firmly established rule of law that it is unnecessary to allege performance, or even readiness to perform, on the part of the plaintiff, when it is shown that the defendant has repudiated the contract, or affirmatively refuses to perform it, or denies liability under it. *People's Building & Savings Ass'n v. Reynolds*, 17 Ind. App. 453, 46 N. E. 1008, at page 457, 17 Ind. App., page 1009, 46 N. E., and authorities there cited. The requirements of this rule are fully complied with by the averments of the complaint.

Another objection urged to the complaint is that the contract upon which it is based is not mutual. In determining the mutuality of a contract, it is important to look to the reciprocal conditions imposed upon the contracting parties. In this case appellant was not a party to the contract, and whatever his rights are, if any, exist by virtue of the fact that appellee, upon certain expressed conditions, agreed, with others, to place a telephone in his house and connect it with a telephone exchange. This, however, would not change the relations of the parties, for the rule of law is that a contract between two parties, made for the benefit of another, may be enforced by such other party, although he was not a privy to it, and no consideration passed from him to the party bound. *McCoy v. McCoy et al.* (Ind. App.) 69 N. E. 193, and authorities cited; *Russell v. Pittsburgh, etc., R. R. Co.*, 157 Ind. 305, 317, 61 N. E. 678, 682, 55 L. R. A. 253, 87 Am. St. Rep. 214; *Ransdel v. Moore*, 153 Ind. 405, 53 N. E. 767, 53 L. R. A. 393. This is also the rule in the federal courts. *Hendrick v. Lindsay*, 98 U. S. 143, 23 L. Ed. 855; *Union Life Ins. Co. v. Hanford*, 143 U. S. 190, 12 Sup. Ct. 437, 36 L. Ed. 118; *City of Superior v. Ripley*, 138 U. S. 93, 11 Sup. Ct. 283, 34 L. Ed. 914; *Central Trust Co. v. Berwind-White Coal Co.* (C. C.) 95 Fed. 392. Neither is it necessary for the plaintiff, for whose benefit a contract has been made, to aver an acceptance of the contract, for an acceptance is implied from bringing a suit upon it. *McCoy v. McCoy et al.*, supra; *Coppage v. Gregg et al.*, 127 Ind. 363, 26 N. E. 903. The contract granted to appellant an option to take the telephone upon the terms specified. It gave him the privilege to exercise this option prior to or on the 1st day of June, 1902, and this he did by demanding a performance of the contract on the part of appellee.

Counsel have ably discussed the question as to whether or not the erection of a telephone line upon a rural highway constitutes an additional burden, for which the abutting owner of the fee in the highway is entitled to compensation; but we do not see any ne-

cessity to decide the question, for the reason that it is not pertinent.

The complaint states a cause of action, and the demurrer should have been overruled. Judgment reversed, and the trial court is directed to overrule the demurrer to the complaint.

(34 Ind. App. 667)

CULLOP v. CITY OF VINCENNES. (No. 4,730.)*

(Appellate Court of Indiana. Oct. 23, 1904.)

EXECUTORS AND ADMINISTRATORS—PAYMENT OF TAXES—PROCEEDINGS FOR COLLECTION—SETTING ASIDE ACCOUNT.

1. A claim for taxes is not required to be filed against a decedent's estate, it being the duty of the executor or administrator to take notice of and pay the tax before his final settlement.

2. Burns' Ann. St. 1901, § 8587, provides that, if the representative of a decedent's estate neglects to pay the taxes due from such estate, the county treasurer shall present to the court a brief statement showing the fact and the amount of such delinquency, and such court shall issue an order commanding such delinquent to show cause why such taxes should not be paid. *Held* that, city officers being required to perform the duties devolved on corresponding county officers (Burns' Ann. St. 1901, §§ 3621, 3672), it is the duty of the city treasurer to file such statement and apply for such order to enforce payment by an administrator of a tax due from a decedent's estate to a city.

3. A final settlement of a decedent's estate without payment of or provision for taxes is illegal, within Burns' Ann. St. 1901, § 2558, and may be set aside for the purpose of compelling its payment.

4. A county treasurer should file a verified statement in the probate court of the amount due by an estate for taxes, and, when filed, a rule to show cause should issue against the executor of the estate, under Burns' Ann. St. 1901, § 8587; and, in answer to such rule, it devolves upon the executor to establish the illegality of the alleged tax, or such other facts as justify the nonpayment thereof.

Wiley, J., dissenting.

Appeal from Circuit Court, Knox County; O. H. Cobb, Judge.

Proceedings by the city of Vincennes against William A. Cullop, administrator, for the collection of taxes. From the judgment rendered, defendant appeals. Affirmed.

Cullop & Shaw, for appellant. Emison & Moffett, for appellee.

ROBY, P. J. On April 1, 1898, the administrators of the estate of Charles Graeter, deceased, had in their hands \$28,000 of the moneys of said estate, and refused to return the same for taxation, saying that a settlement was soon to be made. The assessor thereupon set down and assessed said money to said administrators for taxation in accordance with the provisions of the statute (section 8461, Burns' Ann. St. 1901). On May 16, 1898, said administrators filed a final settlement report. Notice was given, and the

same was set for hearing on June 16th. Prior to that day the treasurer of Knox county and the treasurer of the city of Vincennes each filed petitions asking the court to require the administrators to pay the taxes assessed on said property for the year 1898. Said administrators demurred to each of said petitions; the court sustained the demurrers; and, declining to plead further, a judgment was rendered that the petitioners take nothing. Thereupon said report showing distribution was approved, and the estate declared finally settled. On June 4, 1900, appellant was appointed administrator de bonis non of said estate, and on September 9, 1901, filed his final report, showing that he had collected \$479.33, and had on hand for distribution \$362.98, which report was set for hearing on September 30th. On October 5th following, appellee filed an instrument in form (omitting the caption and verification) as follows: "Estate of Charles Graeter, Deceased, William A. Cullop, Administrator de bonis non, To the city of Vincennes, Indiana, Dr.: To taxes on personal property for year 1898, \$409.24." This instrument was filed in the clerk's office of the Knox circuit court, and was signed and sworn to by the treasurer of the city of Vincennes. Appellant refused to allow the claim. It was placed on the trial docket. He filed an answer in two paragraphs, the first of which was a general denial, and the second a plea of former adjudication. Appellant replied in two paragraphs, the first of which was a general denial; it being averred in the second that, when the prior judgment set up in the answer was rendered, the tax was not due, and that it has since become due, and is unpaid. The cause was tried by the court, evidence introduced, finding and judgment against appellant for \$409.25, from which judgment this appeal is taken.

It was the duty of the administrators to list for taxation property in their possession on the 1st day of April. Section 8420, section 8421, subd. 10, and §§ 8459, 8460, Burns' Ann. St. 1901. A claim or charge is not required to be filed against an estate, but it must be taken notice of by the administrator or executor and paid without being filed; and, if he proceeds to finally settle the estate without the payment of such tax claim, he does so at the peril of having such final settlement set aside. Taxes are not claims which the law of this state either requires or intends shall be filed against the decedent's estate. The duty rests upon the administrator or executor to pay the tax. *Graham v. Russell*, 152 Ind. 186, 52 N. E. 806. The administrator is a creature of the law. He reports to, and is under the supervision of, the circuit court. It is his duty to pay the taxes due upon the property of his decedent. In case of his neglecting to pay any installment of taxes when due, when there is money enough on hand to pay the same, the county treasurer "shall present to the circuit court

*1. See *Executors and Administrators*, vol. 23, Cent. Dig. § 776.

*Rehearing denied. Transfer to Supreme Court denied.

or other proper court of the county * * * a brief statement in writing signed by himself as such treasurer, setting forth the fact and amount of such delinquency, and such court shall at once issue an order directed to such delinquent commanding him to show cause, within five days thereafter, why such taxes, penalty and costs should not be paid," etc. Section 8587, Burns' Ann. St. 1901. Such statement may be made by the city treasurer, who is required to perform the duties devolved upon the corresponding county officer. Section 8672, Burns' Ann. St. 1901; section 3621, Burns' Ann. St. 1901.

While the tax upon property assessed in April, 1898, was not due in the following June, yet the court, having had its attention called to the fact that such assessment had been made, should have directed the administrators to retain sufficient funds to meet the obligation upon its maturity.

A final settlement made without payment or provision for the payment of the tax is illegal, within the meaning of section 2558, Burns' Ann. St. 1901, and it may be set aside for the purpose of compelling its payment. *Graham v. Russell*, supra. The failure of the court to protect the public interest in connection with such final settlement does not estop the state from thereafter collecting the tax. The manner in which to procure the discharge of a tax lien was forcefully stated in the opinion delivered by Judge Jordan in the carefully considered case of *Beard v. Allen*: "Nothing short of the payment of taxes, interest and penalties can serve to discharge or release the property of the owner charged therewith from the liability imposed by the statute." *Beard v. Allen*, 141 Ind. 243, 39 N. E. 665, 40 N. E. 654; *Graham v. Russell*, supra. "The administrator de bonis non has the same powers possessed by the original administrator, and is governed by the laws for the settlement of decedents' estates." Burns' Ann. St. 1901, § 2395; *Barnett v. Vanmeter*, 7 Ind. App. 45, 33 N. E. 666; *Wahl v. Schierling*, 11 Ind. App. 696, 39 N. E. 533.

Upon the filing of the verified statement by the treasurer, a rule to show cause should have issued against appellant. In answer to such rule, it devolved upon him to establish the illegality of the alleged tax, or such other facts as might be relied upon to justify its nonpayment. "The taxes assessed upon any property in this state shall be presumed to be legally assessed until the contrary is affirmatively shown." Section 8642, Burns' Ann. St. 1901; *Brunson v. Starbuck* (Ind. App.) 70 N. E. 163. This is the procedure contemplated by section 8587. The expressions indicating a different practice contained in the opinion in *Lang v. Clapp*, Adm'r, 103 Ind. 17, 2 N. E. 197, are not germane to the facts presented in that case. The decision was not rested upon them, and they do not correctly express the law as applicable to the section as amended in 1897. In the opinion it is stated that the statute requires the

county treasurer to set forth the facts in his written statement. In the section as it now stands, he is required to set forth "the fact and amount of such delinquency."

Those who take property, real or personal, upon the death of its owner, take by virtue of the law, and through the favor of the state. That they should, in return, refuse to pay, or pay grudgingly, a tax essential to the maintenance of government and the enforcement of law, is an ideal illustration of ingratitude and cupidity.

The practice followed in this case was incorrect, but the right result was reached, and the error in the mode of procedure was therefore harmless. *Gray v. Robinson*, 90 Ind. 527-532; *Logan v. Kizer*, 25 Ind. 393.

The cases cited in argument by the appellant's learned counsel are not in point. Many of them were decided prior to the adoption of the statutes relative to taxation now in force, others relate to the special assessment of omitted property, and in none of them was the duty of an administrator to pay taxes assessed upon funds in his hands as such administrator involved or considered.

Judgment affirmed.

BLACK, C. J., and ROBINSON and COMSTOCK, JJ., concur. WILEY, J., dissents. MEYERS, J., not participating.

WILEY, J. I am unable to agree with the conclusion reached by the majority of the court in the prevailing opinion. The point of difference between us is as to the sufficiency of the complaint. It is my judgment that the cause of action stated in the claim filed by appellee against the decedent's estate is not sufficient upon which to base a recovery. The conclusion reached by my associates is in conflict with the decisions of our Supreme Court, if I rightly interpret the questions therein decided.

So far as I am advised, there is no statute authorizing a city treasurer to prosecute a claim in the circuit court against an estate to enforce collection of delinquent and unpaid taxes against such estate; but conceding, without deciding, that he possessed such authority, my first inquiry is to determine whether appellee has stated any cause of action in the claim filed, which must be treated as his complaint. It is earnestly contended that the statement of the claim is sufficient to warrant a recovery; that it is not merely technically defective, but radically and fatally so, by reason of the theory upon which it is based, and the omission of necessary facts essential to the existence of a cause of action. A proceeding to enforce the collection of taxes is essentially different from that to enforce a debt upon contract. It is the settled law in this state that "a tax is not an ordinary debt. It is not founded upon contract, expressed or implied." *Gallup, Exec., v. Schmidt, Treasurer*, 154 Ind. 196, 56 N. E. 443, at page 215, 154 Ind., page 449,

56 N. E.; *De Pauw v. City of New Albany*, 22 Ind. 204; *Richards v. Stogsdel*, 21 Ind. 74. In *Shaw v. Peckett*, 26 Vt. 482, it is held that the assessment of taxes does not create a debt that can be enforced by suit. Preliminary to the collection and payment of taxes, there must be a valid assessment upon the property that is assessable. It seems to me, therefore, that, before any department or branch of the civil government can proceed to require a citizen to pay taxes, it must first show a lawful assessment. The rule prevails in this jurisdiction that a statement of a claim against an estate must state affirmative facts which show prima facie that the estate is lawfully indebted to the claimant. While counsel for appellees do not concede that it is necessary for the claim in this cause to show affirmatively that a lawful assessment was, in the first instance, made, they do beg the question, to some extent, by saying that an examination of the evidence will show that it was in fact made. But we cannot look to the evidence to determine the sufficiency of a pleading, and the claim filed here must be regarded as appellee's pleading. We are not advised by the claim whether the property of the estate was assessed in the regular way, or whether it was assessed at all, or whether this is a proceeding to collect taxes upon the assessment of property omitted from taxation, and which would constitute a special and an exceptional assessment. *Vogel et al. v. Vogler*, 78 Ind. 353. In the case last cited, Vogler, as treasurer of Bartholomew county, brought an action against Vogel, as guardian, and his wards, to recover for unpaid taxes. The complaint averred that on a specified day \$5,000 came into the guardian's hands, which belonged to his wards; that the said guardian and wards resided in said county, and that said money was liable to taxation for the years 1872 to 1873, inclusive; that neither the guardian nor the wards gave in said property for taxation during said time, and that no taxes were assessed or paid thereon; that, it appearing to the proper officers that said property had not been assessed for taxation during said time, the "proper authorities" did, in January, 1879, assess the same for all of said years; that the same was duly placed on the tax duplicate of said county for collection, and the same was duly placed in the hands of the treasurer for collection. A schedule of the taxes alleged to have been assessed against said money for each of the said years is embodied in the complaint. It is then averred that the several amounts assessed were due and unpaid, that the said wards had no personal property that could be seized to satisfy the same, and that the guardian had failed and refused to pay the amount assessed, after demand upon him so to do. It was further averred that appellee, as treasurer, had a lien on the funds in the hands of the guardian for the payment of the same, and

asked that the guardian be required to pay said taxes out of any money in his hands. In that case it will be observed that a succinct statement is made of the manner in which the taxes were assessed; that the guardian and his wards were residents of the county, and that the money was taxable therein; that the taxes were assessed thereon by "the proper authorities"; that a demand had been made for payment, which was refused; and that there was no personal property subject to seizure to satisfy the same. With all these averments, the Supreme Court held that the complaint did not state any cause of action. Under section 8587, Burns' Ann. St. 1901, where an administrator or other fiduciary fails to pay any installment of taxes when due, it is made the duty of the county treasurer to present to the proper court a brief statement, in writing, setting forth the fact and amount of such delinquency, upon which the court shall issue an order, directed to such delinquent, commanding him to show cause why such taxes should not be paid. In a proceeding under that statute, sufficient facts must be stated to show a valid and legal assessment, and the sufficiency of the statement can be tested by demurrer or by an assignment of error. *Lang, Treasurer, v. Clapp, Adm'r*, 103 Ind. 17, 2 N. E. 197. In the case at bar there is only the naked statement that the estate is indebted to the city of Vincennes for "taxes on personal property for the year 1898." Under the authorities, no cause of action is stated.

The judgment should be reversed.

(35 Ind. App. 709)

CHICAGO & S. E. RY. CO. v. POTTS. (No. 4,833).*

(Appellate Court of Indiana, Division No. 2, Oct. 11, 1904.)

APPEAL—DAMAGES—MEASURE—FAILURE TO EXCEPT TO RULE—AFFIRMANCE.

1. Where plaintiff was entitled to recover greater damages than she was awarded, but she failed to except to the ruling, the judgment will be affirmed.

Appeal from Circuit Court, Parke County; A. F. White, Judge.

Action by Emma S. Potts against the Chicago & Southeastern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

U. C. Stover, for appellant. Elwood Hunt and D. P. Williams, for appellee.

COMSTOCK, J. The questions presented in this case are decided in *Chicago & Southeastern Railway Company v. Mary C. McEwen* (at the present term of this court) 71 N. E. 926. By the measure of damages fixed in the appeal of said case appellee would be entitled to a judgment for an amount larger

*1. See Appeal and Error, vol. 2, Cent. Dig. § 1588, to Supreme Court denied.

than that awarded by the trial court. She, however, having taken no exception, the judgment is affirmed upon the authority of said case.

(35 Ind. App. 467)

INDIANAPOLIS ST. RY. CO. v. SEERLEY.
(No. 5,030.)*

(Appellate Court of Indiana, Division No. 2.
Oct. 28, 1904.)

**REMAND AFTER CHANGE OF VENUE—REVIEW—
PERSONAL INJURIES—JURISDICTION—INSTRUCTIONS—EVIDENCE—INCONSISTENT FINDINGS.**

1. The ruling on a motion to remand a cause to the court from which the venue had been changed should be questioned by making it a reason for a new trial rather than by separate assignment of error.

2. That the court has no jurisdiction to try the case cannot be raised by demurrer where want of jurisdiction does not appear on the face of the complaint.

3. In an action for personal injuries from alleged negligence it was proper to instruct that "care is required to be in proportion to the danger to be avoided and the fatal consequences that might result from the neglect."

4. In an action for injuries to a person on the track of an electric street railway, an instruction that the motorman must use diligence to avoid danger to a person on the track, and that the car must be stopped, if there is time to stop it, where the person is in a dangerous position, and if there was time, in the exercise of ordinary care, for a motorman to have stopped the car after seeing, or after he was bound to see, with ordinary care, the dangerous position of the person on the track, and failed to check the speed of the car, then the defendant was guilty of negligence, is not objectionable in not properly stating the theory of "the last clear chance."

5. The distance within which a street car in motion may be stopped by the use of the brake is a question on which an expert witness may properly give an opinion.

6. In an action for injuries by collision with a street car, findings that the motorman sounded his gong when the horse first went on the track, and that up to that time there was no indication of danger, and that the motorman was in proper position, and paying attention, and should first have known that the buggy would not get off the track when the car was 40 feet from it, and the car could have been stopped with the utmost care within 35 feet, are not inconsistent with general verdict for plaintiff.

Appeal from Circuit Court, Shelby County;
Douglas Morris, Judge.

Action by Joseph Seerley against the Indianapolis Street Railway Company. Plaintiff had judgment, and defendant appeals. Affirmed.

F. Winter, Hord & Adams, and W. H. Latta, for appellant. W. J. Beckett, for appellee.

COMSTOCK, J. This action was brought to recover for personal injuries, and was begun by the filing of a complaint against the appellant in the Marion superior court. The damages alleged to have been sustained were suffered on account of injuries to appellee's wife, thereby depriving him of her services.

The accident happened on the 9th day of May, 1900. A buggy driven by appellee himself, in which the appellee and his wife were riding, collided with a street car on Massachusetts avenue, in the city of Indianapolis. The complaint upon which the case was tried was an amended complaint, filed after the case had been venued to Shelby county. The charging part is as follows: "That on or about May 9, 1900, defendant was operating one of its said electric cars over and upon Massachusetts avenue, a public highway of the city of Indianapolis, Indiana, and said car was in charge of and controlled by defendant's servants and employees, and acting in the line of their employment, at the time of the accident to this plaintiff hereinafter described. That said car was running southwest on the north track of defendant's double line of railway in said Massachusetts avenue, and said plaintiff was riding in a one-horse vehicle with his wife, Ruth Seerley, also southwest in and upon said Massachusetts avenue, and north of said defendant's said north track in the roadway of said avenue. That about half way between the points where East and Liberty streets intersect said avenue the horse drawing the vehicle in which this plaintiff and his said wife were riding shied to the south, and ran upon said north track of defendant's said railway; all without fault or negligence of this plaintiff or his said wife. That when said horse drew said vehicle upon said north track as aforesaid, and while said vehicle was upon said track, and before this plaintiff could remove said horse and vehicle from said track in the exercise of due care, defendant's servants and agents in charge of and controlling and operating said car negligently approached with said car this plaintiff's said horse and vehicle upon the same said track, and negligently ran said car against said vehicle and horse upon said track, and negligently collided with, struck, and crushed the said vehicle, and negligently threw and hurled this plaintiff's wife from and out of said vehicle with great force and violence upon the hard street and stones, and negligently injured the plaintiff's said wife, without fault or negligence on her part or negligence on the part of the plaintiff. That when this plaintiff's horse shied and ran upon the track of this defendant as aforesaid, and at all times while said vehicle and horse were upon said track, they were in plain view of defendant's motorman in charge of said car, and said motorman could and did see plaintiff's said horse upon said track; and after said horse and vehicle came upon said track as aforesaid said motorman could have stopped said car, in the exercise of due care, before striking said vehicle, but negligently failed to do so, but negligently ran said car against said vehicle, and thereby negligently injured said plaintiff's wife." A demurrer to this complaint was filed upon four grounds: First, that it did

* 2. See Negligence, vol. 37, Cent. Dig. § 6, 32.

*For opinion on rehearing, see 72 N. E. 1034. Transfer denied.

not state facts sufficient to constitute a cause of action; second, that the court had no jurisdiction of the person of the defendant; third, that the court had no jurisdiction of the subject-matter; fourth, that there was another action pending between plaintiff and defendant for the same cause of action. The demurrer was overruled, and the defendant filed an answer in general denial.

The amended complaint on which the case was tried was filed in the Shelby circuit court on the 7th day of November, 1902, being the twenty-ninth judicial day of the October term of said court. On the 22d day of December, 1902, which was the first judicial day of the December term of said Shelby circuit court, the defendant entered a special appearance, and filed its written motion to remand the cause to the Marion superior court for the reasons stated in said motion as follows: "(1) That on the 23d day of May, 1902, being the seventeenth judicial day of the special term of said court, the plaintiff filed his affidavit for a change of venue in this cause, and said motion was sustained, and said cause was sent to the circuit court of Shelby county, Indiana, but the transcript in said cause was not filed in the Shelby circuit court until the 7th day of October, 1902, and said change of venue was not perfected within the time limited by the court. (2) The defendant moves to remand said cause for the further reason that on the 23d day of May, 1902, the plaintiff filed his motion in the Marion superior court, where this cause was then pending, for a change of venue from said Marion county, which motion was by the court sustained, and the venue of said cause was changed to the Shelby circuit court, and 20 days was given plaintiff within which to perfect said change; and afterwards, on the 13th day of June, 1902, being the eleventh judicial day of the June term of said court, the plaintiff voluntarily appeared in said court after the time limited for perfecting said change, and appeared in said action, and filed his substituted complaint therein." The motion was overruled, and exception taken. The trial resulted in a verdict and judgment in favor of appellee for \$3,500. The jury returned with the general verdict answers to interrogatories.

The error relied upon in this court arises upon the rulings, respectively, of the court on the demurrer to the amended complaint, on the motion to remand, on the motion for judgment on the special answers to interrogatories, and on the motion for a new trial. The action of the court in refusing to remand is presented only by a separate specification of error. It should have been made a reason for a new trial. *Sidener v. Davis et al.*, 87 Ind. 342; *Bogue v. Murphy*, 28 Ind. App. 292, 61 N. E. 957; *Citizens' St. R. R. Co. v. Shepherd*, 29 Ind. App. 412, 62 N. E. 300. It is not claimed that the complaint does not state a cause of action, but the demurrer should have been sus-

tained because the trial court had no jurisdiction to try the cause. Demurrer for this cause will only lie when the defect appears upon the face of the complaint. It does not so appear. The demurrer was therefore properly overruled. *Eel, etc., Co. v. State*, 143 Ind. 231, 42 N. E. 617.

Appellant complains of the fifth and of the seventh instructions given to the jury. The fifth is as follows: "The law interprets care to be that degree of care which a person of ordinary prudence, under the particular circumstances, is presumed to exercise to avoid injury. Such care is required to be in proportion to the danger to be avoided and the fatal consequences that might result from the neglect." Against this instruction it is said that the jury had no right to consider the fatal consequences which might result from the neglect of any act. If care is to be exercised in proportion to the danger to be avoided (as has many times been held), there can be no error in the concluding part of the sentence, "and the fatal consequences that may result from the neglect." Ordinary care is defined in the above language in the following opinions: *Toledo, etc., Ry. Co. v. Goddard*, 25 Ind. 197; *Louisville, etc., Ry. Co. v. Schmidt*, 147 Ind. 638-640, 46 N. E. 344; *Illinois, etc., R. R. Co. v. Cheek*, 152 Ind. 677, 53 N. E. 641. Said seventh instruction is as follows: "(7) The law casts upon persons in charge of a street car the duty of vigilance in observing the tracks ahead of their cars and avoid danger by collision to persons on the track; and to avoid afflicting injury to a person upon the track in a dangerous position the car must be stopped if there is time to stop it, in the exercise of ordinary care, after the danger is observed, or should have been observed in the exercise of ordinary care. And in this case, if you shall find that there was time, in the exercise of ordinary care, for the motorman to have stopped the car after seeing, or after he was bound to see, in the exercise of ordinary care, the dangerous position of the plaintiff's wife upon the track ahead of the car, if you find she was in said position, and that he failed to exercise such care to check the speed of the car, but ran the car against said vehicle in which the plaintiff's wife was riding, and injured her as alleged in the complaint, then you are at liberty to find that the defendant was guilty of negligence in the premises." The objection made to this instruction is that it attempts to state the theory of the "last clear chance," and that under the decisions of this state the peril must be actually known to the motorman before he can be held negligent upon that theory; citing: *Cleveland, etc., Co. v. Klee*, 154 Ind. 430, 436, 437, 56 N. E. 234; *Dull v. Cleveland, etc., Co.*, 21 Ind. App. 571-590, 52 N. E. 1013; *Krenzer v. Pittsburg, etc., Co.*, 151 Ind. 587-593, 43 N. E. 649, 52 N. E. 220, 68 Am. St. Rep. 252; *Louisville, etc., Co. v. Phillips*, 112 Ind. 59, 13 N. E. 132, 2 Am. St. Rep. 155;

Louisville, etc., Co. v. East Tenn., etc., Co., 60 Fed. 993, 9 C. C. A. 314, reviewed Krenzer v. Pittsburg, etc., Co., 151 Ind. 593, 43 N. E. 649, 52 N. E. 220, 68 Am. St. Rep. 252. The instruction correctly states the duty of the motorman. Indianapolis St. Ry. Co. v. Darnell (Ind. App.) 68 N. E. 609; Nellis, Surface R. R. 299, and cases cited; Citizens' St. R. Co. v. Damm, 25 Ind. App. 511, 58 N. E. 564; Elwood St. R. Co. v. Ross, 26 Ind. App. 258, 58 N. E. 535.

But the particular point made by appellant that the peril must be actually known to the motorman is fairly met by the answers to interrogatories 65 and 70. "(65) Did said motorman see the movement of the horse and surry in the direction of the track as soon as they began to move toward the track? Answer. Yes." "(70) How many feet was the front end of defendant's car back of the left front wheels of the surry at the time said surry first began to turn toward the track? Answer. 200 feet." These findings show actual knowledge of imminent peril, so that, as to the criticism made, the instruction, even if erroneous, was harmless. Indianapolis St. R. Co. v. Brown (Ind. App.) 69 N. E. 407.

Upon direct examination Arthur H. Shelby, a witness for appellee who had shown himself qualified to testify as an expert, was asked the following question: "Q. Mr. Shelby, suppose a car is running on the track of the defendant along between the points I have stated at the rate of ten or twelve miles an hour, you may state in what distance that car could be stopped in the exercise of ordinary care by means of the brake alone." The court having overruled an objection of appellant to this question, the witness answered: "Why, a car could be stopped in fifty feet with the brake, running at that speed." Defendant's motion to strike out the answer was overruled, and exceptions to these rulings taken. The distance within which a car in motion may be stopped by the use of the brake is a question upon which an expert may properly give an opinion. The distance within which a car could be stopped by the use of a brake was only one of the questions to be determined by the jury. Tholen v. Brooklyn, etc., Co. (City Ct. Brook.) 30 N. Y. Supp. 1083; Pender v. Brooklyn Ry. Co. (Sup.) 32 N. Y. Supp. 366; McDonald v. Brooklyn, etc., Co. (Sup.) 64 N. Y. Supp. 480; Indiana Bituminous Coal Co. v. Buffey, 28 Ind. App. 108, 62 N. E. 279, and cases cited; Rogers on Expert Testimony (2d Ed.) § 104; Lawson on Expert Evidence, p. 94. But it is claimed that the effect of this evidence was to prove what was ordinary care, and that a witness could not be allowed to state an opinion or conclusion upon a question of ordinary care, because it is for the determination of the jury. Louisville, etc., v. Sparks, 12 Ind. App. 410, 40 N. E. 546; Githens v. McDonnell, 24 Ind. App. 395, 56 N. E. 855; Chicago v. Cummings, 24 Ind. App. 192, 53 N.

E. 1026; L. E. & W., etc., Co. v. Juday, 19 Ind. App. 436, 49 N. E. 843. We concede the proposition, and the cases cited hold, that whether ordinary care has or has not been exercised is for the jury, and not for a witness, and that a witness cannot be permitted to testify to what is ordinary care. But in determining the purpose and effect of this question it is proper to look at all that the witness has testified to upon the particular subject. The language of the question certainly gives the impression that it only seeks to elicit the opinion as to the distance within which a car can be stopped by the use of the brake alone. The answer shows that the witness so understood the question. Upon cross-examination the witness was interrogated as follows: "Q. Do you mean a test stop—for a man to begin at a certain moment to make a test stop? A. Running at that speed? Q. I say you mean a test stop, do you? A. I mean a good stop; yes, sir. Q. You mean a man knows just where he has to begin to stop, and then tries to make a stop as quick as he can? Is that the idea? A. To make that stop; yes, sir. That would make a good stop." And further the witness testified in reference to an ordinary stop with the brake: "Q. When you come along and make an ordinary stop at a street crossing for passengers, don't you begin to stop 150 feet before you get to the crossing? A. Well, it depends on the crossing and how—Q. Answer the question. Do you or do you not? A. If I am behind or late, or early? If I am ahead of time, I take more time, but if I am late I take less time. Q. But ordinarily, if you are running along in the ordinary manner, and you make a stop for passengers, don't you begin 150 or 250 feet? A. Yes, to make a slow stop. Q. That is, to stop with a brake? A. Yes, sir; to stop with the brake—that is, not for an accident." The witness manifestly intended and could only reasonably have been understood as giving his opinion as to the distance within which a car could be stopped under certain conditions. So viewed the testimony was not prejudicial to the appellant.

It is contended that the answers to interrogatories affirmatively show that the appellant was not guilty of negligence. This claim is founded upon the following facts found: When the horse first turned toward the track the motorman sounded his gong. Interrogatory 71. Up to that time everything was clear in front, and no indication of danger. Interrogatories 55 and 56. The motorman was in proper position, running moderately, paying attention, and everything about the car was in good condition. Interrogatories 57, 59, 61, 62, 64. The motorman could first have known that the buggy would not get off the track when the car was 40 feet from the buggy. Interrogatory 117. The shortest distance within which that car could possibly have been stopped by the utmost care and judgment was 35 feet. The whole thing

was very quickly done. In this connection it is proper to remember that the complaint only charges negligence against the appellant after the horse and vehicle were upon appellant's track. The special findings show that the surry was turned toward said track by the horse suddenly becoming frightened at some object, not shown by the evidence, on the street; that he shied and turned quickly toward the defendant's car track; that appellee pulled on his lines to prevent the horse from going upon or in the direction of the track after it became frightened, and did all he could to pull him off the track after he had gotten upon it; that the motorman saw the movement of the horse and surry in the direction of the track as soon as they began to move toward the same; that the front end of defendant's car was back of the left front wheel of the surry, at the time said surry first began to turn toward the track, 200 feet; that the motorman then sounded the gong, but did not apply the reverse current of electricity until after the horse had been pulled off of the track. It is also found that reversing the electric current is the quickest way to stop; that the motorman could have stopped the car sooner than he did had he applied the brake; and it is further found that the motorman did not do what reasonably occurred to him to prevent the accident; that he did not succeed in checking the speed of the car before it struck the surry; that the car was not so close to the surry at the time that it could not have been brought to a complete stop before reaching the point of collision. The general verdict finding that the motorman failed to exercise the care of an ordinarily prudent man is not overthrown by the special findings. The facts found do not show appellee guilty of contributory negligence. They are certainly not in irreconcilable conflict with the general verdict, which finds him free from contributory negligence, and so, under the rule, the general verdict must prevail. There is evidence to support it.

We may concede that under the circumstances—the suddenness with which the horse became frightened and turned toward the track, the conduct of appellee and of the motorman—that the question of the negligence of each of them is a close one; but we are of the opinion that such question was for the jury, and was properly submitted to them. We have passed upon the question discussed, and find no reversible error.

Judgment affirmed.

(34 Ind. App. 1)

CHIPMAN v. WELLS et al. (No. 5,890.)

(Appellate Court of Indiana, Division No. 1.
Nov. 1, 1904.)

APPEAL BY ADMINISTRATOR—TRANSCRIPT—FILING—TIME—STATUTES.

1. Burns' Ann. St. 1901, § 2609, authorizes any person aggrieved by any decision of a circuit court or judge in vacation growing out of a

matter connected with a decedent's estate to appeal to the Supreme Court on filing an appeal bond. Section 2610, as amended, provides that such bond shall be filed within 10 days after the decision complained of, and that the transcript shall be filed in the Supreme Court 90 days after filing the bond. Section 2612 authorizes an executor or administrator to appeal from the decision of any court or judge in vacation without filing a bond. *Held*, that though an administratrix, in taking an appeal from a decision by which she was aggrieved in her representative capacity, was not required to file an appeal bond, she was, notwithstanding that fact, governed by such sections, and was bound to file the transcript within 100 days after the decision.

Appeal from Circuit Court, St. Joseph County; Walter A. Funk, Judge.

Action between Celenda L. Chipman, as administratrix, etc., and Millie Wells and others. From a judgment in favor of the latter, the former appeals. On motion to dismiss appeal. Granted.

Joseph G. Orr and T. E. Howard, for appellant. Hubbard & Hubbard, for appellees.

BLACK, C. J. The appellees have moved to dismiss this appeal. The decision from which the appeal was taken was one growing out of a matter connected with a decedent's estate, within the meaning of sections 2609-2612, Burns' Ann. St. 1901. The judgment appears to have been rendered July 9, 1903. The appellant's motion for a new trial was overruled September 25, 1903. The transcript of the record on appeal was filed in this court July 13, 1904.

Section 2609, *supra*, provides that any person considering himself aggrieved by any decision of a circuit court, or judge thereof in vacation, growing out of any matter connected with a decedent's estate, may prosecute an appeal to the Supreme Court, upon filing with the clerk of the circuit court an appeal bond, described. Section 2610, as amended in 1899 (Acts 1899, p. 397, c. 171), provides that such appeal bond shall be filed within 10 days after the decision complained of is made, unless, for good cause shown, the court to which the appeal is prayed shall direct such appeal to be granted, on the filing of such bond, within 1 year after such decision, but that any person who is aggrieved, desiring such appeal, may take the same in his own name without joining any other person, and that the transcript shall be filed in the Supreme Court within 90 days after filing the appeal bond. Section 2611 relates to the taxing of costs, and by section 2612 it is provided that, in any appeal prayed by an executor or administrator from the decision of any court or judge thereof in vacation, it shall not be necessary for such person to file an appeal bond. In the portion of the Civil Code relating to appeals, provision is made that executors, administrators, and guardians may have an appeal and stay of proceedings in the court below without giving an appeal bond, while sections 2609-2612, *supra*, form part of the statute relating to the settlement of decedents' estates, and have

relation to proceedings under that statute. While it is not necessary for an executor or administrator, in taking an appeal from a decision by which he, in his representative capacity, is aggrieved, to give or file an appeal bond, yet he is affected by the provision of the statute relating to the time of filing the transcript, and, where his appeal is taken from a decision growing out of a matter connected with the decedent's estate, under the statute relating to the settlement of decedents' estates, he must file the transcript within the time required of other parties desiring to appeal from such decision; that is, within 100 days after the decision.

Counsel for the appellant say that, in legal effect, the sections above mentioned in the statute relating to the settlement of decedents' estates provide that all persons, except executors and administrators, considering themselves aggrieved by any decision growing out of any matter connected with a decedent's estate, may prosecute an appeal upon filing a suitable bond within 10 days after such decision, and filing the transcript within 90 days after filing the bond; that sections 2609, 2610, provide for a term-time appeal in all matters connected with a decedent's estate, so far as all persons other than executors and administrators are concerned, but that, as to executors and administrators, these sections do not provide for such term-time appeal, and that appeals taken by them are governed by the Civil Code, which provides that appeals must be taken within one year from the time the judgment is rendered; and counsel for the appellant say that this has been expressly decided by the Supreme Court in *Stultz v. Gibler*, 146 Ind. 501, 45 N. E. 340; and they also ask our attention to *Bake v. Smiley*, 84 Ind. 212, and *Ruch v. Biery*, 110 Ind. 444, 11 N. E. 312. *Stultz v. Gibler*, supra, was a suit to foreclose a mortgage and to recover a judgment for the indebtedness secured thereby, to which an administrator, with others, was a party defendant, and the appeal was brought by the administrator and other defendants without making a co-appellant one of the parties affected by the judgment. It was expressly stated by the court that the appeal was governed by the provisions of the Civil Code, and not by those of the act concerning the settlement of decedents' estates; and conceding, without deciding, that an executor, administrator, or guardian is entitled to take a term-time appeal under the Civil Code without filing an appeal bond, it was held that the appeal in that case was a vacation appeal, and not a term-time appeal, and it was dismissed for failure to make such co-party affected by the judgment a co-appellant. The appeal in that case was governed as to all of the parties by the provisions of the Civil Code, because the action was not a proceeding under the

provisions of the statute relating to the settlement of decedents' estates, but was one governed in all respects by the Civil Code. *Bake v. Smiley*, supra, as is shown in the opinion of the court, was governed, as to the manner of taking the appeal, by the statute of 1852 (2 Rev. St. 1852, p. 291, § 190). While that statute provided for the taking of an appeal by filing an appeal bond within 30 days after the decision, and it expressly provided that it was not necessary for an executor or administrator to file such bond, it did not prescribe the time for the filing of the transcript; and the court directed attention to what it called a "material addition" in the statute of 1881 (Acts 1881, p. 478, c. 45, § 229; Rev. St. 1881, § 2455), of the provision that in such an appeal "the transcript shall be filed in the Supreme Court within ten days after filing the bond." The case affords no support to the appellant. In *Ruch v. Biery*, supra, which was an appeal taken by an administrator in a matter arising under the statute relating to the settlement of decedents' estates, being an appeal from a decision upon exceptions taken to the administrator's final account and report filed in 1883, the court declined to dismiss the appeal because no bond was filed within 10 days. There was no question relating to the time of filing the transcript on appeal. By amendment in 1885 of the statute of 1881, it was provided that the transcript should be filed in the Supreme Court within 30 days after the filing of the bond. Acts 1885, p. 194, c. 73; section 2610, Burns' Ann. St. 1894. And the section thus amended was again amended in 1899 (Acts 1899, p. 397, c. 171), by providing that the transcript shall be filed within 90 days after the filing of the bond, as above shown. The distinction so noted in *Bake v. Smiley*, supra, between the statute of 1852 and the statute of 1881, was also pointed out in *Bender v. Wampler*, 84 Ind. 172; and it was said that the provisions in question of the act of 1852 only controlled the time within which the bond should be filed, and not the time within which the appeal might be perfected, and that an executor could appeal at any time within one year after the decision, without bond, but that the rule as to the time of perfecting the appeal, as applicable to cases arising under the provisions of the revision of 1881, in this class of cases, was changed.

The following cases sustain the conclusion that under the statute now in force the executor or administrator appealing must file the transcript in this court within the period in which it would be necessary for the adverse party to perfect an appeal. *Yearley v. Sharp*, 96 Ind. 469; *Miller v. Carmichael*, 98 Ind. 236; *Simons v. Simons*, 129 Ind. 248, 28 N. E. 702; *Campbell v. Horner*, 12 Ind. App. 86, 39 N. E. 768.

Appeal dismissed.

SOUTHERN RY. CO. v. STATE¹ (No. 4,982.)
 (Appellate Court of Indiana, Division No. 2
 Oct. 28, 1904.)

CARRIERS—REGULATIONS—PASSENGER TRAINS—ARRIVAL—NOTICE—POSTING—STATUTES—CONSTRUCTION—PENALTIES—RECOVERY—ACTIONS—FEDERAL COURTS—REMOVAL—PLEADING—DISCRETION—EVIDENCE—INSTRUCTIONS—RECORD—REVIEW.

1. Burns' Ann. St. 1901, § 5186, requires railroads to post on blackboards erected in telegraph passenger stations the time of the arrival of passenger trains, stating whether the same are late, and, if so, how much; and section 5187 provides a penalty for a violation of the preceding section, to be recovered in the name of the state by the prosecuting attorney for the benefit of himself and the county school fund. *Held*, that an action by the state under such section was not removable to the federal courts for diversity of citizenship, on the ground that the prosecuting attorney and the county receiving the penalty, if recovered, were the real parties in interest.

2. Burns' Ann. St. 1901, § 5186, makes it the duty of railroad companies to cause to be placed in each telegraph passenger depot a blackboard or other device on which they shall cause to be written at least 30 minutes before the schedule time for the arrival of each passenger train stopping at such station whether the train is on time or not, and, if late, how much, provided that the act shall not apply to any freight train carrying passengers, or any train carrying both freight and passengers, or to any station during the hours when a telegraph operator is not regularly on duty. A complaint thereunder alleged that defendant railway company maintained a telegraph railway station at E.; that it operated a regular passenger train through said station, scheduled to stop thereat, at 12:02 o'clock p. m. on June 28, 1901; that said train did pass by and stop thereat on said day; that defendant then and there unlawfully failed and neglected to cause to be written on the blackboard placed in a conspicuous place in the passenger depot at such station, at least 30 minutes before said schedule time for the arrival of said train, whether it was on schedule time or not, and, if late, how much late; that at that time defendant regularly employed and had on duty at such station a telegraph operator; that it did not then have any other device giving such information; and that the train was not a freight train, etc. *Held*, that the complaint was not defective, as pregnant with an implied allegation that defendant did report the train, that it did write on the blackboard, and that it did say that the train was late.

3. The complaint was not objectionable on the ground that it did not sufficiently negative the exceptions in the statute.

4. The denial of an application for a continuance is within the discretion of the trial court, and its ruling thereon will not be reversed in the absence of a showing of gross abuse of such discretion.

5. An appeal record disclosed that "the court, of its own motion, also gave to the jury . . . the following instructions," followed by a series of instructions, numbered 1, 5, and 6. The judge certified that such instructions given by the court of his own motion, and instructions 1, 2, 4, 5, and 6 offered by defendant, and such modified instructions aforesaid, were all the instructions given in the cause. *Held*, that such record should be construed as importing a verity, that the judge, on his own motion, gave only three instructions, and numbered them 1, 5, and 6.

6. A requested instruction that, if the jury should find from the evidence that any witness was promised \$25 by the prosecuting attorney,

they should consider such promise in determining what weight should be given to the testimony of such witness, was properly modified by changing the word "should" to "may" and adding that the jury could consider such fact for no other purpose than to determine the witness' credibility.

7. It is not error to refuse an instruction, though it may correctly state the law, where the same subject is covered by another instruction given.

8. In an action by the state to recover a penalty against a railroad company, it was not error for the court to refuse to charge that defendant had a right to summon its own witnesses and transport them to the place of trial, though it would have been proper for the court to have so charged.

9. Where, in an action on behalf of the state against a railroad company to recover a penalty, a witness had testified to an agreement with the prosecuting attorney to pay his expenses, and that he also expected pay for his time, but it did not appear that the prosecuting attorney had promised to pay him for his time, a question asked as to how much the witness expected for his time was properly disallowed.

10. A witness had a book in which he made daily entries of defendant railroad company's violation of a certain statute, and just before testifying he made certain memoranda from such book, and produced both the book and the memoranda at the trial. He testified that he could not remember such violations, aside from his memoranda, and the court permitted him to refer to the book to refresh his memory. On cross-examination he was asked which he was refreshing his memory from—the book or the memoranda—and answered, "This one here." *Held*, that such evidence did not establish that the witness was not refreshing his memory from the book, instead of the memoranda, so as to require the striking out of his testimony.

11. Burns' Ann. St. 1901, § 5187, providing that for each violation of the preceding section by a railroad company, in failing to report the time of the arrival of a train at a station, etc., the corporation shall forfeit and pay the sum of \$25, authorizes the recovery of a cumulative penalty.

Appeal from Circuit Court, Dubois County;
 E. A. Ely, Judge.

Action by the state against the Southern Railway Company. From a judgment in favor of plaintiff, defendant appeals. *Affirmed*.

A. P. Humphrey, John D. Welman, M. W. Fields, and Bretz & McFall, for appellant.
 Leo H. Fisher, Pros. Atty., Cox & Hunter, A. L. Gray, and H. M. Kean, for the State.

WILEY, J. This was a prosecution by the state to recover penalties for violations of section 5186, Burns' Ann. St. 1901, in failing to post the arrival of trains. The amended complaint is in 404 paragraphs. Appellant appeared to the complaint, and moved, upon petition and bond, to remove the cause to the federal court. The ground stated in the petition for removal was the nonresidence of appellant. This motion was overruled, and the question saved by special bill of exceptions. A demurrer was addressed to each paragraph of amended complaint and overruled, and exceptions reserved. Answer in denial, trial by jury, verdict and judgment for \$4,500. Appellant's motion for a new

¶ 11. See *Railroads*, vol. 41, Cent. Dig. § 769.

¹ Rehearing denied. Superseded by opinion in Supreme Court, 75 N. E. 272. Rehearing denied.

trial was also overruled. All rulings above indicated, adverse to appellant, are assigned as errors.

The first question discussed by counsel for appellant is the overruling of its motion to remove. The ground upon which a removal was asked was diverse citizenship, the petition showing that appellant is a corporation organized and existing under the laws of Virginia. In *Black's Dillon on Removal of Causes*, § 81, it is said: "Since, in the nature of things, a state cannot be a citizen of a state, the federal courts have no jurisdiction, on removal from a state court on the ground of diverse citizenship, of a suit between a private individual and a state, whether the former be a citizen of the same or of a different state. Such a controversy cannot, in any just sense, be said to be 'between citizens of different states.'" The case of *State of Indiana, for the use of Delaware County, v. Alleghany Oil Co. et al.* (C. C.) 85 Fed. 870, was an action to recover a penalty for a violation of the statute making it unlawful to permit the flow of gas or oil from a well into the open air. That statute made it unlawful to permit such escape, and fixed a penalty for its violation, which penalty was recoverable "in a civil action or actions in the name of the state of Indiana, for the use of the county in which such well shall be located, together with reasonable attorney's fees and costs of suit." Sections 7477, 7479, *Horner's Ann. St. 1897*. It was held in that case that, when a state brings a suit in a court of its own creation against a citizen of another state, no removal can be had into a circuit court of the United States on the ground of the diverse citizenship of the parties. In *Huntington v. Attrill*, 146 U. S. 572, 18 Sup. Ct. 229, 88 L. Ed. 1123, it was said: "Beyond doubt, except in cases removed from a state court in obedience to an express act of Congress in order to protect rights under the Constitution of the United States, a Circuit Court of the United States cannot entertain jurisdiction of a suit in behalf of the state, or of the people thereof, to recover a penalty imposed by way of punishment for a violation of a statute of the state." The following cases are also in point: *Ames v. Kansas*, 111 U. S. 449, 4 Sup. Ct. 437, 28 L. Ed. 482; *Postal Tel. Co. v. Alabama*, 155 U. S. 482, 15 Sup. Ct. 192, 39 L. Ed. 231; *State v. Tolleston Club of Chicago* (C. C.) 53 Fed. 18. Appellant's learned counsel concede that these authorities are against their contention, but seek to avoid their force by asserting the counter proposition that they are not in point and of controlling influence, because the state is not the real party in interest. They maintain that, while the action is prosecuted in the name of the state, the beneficiaries are the prosecuting attorney and Dubois county, for the statute provides that one-half of the amount recovered shall go to each of them, and hence they are the parties in interest.

We do not think this position is tenable, and the question is put at rest by the decision in the case of *State of Indiana, etc., v. Alleghany Oil Co.*, supra. The language of the statute under which that case was prosecuted, and the one involved in this case, is essentially the same. In that case the statute directs that the penalties "shall be recoverable in a civil action or actions in the name of the state * * * for the use of the county," etc. In this case the statute provides for the penalty, and directs that it shall "be recovered in a civil action to be prosecuted by the prosecuting attorney * * * in the name of the state of Indiana, one-half of which shall go to said prosecuting attorney, and the remainder shall be paid over to the county * * * and shall be part of the common school fund." In both cases the Legislature directs what shall be done with the amount recovered, and we have no doubt of its power to do so. Within the meaning of the statute, the state was and is the real party in interest. The motion to remove was properly overruled.

Counsel for appellant have made a vigorous attack upon the amended complaint. As above stated, the complaint is in 404 paragraphs, and they are exactly alike, except as to dates, trains, and time. A statement of the material averments of one will therefore serve for all. It is averred that appellant is a railway corporation, and owns and operates a railroad running through Dubois county; that it keeps and maintains a railway station in said county, designated as Ferdinand Station, and kept a telegraph office in connection with its said line of railway; that it owned, operated, and ran a regular passenger train on its said line of road from Jasper, Ind., to Evansville, passing through said Ferdinand Station; that said train was due and scheduled to stop at said station at 12:02 o'clock p. m. on the 26th day of June, 1901, and that it did pass by and stopped thereat on said day; that appellant then and there unlawfully failed and neglected to cause to be written upon a blackboard placed in a conspicuous place in the passenger depot at said station, at least thirty minutes before said schedule time for the arrival of said train, the fact whether it was on schedule time or not, and, if late, how much late; that at that time appellant regularly employed and had on duty at said station a telegraph operator; that it did not then and there have any device, indicator, or register, painted or printed in letters or figures, giving information as to whether said train was on schedule time, and, if late, how much late; that said train was not then and there a freight train carrying both freight and passengers; and that at said time and hour appellant then and there had a regular telegraph operator on duty. As an action of this character is only maintainable by virtue of the statute authorizing it, a complaint to enforce the penalty for a violation of its provisions should be meas-

ured by the statute itself. It becomes important, therefore, to look to the statute. Section 5186, Burns' Ann. St. 1901, being section 1 of the act of 1889 (Acts 1889, p. 279, c. 139), as amended by Acts 1897, p. 176, c. 117, makes it the duty of railroad corporations, etc., to "cause to be placed in a conspicuous place in each passenger depot of such company located at any station in this state, at which there is a telegraph office, a blackboard at least three feet long and two feet wide, upon which such corporation, company or person, shall cause to be written, at least thirty minutes before the schedule time for the arrival of each passenger train stopping upon such route at such station, the fact whether such train is on schedule time or not, and if late, how much: Provided, however, that any device, indicator or register, painted or printed in large letters and figures giving the required information set forth in this act in a more legible form than is practicable on a blackboard, may be substituted in place of said blackboard: and, provided further, that the provisions of this act shall not apply to any freight train carrying passengers or any train carrying both freight and passengers, or to any stations during hours when railroad companies do not regularly have a telegraph operator or operators on duty at any such telegraph office." Section 5187 fixed a penalty for "each violation of the provision of this act, in failing to report or in making a false report, such corporation, company or person so neglecting or refusing to comply with the provisions of this act, shall forfeit and pay the sum of twenty-five dollars, to be recovered in a civil action to be prosecuted by the prosecuting attorney of the county in which the neglect or refusal occurs, in the name of the state of Indiana, one-half of which shall go to said prosecuting attorney, and the remainder shall be paid over to the county in which such proceedings are had, and shall be part of the common school fund." The allegations of each paragraph of complaint are in harmony with both the language and spirit of the statute. The duty of appellant is specifically set forth, and the manner in which it violated that duty is declared.

Counsel have urged several objections to the complaint, which we will consider in their order of discussion:

Our attention is directed to section 2 of the act (Acts 1889, p. 279, c. 139; Burns' Ann. St. 1901, § 5187), which declares a penalty for failing to do certain things. The penalty recoverable is for failing to report, or in making a false report of, the arrival of trains. The state relies upon the fact, charged in each paragraph of the complaint, that appellant, through its agent, "failed and neglected to cause to be written upon a blackboard placed in a conspicuous place in the passenger depot * * * at said telegraph office and station, at least thirty minutes before the said schedule time for the arrival

of said passenger train, the fact whether said train was on schedule time or not, and if late, how much late." The state is not charging or claiming that a false report was made, and hence we only have to consider the charge that no report was made within the limit of time fixed by statute. Counsel say that the complaint may be entirely true, and yet appellant not be liable for any penalty. For the purpose of determining its sufficiency, the demurrer admits, as true, all facts well pleaded. Counsel say: "Suppose the company's agent should report twenty-five minutes before train; this would not be reporting as the law directs, but it would be reporting, and so not a failure to report. Suppose this report should be on a blackboard on the outside of the station, instead of upon a blackboard placed in a conspicuous place in said station; this would not be reporting as the law directs, but it would not violate the law in failing to report." Again they say: "Suppose the report should say 'On time,' when the train was in fact late; this would violate the law in making a false report, but not in failing to report, since he could not at the same time fail to report and make a false report. Suppose he should report his train late, without saying how much; this would not be reporting as the law directs, yet it would not be a violation of the law in failing to report." The several positions thus assumed by the learned counsel are untenable, and the argument based thereon shorn of its force, because they rest upon supposable facts, which are not pertinent to the question presented. We can only deal with the facts tendered by the pleading, and its sufficiency must be determined by such facts alone.

We are confronted by the naked fact, as alleged, that appellant's agent failed to report the arrival of designated trains at least 30 minutes before they were scheduled to arrive. The only construction the language of the complaint will admit of is that no report was made at all of the arrival of such trains. This amounts to a positive omission of duty enjoined by statute, for each failure to perform which a forfeit of \$25 is imposed.

Counsel urge that the allegation that appellant did not report at least 30 minutes before train time, implies that it did report; that it did not write upon a blackboard placed in a conspicuous place in said station, implies that it did write upon a blackboard; that it did not tell the public how much late the train was, implies that it did say the train was late. We cannot adopt this view, for no such implication can arise from the language of the complaint, even by the most technical construction. The failure to comply with the statute, in failing to report, is charged in the substantial language of the statute.

Another objection urged to the complaint is that it does not negative the exceptions in the statute. The exceptions embraced in the

statute are that, in the place of a blackboard, the information to be given may be given by means of "any device, indicator or register, painted or printed in large letters and figures," and that the provisions of the law shall not apply to any "freight train carrying passengers or any train carrying both freight and passengers, or to any station during hours when railroad companies do not regularly have a telegraph operator or operators on duty at such telegraph office." In this regard the complaint fully meets the requirements of the statute and good pleading.

Counsel urge other objections to the complaint, but they are of a technical character, and we think without merit. There was no error in overruling the demurrer.

The record discloses that appellant applied for and was granted a change of venue from Dubois county on account of local prejudice, but that it failed to perfect such change. Subsequently it moved for a continuance, supported by affidavit, on the ground that the prosecuting attorney had, a few days before the case was set for trial, published in a local newspaper, over his own signature, an article attacking appellant for attempting to try the case in the Legislature, which was then in session, by attempting to secure the passage of a law by which it sought to escape the effects of the prosecution then being waged against it. It was charged in the affidavit that the paper containing said article was generally and largely circulated throughout the county, and so prejudiced the public that it could not at that time have a fair and impartial trial. Counter affidavits were filed, and the court overruled appellant's motion. From the conclusion we have reached upon this branch of the case, we do not deem it necessary to state, even in the abstract, the substance of the several affidavits. The ruling upon a motion for a continuance is largely within the discretion of the trial court, and it is only when a clear and strong showing is made of a gross abuse of such discretion, to the manifest injury of the complaining party, that an appellate court will review such ruling. *Conrad v. State*, 144 Ind. 290, 43 N. E. 221; *City of Huntington v. Folk*, 154 Ind. 91, 54 N. E. 759; *Brandt v. State*, 17 Ind. App. 311, 46 N. E. 682. Under this rule, we are not justified in reversing the judgment on the overruling of appellant's motion for a continuance because it does not appear that the trial court abused its discretion.

By its motion for a new trial, appellant predicates error of the trial court in giving, refusing to give, and in modifying certain instructions. Counsel for appellee insists that appellant is not entitled to have the instructions considered, for the reason that it affirmatively appears that all the instructions are not in the record. The instructions are brought into the record by bill of exceptions, and, so far as numbers are concerned,

there is an apparent omission of instructions Nos. 2, 3, and 4 of those given by the court on its own motion. The record shows that "the court, of its own motion, also gave to the jury * * * the following instructions," and then follows a series of instructions numbered 1, 5, and 6. The judge certifies over his official signature that "said instructions given by the court of his own motion, and instructions 1, 2, 4, 5, and 7 offered by defendant, and said modified instructions aforesaid, are all the instructions given in the cause." This discloses that the judge, on his own motion, gave three instructions, and numbered them 1, 5, and 6, respectively; and the trial judge having certified that the bill of exceptions embodies all the instructions given, and as the record fails to show that others were omitted, we must take the bill as a verity.

The third instruction tendered by appellant, and which the court refused to give, was properly refused, because it did not correctly state the law, and for the additional reason that the subject-matter of the instruction was embodied in other instructions which did correctly state the law. The court refused to give, as tendered by appellant, instructions 9 and 10, and, as they present the same question, they may be considered together. Instruction 10, as tendered, was as follows: "If you should find from the evidence that any witness in the case was promised the sum of twenty-five dollars by the prosecuting attorney of the plaintiff in this case, and that the payment of said sum was contingent upon the success of the plaintiff in this case, then you should consider such promise of money, in determining what weight should be given to the testimony of such witness." The court modified it by striking out the words "should consider," and inserting in lieu thereof the words "may consider," and by adding the following: "But you can consider it for no other purpose than for the purpose of determining such witness' credibility." It is insisted that the instruction as tendered was a correct statement of the law, and that it was the duty of the court to say to the jury that they "should consider" a certain fact if they found such fact to be true. Instructions of similar character have been before the courts of last resort in this state many times, and uniformly they have been held to be erroneous. The credibility of witnesses and the weight to be attached to their evidence are within the exclusive province of the jury. In determining them, there are many things, within legitimate bounds, which a jury may consider; and it is the duty of the trial judge to give to the jury all the light he can, in harmony with the law, which may aid them in reaching a correct conclusion, but he oversteps his functions when he invades their province. To say to a jury that they "should" do a certain thing, in determining the weight to be given the evidence of a wit-

ness, is a usurpation of judicial authority, and an invasion of their province. In *Pennsylvania Co. v. Hunsley*, 23 Ind. App. 37, 54 N. E. 1071, many of the authorities are collected, and the conclusion there reached, upon a review of the cases, that such an instruction as the one under consideration was erroneous. The court correctly modified instructions 9 and 10.

Counsel complain because the court refused to give instruction No. 6 tendered by appellant. Without stating what that instruction is, it is sufficient to say that the sum and substance of it is embraced in instruction No. 5. It is not error to refuse an instruction, though it may correctly state the law, where the same subject is covered by another instruction given. *Eureka, etc., v. Bridgewater*, 13 Ind. App. 333, 40 N. E. 1101; *Indiana, etc., R. R. Co. v. Bundy*, 152 Ind. 590, 53 N. E. 175; *Whitney v. State*, 154 Ind. 573, 57 N. E. 398; *Chicago, etc., Ry. Co. v. Curless*, 27 Ind. App. 306, 60 N. E. 467. We are unable to see any substantial difference between instruction 5, given, and instruction 6, refused.

The court refused to give instruction 11 tendered by appellant. That instruction is as follows: "There is evidence before you that some of the witnesses for defendant were subpoenaed by one of the agents of the defendant. This case is *The State of Indiana v. The Southern Railway Company*, and, whatever the event of this suit may be, the defendant will be liable for the costs made by itself, as the state pays no costs. So you should consider this fact, and I charge you that the defendant had a perfect legal right to summon its own witnesses and transport them here." No doubt but what appellant had a legal right to subpoena its own witnesses, and carry them, at its own expense, to the place of trial. It would have been proper for the court to have so instructed, but its failure to do so cannot be regarded as reversible error, and it does not appear that appellant was harmed by such failure. The instruction is not technically correct, for it uses the words "should consider" instead of "may consider," and it was not error to refuse to give it.

We come next to the consideration of some questions presented which arose in the course of the trial, in the admission and rejection of evidence, and in overruling a motion to strike out certain evidence.

Alonzo Clark was a witness on behalf of appellee. It developed on cross-examination that at the time of the trial he lived in St. Louis, Mo., and attended the trial at the request of the prosecuting witness. He testified that the prosecuting attorney insured his expenses. He was asked and answered the following questions: "Q. Did he tell you how much he would give you? A. No, sir. Q. What did he say on the subject? A. He said he would pay my expenses—he needed me, and if I would come he would pay my

expenses. Q. Was you to get anything for your time? A. He didn't itemize it. Q. What will your expenses be? A. My expenses—what I am out in railroad fare, hotel bills, and time. Q. Tell the jury what you expect for your time." To the last question appellee objected, without stating any reason for the objection, and the court sustained the objection and refused to permit the witness to answer. Sustaining the objection is one of the reasons assigned for a new trial. In connection with and as a part of the cross-examination, appellant introduced a letter written by Clark to one of appellant's counsel, in which he inquired if he could be compelled to attend the trial as a witness, and in which he said, referring to the prosecuting attorney: "I will inform him that he must pay me well for my time." We think it is clear from the evidence that the witness not only expected to have all his expenses paid, but also that he was to be paid for his time. The evidence does not show, however, that the prosecuting attorney promised to pay him for his time. That he expected compensation for his time, as a reward for his testimony, in addition to his expenses, in the absence of a promise, express or implied, would not bind the state. Hence as to what he expected in the way of compensation for his time was not a pertinent inquiry. If any amount had been agreed upon between the witness and prosecuting attorney, or if the latter had agreed to pay the former, then it would have been the subject of legitimate inquiry; the fact going to his credibility as a witness. It was not error to sustain the objection to the question.

Peter Schnell was a witness on behalf of appellee, and in his evidence as to the arrival of certain trains, and upon different dates, he testified by refreshing his memory from memoranda made at the time or times. His evidence shows that in keeping the several dates of the arrival of trains, and the failure of appellant's agent to post such arrivals at least 30 minutes before the various trains were scheduled to arrive, he used two separate books, and noted therein, at the time or times, whether or not the arrivals of the trains were posted on the blackboard. From these two books the witness made condensed memoranda some time after the originals were made. He testified that he could not remember a single date or train aside from his memoranda, and the court permitted him to refer to the book to refresh his memory. In cross-examination it developed that the witness had his original memoranda, and had all of the memoranda books before him when he was testifying. He was asked and answered these questions: "Q. Mr. Schnell, I believe you stated you made these memoranda? A. Yes, sir. Q. Look at that memoranda, and tell the jury when you made that? A. I made this here in short form. Q. That on the book? A. Saturday

and Monday. Q. When, last? A. Yes, sir; off of this book I kept daily. Q. Which one was you refreshing your memory from? A. This one here." At the conclusion of the examination of Schnell, counsel for appellant moved to strike out his evidence relating to the facts that certain trains scheduled to arrive at certain times had not been bulletined on the blackboard 30 minutes before they were scheduled to arrive, as to whether they were on time, and, if late, how much, for the reason that he could not "state anything about the facts independent of his memoranda, and the memoranda are not in evidence." This motion was overruled, and, we think, correctly. The point is made in argument that the condensed memoranda was not an original entry, and hence was not competent to be used to refresh the memory of the witness. If it be conceded that this is true, it is not available to appellant, for the evidence does not show that the witness relied upon it. The evidence above quoted does not designate which book or memoranda the witness was using to refresh his memory. He simply said, in answer to the inquiry as to which one he was refreshing his memory from, "This one here." And we are left in the dark whether it was the original or the new one. The witness had a right to refresh his memory from the memoranda he made at the time, and the court was authorized to allow him to use the same for that purpose.

The 13th, 14th, 15th, and 16th reasons for a new trial are, respectively, that the damages are excessive, that the assessment of the amount of penalty was too large, that the court erred in overruling appellant's motion to require appellee to elect upon which paragraph of complaint it would rest its case, and that the verdict is "contrary to the evidence and is contrary to law." Counsel base their argument upon these several reasons for a new trial on the proposition that only a single penalty was recoverable in this action. The statute (section 5187, Burns' Ann. St. 1901) provides that for "each violation of the provision of this act in failing to report or in making a false report, such corporation," etc., " * * * shall forfeit and pay the sum of twenty-five dollars." Under this provision of the statute, we are clear that the penalty provided for is cumulative. The language used will not admit of any other construction, and that question was adjudicated in the case of *State v. Indiana, etc., Ry. Co.*, 133 Ind. 69, 32 N. E. 817, 18 L. R. A. 502. Counsel admit that this case is against their contention, but say it arose upon a demurrer to a complaint, and not "much considered." The Legislature, in the exercise of its power, declared a forfeiture of \$25 for each violation of the command of the statute requiring the posting of the time of the arrival of passenger trains, and to note whether they were on time, or, if late, how much. There is no escape from the

conclusion that the penalty attaches to each violation. The object of the statute has been the subject of judicial decision, and it has been declared that it is to give notice to the traveling public as to whether or not the trains are on schedule time, and, if late, how much. *State v. Indiana, etc., Ry. Co.*, supra. Every law penal in its character must contain some provision for its enforcement. In this instance the Legislature saw proper to place in the prosecuting attorney the power to enforce it, and to say to him that for his services in that regard he should have half the amount recovered. If no provision had been made for its enforcement, it would not have accomplished its object. The law was not enacted for the purpose of enriching prosecuting attorneys, but, on the contrary, it becomes their duty to enforce the law in the interest of the traveling public.

This brings us to the consideration of the question as to the sufficiency of the evidence to support the verdict and judgment. Appellant's counsel admit that there is some evidence on which the verdict may justly rest. There is not only some evidence, but an abundance of it, supportive of the judgment. In such case, we cannot weigh the evidence.

We find no reversible error, and the judgment is affirmed.

(34 Ind. App. 527)

WILKIE v. REYNOLDS. (No. 5,210.)*

(Appellate Court of Indiana, Division No. 1.
Oct. 27, 1904.)

MORTGAGES—RECEIVERS—APPOINTMENT WITHOUT NOTICE—ATTORNEY AND CLIENT—HUSBAND AND WIFE—SUBMISSION OF CAUSE—HARMLESS ERROR.

1. Where a receiver appointed on mortgage foreclosure did not do any act under his appointment, but on a hearing soon after the appointment the court found that he should be discharged, and the costs pertaining to his receivership should be charged to plaintiff, another receiver agreed on by the parties being then appointed, the appointment of the first receiver without notice to defendants was harmless.

2. Where, on mortgage foreclosure, defendant's husband, who was a practicing attorney, appeared for her, with her knowledge and consent, and consented to a continuance, and thereafter made offers of settlement on her behalf, whereupon the cause was again continued, when the cause was settled and the court entered its findings, it was not error to refuse her motion to set aside the submission of the cause for trial.

Appeal from Circuit Court, Madison County; John F. McClure, Judge.

Action by Myron G. Reynolds against Henrietta Wilkie and another. From a judgment in favor of plaintiff, defendant Henrietta Wilkie appeals. Transferred from Supreme Court. Affirmed.

Griffin & Broadbent, for appellant. Bagot & Bagot, for appellee.

BLACK, C. J. The complaint of the appellee against the appellant, Henrietta Wilkie, and her husband, Herman F. Wilkie, was

*Rehearing denied January 31, 1905.

in two paragraphs. In the first, the appellee sought judgment upon a promissory note executed to him by the appellant, and the foreclosure of a mortgage on certain real estate in Madison county, executed to him by the appellant and her husband to secure the payment of the note. The second paragraph was based upon another promissory note of later date, and a mortgage, to secure its payment, of all the rents and profits of certain dwelling houses situated on certain lots in the city of Elwood; both the note and mortgage being executed by the appellant to the appellee. In this paragraph the appellee sought judgment upon the note, and the foreclosure of the mortgage, and the application of the rents and profits to the satisfaction of such judgment until fully paid. The complaint was filed June 8, 1903. On the same day, after the filing of the complaint and the issuing of a summons thereon to the sheriff for service on the defendants, as appears from the entry of record, the appellee filed his verified application for the appointment of a receiver pending the action, to take charge and possession of the mortgaged property, to hold, have, and control the same, and to collect the rents and profits subject to the future order of the court; the application containing averments of facts as excuse for want of notice thereof to the appellant. Thereupon the court, without notice to the appellant of the application for the appointment, proceeded and appointed Ezra R. Williams as receiver, who appeared and qualified as such. June 10, 1903, the defendants, as stated in the entry of record, filed their motion to discharge the receiver, which motion is not in the record. Without any ruling thereon, so far as is shown, the appellant and her husband, June 20, 1903, filed their separate answers in bar of the appellee's cause of action set forth in the complaint. Thereupon, on the same day, without any intervening proceeding, the cause was submitted to the court for trial, hearing, and judgment, and the court, having heard the evidence, found in favor of the appellee, stating the amount due and unpaid upon each of the notes, and finding that the appellee was entitled to recover of the appellant such amounts, and his costs, except the charges and expenses of the receiver so appointed, which the appellee should pay; also that the appellee was entitled to the foreclosure of the mortgage, and entitled to have a receiver to collect the rents, etc.; also that the appellant should have a specified time within which to make payment; also that the receiver theretofore appointed should be discharged, and that Solomon F. Downs should be appointed as such receiver, and that, if payment was not made within such time, the court should then render judgment, etc., and order said receiver to take charge of the property, etc.; the entry of the finding containing, after the foregoing provisions, the following: "All of which

all of said parties in open court fully consent and agree to." Afterward, June 23, 1903, the appellant filed her verified motion to set aside the submission and agreement, and to reassign the cause for trial. The appellee filed his counter affidavit. The court July 13, 1903, overruled this motion, and rendered judgment upon the finding and made its order, appointing said Downs as receiver. The appellant filed her motion for a new trial, which was overruled.

So far as the appointment of a receiver without notice is concerned, without determining whether or not the matter is properly presented for review, we are unable to find any substantial reason for reviewing the action of the court below. It does not appear directly or inferentially that the receiver so appointed took charge or control of any property, or made any lease of real estate, or collected or received any rent or any money or property under such appointment, while it does appear that on the hearing, soon after the making of the order of appointment, the court found that he should be discharged, and that the costs pertaining to his receivership should be paid by the appellee; and final judgment was rendered in accordance with the finding, and another receiver agreed upon by the parties was appointed. By the mere appointment without notice, the appellant was not substantially injured, and we do not examine critically the averments intended to show an emergency for such appointment. The finding of the court was rendered upon the agreement of the parties in open court. It is claimed that the court erred in overruling the appellant's motion to set aside the submission of the cause for trial. This matter was determined upon the appellant's verified motion and the appellee's counter affidavit. It thus sufficiently appeared that the appellant's husband was a practicing attorney and a member of the bar of the court below, and that, while the pleadings of the defendants were signed by other attorneys, the appellant was in fact, with her knowledge and consent, represented by her husband, who was living with her as such; that she appeared in court in person with him while he, with her knowledge and acquiescence, acted and represented her in the cause, no other attorney appearing for her, at a time when the cause had been set for trial, June 15, 1903—he, in her presence and hearing, consenting to the trial of the cause on June 17, 1903, to which date it was continued; that on the latter date he came to the city of Anderson, where the court was held, and, on behalf of her, made offers of settlement of the cause, which was continued until June 20, 1903, when it was settled, compromised, and adjusted, and the court made and entered its finding, he being present in court, representing the appellant, and the appellee's attorneys also being present, acting in good faith in the transaction. The appellant knew the trial was postponed

to June 20, 1903, and does not appear to have made any arrangement to be represented by any attorney other than her husband. Thus, without regard to the merits of the alleged defense set forth in appellant's motion, it appears that by her attorney, representing her as such with her knowledge and consent, she waived the presentation of any defense upon the trial when the finding was entered upon the agreement of the parties, represented, as the court manifestly considered, as it might do, by their attorneys respectively. In *Thompson v. Pershing*, 86 Ind. 303, it is said: "An attorney may, without express authority, bind his client by agreement that judgment may be taken against him, and that, too, though the attorney know that his client has a good defense to said action. If he acts contrary to the express directions of his client, or to his injury, the client must look to the attorney for redress. *Hudson v. Allison*, 54 Ind. 215." See, also, *Devenbaugh v. Nifer*, 3 Ind. App. 379, 29 N. E. 923; *Biddle v. Pierce*, 13 Ind. App. 239, 41 N. E. 475.

Judgment affirmed.

(33 Ind. App. 639)

BEASEY et al. v. HIGH. (No. 5,068.)

(Appellate Court of Indiana. Division No. 1. Oct. 28, 1904.)

QUIETING TITLE—PLEADING—ANSWER—GENERAL DENIAL—SPECIAL DEFENSES—DEMURRER.

1. Since, in an action to quiet title, defendant is authorized by Burns' Ann. St. 1901, §§ 1067, 1082, 1083, to give in evidence under a general denial every defense, legal or equitable, a general denial having been pleaded, it was not error to sustain a demurrer to a special paragraph of the answer, though a valid defense was alleged therein.

2. Where, when a demurrer to a special paragraph of an answer in action to quiet title was sustained, the answer also contained a general denial, defendant could not convert the ruling on the demurrer into an available error by withdrawing the general denial at a subsequent stage of the case and refusing to plead further.

Appeal from Circuit Court, White County; T. F. Palmer, Judge.

Action by Thomas J. High against Nancy Beasey and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

E. B. Sellers, for appellants. Alfred W. Reynolds, for appellee.

BLACK, C. J. By his complaint of one paragraph the appellee sought to quiet his title to certain real estate. The appellants answered in two paragraphs, the second being the general denial. The appellee's demurrer to the first paragraph was sustained. At a subsequent day of the term the appellants withdrew their second paragraph of answer, and refused to plead further, electing to stand upon the ruling of the court in sustaining the demurrer to their first paragraph

of answer; and this ruling is assigned as error.

In such an action the defendant is permitted to give in evidence under his answer of denial every defense to the action that he may have, either legal or equitable. Sections 1067, 1082, 1083, Burns' Ann. St. 1901; *Graham v. Graham*, 55 Ind. 23. There is no available error in sustaining a demurrer to a special paragraph of answer, though a good defense be shown thereby, in such a case, or in sustaining a motion to strike out such paragraph, where at the time of such ruling there remains in the record an answer of general denial. *West v. West*, 89 Ind. 529; *Eve v. Louis*, 91 Ind. 457; *O'Donahue v. Creager*, 117 Ind. 372, 20 N. E. 267; *Watson v. Lecklider*, 147 Ind. 395, 45 N. E. 72; *Sharpe v. Dillman*, 77 Ind. 280. The error, if any, in sustaining the demurrer being harmless at the time of such ruling, the appellants could not convert the ruling into an available error by withdrawing the general denial at a subsequent stage of the cause. *Cincinnati, etc., R. Co. v. Smith*, 127 Ind. 461, 26 N. E. 1009; *Smith v. Pinnell*, 143 Ind. 485, 40 N. E. 798; *Wickwire v. Town of Angola*, 4 Ind. App. 253, 30 N. E. 917; *Berkey v. City of Elkhart*, 13 Ind. App. 314, 41 N. E. 604.

Judgment affirmed.

(33 Ind. App. 638)

FEATHERNGILL v. STATE ex rel. WRIGHT. (No. 5,034.)

(Appellate Court of Indiana, Division No. 2. Oct. 25, 1904.)

SCHOOLS AND SCHOOL DISTRICTS—TRUANT OFFICERS—APPOINTMENT—QUALIFICATION—TENURE—APPEAL—TRANSCRIPT—PRÆCIPUE.

1. Since Burns' Ann. St. 1901, § 661, requiring the clerk to make a complete transcript of the proceeding where there is no written præcipe directing him to certify a portion of the record for an appeal, was not changed by Act March 9, 1903 (Acts 1903, p. 838, c. 193), providing for the preparation of transcripts on appeal, a transcript was not defective for failure to disclose that any præcipe was filed.

2. Burns' Ann. St. 1901, § 6633b, provides that county boards of education shall constitute boards of truancy, who shall appoint one truant officer in each county, and also fixes the duties and compensation of such officer. Held, that such truant officer was a public officer, and therefore bound to qualify, before entering on the duties of his office, by taking the oath prescribed by section 7523.

3. Burns' Ann. St. 1901, § 6633b, providing for the appointment of a truant officer by the board of education of each county on the first Monday of May of each year, is directory only so far as relates to the time of appointment, and does not preclude a subsequent appointment.

4. Where defendant was duly appointed truant officer, he was entitled to hold his office until the first Monday of the succeeding May, when the county board of education was required to appoint his successor by Burns' Ann. St. 1901, § 6633b, and also until such successor had qualified by taking the prescribed oath.

Appeal from Circuit Court, Johnson County; W. J. Buckingham, Judge.

Action by the state, on the relation of Ever-

ett Wright, against Thomas Featherngill. From a judgment in favor of relator, defendant appeals. Reversed.

Will Featherngill and Miller & Barnett, for appellant. Deupree & Slack, for appellee.

ROBY, P. J. Action by the state of Indiana, on the relation of Everett Wright, against Thomas Featherngill. The complaint is in one paragraph. Its averments, in substance, are that appellant was duly appointed truant officer of Johnson county, and took possession of and continued to perform the duties of said office; that on May 6, 1901, the board of truancy of said county met and proceeded to appoint a truant officer for said county; that no appointment was made, and said meeting adjourned; "that on the 3d day of June, 1901, a majority of the county board of education, being a majority of the township trustees and presidents of the school trustees of the incorporated cities and towns of said county constituting said board of education, met as a board of truancy, and proceeded to elect by ballot a truant officer for said county; that the appellee herein received a majority of all votes taken or cast, and was then and there duly and legally elected truant officer in and for said Johnson county; that appellant, since said 3d day of June, 1901, has illegally and wrongfully held said office, and is illegally performing the duties thereof; that appellee is entitled to perform the duties of said office and to receive the salary therefor and demands judgment for the same." A demurrer for want of facts was overruled, and exception reserved, and error assigned upon such ruling. The issue was formed by a general denial, trial, and finding for the relator, and it was adjudged that appellant be ousted and removed from said office, and that he be prohibited from further exercising and performing the duties thereof, and that appellee recover costs.

Appellee makes the point that the transcript does not disclose that any *præcipe* was filed, and that, in its absence, there is nothing for our consideration. If there was no written *præcipe* directing the clerk to certify a portion of the record, it was his duty to make a complete transcript of the proceeding. Section 661, Burns' Ann. St. 1901; Chicago v. Cunningham (Ind. App.) 69 N. E. 304; Barnes v. Pelham et al., 18 Ind. App. 166, 47 N. E. 648. This was the law prior to the act of March 9, 1903, and was not changed thereby. Acts 1903, p. 338, c. 193; Rutherford v. Insurance Co. (Ind. App.) 70 N. E. 177. Section 2 of "An act concerning the education of children," approved March 11, 1901 (Acts 1901, p. 470, c. 209; section 6633b, Burns' Ann. St. 1901), contains a provision under which such officer is appointed. It is as follows: "Sec. 2. The county board of education of each county shall constitute a board of truancy whose duty it shall be to

appoint on the first Monday of May of each year, one truant officer in each county." By section 4 his compensation is fixed at \$2 for each day of actual service. Board, etc., v. Marr, 22 Ind. App. 539, 54 N. E. 402. Following that part of section 2 above quoted, and carried into section 3, his duties are specified. The power conferred upon him, while it is confined within narrow limits, is a part of the power possessed by the state, and inherent to sovereignty. His duties are not a matter of contract. The position carries with it a salary. The tenure is fixed and certain. The term "officer" is applied to him in the act, and he must be regarded, as he evidently was by the Legislature, as a public officer. Mechem's Public Officers, c. 1. It is therefore incumbent upon the truant officer, before he enters upon his official duty, to take an oath to support the Constitution of the United States and the Constitution of the state of Indiana, and to faithfully discharge the duties of such office. Section 7533, Burns' Ann. St. 1901. The provision that the appointment shall be made on the first Monday in May is directory, and does not preclude a subsequent appointment. The selection of a county superintendent is made under a statute in this respect identical with the one under consideration, and the proposition stated announced after careful consideration. Wampler v. State, 148 Ind. 557, 47 N. E. 1068, 38 L. R. A. 829. In that case, as in State v. Vanosdal, 131 Ind. 388, 31 N. E. 79, 15 L. R. A. 832, the board met on the day fixed by statute, and adjourned from day to day thereafter, but the logic of the decision requires the recognition of an appointment made after the day designated by the statute, the board being lawfully called and acting, as it is presumed to have been. State ex rel. Nebeker v. Sutton, 99 Ind. 300. Treating the averments of the complaint as sufficient to show that the appellant was the duly appointed and acting truant officer prior to the date named, it follows that he was entitled to the office until May 6, 1901, and until his successor was appointed and qualified. Baker, Governor, v. Kirk, 33 Ind. 517; Wampler v. State, 148 Ind. 565, 47 N. E. 1068, 38 L. R. A. 829; Kimberlin v. State ex rel., 130 Ind. 120, 29 N. E. 773, 14 L. R. A. 853, 30 Am. St. Rep. 208; State ex rel. v. Bogard, 128 Ind. 480, 27 N. E. 1113. Had the relator, after his appointment, performed the duties of the office without having taken and subscribed the oath prescribed by law, he would have been guilty of a criminal offense. Section 2131, Burns' Ann. St. 1901. In order to entitle himself to office, it was necessary for him to qualify as required by the statute. Minnick v. State, 154 Ind. 379, 388, 56 N. E. 851; Steinback v. The State ex rel., 38 Ind. 483, 488. It has not alleged that he had done so, and facts are not stated from which the deduction can be made. The averments that appellant wrongfully and illegally holds the office and appellee is entitled thereto are legal

conclusions. The demurrer to the complaint should have been sustained.

The judgment is reversed, and cause remanded for further proceedings not inconsistent herewith.

INDIANA NITROGLYCERIN & TORPEDO CO. v. LIPPINCOTT GLASS CO.

(No. 4847.)*

(Appellate Court of Indiana, Division No. 1. Nov. 3, 1904.)

MASTER AND SERVANT—JOINT LIABILITY FOR NEGLIGENCE OF SERVANT—ABATEMENT—INVALIDITY OF SERVICE—ACTION FOR NEGLIGENCE—PLEADING—JUDGMENT AGAINST ONE OF TWO JOINT DEFENDANTS.

1. For an injury from the negligence of a servant while engaged in the business of his master both master and servant are liable, and may be joined in an action, which, under Burns' Ann. St. 1901, § 314, may be brought in the county where either resides, and service made upon the other in the county of his residence.

2. It is not ground for abatement of an action against a corporation that it is brought in a county where the corporation has no office or agent, and that it was not bound by the service made therein on an alleged agent where it is sued jointly with a codefendant properly suable in such county, the insufficiency of the service being ground only for continuance for proper service.

3. In actions for negligence, except those to which the statute of 1899 relating to actions for negligence causing the injury or death of a person applies, the plaintiff is required to show in his complaint his freedom from contributory negligence; but it is sufficient if, from the facts directly alleged, it appears that there was no contributory negligence.

4. Under Burns' Ann. St. 1901, § 579, which provides that, though all of the defendants have been served, judgment may be rendered against any of them severally when plaintiff would have been entitled to judgments against such defendants if the action had been against them severally, the fact that in an action against a master and servant for negligence of the servant no verdict was returned against the servant does not invalidate one against the master.

Appeal from Superior Court, Madison County; Henry C. Ryan, Judge.

Action by the Lippincott Glass Company against the Indiana Nitrolycerin & Torpedo Company and another. Judgment against the corporation defendant, and it appeals. Affirmed.

Dailey, Simmons & Dailey, for appellant. Jas. A. May and Walker & Foster, for appellee.

BLACK, C. J. The appellee brought its action in the court below against the appellant and Stephen A. Clark to recover damages for injury to the appellee's property and loss to it in its business through the alleged unskillfulness and negligence of the defendants in "shooting" with nitrolycerin a gas well for the appellee. The appellant, appearing specially, filed its plea in abatement, and the demurrer of the appellee thereto was sustained. We are required to review this ruling. It was, in sub-

stance, alleged in the plea that the appellant was, and always had been, a corporation organized under the laws of this state, and at all times had its headquarters and offices in the city of Indianapolis, Marion county, Ind.; that all its officers and all the members of its board of directors had always resided in that city; that it had not, and never had, any office or agency in Madison county for the transaction of any business, out of which the cause of action stated in the complaint grew, or for the transaction of any of its business; that there was not, and never had been, any person residing in Madison county upon whom process could be served against the appellant as the law requires; that no process had at any time been served upon any officer, attorney, or agent of the appellant; that the appellee caused a summons to be issued by the clerk of the court below to the appellant; and this summons was set out in the plea, being a summons in the common form, addressed to the sheriff of Madison county, commanding him to summon the appellant, etc. It was averred that the summons was duly delivered by the clerk to the sheriff March 22, 1901, and that the sheriff served it upon one S. A. Clark on the same day, and made return thereon, which, omitting the signature of the sheriff, was as follows: "Came to hand March 22, 1901; was served as commanded, by reading to and within the hearing and in the presence of S. A. Clark, the agent and employé of the defendant, no officer or other agent of defendant being found in my bailiwick, and also leaving a certified copy of this summons with said agent and employé." It was alleged further that S. A. Clark, mentioned in the return, was not, and never was, an agent or any officer of the appellant, but at the commencement of this action and at the time the summons was served upon him he was in the employ of the appellant simply as a laborer; that he had nothing whatever to do with the shooting of the well mentioned in the complaint, except that he shot it as a laborer of the appellant, and he had no interest whatever in the shooting of the well in any other way. "The defendant therefore avers that this court has no jurisdiction over the person of the defendant in this cause, and that this action should abate; wherefore," etc. It may not improperly be observed that when the summons to the appellant was issued and served it was the only defendant, but when the plea in abatement was filed, the demurrer to which was sustained, an amended complaint making Clark also a defendant had been filed by the appellee.

At the time of the ruling upon the demurrer to the answer in abatement the appellee's complaint consisted of two paragraphs. In one paragraph it was shown that the defendants undertook and promised to shoot the appellee's gas well with a certain quantity of nitrolycerin within the

*Rehearing denied. Superseded by opinion in Supreme Court, 75 N. E. 649.

Trenton rock, and that while lowering the nitroglycerin into the well they conducted themselves so unskillfully and negligently that one can of the explosive exploded in the well at a great distance, indicated, above the Trenton rock, thereby breaking and blowing out the drive pipe, etc. In the other paragraph it was shown that the appellant undertook and promised to shoot the well; that the shooting was done by the defendant Clark, the agent or employé of the appellant, whom the appellant represented and held out to be a careful, skillful, and competent well-shooter, and he also so represented and held himself out; that he, as agent or employé of the appellant, while lowering the nitroglycerin into the well, conducted himself so unskillfully and negligently that by reason of such unskillfulness and negligence one can of the nitroglycerin exploded, etc.

If it be assumed that the service of summons on Clark shown in the plea in abatement was not legally authorized service upon the appellant, and that, therefore, there was no legitimate service of process upon the appellant, it would not follow that the action against the appellant should abate, if it may properly be said that the appellant might be sued in Delaware county upon the cause of action stated in the complaint. In such case the insufficiency of the service could only be a reason for continuing the cause for service of process. If for injury through such negligence an action would lie against the employé and the employer jointly, they might be sued together in Delaware county, where the employé resided; it being provided by statute that, where there are several defendants, residing in different counties, the action may be brought in any county where either defendant resides, and a separate summons may be issued to any other county where the other defendants may be found. Section 314, Burns' Ann. St. 1901. The fault charged upon the employé was not an omission to perform a duty of the master toward the injured third person, or mere negligence, but was negligent conduct in the doing of his own duty as an employé, for the negligent and unskillful doing of which both the employer and the employé were liable to respond in damages to the extent of the injury to the third person for whom the work was being performed. In *Wright v. Compton*, 53 Ind. 337, it was held that for an injury to a person lawfully passing along a highway from the negligence of a servant of the owner of a neighboring stone quarry in blasting rock, the servant being engaged in the performance of his master's business, the master was liable and also the servant, and they might be joined as defendants in an action to recover damages for the injury. See, also, *Shearer v. Evans*, 89 Ind. 400. The appellant and Clark, its employé, both owed a duty to the appellee to shoot the gas well with reasonable care, and for negligence in

the performance of the duty they were jointly responsible. There was no error in sustaining the demurrer to the plea in abatement.

The jury expressly based their verdict for the appellee upon the fifth paragraph of a complaint, a demurrer to which for want of sufficient facts was overruled. The objection urged against this paragraph is that it does not contain an averment that the appellee was without fault or negligence. There was no direct allegation that the appellee was without fault or negligence. Our statute of 1899, providing that the plaintiff need not allege or prove want of contributory negligence, applies to actions for negligently causing personal injuries or the death of a person. In such a case as the one at bar the rule remains as before the enactment of that statute. The general rule in this state in actions for the recovery of damages for injuries occasioned by negligence to which the statute of 1899 is not applicable requires the plaintiff to show in the complaint his freedom from contributory negligence; but this need not be by direct averment, if, from the facts directly alleged, it appears that there was no contributory negligence. *Duffy v. Howard*, 77 Ind. 182; *Pennsylvania Co. v. Gallentine*, Id. 322; *Wilson v. Trafalgar*, etc., Co., 83 Ind. 326; *Wabash*, etc., R. Co. v. *Johnson*, 96 Ind. 40; *Stevens v. Lafayette*, etc., Co., 99 Ind. 392; *Pittsburg*, etc., R. Co. v. *Welch*, 12 Ind. App. 433, 40 N. E. 650. This paragraph of complaint showed that the appellant had a factory in Delaware county, where it manufactured nitroglycerin to be used for the shooting of wells, and which was so used in that county; that the appellant did such work through Clark, its agent or employé, and represented him to be a careful, skillful, and competent shooter of wells, and held him out as such, as he did also himself. It was alleged, also, that on, etc., "for a certain reward or consideration to be afterwards paid by plaintiff to" the appellant, then and there being so engaged in the business of shooting gas and oil wells, it "undertook and promised the plaintiff that it would faithfully, skillfully, and carefully shoot" the well in question. It was shown that the explosion which occasioned the injury was caused by Clark in lowering the explosive into the well; that the injuries and damage were caused, produced, and occasioned solely and entirely by the unskillfulness and negligence of the defendants in shooting the well; and that the defendants conducted themselves in and about the work of shooting the well so recklessly and carelessly and so unskillfully, and so negligently lowered the nitroglycerin, and so rapidly and by such jerks and startings, and with such uneven and irregular rate of descent, that by reason thereof, in the conduct of the work, one can of nitroglycerin exploded, etc. Thus it appears that the injury was caused in the performance of a contract, and was produced

by the negligent and unskillful manner in which the work under the contract was done. The work to be done under the contract required skill and care, and was of such a character that there was no participation on the part of the appellee in the doing of the work which the appellant contracted to do upon the property of the appellee. The wrong is shown to have consisted in the doing of acts under the contract unskillfully, and in a positively negligent manner; the appellee having no such relation to the doing of such acts as to furnish occasion for contributory negligence therein. There appears from the complaint to have been positive affirmative fault on the part of the person who lowered the explosive into the well. See *Coon v. Vaughn*, 64 Ind. 89; *Bowlus v. Brier*, 87 Ind. 391. We are unable to hold the complaint insufficient for want of a direct denial of fault or negligence on the part of the appellee.

The court overruled the appellant's motion for a new trial. We cannot disturb the result reached by the jury upon the evidence. The appellee was injured by the premature explosion of the nitroglycerin. The work was being done by the appellant through Clark. If the appellant had failed to undertake the work, upon its refusal to recognize its obligation under contract to do so, a different question would be involved. Having entered upon the performance of the work of shooting the well through Clark, whether acting as its agent or its employé merely, it was responsible for his want of due care and reasonable skill. If, under the evidence, the appellant was liable, the fact that no verdict was returned against Clark or in his favor does not render the verdict against the appellant contrary to law. The statute provides that, though all the defendants have been summoned, judgment may be rendered against any of them severally when the plaintiff would be entitled to judgments against such defendants if the action had been against them severally. Section 579, Burns' Ann. St. 1901. We do not find any available error.

Judgment affirmed.

(34 Ind. App. 3)

WHITE RIVER SCHOOL TP. OF JOHNSON COUNTY v. CAXTON CO.
(No. 4,865.)

(Appellate Court of Indiana, Division No. 2.
Nov. 3, 1904.)

MONEY LENT—QUASI CONTRACTS—BURDEN OF PROOF—EVIDENCE.

1. Where plaintiff loaned money to a school trustee for the district, intending that it should be used for the erection of a schoolhouse, and thereafter brought suit against the school township to recover the same on the theory that defendant had received and retained the benefit of the money advanced, and therefore in equity should repay it, the burden was on plaintiff to prove the receipt of the money by the township.

2. In a suit to recover money alleged to have

been loaned to a school township for the erection of a schoolhouse on the theory of a quasi contract, evidence held insufficient to establish the receipt of the money by the township.

Appeal from Circuit Court, Johnson County; W. J. Buckingham, Judge.

Action by the Caxton Company against White River school township of Johnson county. From a judgment in favor of plaintiff, defendant appeals. Reversed.

W. A. Johnson, R. M. Miller, and H. C. Barnett, for appellant. Wm. E. Deupree and L. Ert Slack, for appellee.

ROBY, P. J. The substance of the amended complaint upon which this case was tried is: That one John R. Brickert on August 14, 1896, was the legally elected, qualified, and acting trustee of the defendant township, and so continued until February 12, 1898. That on said 14th day of August the township became indebted to the appellee in the sum of \$500, with interest at 7 per cent. per annum from said date, as evidenced by a promissory note due on or before the 20th day of June, 1897, issued in the name of said township, per John R. Brickert, said instrument being in terms as follows: "\$500. State of Indiana. Trustees No. Issued this 14th day of August, 1896, at Bluff Creek, Indiana. On or before the 20th day of June 1897, White River Township of Johnson county, State of Indiana, will pay to the Caxton Company of Chicago, Illinois, or order, the sum of five hundred dollars, value received, with interest thereon at the rate of eight per cent per annum from the 14th day of August 1896, until paid together with attorneys' fees, waiving valuation and appraisal laws of the State of Indiana. For money advanced to special school fund. The undersigned trustee hereby certifies that the present indebtedness of said township is not such as to prevent the payment of this order when due. Payable 189-, at Citizens' National Bank, Franklin, Indiana. Caxton No. 2800." That at said time such trustee was erecting a schoolhouse in District No. 8 of said township, which was necessary for the educational purposes thereof, and that, in order to erect and complete the same, it became necessary for him to borrow money and incur debts on behalf of said township, and that he represented to appellee that it was necessary therefor that he have the sum of \$500; relying on which representation appellee turned over to him the following sums of money at the following times, to wit, about October 1, \$175, October 17, \$125, October 23, \$100, December 5, \$50, all in 1896, and January 4, 1897, \$50, which sums were received by said trustee, who, as evidence thereof, "executed and delivered" the "above-mentioned note or warrant." "That at said time said township had not sufficient funds belonging to the special school fund of said township with which to pay for the erection and completion of said schoolhouse, and that

the whole of said funds so loaned to the defendant was required for the erection and completion thereof, and was used by said trustee in paying for the erection and completion thereof, and said township received and retains the benefit thereof. That the debt so contracted was not in excess of the funds on hand in said special school fund and the fund to be derived from the tax assessed for the year 1896." "That said sum is due and unpaid; wherefore," etc. A demurrer to this pleading for want of facts was overruled. General denial was then filed, and upon the issue thus joined trial was had by the court without a jury, and a general finding in favor of the plaintiff for \$250. Appellant's motion for a new trial was overruled, and judgment entered in accordance with the finding. Assignments of error are based upon the action of the court in overruling the motion for a new trial and the demurrer to the complaint.

The point made against the complaint is that the necessity alleged to have existed for borrowing money is not shown to have existed at the time that the money was furnished. The pleading is subject to criticism, attributable to the peculiar character of the transaction disclosed, but in substance is sufficient in the respect indicated. Motion for a new trial challenges the sufficiency of the evidence, a résumé of which will not prove uninteresting. The Caxton Company was a corporation located at Chicago, Ill., and engaged in the sale of school supplies and furniture. Loaning money was not a part of its business, although it had the power to do so, and sometimes made loans to accommodate its customers, but "would rather not do it." The gentleman who was its vice president and secretary at the time of the transaction in question was a witness, and testified to the foregoing among other facts. The former trustee, Brickert, was also a witness, as was the contractor who built the schoolhouse. The evidence of the latter related principally to the contract price paid and the terms and manner of payment, which, for present purposes, are not of controlling importance. Appellee's right to recover is grounded upon the proposition that appellant has received and retains the benefit of the money advanced, and should, in "equity and justice," repay it. *White River School Tp. v. Dorrell*, 26 Ind. App. 538, 540, 59 N. E. 867. It was therefore incumbent upon it to prove the receipt of the money by the township. On August 14, 1896, Brickert executed and mailed to appellee the township warrant set out in the complaint, without having received a cent of money, or without having had, so far as the evidence shows, any promise of any money from it. It appears that about the same time he borrowed \$500 from William Dorrell, for which sum a judgment has heretofore been rendered against said township. *White River Township v. Dorrell*, supra. The trustee's January, 1896, draw of

special school fund was \$590.71, his June draw \$1,628.52; making a total of \$2,719.23 of said fund then on hand. The contract price paid for erecting said schoolhouse was \$1,300. What disposition had been made of the remainder of said fund is not shown by the evidence, except as it may be inferred that portions of it, at least, were diverted to private use. About the 1st of October following the receipt of the warrant by appellee, its vice president and secretary met Brickert at an Indianapolis hotel, and was told by him that he wanted money to complete a schoolhouse; wanted to borrow it for the township, and could pay it by a certain time. Appellee's said officer was asked to tell exactly what was said, and answered, "I had to cross-examine him on that point." He, however, paid to Brickert \$175 at that time, taking a receipt therefor. The next payment was sent from Chicago by check, the next one paid by forwarding a \$100 bill by a registered letter from Chicago to Bluff Creek. The first \$50 was also sent by registered letter, and the last amount given to Brickert while in appellee's office at Chicago, it handing him a check for \$81 and receiving in return his check for \$31, the explanation being that he "wanted to use \$81 for some purpose." The name of the township does not appear in the transaction after the issuance of the warrant, checks, and receipts being made payable to or signed individually by Brickert, who was unable to remember whether he also issued to the Caxton Company on the same day other warrants for \$175, \$395, and \$450. There was evidence that various letters had been written in connection with these transactions, but none of such letters were introduced in evidence or accounted for. The examination of the two main witnesses was unduly restricted, invoking as it did equitable aid. Appellee invited the fullest investigation of its dealing with said township and its trustee, both in his private and public capacity, and such investigation should have been accorded to it. The only evidence tending to show that appellee's money was used to build the schoolhouse in District No. 8 is in the testimony of Brickert, and while, in general terms, he stated that it went into the house, his statement was qualified by specific facts elicited from him. He kept no separate bank account. He commingled his own funds, which were apparently not inconsiderable, with those of the township, paying them out indiscriminately. He testified that he could not say that any of the identical money received from appellee went into the building. He kept a trustee's record in which he charged himself with moneys received for the township. Made no charge of any part of the \$500 sued for in 1896, but two years later—in 1898, shortly before his retirement from the office—did make an entry of the amount. He was unable to tell the name of any person, the place when, or for what or where

any of this money was expended. His general statement, upon which appellee relies to sustain the judgment, is not effective to that end when taken in connection with all the qualifying facts to which he testified. Appellee undertook to show that the township did not have sufficient money belonging to the special school fund with which to pay for the erection and completion of said school-house. The fact was one susceptible of accurate and incontrovertible evidence. The testimony of Brickert showed that he had received \$2,719.23 to the credit of that fund, and did not show any legitimate expenditure thereof. The evidence is not sufficient to support the finding in other respects, which need not be indicated. The questions propounded to Brickert by the skillful counsel for appellee were in part as follows: "Q. What is your impression whether the special school fund was overdrawn?" "Q. I will ask you if you have any impression how much it was overdrawn?" The loose generalities behind which fraud loves to lurk, and which frequently are used to obscure truth, abound in the testimony of this witness.

The learned trial judge found for one-half the amount claimed. The process by which this result was reached is unknown. Appellee is either entitled to recover \$500, with interest from the time the money was received by the township, or it is not entitled to recover anything. The evidence did not justify the finding that its money was received by the township, or that a necessity for borrowing it existed.

Judgment reversed, and cause remanded, with instructions to sustain motion for a new trial.

(35 Ind. App. 73)

CARTER et al. v. CARTER. (No. 4,757).
(Appellate Court of Indiana, Division No. 2
Nov. 1, 1904.)

**BENEFIT INSURANCE—BENEFICIARIES—CHANGE
—ACTIONS—PLEADING—REPLY—DE-
PARTURE—INVITED ERROR.**

1. Where plaintiff claimed the proceeds of a benefit certificate both as beneficiary and under an antenuptial agreement with her deceased husband, who was the insured, and defendant's demurrers to the paragraphs of the complaint setting up the antenuptial agreement were sustained, whereupon he answered, setting up the issuance of a subsequent certificate to him, he was estopped to object that plaintiff's reply, in which she relied on such antenuptial agreement, was a departure, since, if the order in which the facts were presented was erroneous, it was invited.

2. Where the same facts pleaded in plaintiff's reply were provable under her answer to defendant's cross-complaint, the fact that the allegations of the reply were not germane to the claim made by plaintiff in her complaint was immaterial.

3. Where, in an action to recover the proceeds of a benefit certificate, defendant set up a claim under a certificate subsequently issued, allegations of an antenuptial contract between plaintiff and insured, in which he agreed to transfer the insurance in question to her in consideration of marriage, etc., was proper matter in reply, under Burns' Ann. St. 1901, § 360,

*Rehearing denied. Transfer to Supreme Court denied.

authorising the pleading in reply of any matter tending to avoid new matter set up in the answer.

4. Where, under an antenuptial contract, insured transferred to his wife a benefit certificate held by him, he was not authorized to obtain a new certificate payable to another under the association's constitution providing that, if the benefit certificate of a member "be lost or beyond his control," a new certificate may be issued to the same or another beneficiary.

Appeal from Circuit Court, Floyd County; Perry A. Bear, Special Judge.

Interpleader by the Supreme Lodge Knights of Honor to determine the ownership of the proceeds of a benefit certificate as between Della L. Carter and George A. Carter and others. From a decree in favor of Della L. Carter, George A. Carter and others appeal. Affirmed.

L. A. Douglas and G. H. Voigt, for appellants. Geo. H. Hester and Jacob Herter, for appellee.

ROBY, P. J. Suit instituted by appellee against the Supreme Lodge Knights of Honor, William B. Carter, and George A. Carter. The supreme lodge filed its verified interpleader, in which it stated upon information and belief the death of William B. Carter, who was a member of its order, and admitted its liability to pay to the proper beneficiary the sum of \$2,000 on account thereof. It further alleged that it was unable to determine to whom said sum should be paid, and made a detailed statement of facts supportive of such conclusion. Said sum was ordered to be paid into court, and the defendants Carter directed to set up their respective rights thereto. The lodge made such payment, and was discharged from further liability. Thereafter appellee filed "an amended and supplemental complaint" in four paragraphs. The first paragraph contained averments showing the issuance of a benefit certificate in said lodge for \$2,000 to William B. Carter, who was her husband, the same being payable to her at his death, and that said lodge had paid said sum into court for the party entitled thereto; wherefore, etc. A copy of the certificate was filed, appellee being named therein as the beneficiary. The second paragraph, in addition to the foregoing facts, sets up the making of antenuptial contract between appellee and William B. Carter, and that such contract provided, among other things, that he should make over to her, as soon as she became his wife, the benefit certificate held by him in said supreme lodge; that she thereafter, in consideration thereof, did marry him, and that in compliance with his agreement he surrendered the certificate then held by him, and procured a new one to be issued, payable upon his death to her; that said certificate is in force, has never been paid, and that she is entitled to said sum. In the third paragraph a conspiracy between appellant George A. Carter and said William B. Carter is averred to have existed, in carrying out

which said William B. Carter fraudulently and without her knowledge procured the issuance of another certificate by said supreme lodge, payable to George A. Carter, who had full knowledge of the certificate held by her of the antenuptial contract aforesaid, and who gave no consideration therefor. In the fourth paragraph it was further charged that at the time William B. Carter procured the issuance of the last-named certificate he was over 75 years of age, of unsound mind, and incapable of managing his own affairs, as George A. Carter knew, and that the issuance of said new contract was unduly procured by him. Various pleadings were filed by William H. Carter, who was an original defendant, and by certain interveners, but none of such parties are interested in this appeal. These pleadings will not, therefore, be further referred to, and the word "appellant" will be used as relating to George A. Carter alone.

Appellant's demurrer to the second, third, and fourth paragraphs of this "amended and supplemental complaint" was sustained. He thereupon filed an answer to the first paragraph in the second paragraph, of which he admitted the issuance of the benefit certificate payable to appellee as set out in her complaint, and in connection therewith he avers that by the constitution of the Knights of Honor, copy of which is filed with the pleading, it is provided that, "If the benefit certificate of a member be lost or beyond his control, the member may in writing surrender all claims thereto, and direct that a new certificate be issued to him, payable to the same, or other beneficiary, in accordance with the laws of the order, upon making affidavit of the facts and paying a fee of fifty cents, to be forwarded by the subordinate lodge, with the affidavit, to the supreme reporter." Facts are further pleaded showing a compliance by William B. Carter with the terms of said provision, and the issuance in accordance therewith of a new certificate payable to appellant. Appellee, replying to this paragraph of answer, the other paragraphs not being material at this time, set up the same facts in substantially the same form as in those paragraphs of her complaint to which demurrers had been sustained. Appellant also filed a cross-complaint, in which he counted upon the benefit certificate in terms made payable to him, and issued in place of the certificate sued upon by appellee. Appellee, in answering such cross-complaint, duplicated, except as to formal parts thereof, those paragraphs of the complaint to which the demurrer had previously been sustained and the corresponding paragraphs of reply filed by her. Demurrers to these pleadings were overruled. The case was submitted to trial. Judgment was rendered for appellee that she have and recover the \$2,000 in the hands of the clerk, and that she recover her cost.

No attempt has been made to bring evi-

dence to this court. The sole questions presented are those arising upon the pleadings. Appellant asserts that the replies to his answer which set up a right to the fund in controversy by virtue of the antenuptial agreement, are departures, and that the demurrers to them should have been sustained, the right relied upon in the complaint being only that arising from the certificate. If the order in which such facts were presented was erroneous, the error was invited by appellant, his demurrer having been sustained to those paragraphs of complaint based upon the antenuptial contract. It was also a harmless one in so much as the same facts admissible under the averments of the reply were also provable under appellee's answer to appellant's cross-complaint. *Whitely Co. v. Bevington*, 25 Ind. App. 391, 58 N. E. 268. But the new matter set up tended to avoid the new matter—i. e., the issuance of a certificate superseding that held by appellee stated in the answer—and it was, therefore, proper matter to reply. Section 360, Burns' Ann. St. 1901.

The substantial argument made by appellant is, however, based upon the assumption that he has a right to assert the same defenses against appellee's claim to the fund which the supreme lodge might have asserted against her in an action upon the certificate to which the other claimants were not parties. It is undoubtedly true that the beneficiary in such certificate does not acquire by reason of that fact alone a vested right therein (*Masonic Society v. Burkhart*, 110 Ind. 189, 10 N. E. 79, 11 N. E. 449), and that the member had power to change the beneficiary in accordance with the rules of the order (*Milner et al. v. Bowman et al.*, 119 Ind. 448, 21 N. E. 1094, 5 L. R. A. 95). These propositions are not of controlling importance in this case. Appellee's claim to the fund does not depend upon them. No provision of the constitution of the order purports to limit the right of its members to contract. The member may contract with other parties as his interest or choice may dictate, and in a proper case the society may be compelled to recognize such contract. *Smith v. Benefit Society*, 123 N. Y. 85, 25 N. E. 197, 9 L. R. A. 616; *Hellenberg v. District, etc.*, 94 N. Y. 580; *Leaf v. Leaf*, 92 Ky. 167, 17 S. W. 354, 854; *McGrew v. McGrew* (Ill.) 60 N. E. 861; *Webster v. Welch* (Sup.) 68 N. Y. Supp. 55; *Jory v. Supreme Council, etc.*, 105 Cal. 20, 38 Pac. 524, 26 L. R. A. 733, 45 Am. St. Rep. 17. The power of changing the beneficiary is independent of, and does not destroy, such contract. The owner of real estate has the absolute power of alienation thereof, but such power does not invalidate an agreement relative to its future disposition, and a conveyance made to a volunteer does not prevent the courts from decreeing specific performance in a proper case. The provision of the constitution may only be invoked "if the benefit certificate of a

member be lost or beyond his control." The affidavit upon which appellant's certificate was issued was untrue, the certificate held by appellee not having passed beyond his control. Holding it by virtue of a consideration and a contract, the possession of such certificate by appellee was equivalent to its possession by the member. *McGrew v. McGrew*, supra.

No reason for the reversal of the judgment has been presented, and it is therefore affirmed.

(38 Ind. App. 305)

FRANK BIRD TRANSFER CO. v. MORROW. (No. 4,998.)¹

(Appellate Court of Indiana, Division No. 2
Nov. 1, 1904.)

CARRIERS—STREET CARS—PASSENGERS—POSITION—CITY ORDINANCES—APPLICATION—INJURIES—DRIVERS OF OTHER VEHICLES— NEGLIGENCE—INSTRUCTIONS—APPEAL—RECORD—REVIEW.

1. A city ordinance providing that it should be unlawful for any person to hang from the outside of any street car, which ordinance was passed when the only cars in operation in the city were drawn by horses, was inapplicable to summer cars subsequently operated by electricity, arranged with seats running crosswise, with a footboard running lengthwise of the car, used as a step or platform for the accommodation of passengers.

2. It is not negligence per se for a passenger to stand on the running board of an open summer street car operated by electricity.

3. Where a passenger standing on the running board of a street car was injured by being struck by defendant's bus, which was heavily loaded, driving past the car, and the accident occurred by reason of the negligence of the driver of the bus in attempting to pass or pull around another vehicle in the street, defendant was liable.

4. Where the instructions are not contained in the appeal record, their correctness cannot be reviewed.

Appeal from Superior Court, Marion County; John L. McMaster, Judge.

Action by Samuel P. Morrow against the Frank Bird Transfer Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Schuyler A. Haas, for appellant. Jos. Collier and J. H. Kingsbury, for appellee.

WILEY, J. The appellant prosecutes this appeal from a judgment rendered against it in favor of appellee on account of personal injuries resulting from its alleged negligence.

Under the assignment of errors, the sufficiency of the complaint is called in review, but, counsel for appellant having failed to discuss that question, it will not be considered, under the rule so long established in this state. This leaves but a single question for determination, to wit, the overruling of appellant's motion for a new trial.

In the court below the Indianapolis Street Railway Company and the Indianapolis

Transfer Company were made defendants. During the trial the appellee dismissed as to the latter company, and upon the conclusion of the evidence the record shows that, upon the motion of the Indianapolis Street Railway Company, the court instructed the jury to return a verdict in its favor.

Appellant asked for a new trial upon three grounds: First, that the verdict was not sustained by sufficient evidence; second, that the court erred in excluding certain offered evidence; and, third, that the court erred in instructing the jury to find for the Indianapolis Street Railway Company.

The first reason above stated may be disposed of upon the proposition that the record contains ample evidence upon which to base a verdict and judgment against appellant. There is convincing evidence of appellant's negligence, which resulted in the appellee's injury, and hence upon that ground we cannot disturb the verdict.

As to the second reason, the offered evidence on behalf of the appellant, which the court excluded, was an ordinance of the city of Indianapolis adopted at a time when all street cars within the limits of the city were propelled by horse power. So much of that ordinance as is necessary for us to consider in this case is as follows: "From and after the passage of this ordinance, it shall be unlawful for any person within the corporate limits of the city of Indianapolis to swing or hang from the outside of any street car." The evidence shows that the appellee was on a west-bound street car, returning from a baseball game on East Washington street to the city. The car was crowded, and he, with many others, was standing upon what is commonly known and designated as the running board of a summer street car. While in that position, appellant, by its servant, drove a large two-horse bus filled with ball players against appellee, while standing upon the running board, and crushed him up against the car, and when it pulled away from the car he fell to the street. It is urged by counsel for appellant that when appellee was injured he was violating a penal ordinance of the city by riding on the running board of the car, and that, as he was a wrongdoer himself, he could not recover. It is apparent from the record that the trial court excluded this offered evidence upon the ground that the ordinance was not applicable to the present condition and manner of operating street cars. It is a matter of common knowledge that radical changes have taken place in the past 30 years in regard to the operation and propelling of street cars. It is also a matter of common knowledge that, in the modern construction of street cars, regard is had to conditions and seasons; and in the city of Indianapolis we do not only know from everyday observation and common knowledge, but from the evidence in this case, that upon the streets in the city of Indianapolis, during the summer

¹ 2. See *Carriers*, vol. 9, Cent. Dig. § 1379.

² Rehearing denied. Transfer

season, street cars are operated which are known and designated as summer cars. These are open carriages, with the seats running crossways, and with the running board running lengthwise with the car from end to end, and projecting from the car a sufficient distance and the board being of sufficient width for a step or platform for the accommodation of passengers getting on and off the cars. It may be remarked that the primary purpose of this running board is for the convenience of persons desiring to take passage and alight from such cars, but we also know that it is used frequently for passengers to stand upon when the car is crowded. Under these conditions, we are clearly of the opinion that the ordinance offered in evidence did not apply to the facts disclosed by the record in this case. We are not without authority upon this proposition. In the recent case of *Bonham v. Citizens' St. R. Co.*, 158 Ind. 106, 62 N. E. 996, it was held that said ordinances adopted in 1864 and 1876, regulating the rate of speed at which a horse power street car company should run its cars, are not applicable to the successor of such company, operating its cars by electricity, although the electric company, by the terms of its franchise, accepted the duties and obligations imposed upon its predecessor, and it was held that the trial court properly excluded such ordinance from the evidence in an action against the latter company for an unlawful injury. In that case the court said: "Notwithstanding the intervention of many years since a statute was enacted or an ordinance was adopted, we may be able to say that the statute or ordinance is still a manifestation of the legislative intent as applied to a particular case; but when substantially new factors enter into the problem as to what the written law ought to be, as applied to a particular case, the courts can no longer treat the statute or ordinance as an expression of the legislative purpose as applied to that case." It is the contention of appellant that, as appellee was violating the ordinance under consideration, he was himself a wrongdoer, and hence was not entitled to recover. If the ordinance was inapplicable to existing conditions—and, under the authority cited, it was—then there is no evidence to show that appellee was a wrongdoer. In passing the ordinance in question, the city council did not contemplate the operation of street cars by electricity, nor did it intend that such ordinance should apply to the modern summer car with a running board. The council was legislating with regard to then existing conditions. Neither is there any evidence to show that appellee was negligent, under all the facts and circumstances, in riding upon the running board. We are clear that it is not negligence per se for a passenger to stand upon the running board of a street car, as such cars are usually operated in the city of Indianapolis. *Citizens', etc., Co. v. Hoffbauer*,

23 Ind. App. 614, 56 N. E. 54, at pages 624, 625, 23 Ind. App., pages 57, 58, 56 N. E. In this case the evidence establishes the fact that appellant was driving its heavy, loaded bus faster than the street car upon which appellee was riding was running. It was bound to take notice of the conditions and surroundings. There was plenty of room between the north rail of the street-car track and the curb for appellant's bus to pass the car without coming in contact with persons standing on the running board, and the accident would not have occurred if the driver of the bus had not carelessly attempted to pass or pull around another vehicle in the street.

It is next contended by counsel for appellant that the court erred in sustaining the motion of the Indianapolis Street Railway Company to instruct the jury to return a verdict in its favor. If there was any error in this, we do not think the record presents the question. It is disclosed by the record that the street railway company filed the following motion: "The Indianapolis Street Railway Company, now, at the close of all the evidence, move the court to instruct the jury to return a verdict in favor of the Indianapolis Street Railway Company in this cause." And the record also contains the further entry: "Which motion the court sustains. Thereupon the argument of counsel is heard, and the jury is instructed by the court, and retire to consider of their verdict," etc. The record does not contain any instructions whatever. We cannot consider the correctness of any instruction when the record does not contain the instruction complained of.

Judgment affirmed.

(37 Ind. App. 146)

WAYNE INTERNATIONAL BUILDING & LOAN ASS'N v. GILMORE et al.¹
(No. 4,084.)

(Appellate Court of Indiana, Division No. 1.
Nov. 1, 1904.)

BUILDING AND LOAN ASSOCIATIONS—BORROWING MEMBERS—STOCK—MATURITY—MISREPRESENTATIONS—STATEMENTS OF OPINION.

1. Where a building association bond and mortgage signed by defendant plainly obligated him to make specified monthly payments until his shares of stock matured as provided by the by-laws, and the by-laws declared that the stock should mature as soon as the total loan-fund portion of the installments, with accumulated profits, should equal \$100 per share, it was no defense to a suit to foreclose the mortgage for failure to make further payments that defendant had paid 60 monthly installments on his stock, etc., and that, in order to induce him to purchase the stock and take the loan, plaintiff's agents had represented that 60 installments would be sufficient to mature the stock and discharge the loan.

2. Since it is impossible to determine in advance the future profits of a building and loan association, representations that a payment of 60 installments would be sufficient to mature the stock of a borrowing member, and pay off

¹Rehearing denied. Transfer

to Supreme Court denied.

his loan, was a mere expression of opinion; the by-laws of the association providing that the stock should not mature until the loan-fund portion of installments paid, with accumulated profits, should equal \$100 a share.

Appeal from Superior Court, Madison County; H. C. Ryan, Judge.

Action by the Wayne International Building & Loan Association against Charles I. Gilmore and others. From a judgment in favor of defendants, plaintiff appeals. Reversed.

A. R. Teemster and Daniel Wait Howe, for appellant. Walker & Foster, for appellees.

ROBINSON, J. Suit by appellant to foreclose a mortgage given to secure a bond executed by appellee. The complaint avers that appellant issued to appellee a certificate of stock for five shares in Class A of appellant association; that afterwards appellee borrowed of appellant \$500, and executed a bond for that sum, and a mortgage to secure the same; that, after making a certain number of payments, appellee refused to make further payments, leaving a balance still due and unpaid. The certificate of stock, bond, mortgage, and by-laws of appellant are made parts of the complaint. The certificate of stock certifies that the appellee is a shareholder in appellant, and holds five shares, of the par value of \$100 each, and that in consideration of the membership fee, together with the statements and agreements in the application for membership and stock, and a full compliance with the charter and by-laws of appellant, which are referred to and made part of the contract, and the payment of \$1 not later than the 25th day of each month on each share named in the contract, for 60 months, unless the stock should sooner mature, appellant promises to pay to the holder the sum of \$100 for each share named therein, whenever the monthly payments made in pursuance of the contract and an equitable proportion of the profits shall amount to the par value of the stock. The bond contains the provision that whereas appellee has subscribed for five shares of stock, of the face value of \$100 each, for which he received the sum of \$500 as a loan, which shares of stock are thereby transferred as collateral security for the payment of the bond, with agreement on his part that he will continue to pay monthly dues on the stock at the rate of \$1 per month on each share, as provided by the by-laws of appellant, together with a premium of 50 cents per month on each share, and interest at 6 per cent, per annum, all to be due and payable on the 1st, and delinquent on the 25th, day of each month, until such shares mature as provided by the by-laws of appellant. The mortgage contains the following provision: That it is executed and intended as security for the performance of the stipulations and

agreements of the bond, conditioned that appellee shall continue to pay monthly dues upon five shares of the capital stock at the rate of \$1 per month on each share of stock, as provided in the by-laws, together with a premium of 50 cents per month on each share, and interest on the loan at 6 per cent, per annum, and due and payable on the 1st, and delinquent after the 25th, day of each month, until the shares mature as provided by the by-laws of appellant. The by-laws of appellant provide, among other things, that the installment stock of appellant is issued in three classes. Classes A, B, and C shall be paid for in monthly installments of \$1, 80 cents, and 40 cents, respectively, and the stockholders' liability for such installments shall be limited to 60, 72, and 108 installments, respectively; also that stock issued in Classes A, B, and C shall mature as soon as the total loan-fund portion of the monthly installments, with accumulated profits, shall equal \$100 per share.

Appellee, in his fourth paragraph of answer, admits the issue to him of the five shares of stock, and that afterwards he borrowed the sum of \$500 thereon, executing the bond described in the complaint, and also executing to the appellant the mortgage described and set out in the complaint, and that the by-laws of appellant are referred to and made a part of the certificate of stock issued to him, and in both the bond and mortgage the by-laws are referred to, and in the bond and mortgage it is provided that payments shall be made until the shares mature as provided by the by-laws of appellant; and he alleges: That at the time of and before the issuance of the stock he was desirous of making a loan of \$500, and at that time he had no knowledge of the rules governing loan associations, or the rights of persons becoming members thereof, and that for the purpose of inducing him to become a member, and to execute the bond and mortgage sued on, appellant, its officers and agents, falsely and fraudulently represented to him that if he would become a member and shareholder, and subscribe for five shares of stock, of the face value of \$100 each, and pay \$1 per share monthly in advance for 60 months, appellant would pay him the sum of \$500, and that if he would execute the bond and mortgage now in suit, and pay in addition thereto the premium of 50 cents per month on each share of stock, and interest on the loan at 6 per cent, per annum, the stock would be thereby matured, and the debt would thereby be fully paid, and the mortgage and bond would be canceled, and that he would be relieved from any further liability thereon; that he would be required to pay on the loan, for the maturity of his stock and the full payment of the loan, only 60 monthly payments, with premium and interest thereon. That appellant's agent exhibited to appellee a copy of the certificate of stock, wherein it is provided that on the

payment of \$1 not later than the 25th day of each month on each share for a period of 60 months, unless the stock shall sooner mature, appellant promises to pay the holder \$100 for each share named therein whenever the monthly payments made in pursuance of the contract and the equitable apportionment of the profits shall amount to the par value of the stock. That appellant's agent also exhibited to appellee a copy of the by-laws of appellant, containing the provisions herein above set out. That the language above set out as a part of the certificate was embodied in the certificate of stock issued appellee, as averred in the complaint, and that the by-laws above mentioned were in force at the time the contract was entered into by the appellee, and the loan made. That appellant, by its agents, in explaining the language and meaning of the certificate of stock, and the by-laws above mentioned, and the bond and mortgage to be executed in the matter of the loan now in suit, represented and stated to appellee that such payments for such period would mature the stock, and pay and satisfy the bond and mortgage, and discharge him from all liability thereon. That the proper and true meaning and construction of these sections of the by-laws and clause contained in the certificate was to the effect that appellee should pay 60 payments only, together with the interest and premium thereon, in order to mature the stock and fully pay the bond and mortgage debt, and that such representations and explanations were so made for the purpose and with the intention of misleading and defrauding appellee by inducing him to purchase the stock and execute the obligation sued on in this action. That, at the time of such representations and explanations, appellant and its agents well knew that the same were false and fraudulent, and that they were made for the purpose of misleading appellee and inducing him to become a member of appellant and make the loan. That, believing such representations and explanations so made to be true, and wholly relying on them, and having no other means of knowing the truth or falsity thereof, he took out the stock and executed the bond and mortgage. Appellee further alleges that, if he had not believed such false and fraudulent representations, he would not have become a member, and would not have executed the bond and mortgage; that before the bringing of this action he had made payments for 60 months regularly each month, together with all dues and interest, and had paid appellant thereon the sum of \$600; that appellee made such payments, relying on the representations so made to him that the sixty payments would mature the stock and pay the bond and mortgage, and that he made all such payments in the full belief that they would fully mature the stock, and pay and discharge the bond and mortgage, and all liability of appellee on account thereof; that

at the end of 60 months, and after having made 60 payments of dues, with all premiums and interest thereon, and after having fully paid the debt according to the terms of the contract, he demanded the cancellation and release of the bond and mortgage, and the return thereof, but appellant refused so to do, claiming that the stock was not matured, and the bond and mortgage were not yet fully paid; that appellee then for the first time learned of the falsity of such statements and representations; and that thereby a fraud had been perpetrated upon him to become a member of appellant and take the stock and execute the bond and mortgage.

The demurrer to this fourth paragraph of answer was overruled, and this ruling is assigned as error. The demurrer to this answer should have been sustained. Appellee may have been induced to enter into the transaction by the representations made, but when he signed the bond and mortgage he agreed to comply with the stipulations therein contained. The bond and mortgage, and the by-laws made a part of each, state very plainly the manner in which the debt may be discharged. Appellee obligated himself in the bond and mortgage to continue to make certain specified monthly payments "until such shares mature as provided in the by-laws," and the by-laws provide that the stock shall mature as soon as the total loan-fund portion of the monthly installments, with accumulated profits, shall equal \$100 per share. As a stockholder, he was to pay for 60 months only, but would receive the par value of his stock, as the certificate of stock says, whenever the monthly payments and an equitable apportionment of the profits should amount to the par value. This might have been some time after he had ceased making the monthly payments. As a borrower, he was not to pay for 60 months only, and have his debt canceled whenever the monthly payments and an equitable apportionment of the profits should amount to the par value; but he agreed, by the bond and mortgage, to continue to make these monthly payments until the shares should mature, and the shares would not mature, the by-laws say, until the total loan-fund portion of the monthly installments, with accumulated profits, should equal \$100 per share. Appellee was a member of appellant association. He must not only take notice of its by-laws, but in this case the by-laws are expressly made a part of his contract. The bond and mortgage and the provisions of the by-laws are not susceptible of the construction given them by the representations made by the agent of appellant. It is not shown that appellee was in any way prevented from knowing all these provisions when he signed the bond and mortgage. There was no relation of trust or confidence between him and appellant's agent. See *American Ins. Co. v. McWhorter*, 78 Ind. 136; *Miller v. Powers*,

119 Ind. 73, 21 N. E. 455, 4 L. R. A. 483; Robinson v. Glass, 94 Ind. 211. While the representations alleged in the answer might, if standing alone, be representations of facts, yet, as the by-laws provide that the stock shall not mature until the loan-fund portion of the monthly installments, with accumulated profits, shall equal \$100, and as it is not possible to determine in advance what the future profits of the association will be, such representations, when taken in connection with the by-laws, were no more than the expression of the opinion held by the agent making them. See Myers v. Alpena, etc., Ass'n, 117 Mich. 330, 75 N. W. 944; Campbell v. Eastern, etc., Ass'n, 98 Va. 729, 37 S. E. 350; Winget v. Quincy, etc., Ass'n, 128 Ill. 67, 21 N. E. 12; Gale v. Southern, etc., Ass'n (C. C.) 117 Fed. 732; O'Malley v. People's, etc., Ass'n, 92 Hun, 572, 36 N. Y. Supp. 1016; Wayne, etc., Ass'n v. Skelton, 27 Ind. App. 624, 61 N. E. 951; Union, etc., Ass'n v. Aichele, 28 Ind. App. 69, 61 N. E. 11; Noah v. German, etc., Ass'n, 31 Ind. App. 504, 68 N. E. 615.

Counsel for appellees cite the case of Hartman v. International, etc., Ass'n, 28 Ind. App. 65, 62 N. E. 64, and state in their brief that, upon the authority of that case, the demurrer to this paragraph of answer was overruled. The answer in that case and the answer in the case at bar are substantially the same, but the complaints to which they are directed are very different. The only condition in the Hartman Case, in the bond or mortgage, as to the payments to be made or the maturity of the stock, was that if the appellant should pay the appellee "the sum of a loan of \$800.00 this day to him made, on or before the maturity of the shares herein pledged as collateral security," and 5 per cent. interest, and 5 per cent. premium, and 75 cents per share monthly as dues, and perform the covenants of the mortgage, then the bond to be void. In that case no reference is made to any by-law in either the bond or mortgage; in this case reference is made to the by-laws in both the bond and mortgage. In that case no by-laws were set out in any of the pleadings; in this case they are. In that case the bond and mortgage did not, in and of themselves, necessarily charge the borrower with the information that he was to pay a certain specified sum for an indefinite period of time; in this case the bond, mortgage, and by-laws do necessarily charge appellee with the information that the loan was to be paid by monthly payments for a period of time necessarily uncertain in duration. In that case the representations made were not inconsistent with a reasonable construction of the only condition in the bond as to the payments to be made, or the maturity of the stock; in this case the representations made were inconsistent with a reasonable construction of the conditions in the bond and mortgage and the provisions of the by-laws. In the opinion

72 N.E.—13

in that case reference is expressly made to the fact that no by-law is set out in the pleading, and no reference is made to any by-law in either the bond or the mortgage, and the opinion further states that "the bond and mortgage in the case at bar, so far as disclosed by the pleadings, stand alone, and their interpretation and meaning are not affected by any by-law, of the provisions of which a member must take notice." We still adhere to the ruling in that case, but the question presented in that case and the question in the case at bar are by no means the same. The demurrer to the fourth paragraph of answer should have been sustained. Judgment reversed.

(34 Ind. App. 253)

CRUM v. NORTH VERNON PUMP & LUMBER CO. et al. (No. 4,955.)*

(Appellate Court of Indiana, Division No. 2.
Nov. 1, 1904.)

MASTER AND SERVANT—ASSUMED RISK—PROMISE OF MASTER TO REMOVE DANGER—SAWMILLS—STATUTORY DUTY FOR PROTECTION OF EMPLOYEES.

1. The promise of a master to construct an appliance which would remove a danger to which a servant was exposed while at work does not relieve the servant from assumption of the risk where the danger was imminent, and he continued in the work with full knowledge of it.

2. Defendant operated a sawmill, in which slabs and other refuse were thrown from the second floor into a bin on the ground, from which they were taken by plaintiff, an employé, for fuel. When the bin was empty there was constant danger that plaintiff, when taking fuel from the bin, would be struck by falling pieces, since the persons throwing them could not see him, nor could he see them. On his complaint, defendant's manager promised to construct a chute which would remove the danger, and plaintiff continued at work, and was injured two or three days later. Held, that he assumed the risk.

3. The failure of the owner of a sawmill to construct a chute for conveying slabs from the second floor to the ground does not constitute a violation of the duty imposed on it by section 8 of Act March 2, 1899 (Acts 1899, p. 234, c. 142), requiring the construction and maintenance of safeguards to protect employes from injury in the use of machinery.

Appeal from Circuit Court, Jackson County; Jos. H. Shea, Special Judge.

Action by Oliver D. Crum against the North Vernon Pump & Lumber Company and others. From a judgment for defendants on demurrer, plaintiff appeals. Affirmed.

McHenry Owen, for appellant. Lincoln Dixon and H. C. Meloy, for appellees.

COMSTOCK, J. Appellant brought this action in the Lawrence circuit court against appellees to recover for personal injuries alleged to have been received while working as their employé in a sawmill in Lawrence county. A change of venue was taken to the Jackson circuit court. A change of judge

* 1. See Master and Servant, vol. 34, Cent. Dig. §§ 623, 642, 646.

*For opinion in Supreme Court, see 72 N. E. 582.

was granted in the Jackson circuit court. The amended complaint consisted of two paragraphs. A demurrer was sustained to each for want of sufficient facts. Appellant declining to plead further, judgment was rendered against him for costs. A reversal is asked, upon the rulings on said demurrers.

Omitting the formal parts of the complaint and conclusions of fact, it may be fairly summarized as follows: At the time plaintiff received his injury, defendants owned and were operating a sawmill known as a "band mill," and employed therein a number of servants, of whom plaintiff was one; that the building in which were located the saws and other machinery of said mill was composed of two stories, the second of which was supplied with a floor which was $5\frac{1}{2}$ feet above the sills of the lower story, and on said second story, and 10 feet west of the east end of said second floor was a saw known as a "cut-off saw," fastened to a table which was $2\frac{1}{2}$ feet in height, and the operator thereof worked on the west side of same; that the boiler and engine room was immediately east of said saw building, was but 1 story high, and lacked about 85 feet of projecting northward to the northeast corner of the said sawmill building, so that when wood and slabs were pitched and thrown out eastward from the second floor, and from the cut-off saw, the same would fall north of where the said wood and slabs were used, and near the fire doors of the furnace by which the boiler was heated; that when the said place where said wood and slabs would fall when so pitched and thrown from the second floor, and from the cut-off saw, was allowed to fill up so that said wood and slabs struck the top of the wood and slab pile, the place of the work of plaintiff, which was at and near said boiler and engine room and building in which the same were placed and operated, was not particularly dangerous, but when said place became empty, so that the wood and slabs, when so pitched and thrown, fell on the ground, the place of the work of plaintiff was thereby made dangerous and unsafe in this: that he was placed in danger of being struck and injured by said wood and slabs when attempting to pick up the same; that the plaintiff at the time of his injury, when at the place of his work, could not see the workman who operated the cut-off saw, and could not know when a slab or stick might be thrown from the place of said saw out at the east end of said second story to his place of work, nor could the workman who operated the said cut-off saw, from his place of work, see the plaintiff at his work, thus making the place of the work of the plaintiff dangerous and unsafe when the slab pile had become wholly, or almost wholly, removed; that about one week immediately preceding the injury of the plaintiff the said slab bin, by the order of the defendants, had been made empty,

and caused to remain empty, so that, when the slabs were pitched from the said saw down toward the said boiler room, they would go to the bottom of the bin, which was the ground, thus making the place of the work of the plaintiff dangerous and unsafe, which fact was by plaintiff communicated to defendant, and to defendants' vice principal, William Hess, upon which the defendant, through its vice principal, William Hess, then and there promised the plaintiff that the said defective and insufficient machinery and appliances would be forthwith supplied, and the said danger and unsafety to plaintiff removed and obviated, by constructing and placing a chute of sufficient size from the cut-off saw downward to the binroom, to convey the said wood and slabs to their place of use; that, pursuant to said promise so made by defendant to plaintiff, defendant then and there, through its vice principal, William Hess, ordered, with the knowledge of the plaintiff, that measurements be made and plans and designs formed and arranged for the immediate construction of the said chute, and that the said chute be constructed and placed in the said mill immediately, and plaintiff, relying upon the promise of defendant so made, continued in appellee's service for three days immediately thereafter, but the chute or conveyor was not constructed, when, by reason of the slabs thrown down from said floor of the mill into the bin or receptacle for the same, where plaintiff had to come for them, he was struck by a heavy slab of wood, and received the injury of which he complains, and on account of which he sues; that he was injured without any fault upon his part, and by reason of the negligence of the defendant in failing to supply the chute in accordance with the promise set out.

A servant voluntarily entering upon an employment, the dangers of which are known to him, must be held to have assumed the consequences of such risk. "An employé who continues in the service of his employer after notice of a defect augmenting the danger assumes the risk as increased by the defect, unless the master expressly or impliedly promises to remedy the defect. The promise of the master is the basis of the exception." *Indianapolis, etc., Ry. Co. v. Watson*, 114 Ind. 20, 14 N. E. 721, 15 N. E. 824, 5 Am. St. Rep. 578; *Bally, Personal Injuries*, § 3079. Appellant's knowledge of the danger of his employment, and his continuance in appellee's services after such knowledge, clearly appear. His right of action, then, if it exists at all, must be based upon appellee's promise to construct the chute. In addition, it should appear that the building of the chute would have lessened the danger to appellant, and that he believed it would do so. It does appear that the vice principal of appellee promised to have the chute constructed, but it only appears that said vice principal assured appellant that

said chute would remove the danger; but no fact is alleged showing that the danger would have been lessened, nor is it alleged that appellant believed that such result would follow the construction of said chute. The exception which has been stated does not relieve the servant from all risk. If the danger is known and imminent, he must not expose himself to it, even if a promise has been made to remove it. *Indianapolis, etc., Ry. Co. v. Watson, supra*; *McAndrews v. Montana Union R. Co. (Mont.) 39 Pac. 85*; *Erdman v. Illinois Steel Co. (Wis.) 69 N. W. 993, 60 Am. St. Rep. 66*. The allegations of the paragraph under consideration show that the danger was known, was imminent, and great. It was a constant menace to appellant's safety. He knew that he was liable to be struck by a falling slab of wood any time that he attempted to "pick up any part or parcel of the same for the purpose of making a fire in the said furnace." "When the line of danger, direct and certain, is reached, there the citizen must stop, and he cannot pass it, even upon the faith of another's promise, if to pass it requires a hazard that no prudent man would incur." *Indianapolis, etc., Ry. Co. v. Watson, supra*. The facts alleged do not present a claim based upon the use of defective machinery after a promise has been made to repair it. A defective machine may be, and often is, operated, by the use of care, without injury to the employé. The situation in which the facts place appellant shows that care was unavailing, for the reason that he could have no knowledge when the slabs would be thrown, nor could the man at the cut-off saw know when appellant was in a place of danger. It has been held that the rule which appellant invokes, that a servant may rely on the master's promise to repair, does not apply when the servant is performing ordinary labor, not requiring intricate machinery or appliances, and has an equal knowledge with the master of existing defects or dangers. *Marsh v. Chickering, 101 N. Y. 396, 5 N. E. 56*; *Meador v. L. S., etc., Ry. Co., 138 Ind. 290, 37 N. E. 721, 46 Am. St. Rep. 884*.

The second paragraph describes the mill and conditions as set out in the first, and charges that the failure to furnish a chute or conveyor for the slabs constituted negligence, under section 9 of an act concerning labor, approved March 2, 1899 (Acts 1899, p. 234, c. 142). Its sufficiency must be determined upon the theory upon which it is framed. Said section makes it the duty of any person in charge of an establishment of the kind operated by appellees to furnish "belt shifters or other safe mechanical contrivances for the purpose of throwing on or off belts or pulleys, and, whenever possible, machinery therein shall be provided with loose pulleys; all vats, pans, saws, planers, cogs, gearing, belting, shafting, set-screws, and machinery of every description therein shall

be properly guarded, and no person shall remove or make ineffective any safe-guard around or attached to any planer, saw, shafting, or other machinery, or around any vat or pan while the same is in use, unless for the purpose of immediately making repairs thereto, and all such safe-guards shall be promptly replaced." The failure to provide the chute or conveyor does not constitute a violation of a statutory duty. The court did not err in sustaining the demurrer to each paragraph.

Judgment affirmed.

(213 Ill. 174.)

CHICAGO CITY RY. CO. v. UHTER.

(Supreme Court of Illinois. Oct. 24, 1904.)

NEGLIGENCE—RELEASE OF PERSON LIABLE—FRAUD—RAISING QUESTION OF FRAUD—EVIDENCE—QUESTION FOR JURY—INJURIES—HEARSAY EVIDENCE—IMPEACHING WITNESS.

1. Where one signing a release is induced to do so by a fraudulent representation, but understands what he is signing, in order to make an attack on the release resort must be had to equity.

2. Where one signing a release is deceived in signing it by the belief that he is signing something else, he may attack the instrument in an action at law.

3. Where, in an action for personal injuries, there was evidence that plaintiff signed a release under the belief that he was signing a receipt for something else, the question whether the release was obtained unfairly was for the jury.

4. In an action for injuries where one defense was that prior to the accident plaintiff had met with other accidents, which had caused many of the ailments attributed to the accident in question, it was error to permit plaintiff to introduce the testimony of witnesses as to what they had heard about prior injuries to plaintiff.

5. Where evidence was introduced by plaintiff over objection, and defendant thereafter introduced evidence of the same character, he was not thereby precluded from questioning the correctness of the ruling on plaintiff's evidence.

6. In an action against a street railway for injuries sustained by having been struck by one of defendant's cars, it was error to admit on behalf of plaintiff evidence showing that a policeman arrested the motorman and conductor several hours after the accident.

7. A party had no right on cross-examination of a witness to examine him as to his relations with his wife, and as to whether he supported his family.

Appeal from Appellate Court, First District.

Action by Henry Uhter against the Chicago City Railway Company. From a judgment of the Appellate Court affirming a judgment in favor of plaintiff, defendant appeals. Reversed.

This is an action on the case, brought on May 18, 1895, by the appellee against the appellant company to recover damages for personal injuries claimed to have been received by appellee on December 31, 1894, by being struck by one of appellant's electric street railway cars at or near the intersection of Sixty-Third street and Madison avenue in the city of Chicago. The ad damnum was laid at \$25,000. The plea of the general

issue was filed, and the case has been tried three times. In the first two trials the juries were unable to agree. The last jury rendered a verdict in favor of appellee for \$12,500, of which the trial judge required a remittitur of \$8,500, and judgment was entered against appellant for \$4,000. Upon appeal to the Appellate Court the latter judgment has been affirmed, and the present appeal is prosecuted from such judgment of affirmance.

William J. Hynes and Watson J. Ferry (Mason B. Starring, of counsel), for appellant. George W. Plummer, Wharton Plummer, and S. C. Dwyer, for appellee.

MAGRUDER, J. In the present action to recover damages on account of personal injuries the usual questions whether or not the plaintiff below was in the exercise of due care for his own safety when the accident occurred, and whether or not the defendant was guilty of such negligence as caused the accident, were not the only questions involved upon the trial of the case, but there was also presented for the determination of the jury, upon the trial below, the question whether or not a certain release executed by the appellee some five days after the accident occurred was valid and binding upon the appellee. The release was in writing, and was signed by the appellee by his mark, and was witnessed by two witnesses, one of whom was his daughter, and the other of whom was his granddaughter. The instrument, by its terms, released the appellant from all demands, and especially from any claim on account of the accident in question, and recited that it was in consideration of \$35, paid to the appellee, and of an agreement to send a certain physician to attend upon him, such physician not to make more than four visits.

There are two kinds of fraud for which such a release as was here introduced in evidence may be impeached. Where a party, signing such an instrument is induced to execute it by a misrepresentation or fraudulent representations as to collateral matters, or as to the nature and value of the consideration, resort must be had to a court of equity for relief. In such cases the party fully understands what he is signing, and is aware of the nature and character of the instrument executed by him, but is deceived by fraudulent representations as to facts outside of the instrument itself. There is another kind of fraud, however, for which a release may be impeached, and that is fraud which inheres in the execution of the instrument; that is to say, where the signer of the instrument is deceived into signing it by the belief that he is signing something other than that which he does really sign. Cases of this kind arise where the instrument is misread to the party signing, or where there is a surreptitious substitution of one paper for another, or where, by some trick or device, a party is made to sign an instrument

which he did not intend to execute; and, where this is the case, the nature of the instrument signed is not fully understood by the party signing it. Where fraud of the latter kind exists—that is, fraud in the execution of the instrument itself—it may be shown in an action at law. *Papke v. Hammond Co.*, 192 Ill. 631, 61 N. E. 910.

In the case at bar it was charged by the appellee that when he signed the instrument introduced in evidence as a release he did not know that he was signing such a release, but supposed he was signing a receipt for money which he had paid out to a doctor for medical services in dressing his wounds and caring for his injuries. The evidence tends to show that the appellee, or some member of his family, had paid out about \$80 to a doctor for these services when the representative of the appellant company approached him with the view of securing the release in question, and he supposed, when he executed the release, that he was merely executing a receipt for such money, paid out by him to the physician, and returned to him by the appellant's representative. There was evidence in the record tending to establish appellee's contention that he did not execute the release, and that he signed it under the belief that he was signing a receipt. Whether or not such a release was obtained unfairly is a question of fact for the jury. *Illinois Central Railroad Co. v. Welch*, 52 Ill. 183, 4 Am. Rep. 593; *Chicago, Rock Island & Pacific Railway Co. v. Lewis*, 109 Ill. 120; *National Syrup Co. v. Carlson*, 155 Ill. 210, 40 N. E. 492; *Indiana, Decatur & Western Railway Co. v. Fowler*, 201 Ill. 152, 66 N. E. 394, 94 Am. St. Rep. 158. But while it is true that sufficient evidence was introduced, attacking the validity of the release, to justify the submission of the question of its execution to the jury, yet we are of the opinion that serious errors were committed by the trial court in the admission of testimony bearing upon other questions presented by the record. Even if the release was not understandingly executed as such by the appellee, yet the questions remained whether or not the negligence of the appellant company caused the injury while appellee was in the exercise of due care, and whether or not the injuries suffered by him were such as they were claimed to be, and were of the character sought to be established by appellee's testimony.

1. One of the questions in the case was whether certain ailments of the appellee, to which many of his witnesses testified, and certain sufferings endured by him after he received the injuries in question, were really caused by such injuries, or existed before the accident, or were due to causes operating before the accident occurred. For instance, the medical testimony showed that after the accident appellee showed signs of rheumatism and rupture, and indications of serious fractures in his limbs. Undoubtedly the in-

jury was a very serious one, and the appellee at the time of its occurrence was an old man 70 years of age. Whether the physical ailments suffered by the appellee after the accident were really caused by it or not was a question about which the testimony was conflicting. Appellant introduced testimony upon the trial tending to show that many of the physical troubles which appellee's witnesses attributed to the accident had existed prior thereto. But before such testimony was introduced upon the last trial by the appellant, the appellee, evidently in anticipation that such testimony would be produced when the appellant should begin to make its defense, introduced much of its own testimony upon this subject, not in rebuttal, but as a part of its original case. Appellee placed upon the witness stand a witness by the name of Hull, and a part of his examination was as follows: "Q. Did you ever hear of his having rheumatism? (Objected to by counsel for defendant as incompetent; objection overruled; exception by defendant.) A. No, I never did. Q. Did you ever hear of him having a rupture of any kind, or know of his having any? (Objected to by counsel for defendant for the same reason; objection overruled; exception by defendant.) A. No, sir. * * * Q. Did you ever hear of him being kicked by a horse? (By counsel for appellant, the same objection as before.) * * * A. Before this injury, I never saw him walk lame." Again, a witness by the name of Love was put upon the stand by the appellee, and the following is a part of his testimony: "Q. Did you ever hear of his being ruptured, having a rupture? (Objected to by counsel for defendant as incompetent; objection overruled; exception by defendant.) A. No, sir. Q. Did you ever hear of anything being the matter with him until the time of this accident? (Same objection by defendant; objection overruled; exception by defendant.) A. No, I think not. He cut his foot one time in the woods. I heard that years ago. That is all I ever heard." Appellee in rebuttal also placed on the witness stand a witness by the name of Northrup, and the following is a part of his testimony: "Q. Did you hear of his having his arm broken? (Objected to by counsel for defendant as incompetent; objection overruled; exception by defendant.) A. No, sir." This evidence should not have been admitted, because it was mere hearsay, and was, therefore, prejudicial to the appellant company. One of its defenses as to the character and extent of appellee's injuries was that prior to the accident in question he had met with a series of other accidents, in one of which the arm which he claimed to have been injured in the accident in question was fractured; in another of which his leg was broken, and that he had sustained a rupture; and in another of which he had cut his foot; and that he had also been afflicted with rheumatism in the arm claimed to have been injured by the present accident. These wit-

nesses were not asked to state what they knew as to the character of the appellee's injuries or ailments prior to the accident, but as to what they had heard in reference thereto.

In *Treschman v. Treschman*, 28 Ind. App. 206, 61 N. E. 961, which was an action by an infant against her stepmother for personal injuries, evidence that it was the general repute in the neighborhood that the weakness of the plaintiff's eyes was caused from measles, and that plaintiff's mother told witness in the presence of plaintiff, then two years old, that plaintiff had had the measles, and that it had caused her eyes to become weak, was properly rejected as hearsay; and the court there said: "The court excluded certain offered testimony of a witness to the effect that it was the general repute in the neighborhood that the weakness of appellee's eyes was caused from measles; also by the same witness that the appellee's mother had told witness that appellee's eyes were weak from measles; also the offered testimony of a witness that appellee's mother told witness in the presence of appellee, then two years old, that the appellee had the measles, and that it had caused her eyes to become weak. As to part of this offered testimony, counsel for appellant have given no sufficient reason why it should be excepted from the general rule excluding hearsay evidence. What the appellee's mother told the witnesses was certainly properly excluded. It is true that hearsay evidence is admissible in certain cases. But it is admitted only through necessity, as to prove pedigree, age, place of birth, and the like. But it is not admissible to prove the existence of a physical fact. Whether or not appellee's eyes were weak from some prior disease could be established by positive testimony." So, in the case at bar, whether or not appellee's ailments in the nature of rheumatism and rupture and fractures were due to the accident in question or to prior injuries or sickness could be established by positive testimony without the resort to such hearsay evidence.

2. It is claimed, however, by the appellee, that when the appellant introduced its testimony to sustain its defense it asked some of its witnesses questions of the same character; that is to say, whether or not they had ever heard that the appellee had suffered from any of the disabilities or ailments mentioned prior to the accident. It seems to be contended that because the appellant, following the ruling of the trial court in favor of the plaintiff below upon this subject, introduced in its own behalf such hearsay evidence, it thereby waived the right to question the correctness of the trial court's ruling upon this subject upon appeal in a court of review. Such is not the law.

In *Richardson v. Webster City*, 111 Iowa, 430, 82 N. W. 921, the trial court had ruled that certain questions asked of the witnesses as to the amount of damage suffered by the

plaintiff were improper as calling for the conclusions of the witnesses, and thereby usurping the province of the jury, and it was claimed by counsel for plaintiff in the reviewing court that the defendant could not complain of such error because it had asked similar questions of its own witnesses; but it was there held that an appellant is not precluded from taking advantage of exceptions taken to incompetent testimony, although he has introduced similar testimony in his own behalf; the Supreme Court of Iowa there saying: "It is said by counsel for plaintiff that similar questions were asked by defendant of its witness. This does not prevent it from taking advantage of the exceptions it has preserved."

In *San Antonio & Aransas Pass Railway Co. v. De Ham*, 54 S. W. 396 (Court of Civil Appeals of Texas, June 29, 1899), it is said by the court: "It is contended, however, that after the admission of the objectionable evidence defendant also offered proof upon the matter, and is therefore estopped to complain. We do not think this contention sound. A defendant has the right to meet the plaintiff's case as made under the rulings of the trial judge, and, after making objection and reserving proper exceptions, may combat the testimony of plaintiff, whether correctly admitted or not, without losing his rights on appeal."

In *Horres v. Chemical Co.*, 57 S. C. 192, 35 S. E. 501, 52 L. R. A. 36, it was said by the court: "But the respondent contends that, inasmuch as the defendant, after the ruling of the circuit judge by which the testimony of plaintiff was allowed as competent, offered similar testimony, therefore defendant has waived his objection to such testimony. * * * It cannot be good law that, after a party has excepted to the ruling of the presiding judge admitting incompetent testimony (which ruling is the law of the case on that trial in the circuit court), the exceptor is prevented from cross-examining plaintiff's witness on the matter excepted to, or in offering testimony in his own interest on the same line." In the latter case it was distinctly held that the appellant does not waive his right to except on appeal to testimony, admitted over his objection, by offering testimony in his own behalf in reply on the same line.

In *Washington, etc., Co. v. McCormick*, 19 Ind. App. 664, 49 N. E. 1086, it was held that, where a party objects to the admission of evidence, and afterwards introduces evidence of the same character in rebuttal thereof, he does not thereby waive his objection; the court there saying: "After the court had held, over appellant's objection, that the evidence was competent, and had permitted appellee, who had the burden, to introduce such evidence to maintain his case, appellant, in seeking to overcome the case made by appellee, could follow the theory laid down by the court without impliedly admitting the court's

theory to be right, and without waiving his right to question the court's action."

3. The deposition of a policeman named Finnegan was taken by the appellant before the trial, and was read upon the trial to prove certain facts in regard to the occurrence of the accident. The policeman witnessed the accident, and saw the car when it struck appellee and knocked him down, and testified as to what he saw and did. Upon the cross-examination of Finnegan the appellee asked him certain questions, which called out the fact that he took the motorman and conductor of the train of cars which caused the injury into his charge; or, in other words, arrested them. The questions calling out the fact of the arrest of the motorman and conductor were objected to at the time they were asked of the witness when the deposition was taken, and were also objected to at the trial before the answers were read to the jury. A motion was also made by counsel for appellant that the answers be stricken out. But the motion was denied, and the answers were read to the jury.

This evidence in regard to the arrest was improperly admitted by the trial court. There was no charge of willful and wanton conduct on the part of the motorman and conductor in the declaration, but only a charge of ordinary negligence on the part of the company. The admission of this evidence tended to make the impression upon the minds of the jury that the motorman and conductor had been guilty of committing an act which was criminal in its nature; and as the verdict of the jury, before its reduction by a remittitur, was \$12,500, it may be that the jury came to the conclusion, in view of this evidence, that they had a right to award punitive damages. The theory upon which the introduction of this testimony is sought to be justified is that the officer's act in making the arrest was a part of the *res gestæ*. It cannot be so regarded. The appellee, after receiving the injuries in question, was taken to a doctor's office and examined, and was there quite a long time, and after he had been there several hours was taken to his daughter's house, distant several miles from the place where the accident occurred. The arrest in question was made, or the motorman and conductor were taken in charge by the policeman, at the same time when appellee was taken from the doctor's office, near the place where the accident occurred, to his daughter's house. Inasmuch as the arrest was made several hours after the accident happened, it cannot be regarded as a part of the *res gestæ*. An act or declaration can only be considered as a part of the *res gestæ* when it illustrates, explains, or interprets other parts of the transaction of which it is itself a part. *Chicago West Division Railway Co. v. Becker*, 123 Ill. 545, 21 N. E. 524, 15 Am. St. Rep. 144. In *Pennsylvania Co. v. McCaffrey*, 173 Ill. 169, 50 N. E. 713, where it was held that a certain act

was not a part of the *res gestæ* because it took place some time after the accident occurred, we said: "That which occurs before or after the act is done is not a part of the *res gestæ*, although the interval of separation is very brief." See, also, *Montag v. People*, 141 Ill. 75, 30 N. E. 337. Greenleaf, in his work on Evidence (vol. 1, § 108), says upon this subject: "The principal points of attention are whether the circumstances and declarations offered in proof were contemporaneous with the main fact under consideration, and whether they were so connected with it as to illustrate its character." This precise question arose in *Luby v. Hudson River Railroad Co.*, 17 N. Y. 131, which was an action for damages, where the plaintiff was struck by one of the defendant's cars while crossing a street in the city of New York, and on the trial evidence was allowed to be given by a police officer, against the objection of defendant, that he arrested the driver of the car; and it was there held that the fact of the arrest was irrelevant, and may have improperly influenced the jury in their judgment; the Court of Appeals of New York there saying: "That fact was irrelevant to the case, and we cannot tell what influence it may have had upon the minds of the jury. It is true that the jury ought not to attach any importance to the circumstance in trying the issue before them, but this only proves that this fact ought not to have been shown for their consideration. It certainly has some tendency to prove that at the very time of the transaction the defendant's driver was considered by the officer and others as guilty of culpable negligence. The question of his negligence was in issue and on trial, and how far the jury were aided in their conclusion by the manner in which the driver was treated by a police officer, or others who witnessed or were near the transaction, it is impossible for us to say. There is no pretense for saying that this evidence was necessary or proper for the purpose of identifying the occasion."

4. Appellant placed upon the witness stand a witness by the name of Stewart from Lowell, Ind., where the appellee lived, for the purpose of establishing certain facts tending to show that the sickness and ailments of the appellee existed before the accident. At a subsequent stage in the trial appellee introduced testimony for the purpose of impeaching the witness Stewart. But before the impeaching testimony was gone into the appellee, upon the cross-examination of Stewart, asked him certain questions as to his past life, and his relations to his family, and his moral character. A part of such cross-examination was as follows: "I have lived with Mrs. Metcalf twenty-one years. Q. Are you a married man? A. A married man? I was once; yes, sir; and I presume I am yet. My family live in Penn-

sylvania. Q. Did you run away from your family? (Objected to by counsel for defendant; objection overruled; exception by defendant.) A. No, sir; I did not. I have letters from them every once in a while now. My wife is living. It is twenty-six years, I think, since I lived with my family. I have a son and a daughter. The daughter is married, and the son was on the man-of-war Montgomery in the Spanish war. He was a machinist by trade. Q. Since you came away have you supported your family at all? (Objected to by counsel for defendant; objection overruled; exception by defendant.) A. No, sir." This cross-examination was improper. The appellee had a right to cross-examine the witness Stewart in any such way as to show his want of truthfulness if he was not a truthful man, but it was not material or proper to show his delinquencies in any other direction. It had a tendency to prejudice the minds of the jury against the witness to go into his private relations and the condition of his domestic affairs. It was immaterial whether those relations were pleasant or not, or whether he supported his family or not. The only matters connected with the character of the witness, with which the jury had any concern, or which had any proper place in the progress of the trial, were those only which affected the truth or falsity of his testimony. In *Atwood v. Impson*, 20 N. J. Eq. 157, the chancellor said in reference to testimony attacking the character of a witness: "No one witness swears that he knows his general character for truth and veracity. They have heard something against him, mostly as to his character for other matters beside truth and veracity, and evidently have heard them from persons who referred to particular transactions. This is not the evidence which the law permits, or should permit, to affect the credibility of a witness. With many, telling the truth is a habit and a principle which they adhere to always, though they may indulge in drinking, swearing, gambling, roystering, or making close bargains. With others, lying is the habit or principle, and if elevated to be senators or legislators, or made church members or deacons, it does not always reform them. The object of the law is to show the character of the witness as to telling the truth. General reputation in the community where he is known is the test, and the only test, which the law allows as to character."

For the errors above indicated in the admission of irrelevant, incompetent, and improper evidence, the judgments of the Appellate Court and the circuit court of Cook county are reversed, and the cause is remanded to the latter court for further proceedings in accordance with the views herein expressed.

Reversed and remanded.

(212 Ill. 124)

**MUTUAL LIFE INS. CO. OF NEW YORK
v. ALLEN.**

(Supreme Court of Illinois. Oct. 24, 1904.)

LIFE INSURANCE—CONVERSION OF POLICY—SURRENDER FOR CANCELLATION—DEPOSIT AS SECURITY—EVIDENCE—QUESTION FOR JURY—PARTIES—JURORS—COMPETENCY—BUSINESS RELATIONS WITH PARTY—FORFEITURE OF POLICY—FAILURE TO PAY PREMIUM NOTES—HARMLESS ERROR.

1. It is permissible to join counts in trover and in case in the same declaration.

2. The first premium on a life policy was paid by notes which were sold by the insurer's agent, who was entitled to retain a per cent. as his commission. There was evidence that the insurer recognized the custom of agents to take notes for the first premium, and that the insurer in such cases would look to the agent to pay its percentage of the premium in 30 or 60 days. The agent did not pay this percentage, and assured did not pay three of the notes which fell due before his death. *Held*, that it could not be said, as a matter of law, that the insurer was entitled to insist, as against the beneficiary, that there had been no payment of the premium.

3. Whether a life insurance policy was delivered to the insurer's agent for cancellation because of failure to pay the premium notes, or merely as security for a loan of money, could not be determined, as a matter of law, from letters not disclosing the full negotiation between the parties with reference to the matter.

4. In an action against a life insurance company for the conversion of a policy, it was a question for the jury whether the policy was surrendered to defendant's agent to be canceled, or as a pledge to secure the repayment of money loaned by the agent to the beneficiary.

5. The beneficiary in a life policy has a vested right in the fund provided to be paid by the policy, unless power to divest that right is expressly reserved to the assured by the policy; and hence, in the absence of any proof of such a reservation, the assured cannot surrender the policy for cancellation.

6. Where the application for a life policy does not provide that it shall become part thereof, and it does not appear that the policy incorporates the application, any statement in the application as to the right of the insured to control the fund provided to be paid by the policy is unimportant, in determining the right of assured to consent to a cancellation.

7. In an action for conversion of a life policy, the measure of damage is the face value of the policy, in the absence of any evidence that its collectible value is less.

8. Where, in an action by the beneficiary in a life policy for the conversion thereof, plaintiff had, after the conversion and before the bringing of the action, assigned the policy, the suit was properly brought in the name of the beneficiary to the use of the assignee.

9. In an action for the conversion of a life policy, it appeared that a minor daughter of the beneficial plaintiff, who was also attorney for the plaintiff, had negligently injured the father-in-law of one of the jurors, and that the beneficial plaintiff had at various times sent money to the juror's wife to be used in caring for her father. It was shown, however, that the daughter was not engaged in the affairs of her father at the time the injury was inflicted, that the money was voluntarily contributed, and that there had never been any mention of a claim of damages between the juror and the beneficial plaintiff. The juror had made no evasive or misleading answers on his voir dire examination. *Held*, that refusal to discharge the juror during trial was not an abuse of discretion.

10. In an action against a life insurance company a question as to how long an agent of

the company had been such was not harmful, where the witness stated that she did not know.

11. The assumption in a question of a material fact is not objectionable, where there is no controversy as to the existence of such fact.

12. In an action against a life insurance company for conversion of a policy which defendant alleged had been surrendered for cancellation because of failure to pay premium, the financial condition of the assured was immaterial.

13. In an action against a life insurance company for conversion of a policy, a question to the secretary of the company as to whether or not since a certain date there had been in existence any policy or contract of insurance by the company upon the life of assured called for an opinion.

14. Where a witness testified that he was manager for a co-operative building company, it was not error to refuse to allow the adverse party to ask him what was the purpose of the company.

15. On an issue as to whether assured in a life policy had made false representations in the application, an instruction that the burden was on the insurer to show that false answers were made was not objectionable on the ground that the word "answers" would lead the jury to believe that at least two false answers must be proven.

16. Where a life policy does not provide that it shall be void if premium notes are not paid at maturity, default in the payment of such a note will not work a forfeiture of the policy.

17. In an action against a life insurance company for conversion of a life policy which came into the possession of defendant's agent, and was by him surrendered to defendant for cancellation, instructions as to the right of the agent to retain the policy as security for a loan made to the insured by him were not required.

Appeal from Appellate Court, Second District.

Action by Kate M. Allen against the Mutual Life Insurance Company of New York. From a judgment of the Appellate Court affirming a judgment for plaintiff, defendant appeals. Affirmed.

Winston, Payne & Strawn, Page, Wead & Hunter, Julian T. Davies, and Edward Lyman Short, for appellant. Arthur Keithley, for appellee.

BOGGS, J. The judgment entered in the circuit court of Peoria county in favor of the appellee and against the appellant company and one Joseph Clark in the sum of \$20,658.01 was affirmed by the Appellate Court for the Second District on appeal, and the cause has been brought into this court by the further appeal of the appellant company.

The declaration was in trover, with a count in case. The first count alleged, in substance, that the appellant company on the 1st day of October, 1901, issued its policy insuring the life of one Joseph H. Allen, husband of the appellee, in the sum of \$20,000, payable to the appellee upon the death of said Joseph H. Allen, and that the appellee had such policy in her possession on the 1st day of February, 1902, and that it was then of the value of \$20,000; that said policy was casually lost out of her possession, and came into the hands of the defendants by finding,

¶ 11. See *Witnesses*, vol. 50, Cent. Dig. § 831.

and that the defendants converted and disposed of the policy to their own use and benefit; that said Joseph H. Allen died on or about the 27th day of May, 1902; and that the plaintiff thereupon became entitled to have and receive from the defendants the value of said policy at the time of its conversion, etc. The second count alleged the execution and delivery of the policy to the husband of the plaintiff, and the delivery of the same by her husband to her, and that subsequently she (the plaintiff) borrowed from the defendant Joseph Clark, who was then and there an agent of the appellant company, the sum of \$10, and, at the request of said Clark, delivered to him the said policy of insurance, to be held by him as security for the said loan; that the appellant company and the said Clark, with the fraudulent purpose of defrauding the plaintiff out of the said policy, conspired together and procured the said policy to be returned to the appellant company, and it has since retained the same, though the said sum of \$10, with legal interest thereon, has been tendered to said Clark, and said policy demanded of him, and also of the said insurance company. The count also alleged the death of said Allen; that the appellee was beneficiary under the policy; that the policy was of the value of \$25,000, etc. It is permissible to join counts in trover and in case in the same declaration. *Hayes v. Massachusetts Mutual Life Ins. Co.*, 125 Ill. 626, 18 N. E. 322, 1 L. R. A. 303.

The defense that certain of the statements made by the said Joseph H. Allen in the application for the policy with respect to the condition of his health and of his habits were false, and the further defense that the first premium on the policy was not paid during the continuance in good health of the assured, constituted questions of fact which were submitted to the jury for decision.

The trial court did not err in refusing to direct a peremptory verdict in favor of the defendants below on the ground that there was no evidence tending to overcome that produced in behalf of the defendants below in support of these defenses that false and fraudulent material statements were made by the assured in the application, and that no premium whatever had been paid to the company on the policy. There was abundant evidence to show that appellant's codefendant, Clark, was its agent. He solicited the insurance, forwarded the application therefor, received the policy from the company, and delivered it to the assured. He accepted from the assured four notes signed by the assured, payable to him at different times, for different amounts; the aggregate of the notes being the total premium for the first year. These notes were payable to Clark, and were by him discounted. He was entitled to 70 or 75 per cent. of the amount of the notes for his commission. There was evidence tending to show the company recognized the custom of its agents to take notes

of the assured for the first annual premium, payable to the agent, and that the company in such cases would look to the agent to pay its percentage of the total premium in 30 or 60 days. Clark sold the notes given by Allen, but did not pay the company the 25 or 80 per cent. of the proceeds which it was entitled to receive. The assured did not pay the notes, three of which fell due before his death. When the suit was brought, all of the notes were in the hands of assignees of Clark. Under this state of case, the court could not say, as matter of law, that the company might insist, as against the policy holder, that there had been no payment of the premium on the policy.

Whether, as the appellant company insisted, the policy was voluntarily surrendered to Clark, as the agent of the company, for cancellation, because of the failure to pay two of the notes which the assured had given to Clark, and which had fallen due, or whether the policy was deposited by the appellee with Clark as security for a loan of money, as she contended, could not be declared, as a matter of law, from two letters produced in evidence—the first, a letter from Clark to Mr. Allen, possibly in response to a letter written by the appellee, and the second her reply thereto—for the reason that it appears from the face of these letters that they do not disclose in full the negotiation between the parties with reference to this matter. The letters relied upon to constitute the contract to surrender the policy do not appear, upon inspection, to purport to be an entire contract, or that they were written with intent to express the whole agreement or any agreement between the parties; and, when read in the light of attendant facts and circumstances, it is apparent they were not intended to set forth all of the agreement. If this were not so, it could not be determined from the particular two letters that the policy did not come into the possession of Clark as mere security for money. The letter written by Mrs. Allen distinctly says that she is to, and will, return the money to Clark as soon as she can possibly do so. The notes which Allen had given to Clark for the premium on the policy had been sold by Allen and were outstanding at the time of the writing of these letters, and the company had not then directed Clark to have the policy taken up, but, so far as the record shows, was still content to look to Clark for the small proportion of the premium that it was to receive. It was highly improbable that Clark would demand or expect that the policy would be surrendered while he or his assignees were still holding the notes of the assured, and incredible that the appellee and her husband would consent to surrender the policy, and not receive the notes which had been given for the premiums thereon. Whether the policy was surrendered to Clark to be canceled, or as a pledge to secure the repayment of the money loaned by Clark to appel-

lee, could not be determined as a matter of law, but was for the decision of the jury.

Clark testified that the assured promised at different times to surrender the policy. But it was not shown that the assured had the power to cancel the policy. The appellee was named as beneficiary in the policy, and had possession of the instrument. She had a vested right in the fund provided to be paid by the policy, unless power to divest that right was expressly reserved to the assured by a provision of the policy. 3 Am. & Eng. Ency. of Law (2d Ed.) 980; *Glanz v. Gloeckler*, 104 Ill. 573, 44 Am. Rep. 94. The policy was not produced in evidence, nor was it proven to confer upon the assured authority to assign the policy or divest the rights of the beneficiary. The application, which was produced in evidence, did not provide it should become a part of the policy, nor was it shown that any provision of the policy incorporated the application as a part thereof. Therefore any statement made in the application as to the right of the assured to control the fund is unimportant, as the right of the beneficiary is to be determined from the provisions of the policy. The policy was traced to the possession of the appellant company, and was not produced in evidence. Hence the trial court properly ruled, in passing upon the motion to direct a peremptory verdict, and in giving and refusing instructions, that the assured, the husband, had no power to agree to or promise to surrender the policy for cancellation.

The observations heretofore made as to the interest of the appellee in the policy dispose of the suggestion that the action could not be maintained for the want of proof that the plaintiff had either a general or special interest in the policy. The true measure of damages was the face value of the policy, there being no evidence that its collectible value was less. *Hayes v. Massachusetts Mutual Life Ins. Co.*, 125 Ill. 626, 18 N. E. 322, 1 L. R. A. 303.

Interest at the legal rate from the date of the conversion was properly allowed, according to the universal rule.

The title to the policy and right of action thereon were in Mrs. Allen, the appellee, at the time of the conversion of the policy, and the action was therefore properly brought in her name. Arthur Keithley was named as beneficial plaintiff, for the reason that he held an instrument in writing, signed by Mrs. Allen, purporting to assign the policy, or the benefit thereof, to him as security for money advanced by him to her, and for his fees as attorney for her. Mrs. Allen had only a right of action. It was not negotiable. The interest of Keithley was equitable only, and the suit therefore properly proceeded in her name, with that of Keithley as usee.

During the course of the trial the appellant company asked the court to discharge one of the jurors (George C. Joseph) on ac-

count of alleged improper relations between the juror and said Keithley. In support of this application, it was represented to the court that a minor daughter of said Keithley, the beneficial plaintiff, and also the attorney for the plaintiff, negligently drove a buggy upon and against one Thomas H. Tamplin, the father-in-law of the said juror Joseph, and injured him; that Tamplin had no property, and was cared for by the said Joseph; that Keithley had attempted to negotiate with Joseph and his wife for a settlement of the claim for damages occasioned by the injury to Tamplin; that Keithley had at various times sent checks to the wife of Joseph to be used in caring for Tamplin; that the question of damages was pending and undetermined; and that Joseph relied upon the good will of Keithley to secure a satisfactory settlement. It was otherwise disclosed to the court that the daughter of Keithley, when Tamplin was injured, was not engaged in the affairs of her father, nor did he know that she was riding in the buggy, and did not in any manner authorize or direct her to do so; that he had voluntarily contributed money to Mrs. Joseph to pay for a nurse for her father; that Mrs. Joseph had charge of the house and kept boarders; that there had never been any discussion or mention of a claim of damages in any way; that he had never been asked by any of them to pay anything; and that he had never discussed the matter at any time with Joseph. No right of action existed against Keithley for the acts of the minor daughter, so far as the case was disclosed to the court. Any right of action which existed would be in favor of Tamplin and against the daughter, and neither Joseph nor Keithley would have any legal interest in the result of the action. It is not insisted that Joseph, on his voir dire, made any evasive or misleading answers, nor that he did not fully and clearly answer all questions that were put to him. The juror was accepted and duly sworn, and no more appeared than that it might be feared he would be more favorably inclined to the cause of the plaintiff than that of the defendants. This could have been discovered by the appellant company before the juror was accepted, for, as before said, the juror frankly and fully answered all questions that were asked him. Such question must be committed in the greater degree to the discretion of the trial court, and we do not feel that it can be said the action taken by the court in this instance prejudiced the cause of the appellant company, or was an abuse of the discretionary authority of the court.

During the trial one Whittaker, one of the jurors, became ill, and the court, on being advised, ordered an adjournment of the court until the hour of 2 o'clock in the afternoon. At that hour the appellant company entered a motion to discharge the jury and continue the cause on account of the illness of the

juror. The court, without deciding the motion, adjourned the trial until the following morning, at which time the court interrogated the juror, and decided that his health would permit him to sit in the case, and that he was mentally capable of discharging his duties as a juror. We have consulted the statements of the juror made in answer to the questions asked him by the court, as preserved in the record, and agree with the view held by the court that the juror was mentally and physically competent to perform the duties of a juror.

We have examined the various alleged errors of the court in ruling as to the admissibility of testimony, and find no error reversible in character. It could not have prejudicially affected the appellant company to permit the appellee, over the objection of the company, to answer the question how long Clark had been agent of the appellant company, for the reason that the witness answered that she did not know. It may be that the question assumed that Clark was or had been an agent of the appellant company. The proof upon that question had placed the fact that he was agent of the company so far beyond all controversy that it could not be seriously urged that such an assumption would justify a reversal of the judgment.

The financial condition of the assured, Joseph H. Allen, was immaterial, and the many different offers of the appellant company to introduce proof on that point were properly overruled.

It was also proper to refuse to allow certain questions to be propounded to the physician who, as medical examiner for the company, examined the assured. The only reason urged in the brief in support of the admissibility of answers to the questions is that they were proper, as tending to show the possibility of collusion between the assured and the medical examiner. We think they were too remote to establish a mere possibility, even if mere possibilities were competent to establish a defense.

The question desired to be propounded by the appellant company to its secretary, Easton, viz., "State whether or not, since the 24th of February, 1902, there has been in existence any policy or contract of insurance by the Mutual Life Insurance Company of New York upon the life of Joseph H. Allen, formerly of Peoria and Elmwood, Illinois," did not, as the appellant company insists, call upon the witness to state the action taken by the company in the way of a formal cancellation of the policy, but more plainly called for the opinion of the witness on the question whether the policy had been surrendered or its validity destroyed in any way. It was properly refused.

The complaint is groundless that the court refused to permit the appellant company, on cross-examination of the witness Owen, after having brought out that he was manager for a co-operative building company, to ask him

what were the purpose and object of such co-operative company.

It would unreasonably extend this opinion to state and discuss a number of other complaints as to the rulings of the court on questions of the admissibility of evidence. It must suffice to say we have considered them, and find no error reversible in character.

Instruction No. 1 given at the request of the appellee correctly advised the jury that the burden was on the appellant company to show that false answers were made to questions contained in the application for the insurance. It is conceded the instruction stated the correct principle of law, but the contention is that in drafting the instruction the word "answers" was used in the plural, and therefore charged the jury that it was incumbent on the appellant company to prove that all of the answers in the application, or at least two of such answers, were false. This is an unreasonable and unwarranted view of the meaning that would ordinarily be given the instruction.

Instruction No. 3 advised the jury as to the legal effect of knowledge on the part of the agent of a life insurance company as to the habits and health of an applicant for insurance, and as to the extent to which the insurance company would be bound by such knowledge. There is no ground for the criticism that the instruction might have been taken by the jury to have reference to the knowledge which Clark acquired after the making of the application for insurance.

Instruction No. 5 given for appellee advised the jury as to the legal effect of the acceptance by Clark of the notes of Allen in payment of the premium for one year, and the criticism upon it is that the "contract of insurance" provided that the insurance should not take effect until the first premium should be paid. The policy, though traced to the hands of the appellant company, was not produced in evidence. The "contract of insurance" referred to by counsel is the application for the policy, and the meaning of the particular clause therein which they insist renders this instruction improper is that liability of the company shall not attach until the policy shall have been issued and signed by the company; and there is nothing therein which forbids payment of the premiums by notes payable to the agent, in pursuance of the custom in force between the company and its agents. In the absence of proof of a clause in the policy providing the policy shall be void in the event the premium is not paid at the maturity of a note or notes taken for the premium, default in the payment of the note will not work a forfeiture of the policy. 19 Am. & Eng. Ency. of Law (2d Ed.) 47, and notes; United States Life Ins. Co. v. Ross, 159 Ill. 476, 42 N. E. 859; May on Insurance (2d Ed.) § 87.

The objection to the seventh instruction is that it ignores the fact that if, under appellee's contention, Clark held the policy for a

loan, he had a right to retain the possession of the policy. Clark surrendered the policy to the company for cancellation, and the instruction advised the jury as to his right to do so if he held it as security only, and as to the legal effect of the cancellation if Clark held the policy as security only for a loan. Any reference to the right of Clark to have held the possession of the policy as security was manifestly unnecessary, as he did not so retain it, but surrendered it to the company to be canceled.

Instruction No. 22 asked by appellant was properly refused. It asked the court to instruct the jury, as a matter of law, that the letters hereinbefore referred to—one written by Clark to Joseph H. Allen, and the other in reply thereto, written by the appellee to Clark—do not, in law, constitute an agreement on the part of Clark to loan money to the appellee, and take the policy as security therefor. As we have before shown, these letters, within themselves, did not constitute the contract between the appellee and Clark. They were admissible in evidence as tending, together with other evidence, to establish the contract. The appellant contended the letters alone should be considered in ascertaining the contract between these parties, and that they established that the policy was surrendered to Clark, and not deposited with him as security; but the court correctly refused to so interpret the letters, or to hold that the letters alone must be resorted to as the only evidence of the contract. The instruction was therefore properly refused.

All that was proper to be given in appellant's instructions Nos. 24 and 25 was clearly and plainly made known to the jury by instructions Nos. 13, 17, and other given instructions.

The court properly refused to instruct the jury, as asked by appellant's instruction No. 26, refused, that there was no evidence showing any loan from the defendant Clark to the plaintiff upon the policy as security therefor, and instruction No. 27, refused, requesting the court to charge the jury that there was no evidence to show that Clark did not perform all of the conditions which it appeared from the evidence he was to perform as a condition of having the policy delivered to him. There was evidence tending to show the appellee did not give up the policy to Clark to be canceled, and that she received the money from him with the understanding on her part, at least, that she was to repay it. Clark did not return the notes of Allen when he got the policy. He did not have the notes then. They were in the possession of the person to whom he had transferred them, and remained in the possession of his assignee until after the institution of this suit by the appellee. He had not been notified by the company to take up the policy when he received it from the appellee. After receiving it from her, he retained it in his possession some 10 or 12 days, and did not no-

tify the company that he had it. The cashier of the company, having learned that Clark had the policy, informed the company, and it ordered him to surrender the policy to it, and he did so. It was for the jury to determine, from all the facts and circumstances in proof, whether Clark received the policy as being surrendered for cancellation, or as security for the money which appellee had received from him; and instructions Nos. 26 and 27, if given, would have invaded the province of the jury. The judgment of the Appellate Court is affirmed.

Judgment affirmed.

(213 Ill. 146.)

GAGE et al. v. CAMERON.

(Supreme Court of Illinois. Oct. 24, 1904.)

DEED—ASSUMPTION CLAUSE—CONSTRUCTION—EJUSDEM GENERIS—PAROL EVIDENCE—ADMISSIBILITY—EQUITY JURISDICTION—INTERVENTION—ORDER—ACCEPTANCE—STATUTE OF FRAUDS.

1. Where a deed provides that the grantee shall assume and pay existing mortgages, liens, taxes, and claims of any and every description, the maxim of ejusdem generis has no application to restrict the phrase "and claims of any and every description" to such claims as are indicated by the preceding words "mortgages, liens, and taxes."

2. Where a deed provides that the grantee shall assume and pay existing mortgages, liens, taxes, and claims of any and every description, the presumption is that such payments were a part of the consideration for the conveyance.

3. Where a deed provides that the grantee shall assume and pay existing mortgages, liens, taxes, and claims of any and every description, parol evidence is admissible to show the circumstances surrounding the parties at the time the instrument was executed, so that the court may view the instrument from the standpoint of the parties who executed it, and be thereby the better enabled to determine the sense in which the words used were intended to be understood.

4. Parol evidence is also admissible to identify the subject-matter of the clause.

5. Parol evidence is also admissible to show the true consideration when the presumption that the payment of such claims was part of the consideration has not been overthrown.

6. Where a deed containing a clause whereby the grantee assumed existing incumbrances and claims is accepted and placed on record with knowledge of its contents, it is binding on the grantee, though its execution took place through an agent for the grantee.

7. Where a deed contained a clause by which the grantee assumed and agreed to pay existing mortgages, liens, taxes, and claims of any and every description, the assumption created a charge on the land.

8. Complainant took title to certain real estate to enable an insolvent contractor and builder to procure a loan to pay for the erection of improvements thereon. The only consideration for the deed was a stipulated sum as payment for the service. In the course of erecting the improvements, the complainant became personally liable for debts incurred by the contractor, who finally had the property transferred to another person, and to protect the complainant the deed required the grantee to assume the payment of existing mortgages, liens, taxes, and claims of any and every description. The grantee was a bookkeeper in the employ of the defendant, who was the beneficial grantee, and there was no consideration for the transfer.

Subsequently the property was conveyed without consideration to the defendant, the deed reciting that the defendant assumed the payment of incumbrances of record on that date. The complainant has taken for his protection, before his transfer of the property, an indemnifying mortgage on the property from the contractor. *Held*, that complainant was entitled to maintain a bill in equity against the defendant on behalf of himself and others having claims against the property, arising out of the transaction, who desired to join in the suit to enforce such payments on the defendant's refusal to make them.

9. All persons whose demands were within the assumption clause of the deed of defendant's grantor were entitled to intervene in a suit by the complainant to enforce their claims.

10. Reference to property by the street numbers, in an order for payment out of moneys due for work done on a building, is a sufficient identification of the property to take an acceptance of the order indorsed on the back thereof out of the statute of frauds, though the location of the property is not referred to in the acceptance.

Appeal from Appellate Court, First District.

Suit by Eli A. Gage against William A. Cameron, Croall and others interveners. From a judgment of the Appellate Court reversing a decree in favor of complainant and interveners, the complainant and interveners appeal. Reversed.

This is an appeal from a judgment of the Appellate Court reversing a decree of the circuit court rendered in favor of the appellants without remanding the cause.

The original bill was filed on September 13, 1901, by Eli A. Gage, appellant, as complainant, against the appellee, William A. Cameron, and John McSorley and G. H. Detlor, as defendants, and, after setting up an arrangement between complainant and McSorley for the erection of a large flat building upon sublots 6 to 9, both inclusive, of Sidney Kent's Subdivision, etc., in Chicago, Cook county, by the terms of which complainant was to hold the legal title to said property, the bill alleged that Anna Connell and her husband, by warranty deed, conveyed said premises to complainant, which warranty deed was dated October 21, 1899, and recorded November 23, 1900; that by warranty deed dated October 11, 1900, and recorded November 23, 1900, the complainant, Gage, conveyed said lots to Detlor, and that subsequently, by deed dated December 27, 1900, recorded February 27, 1901, Detlor conveyed said lots, with the improvements thereon, to appellee, Cameron; and the bill prayed that Cameron might be declared to hold said property in trust for the benefit of complainant, Gage, and such persons and corporations as furnished labor and material for the construction of said building, for which they had not been paid; and that the deeds from complainant to Detlor, and from Detlor to Cameron, should be declared null and void, and set aside; that Cameron be

enjoined from transferring, and that a receiver be appointed, and for general relief. Answers were filed to the original bill by Cameron and Detlor. On December 10, 1901, William A. Cameron, one of the defendants, filed a cross-bill, praying that a certain contract or indemnity mortgage executed by John McSorley and his wife to the complainant, Gage, dated November 28, 1900, and recorded March 13, 1901, might be set aside as a cloud upon Cameron's title, and delivered up to be canceled. This cross-bill was answered by Gage, the complainant below, who set up the execution and delivery by him to Detlor, or Cameron, of the deed dated October 11, 1900, together with an assumption clause therein, and alleged that, although said deed recited the consideration of \$1,000, yet no sum of \$1,000, or any sum, was paid by him, and that the real consideration of said deed of October 11, 1900, was that a loan might be made on said property with which to pay the indebtedness incurred by John McSorley or the Central Brick & Stone Company and obligations incurred by Gage in connection with the building upon said premises, and to pay certain orders, which had been accepted by Gage, payable personally, or out of the loan to be made upon the property; and the further agreement in said deed contained being the assumption clause above referred to and hereinafter quoted. The answer of Gage to the cross-bill also mentions many of the claims whose payment was assumed by said deed, and also states that the instrument sought to be removed as a cloud was made and delivered by McSorley to Gage before the deed from the latter to Detlor was delivered, and was one of the mortgages assumed in that deed, and admits that McSorley had an equitable interest in the profits of said property, but denies that Cameron purchased that interest for a good and valuable consideration. The answer further stated that Cameron took the title to the property subject to the mortgages, liens, taxes, and claims of every description, and agreed to pay the same, but refused to do so.

On December 30, 1901, Gage filed an amended bill, in which, after referring to the execution of the deed by Anna Connell and husband to Gage on October 21, 1899, under the arrangement above referred to, it was alleged that McSorley caused contracts to be made by the Central Brick & Stone Company, a corporation of which McSorley was president, for the purpose of erecting said building, and thereby large indebtedness was incurred in that connection; that McSorley, for himself and said company, agreed with Gage that a loan should be placed on said property as soon as the building should be under roof, out of the proceeds of which the indebtedness so incurred, and the obligations incurred by Gage by reason of certain orders accepted by him, and also certain claims against McSorley individually,

¶ 10. See *Frauds*, Statute of, vol. 23, Cent. Dig. § 231.

as well as the cost of building the building, should be paid; that Gage, who was to hold the title during the erection of said building, accepted certain orders, drawn on him in connection with erecting the same, payable out of said loan, and agreed that certain other matters should be paid out of the money to be so raised; that Gage attempted to make such loan sufficient for said purposes, but was unable to do so; that Cameron had furnished material for use in said building, for which McSorley, or the Central Brick & Stone Company, had become indebted; that thereupon it was agreed between Gage, McSorley, Cameron, and Detlor, the latter being in the employ of Cameron, that Gage should transfer the property to Detlor, and in consideration thereof a loan should be made upon the property in a sum sufficient to pay all of the indebtedness remaining unpaid and whatever would be necessary to complete the building; that the grantee in said deed of October 11, 1900, should assume and agree to pay existing mortgages, liens, taxes, and claims of any and every description, and should hold the title for said purpose, and for the benefit of Gage, McSorley, and Cameron; that, relying upon said agreement, complainant, by said warranty deed of October 11, 1900, conveyed the property to Detlor; that said deed, which is the usual short form of a warranty deed, makes the following recitation, after the description of the property conveyed, to wit: "Subject, however, to existing mortgages, liens, taxes and claims of any and every description, which the party of the second part assumes and agrees to pay;" that said deed was acknowledged on October 17, 1900, but not recorded until November 23, 1900; that the real consideration of said deed was as above stated, no sum of money having been paid to Gage for said transfer; that said deed of October 11, 1900, was accepted by Detlor for Cameron, and therefore accepted by Cameron, and that Cameron and Detlor thereby jointly and severally agreed to pay said mortgages, liens, taxes, and claims of every description, and said property thereby became charged therewith; that, by the deed dated December 27, 1900, Detlor conveyed the property to Cameron, who became possessed thereof, charged with and subject to said mortgages, liens, taxes, and claims; that, as Gage had incurred on behalf of McSorley and the Central Brick & Stone Company indebtedness in connection with said building, McSorley agreed to save him harmless, and for that purpose made the indemnity mortgage above referred to, which was made and delivered before the delivery of the deed from Gage to Detlor, and is one of the claims assumed by the grantee in said deed; that at that time McSorley had an interest in the profits that might arise from the sale of said lots and in the property itself; that McSorley claimed that said indemnity contract should not be recorded, as it might inter-

fere with the proposed loan, and Gage, relying upon the agreement of the parties, did not record the same; that no loan was made while Detlor held the title, and none of said indebtedness or claims was paid by any of the defendants; that McSorley and Cameron conspired together to defraud Gage, and those who had furnished labor and materials for the said building, and other creditors and claimants, and fraudulently agreed that Cameron should purchase McSorley's interest in the property, and in any contracts he might have in regard to the same, for \$5,000 in money or notes; that said property should be transferred to Cameron, and that none of the liens or claims thereafter in the bill referred to should be paid, and that none of the indebtedness already incurred in erecting the building should be paid, except so far as it was specifically recorded or a mechanic's lien upon the property, and that Cameron should take the property subject only to such recorded incumbrances and liens, and should complete the building and become the owner of it, which was of great value, for a grossly inadequate consideration; that Cameron now claims to be a bona fide purchaser of the property, and to own the same in fee, free from the liens and claims set forth in the bill, and refuses to recognize and pay the same; that his acquisition of the property was in fraud of the rights of Gage and the claimants, and that the purchase price alleged to have been paid by Cameron was inadequate, and was \$25,000 less than the actual value of the property; that the conveyance of the property by Detlor to Cameron on December 27, 1900, which was in pursuance of an agreement between McSorley and Cameron, was made without Gage's knowledge, and that Cameron took a transfer of all McSorley's interest in the property, and in the rents and profits thereof; that Cameron paid McSorley a small sum of money, and gave notes either of himself or of the corporation above referred to; that some of said notes have not been paid, and should be paid to Gage on his indemnity mortgage.

The amended bill then sets up certain claims, the payment of which is alleged to have been assumed by the grantee in the deed of October 11, 1900; that certain of the claimants have commenced suit against Gage on said claims and recovered judgment; that Cameron and Detlor refuse to pay the claims in question, and that Detlor is without means, and is unable to pay the same; that Gage, the complainant, brings this suit in his own behalf, and in behalf of any other claimants referred to who desire to join therein. The amended bill makes McSorley, Cameron, and Detlor defendants, and requires them to set forth all the facts and circumstances regarding the conveyances from Gage to Detlor, and from Detlor to Cameron, and from McSorley to Cameron, and the amount of money paid by Cameron to McSorley, and

the amount of money paid out by Cameron on account of said buildings, and the amount of rents received by him; that McSorley may set forth a full list of the claims; that Cameron be declared to hold the property in trust for the benefit of Gage, and those who furnished labor or material for said building and have not been paid therefor; that Gage be allowed to have a lien upon the property for the amount of the judgments in favor of certain of the claimants, and for all other claims upon which he is personally liable; that there be an accounting of the claims and liens assumed by Cameron or Detlor, or either of them, and that Gage and the other claimants may have liens upon said property; that a decree be entered in favor of said claimants; that Detlor and Cameron may be decreed to pay the same by a short day, and in default thereof that the premises be sold to satisfy the same; that a receiver be appointed, etc.

The answer of Cameron and Detlor to the original bill was allowed, by order of court, to stand as their answer to the amended bill.

On May 6, 1902, the court entered an interlocutory decree finding that Gage transferred the premises to Detlor by deed containing the clause above quoted; that they passed to Cameron charged with "said mortgages, liens, taxes, and claims, the said liabilities of said Gage incurred with respect to the erection of said building, and the claims of said persons and corporations that had furnished labor or material or funds for, or had otherwise contributed to, the erection of said building"; that Cameron completed said building, made a loan, paid out money, and received rentals; and by said interlocutory decree the cause was referred to a master to take evidence and report the amount and nature of the mortgages, liens, taxes, and claims existing November 23, 1900, referred to in said deed; also to report the individual liability incurred by Gage in respect to the erection of said building, and the amounts and nature of the unpaid claims of persons and corporations holding orders accepted by Gage, and who furnished labor or materials or funds for, or otherwise contributed to, the erection of said building.

Certain creditors, 12 in number, holding claims amounting altogether to something over \$10,000, were allowed to come in and file intervening petitions setting up their claims and the manner in which they were incurred. To these intervening petitions answers were filed by Detlor and Cameron. The amended bill was amended by alleging that McSorley was insolvent.

The master took testimony and made a report, making a statement of the claims against the property. Objections and exceptions were made to the report by Cameron and Detlor, to the effect, in substance, that the claims referred to in his report and in the final decree hereinafter mentioned were not of the kind or class included in the as-

sumption clause in the deed, from Gage to Detlor, namely, "subject, however, to existing mortgages, liens, taxes, and claims of any and every description, which the second party assumes and agrees to pay." The exceptions also attacked the report upon the ground that it found that Cameron knew or had notice of these claims.

On September 12, 1902, the court overruled the exceptions to the report, and rendered a final decree, modifying the report, however, in some slight particulars. This final decree found that on October 21, 1899, Anna Connell conveyed the premises by warranty deed of that date to Gage, a son of a prominent citizen of Chicago of means, but himself without means; that Gage acquired title as part of a plan of McSorley to erect a building on the property to be paid for out of a building loan, and was to make contracts for that purpose, Gage being held out as owner; that Gage was to do the things and sign the papers necessary on his part for that purpose, and was to be protected by holding the title, and out of said loan, from loss, and was to receive \$500 for holding the title; that McSorley used the name of the Central Brick Manufacturing & Stone Company, sometimes called by him the Central Brick & Stone Company, a corporation of which he was president, and held out said corporation to be the original contractor for said building, but that the same was merely an instrumentality in his hands for carrying out said purpose; that the deed from Connell to Gage was not recorded until November 23, 1900, but that Gage was held out as owner to those furnishing material and labor for the building, to whom it was stated that a loan would be made to pay the claims; that Gage became personally liable on certain claims specified; that McSorley was insolvent, but had some credit and borrowed some money, and used it in the building, and had secured much material and labor; that payment came due for material, labor, and borrowed money, and, to postpone payment of the same, McSorley, personally or through his company, gave written orders addressed to Gage, payable out of the loan to be made, which were accepted in writing by Gage, payable out of said loan, or absolutely; that Gage accepted the same with the understanding that he should be protected out of the loan and by holding the title; that he personally gave his orders, addressed to Hoffmeyer & Fitzgerald, real estate agents, endeavoring to place said loan; that Gage and McSorley endeavored to make said loan for said purpose and to complete the building, and represented to contractors and others, who furnished material, labor, or money, that they should be paid out of the loan as soon as made; that, relying upon such representations, said persons furnished money, supplies, etc., and extended credit therefor; that among such persons was the Kellogg-Mackay-Cameron Company, a corporation of

which Cameron was an officer; that said company furnished material for heating apparatus to the value of \$3,000, payment for which fell due in the summer of 1900, and which could not be collected, as the loan had not been made; that, during the summer and fall of 1900, Cameron was informed of and knew generally the way in which the title was held by Gage, and that obligations for building had been incurred, and that it was necessary to make a building loan to pay the same; that, as Gage and McSorley could not obtain a loan in the fall of 1900, application was made on October 11, 1900, to Cameron, a man of means, to take the title, obtain the loan, complete the building, and make payments in connection therewith; that Cameron obtained from Gage and wife a deed, in usual form, conveying the premises to Detlor, a man of small means, and who acted as agent for Cameron; that said deed was dated October 11, 1900, acknowledged October 17, 1900, recited a consideration of \$1,000, but that no money was paid to Gage personally; that said deed, after the description of the premises and the granting words, contains the assumption clause above set forth, and was delivered and recorded November 23, 1900; that said deed was made to Detlor at Cameron's request, and that it was understood and intended that Detlor took title as agent or trustee for Cameron, who would protect him from liability; that, when said deed was executed, certain claims existed which were contemplated by and referred to in said assumption clause; that some of these claims Gage had become liable to pay, and others had been actually brought to Cameron's notice at or before the delivery of the deed; that, in connection with the acceptance and delivery of said deed, there became charged on the said premises, among such existing mortgages, liens, taxes and claims, the claims set up in the decree, being the 12 claims above referred to, including those of the appellants John M. L. Sexton, Pyott Foundry Company, and Norman G. Croall. After setting forth these 12 claims, specifying their nature and character, and how they were incurred, the decree finds that these claims are included in the claims referred to in said assumption clause, and are charges upon the premises in question in favor of the respective claimants who filed intervening petitions. The decree also finds that on December 27, 1900, Cameron procured Detlor to convey the premises to him by warranty deed, reciting a consideration of \$30,000, and containing this clause, "This deed is subject to encumbrances of record at the day of the date thereof," but that no consideration was paid by Cameron to Detlor for said deed; that Cameron obtained possession in December, 1900, and has since received the rents and profits, and paid for the care and maintenance, of the premises. The decree thereupon orders that, unless Cameron pay within 20 days to said intervening petitioners,

naming them, the amounts due, and their costs, and the complainant his costs taxed against Cameron, the premises be sold, and provides for distribution and deficiency, and for redemption.

Alexander S. Bradley (J. A. McAnrow, of counsel), for appellant J. M. L. Sexton. Matz, Fisher & Boyden, for appellants Eli A. Gage et al. Fassett & Andrews, for appellant Pyott Foundry Co. Dent & Whitman, for appellant Croall. Henry S. Robbins (J. S. Dudley, of counsel), for appellee.

MAGRUDER, J. (after stating the facts). By warranty deed, dated October 11, 1900, acknowledged October 17, 1900, and recorded November 23, 1900, the appellant, Eli A. Gage, deeded the lots here in controversy, "with improvements thereon situated in the city of Chicago," etc., to G. H. Detlor, the deed containing, after the description of the property, the following clause, to wit: "Subject, however, to existing mortgages, liens, taxes, and claims of any and every description, which the party of the second part assumes and agrees to pay." The main question presented by the record in this case relates to the construction and meaning of the assumption clause thus quoted.

On the part of the appellee, Cameron, it is claimed that the assumption clause is merely an exception to the warranty of title; that is to say, that Gage and his wife warrant the title to the real estate, subject to existing mortgages, liens, taxes, and claims; or, in other words, warrant the title to be good, except so far as the land is incumbered by such mortgages, taxes, liens, and claims. The contention of the appellee is that the claims which are excepted from the warranty can only be claims against the property upon the alleged ground that only claims against the property affect the title; and it is said that the parties could not have intended to except from the warranty claims which do not affect the title, and, if they affect the title, they must be shown upon the record to be liens or incumbrances. It is further contended on the part of the appellee that the words "and claims of any and every description" are to be considered in connection with the preceding words "existing mortgages, liens, taxes," under the maxim ejusdem generis, which is an illustration or specific application of the broader maxim, noscitur a sociis. It is claimed that by the application of this maxim the general words "and claims of any and every description" will be restricted to a sense analogous to the less general words "existing mortgages, liens, taxes." In other words, the rule of construction that, when general words follow particular words, the former can mean only things or persons of the same kind or class as those which are particularly mentioned, is alleged to be applicable here in construing the assumption clause. The result of the

application of this maxim in the manner contended for by appellee would be that the grantee in the deed of October 11, 1900, only assumed such claims as appear of record to be liens upon the property. It is said that the words "claims of any and every description" can only refer to such claims as are indicated and designated by the previous words "mortgages, liens, taxes."

If the maxim *ejusdem generis* is to be strictly applied in the present case, then the general words "and claims of any and every description" are meaningless, and nothing but surplusage. Mortgages are claims which are liens, and taxes are claims which are liens. But the assumption clause makes use of the general word "liens," which includes not only mechanics' liens, but all kinds of liens. If the intention was to assume the payment of such claims only as are liens, then the use of the general word "liens," in connection with the words "mortgages" and "taxes," would have expressed such intention without the use of the words "and claims of any and every description." The latter words could not have been intended to refer only to such claims as were liens, because the use of the previous word "liens" expressed the meaning of the parties without the use of the general words which follow the words "taxes."

In the first place, in defining the meaning of the maxim "*ejusdem generis*," and applying it to the construction of statutes and contracts, the cases decided by this court are nearly all cases where the word "other" is used to qualify the general terms which follow the specific designations. Thus, in *Drake v. Phillips*, 40 Ill. 388, a township organization law specified certain purposes for which taxes might be levied by the town, "or for any other purpose they may deem necessary," and the latter clause was there construed as authorizing taxation only for purposes of the same general scope and character with those already enumerated.

In *Brush v. Lemma*, 77 Ill. 496, the statute named several officers, and declared the same applicable to "all other officers," and it was held that the latter expression, by a well-known canon of construction, referred to officers of the same class or grade as those previously named. In *Wilson v. Board of Trustees*, 133 Ill. 443, 27 N. E. 203, where the court had under consideration a section of the Constitution which provided that the General Assembly might vest the corporate authorities of cities, etc., with power to make local improvements "by special assessment, or by special taxation of contiguous property, or otherwise," it was there held that the words "or otherwise" meant "or otherwise assessing the cost of the improvement against the property actually or presumptively benefited thereby, that being the kind or class of assessments particularly mentioned"; and, in view of the use of the expression "or otherwise," the court applied the familiar rule

of construction that, when general words follow particular words, the former can mean only things or persons of the same kind or class as those which are particularly mentioned. In *Misch v. Russell*, 136 Ill. 22, 26 N. E. 528, 12 L. R. A. 125, a statute provided that the county court should hear and determine contests of election of all other county, township, and precinct officers, "and all other officers for the contesting of whose election no provision is made," and it was there held, in view of the use of the expression "all other officers," that the statute included contests of the election of school officers, as they were of the same class as county, city, and township officers. In *Webber v. City of Chicago*, 148 Ill. 313, 36 N. E. 70, where a statute vested in the city council the power to license, etc., "theatricals and other exhibitions, shows and amusements," and where an ordinance referred to circuses, menageries, "or similar games for sport and all other exhibitions, performances," etc., it was held, in view of the use of the words "other exhibitions," that the rule of construction in question was applicable; that is to say, that, when an enumeration of specific things is followed by general words or phrases, the latter are held to refer to things of the same kind as those specified. So, also, in *Gillock v. People*, 171 Ill. 307, 49 N. E. 712, where a penal statute declared that whoever entered into any dwelling house, etc., "or other building," with intent to commit robbery or larceny or other felony, should be deemed guilty of burglary, the application was made of the rule of construction here contended for, in view of the use of the words "other building." In *Adams v. Akerlund*, 168 Ill. 632, 43 N. E. 454, where a treaty made use of the words "goods and effects," we said (page 637, 168 Ill., page 456, 43 N. E.): "If the expression here, instead of being 'goods and effects,' was 'goods and other effects,' we should be inclined to apply the rule of construction that general and specific words which are capable of an analogous meaning, being associated together, take color from each other, so that the general words are restricted to a sense analogous to the less general. *Misch v. Russell*, 136 Ill. 22 [26 N. E. 528, 12 L. R. A. 125]; *First Nat. Bank of Joliet v. Adam*, 138 Ill. 483 [23 N. E. 955]. Thus, in the case of *First Nat. Bank of Joliet v. Adam*, supra, where the words used were 'all goods, chattels or other property,' it was held that the general words 'or other property' would be restricted to a meaning analogous to the meaning of the words 'goods and chattels,' and consequently would not embrace such property as fixtures or chattels real, partaking more of the nature of realty than personalty. So, here, if the expression were 'goods and other effects,' the words 'other effects' would be restricted to a meaning analogous to the meaning of the word 'goods,' and would not embrace real property. But as the word 'other' is not used, there is no

occasion for the application of the maxim *ejusdem generis*."

In the case at bar, the assumption clause is not "existing mortgages, liens, taxes and other claims of any and every description." The word "other" nowhere appears as qualifying the general clause after the setting forth of the specific words. In this respect the case at bar differs from the cases above referred to decided by this court, where application has been made of the maxim *ejusdem generis*.

In the second place, the rule that, where an enumeration of specific things is followed by general words or phrases, the latter are held to refer to things of the same kind as those specified, is only one of the many rules of construction which are employed for the purpose of ascertaining the intention of the Legislature, or of the contracting parties, as expressed in a statute or contract sought to be construed; "and where, from the whole instrument, a larger intent may be gathered, the rule under consideration will not be applied in such manner as to defeat such larger intent"; or the rule will not be applied where, from the whole statute or contract, a larger intent may be gathered, if the application of the rule will operate to defeat such larger intent. *Webber v. City of Chicago*, 148 Ill. 313, 36 N. E. 70, and authorities referred to on page 318, 148 Ill., page 71, 36 N. E. In the case at bar, the words in the assumption clause, "and claims of any and every description," were evidently intended to have a larger meaning than the words "mortgages, liens, taxes." To be sure, "mortgages, liens, taxes," refer to claims which are incumbrances upon the property and are shown of record to be such. But the words "and claims of any and every description" have a larger meaning than claims which are mere incumbrances shown of record to exist against the property. In other words, the assumption clause not only intended to include claims which were liens, but also claims of any and every description connected with the property and improvements conveyed, whether such claims were liens or not; that is to say, such claims as are mentioned in the interlocutory decree of May 6, 1902, referred to in the statement preceding this opinion.

In the third place, "the restriction of general words to things *ejusdem generis* must not be carried to such an excess as to deprive them of all meaning. The enumeration of particular things is sometimes so complete and exhaustive as to leave nothing which can be called *ejusdem generis*. If the particular words exhaust a whole genus, the general words must refer to some larger class." *Gillock v. People*, 171 Ill. 307, 49 N. E. 712. In the case at bar, to limit the meaning of the general words, as used in the assumption clause to claims *ejusdem generis* with those specifically named, would be to render the general words practically mean-

ingless. The particular words "mortgages, liens, taxes," exhaust the whole genus of claims which are shown of record to be incumbrances upon the property, and therefore the general words "and claims of any and every description" must refer to some larger class. The maxim *ejusdem generis* "must yield to another equally salutary rule of construction, viz., that every part of a statute should, if possible, be upheld and given its appropriate force." *Misch v. Russell*, supra. If, by the assumption clause the grantee in the deed of October 11, 1900, only assumed the payment of claims which were liens upon the property in question, then the general words "and claims of any and every description" could not be given their appropriate force, as they are broad enough to include a larger class of claims than those designated by the specific words used. In *Mittel v. Karl*, 133 Ill. 65, 24 N. E. 553, 8 L. R. A. 655, we held that words placed in a deed by the contracting parties for a purpose could not be arbitrarily rejected, and we there said (page 68, 133 Ill., page 554, 24 N. E., 8 L. R. A. 655): "In the construction of written contracts it is the duty of the court to ascertain the intention of the parties, and the intention, when ascertained, must control; but in arriving at the intention, effect must be given to each clause, word, or term employed by the parties, rejecting none as meaningless or surplusage." See, also, *Hayes v. O'Brien*, 149 Ill. 403, 37 N. E. 73, 23 L. R. A. 555; *Minnesota Lumber Co. v. Coal Co.*, 160 Ill. 85, 43 N. E. 774, 31 L. R. A. 529; 2 *Parsons on Contracts* (6th Ed.) p. *505. Bishop, in his work on *Contracts* (section 384), says: "Every clause, and even every word, should, when possible, have assigned to it some meaning. It is not allowable to presume or to concede, when avoidable, that the parties in a solemn transaction have employed language idly." In the case at bar the restriction of the general words used in the assumption clause to such claims as are designated by the previous specific words would not be giving effect to such general words, but would amount to a rejection of the same as meaningless or surplusage.

It is said that the intention of the parties in the use of the words in the assumption clause must be determined from the language of the clause itself, and that parol testimony cannot be introduced for the purpose of proving what the intention of the parties was. Undoubtedly, parol testimony for the purpose of showing the intention of the parties is not permissible. *Fowler v. Black*, 136 Ill. 363, 26 N. E. 596, 11 L. R. A. 670; *Skelton v. Dustin*, 92 Ill. 49.

But while it is true that parol evidence cannot be introduced to contradict or vary the terms of a valid written instrument, yet such evidence is admissible for the purpose of explaining written instruments by showing the situation of the parties in their relation to persons and things around them, or,

as is sometimes said, by proof of the surrounding circumstances. 1 Greenleaf on Evidence, §§ 275, 282, 286-288; 2 Parsons on Contracts, pp. *561, *563. In such cases oral evidence may be resorted to for the purpose of showing the circumstances surrounding the parties at the time the instrument was executed, so that the court may view the instrument from the standpoint of the parties who executed it, and be thereby the better enabled to determine the sense in which the words used were intended to be understood. In *Minnesota Lumber Co. v. Coal Co.*, 160 Ill. 85, 43 N. E. 774, 31 L. R. A. 529, we said (page 92, 160 Ill., page 776, 43 N. E., 31 L. R. A. 529): "Contracts should be construed in the light of the circumstances surrounding the parties, and of the objects which they evidently had in view. The circumstances which both parties had in view at the time of making the contract may be referred to for the purpose of determining the meaning of doubtful expressions." In *Drury v. Holden*, 121 Ill. 130, 13 N. E. 547, where the court had under consideration a clause in a deed where the grantee assumed certain incumbrances, it was said that parol evidence could be introduced for the purpose of showing what constituted the consideration of the deed, and that, as the amount of the incumbrance it assumed was included in and formed a part of the consideration, the oral evidence was clearly competent under the rule which permits parol evidence upon the subject of the consideration of a deed. See, also, *Hayes v. O'Brien*, 149 Ill. 403, 37 N. E. 73, 23 L. R. A. 555; *Louisville & Nashville Railroad Co. v. Koelle*, 104 Ill. 455; *Hadden v. Shoutz*, 15 Ill. 581; *Batavia Mfg. Co. v. Newton Wagon Co.*, 91 Ill. 230. In *Louisville & Nashville Railroad Co. v. Koelle*, supra, it was held that the ordinary rule that the rights of the parties must be ascertained from the words of the deed is subject to the modification; that surrounding circumstances may be taken into consideration in order to ascertain the intention of the parties to the deed.

In *Siegel v. Borland*, 191 Ill. 107, 60 N. E. 863, we said, in discussing the question of the assumption of an indebtedness by the grantee in a deed (page 111, 191 Ill., page 864, 60 N. E.): "It is true that a contract may be implied, and that, if the amount of an incumbrance is included in and forms a part of the consideration which a grantee promises to pay for premises, and he retains that part of the purchase price, the law will create a personal liability against him, on the ground that he has agreed to pay such indebtedness. In such a case the law presumes that the grantee has agreed to apply the money so retained for the purpose of paying the incumbrance. Either there must be an express assumption of the indebtedness, or the amount must be allowed in the purchase price, so that the law will imply the promise. * * * The implied contract

to pay to the holder of an incumbrance money retained for that purpose arises only from the presumed understanding of the parties. It is implied, because the facts justify the inference that such was the mutual intention; but an implied contract cannot exist when there is an express one about the same subject-matter. It is only where the parties do not expressly agree that the law implies a promise."

The language of the assumption clause here under consideration is, "subject, however, to existing mortgages, liens, taxes," etc. The mortgages assumed by the grantee are not specifically described, but parol testimony would certainly be admissible to prove what the mortgages upon the property conveyed were, so as to show what mortgages were assumed by the grantee. Parol proof is necessary in such case to explain what mortgages are referred to by the word "mortgages." "The identity of the mortgage assumed, when left in doubt by the terms of the deed, may be shown by parol evidence." 1 *Jones on Mortgages* (5th Ed.) § 740a. If parol testimony can be introduced to show what particular mortgages and taxes upon the property are embraced in the general words "mortgages" and "taxes," then parol evidence can also be introduced to show what claims were embraced within the words "and claims of any and every description." The presumption is that these claims and mortgages and taxes and liens were assumed as a part of the consideration of the conveyance, and it is always admissible to introduce parol evidence to show the real consideration of a deed.

The circumstances surrounding this transaction, as developed by the evidence, are substantially as follows: McSorley desired to purchase some real estate for the purpose of constructing a building of flats. Being insolvent, he did not desire to take title in his own name, or to make contracts for the construction of the building in his own name. He persuaded Gage, a young man whose father stood high in the community as a man of means and financial ability, to take the title to the property, and hold it for him, McSorley. Accordingly, through the efforts of McSorley, a contract was made by Mrs. Connell, the owner of the property, to sell it to Gage. Mrs. Connell executed a deed, dated October 21, 1899, conveying the lots to Gage. The contract for the sale of the property by Connell to Gage, and the deed from Connell to Gage, were put in escrow in the possession of the Chicago Title & Trust Company. Gage did not pay a cent for the property, and it was agreed that he should have \$500 for his services in holding the title. It was also understood that, by the holding of the title, he was to protect himself against the claims of parties furnishing labor and material for the construction of the building. Although the title was not of record in Gage, because the deed to him was held in escrow, yet he

was held out as the owner of the property. On December 12, 1899, a contract was entered into between Gage and an alleged corporation, called the Central Brick & Stone Company, for the construction of a building upon the lots in question at a cost of \$48,000. It is not certain from the evidence whether any such corporation as the Central Brick & Stone Company existed, but McSorley made use of the name of the Central Brick & Stone Company because he was insolvent and dared not use his own name. All the contracts which were made for the furnishing of labor and material were made with the Central Brick & Stone Company, and not with McSorley, although they were really and in effect the contracts of McSorley, who claimed to be president of the company. It was understood that, as soon as the construction of the building had proceeded to a certain extent, a building loan should be obtained upon the building, the mortgage securing the same to be executed by Gage. After the building contract of December 12, 1899, had been executed, the construction of the building was commenced and carried on. Gage and McSorley were unable to obtain a loan upon the property. Many orders were given to men furnishing materials and labor upon the building, drawn upon Gage, and to be paid out of the loan to be made upon the property by Gage. These orders were accepted in writing by Gage. A corporation in which Cameron was interested furnished a heating apparatus, costing about \$3,000, to be put into the building in question. Cameron was unable to obtain his money. Negotiations were then carried on between McSorley and Cameron for the purpose of inducing Cameron to take the title to the building, and obtain a loan upon the same, in order to pay the parties who had furnished labor and material. The evidence shows that in this matter McSorley and Cameron acted together. McSorley was really an agent of Cameron to procure for the latter the title to the property. Cameron was to be substituted for Gage, and take the title, in order to obtain a loan. He did afterwards obtain a loan of \$40,000 upon the property.

A series of efforts were begun by McSorley and Cameron to obtain title. Gage was induced to execute a deed to Detlor, who was an employé and bookkeeper of Cameron. The evidence is quite clear that McSorley was instrumental in inducing Gage to convey the title to Detlor. In November, 1900, an indemnity mortgage or contract was executed by McSorley to Gage, which recites that Gage had personally incurred certain indebtedness in connection with the erection of the building in behalf of McSorley, and that McSorley had agreed to hold him safe and harmless; and it also recites that McSorley was desirous that Gage should transfer and convey the legal title to Detlor, and that Detlor was about to enter into a contract with McSorley in reference to the property; and,

by the terms of this indemnity instrument, McSorley conveys an undivided quarter of three of the lots to Gage, and sells him an undivided half interest in the contract between McSorley and Detlor. And this is stated in the instrument to have been done for the purpose of protecting Gage against any loss or liability that he might incur, or had incurred by reason of holding the title to the property, and by reason of having made contracts and accepted orders and incurred bills in connection with the erection of the building. Accordingly, on October 11, 1900, Gage executed to Detlor the deed which contains the assumption clause above quoted. This deed was drawn by a real estate agent by the name of Hoffmeyer, and the testimony shows that the assumption clause was put in for the express purpose of protecting Gage against the claims of these parties who had furnished material and labor for the construction of the building. The evidence tends to show that Cameron, when the deed was made to Detlor, had full knowledge of the relations of Gage and Connell and McSorley, and of these claimants, to the property and building in question.

No consideration whatever was paid to Gage by Detlor for the transfer of the property to the latter. As we understand the evidence, the deeds from Connell to Gage, and from Gage to Detlor, were both delivered at the same time, to wit, on November 23, 1900. The case stands in the same position as though the deed had been made by Gage to Cameron, instead of being executed to Detlor. Detlor was the agent and clerk of Cameron, and took the title for him. Cameron says: "I told McSorley I would not take title, as a large loan would have to be made, and I didn't want to sign the notes. I put the title in my bookkeeper, so he could sign the paper, and I would assume no obligation thereby. * * * I never saw the deed. Dudley acted for me in receiving it." Elsewhere it is shown by the evidence that the title was taken in the name of Cameron's bookkeeper as a matter of convenience to Cameron, and Cameron himself says that the deed was taken for his benefit. Cameron also says: "At no time prior to the deed from Gage to Detlor had I any agreement with any one respecting these claims, other than that mentioned in the deed. The language in that deed with respect to claims to be paid has not been changed by any agreement with anybody. Detlor had nothing to do with any of these transactions. Detlor is our bookkeeper, and looks after my books for me. He has for five or six years. He is twenty-six or twenty-seven years old; not much means; probably \$3,000 or \$4,000 in personal property. I simply told him what I wanted him to do. It was satisfactory to him. He was not protected in any way. It was my intention to protect him." Cameron also says that he dealt with McSorley, and his testimony shows that he knew that McSor-

ley's company had contracted to erect the building, and that the owner could not get a loan and could not go ahead with the building, and he says that McSorley told him he could procure title for him, Cameron. McSorley also told Cameron that Gage had a contract to buy the property from Connell.

Under the facts thus narrated, it is unquestionably true that the assumption of these claims by Detlor was an assumption of them by Cameron himself. "If the conveyance be to a trustee who assumes an existing mortgage, and the trustee holds the title for the benefit of others who paid the consideration, in case of a deficiency each beneficiary under the trust is liable therefor in proportion to the amount of his separate interest in the property." 1 Jones on Mortgages, § 740b. Detlor held the property in trust for Cameron, and assumed the payment of the claims. The consideration for the conveyance to Detlor passed, not from Detlor, but from Cameron, and Cameron, being the beneficiary under the trust held by Detlor, is liable for the payment of the claims whose payment was assumed by Detlor. It is true that soon after the deeds from Connell to Gage, and from Gage to Detlor, were delivered and recorded, and on December 27, 1900, Cameron obtained a deed from Detlor to himself. This latter deed was without any consideration whatever, and, although the deed from Detlor to Cameron had a clause in it to the effect that it was subject to the incumbrances of record at the date thereof, yet we are of the opinion that Cameron could not relieve himself from the liability to Gage and these claimants, assumed by the assumption clause in the deed from Gage to Detlor, by any language which was put in the deed of the property made to him by his bookkeeper, Detlor.

The evidence shows that the building upon this property was finished to the extent of two-thirds thereof when Cameron or Detlor obtained the title to it. The testimony shows that the lots and buildings are now worth from \$75,000 to \$80,000, and that in November, 1900, when this transfer was made, they were worth upwards of \$50,000. It is difficult to see what adequate consideration Cameron paid for this property, if it was not the understanding and agreement that he should pay off the claims that existed in favor of those who had furnished materials and labor and money for the construction of the building. The amount which Cameron paid to Connell in order to obtain the deed from Connell to Gage was small when compared with the value of the property and the improvements thereon. As Gage received no consideration for the deed which he made to Detlor, Cameron obtained the property for a very small consideration, if it was not true, as is claimed by the appellants, that he was to make a loan upon the property and pay off all the claims existing in favor

of those who had furnished materials and labor.

The parties holding these claims—many of them, or their agents and representatives—went to see Cameron when they heard that he was to buy the property and make a loan upon it. Some 10 or 11 witnesses swear that Cameron, or his attorney or agent, told them that he would pay off these claims when he obtained the title to the property and negotiated a loan upon it, which he afterwards did to the extent of \$40,000.

It is true that the deed from Gage to Detlor did not run to Cameron himself, but the evidence shows that one Dudley was the attorney and agent of Cameron and represented him in the matter of the deed, and the deed was delivered to Dudley for Cameron, as the deed also from Connell to Gage was at the same time delivered to Dudley. Although a party does not sign a deed under which property is conveyed to him, and which contains an assumption clause, yet, if he accepts the instrument and places it upon record, such acceptance of the deed with the knowledge of its contents binds him as effectually as though the deed had been executed by him. *Dean v. Walker*, 107 Ill. 540, 47 Am. Rep. 487; 2 *Warvelle on Vendors* (2d Ed.) § 646. Cameron, being a grantee from Detlor, and chargeable with notice of the assumption of these claims by Detlor, from whom he received a conveyance, the land in Cameron's hands was subject to the lien created by the deed. *Sidwell v. Wheaton*, 114 Ill. 267, 2 N. E. 183; 1 *Jones on Mortgages*, §§ 740, 740b; *Markoe v. Andras*, 67 Ill. 34; *Carpenter v. Mitchell*, 54 Ill. 128.

A charge upon land may be created by contract, and here the words of the assumption-clause created a charge upon the land conveyed by Gage to Detlor or Cameron. *Sidwell v. Wheaton*, supra; *Markoe v. Andras*, supra; *Drury v. Holden*, 121 Ill. 130, 13 N. E. 547; 1 *Jones on Mortgages*, §§ 736, 740; 2 *Warvelle on Vendors* (2d Ed.) § 647.

In addition to what has been said, it appears that some of these claimants filed petitions for mechanics' liens, which petitions are still pending. It furthermore appears that some of the claimants, who were entitled to mechanics' liens and would have filed petitions for the same, abstained from doing so because of Cameron's assurances that their claims would be paid when the loan should be negotiated. It also appears from the evidence that Cameron did, as a matter of fact, make payments in cash to some of these claimants, and made agreements of settlement with others, by the terms of which he was to pay partly in money and partly in notes. When, however, he had obtained the title to the property in the manner above stated, he repudiated all these agreements and obligations.

Gage has a right to file the present bill. "Where the vendee of mortgaged property has assumed the payment of the mortgage,

the mortgagor may proceed in equity to compel such vendee, to whom he stands in the situation of a mere surety, to discharge the debt for his protection." 2 Warvelle on Vendors (2d Ed.) § 651; Bay v. Williams, 112 Ill. 91, 54 Am. Rep. 209.

The petitioners here who filed intervening petitions had a right so to intervene. "An intervener has the right to claim the benefit of the original suit, and to prosecute it to judgment. Such right cannot be defeated by the dismissal of the suit by the plaintiffs after the filing of the petition and notice thereof to such plaintiffs." 11 Ency. of Pl. & Pr. p. 509. In Shannahan v. Stevens, 139 Ill. 428, 28 N. E. 804, we held that a person interested in the subject-matter of a bill, who is a necessary party, has the right, on his motion, to intervene and become a party to the suit, even after the bill has been dismissed under a stipulation with the complainant, when his motion is made at the same term the suit is dismissed. Marsh v. Green, 79 Ill. 385; Poehlmann v. Kennedy, 48 Cal. 201.

"The rule is perfectly well settled that a party may by express agreement create a charge or claim in the nature of a lien on real as well as personal estate of which he is the owner or possessor, and that equity will establish and enforce such charge or claim, not only against the party who stipulated to give it, but also against third persons who are either volunteers, or who take the estate on which the lien is agreed to be given with notice of the stipulation. Such an agreement raises a trust which binds the estate to which it relates, and all who take title thereto with notice of such trust can be compelled in equity to fulfill it." Pinch v. Anthony, 8 Allen, 539. Under these authorities, and others above referred to, claims, when specifically named, may be made charges by contract against land; and, if this be so, there is no reason why such claims may not be charged by contract against land when they can be made specific by proof. In the case at bar, the claims referred to in the assumption clause have been made specific by proof. The evidence shows that Cameron either had actual or constructive notice of the claims mentioned in the decree below. Before he concluded to take the title from Gage he employed McSorley and Dudley, an attorney, to make a list of the claims against the property, and this list was examined by him, or by his attorney, before he took the title to the property.

In the case of the appellant Croall, the following order on Gage was given to Croall, to wit: "Chicago, March 8, 1900. To Eli A. Gage, care of Hoffmeyer & Fitzgerald: Please pay to J. Jackson Todd, agent, the sum of \$3000 out of moneys due us for construction of building at 5420 to 5428 Indiana avenue, and charge to our contract on said building. Central Brick and Stone Co., John McSorley, Pres."

On the back of this Gage made the following entry, and signed it under seal: "Value received hereby accept this order and agree to pay same according to its terms, and I do acknowledge said order to be a valid and subsisting lien against the premises in question. Eli A. Gage. [Seal.]"

This contract in writing was an express contract creating a lien in favor of Croall, or his agent, Todd, upon the property in question. So far, therefore, as the Croall claim is concerned, it would be embraced under the word "liens" in the assumption clause, if it were not included under the general clause, "and claims of any and every description." The evidence tends to show that Cameron, before he took the title, had notice of Croall's claim. Certainly the circumstances were such as to put him upon inquiry, and he could easily have ascertained all the facts about the claim by inquiring of Gage, whom he knew to be the holder of the legal title. Counsel for appellee claims that the acceptance of Gage in writing of the order upon him in favor of Todd, as above set forth, was not sufficient under the statute of frauds, upon the alleged ground that it did not identify the property. The acceptance acknowledges the order to be a valid and subsisting lien upon the premises in question, and, when we look at the order upon which the acceptance is indorsed, it refers to moneys due for construction "of building at 5420 to 5428 Indiana avenue." We think the reference to the property by the numbers on Indiana avenue was a sufficient identification of it.

After a careful examination of the whole record, we are of the opinion that the decree of the circuit court was correct. Accordingly, the judgment of the Appellate Court is reversed, and the decree of the circuit court is affirmed.

Judgment reversed.

(212 Ill. 156)

SPENGLER et al. v. KUHN et al.

(Supreme Court of Illinois. Oct. 24, 1904.)

WILLS — CONSTRUCTION — TRUSTS — TRUSTEES — POWERS — DELEGATION — ESTATES.

1. Where testator devised property to his executors in trust, and one of the executors did not qualify, the other executor, after having qualified, became vested with the property devised as sole executor and trustee.

2. Where a will devised and bequeathed the remainder of testator's property to his executors in trust, for the exclusive use of his widow for life or during widowhood, with power to convey the property in fee and reinvest the proceeds, and, by virtue of the failure of one of the trustees to qualify, the widow became sole executrix and trustee, she held the property in her representative capacity in fee for her own benefit as cestui que trust under the terms of the will.

3. Where testator devised the remainder of his estate in trust for the exclusive use of his widow during her natural life or widowhood, with power to the trustees to let, sell, incumber, or convey any portion of the estate and reinvest the proceeds, the trust to cease on the widow's

death or remarriage, whereupon the property should go to testator's children, etc., and if any shall have died in the meantime, leaving descendants, such deceased child's share shall go to his or her issue, the estate did not vest in testator's children at his death, it being testator's intention that those entitled to share should not be determined until the expiration of the trust.

4. Where testator's widow became sole trustee under his will, creating a trust for her sole use during life or widowhood, with power to convey the property in fee and sell and reinvest the proceeds, etc., she had absolute power to use such part of the trust property, principal or income, as was necessary to preserve the trust estate and for her own support.

5. Where a widow became sole trustee under her husband's will, an agreement between herself and other heirs entitled to the property in remainder, authorizing a trust company to carry out the trust, was valid only so far as it authorized the performance of such ministerial duties as the widow might have performed through an agent.

6. Where a trustee under a will was also the cestui que trust, and had full power to use such part of the trust estate as was necessary for her own benefit, a decree requiring a trust company, to whom the trustee, on falling into ill health, had attempted to delegate her powers, to pay her certain sums from the trust estate for support, was erroneous, since, if the trustee was unable to further perform her duties as such, a new trustee should be appointed by a court of equity.

Appeal from Circuit Court, Cook County;
R. W. Clifford, Judge.

Bill by Katharina Kuhn and others against Emma W. Spengler and others. From a judgment in favor of plaintiffs, defendants appeal. Reversed in part.

Felsenthal & Foreman, for appellants Spengler, Bartels, and Kuhn. Ives, Mason & Wyman, for appellant Chicago Title & Trust Co. Mary M. Bartelme, for infant appellees. Lackner, Butz & Miller and William M. & William S. Johnston, for appellee Katharina Kuhn.

BOGGS, J. This was a bill in chancery filed by Katharina Kuhn, widow of Frank Kuhn, deceased, against the heirs at law of her deceased husband, and against the Chicago Title & Trust Company, wherein the said Chicago Title & Trust Company filed a cross-bill, as did also the appellants Emma W. Spengler, Annie Bartels, and Tillie I. Kuhn, certain of the heirs at law of the said deceased. The deceased, Frank Kuhn, departed this life May 3, 1890, leaving a last will and testament, whereby he placed his property, real, personal, and mixed, in the hands of his executors, as trustees, to be held and administered for the use and enjoyment of Katharina, his wife, during her natural life, unless she should remarry. The original bill alleged that the income from the property had proven insufficient to pay taxes, special assessments, and necessary repairs, and provide for the necessary support and maintenance of the widow; that certain of the real estate had been sold for taxes and special assessments; that there was no express provision in the will authorizing the use of any part of the principal or corpus of the estate in

making payment of such taxes, assessments, and repairs, or in making redemption of the land from tax sales, or to the support and maintenance of the widow; that an exigency had therefore arisen which the testator had not contemplated; and that the preservation of the estate and the necessities of the widow imperatively required that a decree should be entered so enlarging the power of the trustee appointed by the will as to authorize the application of the principal or corpus of the fund to the purposes of providing a reasonable support for the widow, redeeming the real estate from the tax sales, paying taxes and special assessments, etc. The heirs at law of the deceased testator, except his two sons, Frank C. and Adolph A. Kuhn, answered the bill, denying that a contingency existed requiring the enlargement of the powers of the trustee under said will.

Frank C. Kuhn and Adolph A. Kuhn had been severally adjudged to be bankrupt, and the Chicago Title & Trust Company had been appointed trustee in bankruptcy for the respective estates of the said bankrupts. The title and trust company filed its cross-bill, in which it averred that it claimed that each of said bankrupts, in virtue of the provisions of the will of the testator, their father, became seised at the time of his death of a vested estate in remainder in the undivided one-fifth of all the property, real, personal, and mixed, of the testator; that the executor and trustee under said will denied that such was the true construction and effect of the said will, and insisted that the interest of each of said bankrupts in the remainder created by the said will was contingent upon their surviving their mother, said Katharina. Emma W. Spengler, Annie Bartels, and Tillie I. Kuhn, heirs at law of the testator, answered the cross-bill of the title and trust company and conceded the correctness of the construction given to the will by that company, and also filed a cross-bill asking the court to declare such to be the true construction of the will, and to decree that each of them had also become seised, as devisee under the will, of a vested undivided one-fifth interest in the real estate left by said deceased. Answers were filed and replications thereto, and the cause was submitted to the chancellor for decision. The decree was that the estates in remainder created by the provisions of the will were not vested estates, but contingent upon an event which had not occurred, and that therefore the cross-bill filed by the title and trust company, and the cross-bill filed by Emma W. Spengler, Annie Bartels, and Tillie I. Kuhn, should each be dismissed. The decree further found and decreed that it was the intention of said testator that his widow, Katharina Kuhn, should have a reasonable support out of his estate, whether the same be taken from the income alone or from the principal as well, and that, as shown by the evidence, the sum of \$2,900 per year is needed for the reasonable care

and support of said Katharina Kuhn, and that said sum is a reasonable sum for such purpose under the circumstances of this case, and that said allowance should begin from the date of the filing of the bill herein, to wit, on October 17, 1901. The Chicago Title & Trust Company, Mrs. Spengler, Mrs. Bartels, and Tillie I. Kuhn have perfected this appeal to reverse the decree.

The will, the provisions whereof are to be considered and construed, reads as follows:

"I, Frank Kuhn, of the city of Chicago, being of sound mind and memory, do make, publish and declare this my last will and testament.

"First. I desire that all my just debts shall be paid and discharged out of my estate.

"Second. All the rest and remainder of my estate remaining after the payment and discharge of said debts, real estate, as well as personal and mixed estate and property, I give, devise and bequeath to my executors hereinafter named, and for the purpose of facilitating the winding up and settlement of my estate and promoting the interest of my devisees, I do hereby fully empower and authorize my said executors, and the survivor of them, to let, sell, exchange, encumber, convey all, each and every portion of my real and personal property, and the proceeds of such sales or other disposition of the same, or any part thereof, again in their discretion to re-invest in the purchase of other real or personal estate, or in bonds, stocks or other securities, or to lend the same at interest upon real estate or other securities, as may by them be deemed most advisable, and the property and estate so acquired with such proceeds again to hold under the same restrictions and for the same uses and purposes hereinafter particularly set forth, namely: The real and other estate hereinabove to my executors given, devised and bequeathed, is to be held by them, and the survivor of them, in trust, first, to and for the exclusive use and enjoyment thereof, during the term of her natural life, of my wife, Katharina, provided she shall so long remain my widow and unmarried, who is to have and retain the exclusive possession, use, enjoyment and control thereof, and shall have, use, enjoy the same, and each and every the income, rents, profits and proceeds arising therefrom, as long as she shall remain unmarried after my death, to and for her own use and behoof. Should my said wife, however, marry again after my death, then upon such re-marrying the operation of the above provision in her favor shall at once cease and be of no further effect, and she shall thereby become and entitled only to such dower in my real estate then remaining unsold or undisposed of and other portion in my other estate as she would in law be entitled to if I died intestate. Upon the re-marriage or death of my said wife, the trust estate hereby created shall at once cease, and the trust property shall thereupon go to and the title to the real estate become

vested in my children, and the whole of my estate remaining unconsumed and constituting such trust fund shall be divided equally between them, share and share alike, and if, in the meanwhile, any or more of my children shall have died leaving a descendant or descendants, such deceased child's share shall go to his or her issue, descendant or descendants.

"I do hereby nominate and appoint my said wife, Katharina, the executrix, and my son, Emil Kuhn, the executor, of this my last will and testament, and I do hereby expressly provide that no security shall be taken from them or either of them for the faithful performance of their duties in this behalf."

Emil Kuhn, nominated in the will to be one of the executors, did not qualify, and has since died, leaving the appellant Tillie I. Kuhn his sole heir at law. The appellee Katharina Kuhn, also nominated as executrix, accepted the trust, qualified as required by law, and on the 30th day of June, 1890, received letters testamentary as sole executrix, and has since acted in that capacity. She thereupon became vested with all the power and authority as sole executrix and sole trustee which would have vested in herself and said Emil Kuhn had the latter accepted the trust and qualified as required by law. 1 Starr & C. Ann. St. 1896, pp. 270, 321, c. 3, §§ 5, 97; Wardwell v. McDowell, 81 Ill. 364; Ely v. Dix, 118 Ill. 477, 9 N. E. 62.

The will creates a trust, the executor being empowered to execute the trust. The will devises and bequeaths all of the property belonging to the testator, real, personal, and mixed (remaining after all debts have been paid), to the executors, and the survivor of them, in trust, to and for the exclusive use, possession, enjoyment, and control of the widow, Katharina (the sole executrix and trustee), during the term of her natural life, she to have the income, rents, profits, and proceeds thereof to her own use and behoof as long as she should remain unmarried. The will also provided that said trustees should be fully empowered and authorized "to let, sell, exchange, encumber, convey all, each and every portion of my real and personal property, and the proceeds of such sales or other disposition of the same, or any part thereof, again in their discretion to re-invest in the purchase of other real or personal estate, or in bonds, stocks or other securities, or to lend the same at interest upon real estate or other securities, as may by them be deemed most advisable, and the property and estate so acquired with such proceeds again to hold under the same restrictions and for the same uses and purposes hereinafter particularly set forth, namely."

Under this will the executors and trustees must be held to have become seised of that estate which was necessary to enable them to accomplish the purposes of the trust. They were empowered to sell, exchange, and convey each and every portion of the prop-

erty, real and personal, to buy other real estate or other securities with the proceeds, sell the same, and again reinvest the proceeds in real or personal property, as their judgment and discretion should dictate. The purposes of the trust required that the trustees should grant the fee title to the trust property and take the fee title to any real property bought by them with the proceeds of that sold, and therefore it was essential to the accomplishment of the objects of the trust that the executors and trustees should be vested with title in fee to all of the property. In *Lawrence v. Lawrence*, 181 Ill. 248, 54 N. E. 918, we said (page 251, 181 Ill., page 919, 54 N. E.): "The trustee acquires whatever estate, even to a fee simple, that is needed to enable him to accomplish the purposes of the trust. *Preachers' Aid Society v. England*, 106 Ill. 125; *West v. Fitz*, 109 Ill. 425; 27 Am. & Eng. Ency. of Law, 110-118, 117. When the trustee is directed and empowered to convey the land to the objects of the settlor's bounty, the legal estate necessarily vests in the trustee. If a trustee is required to grant a fee, the fee must be conferred upon him. *Kirkland v. Cox*, 94 Ill. 400; *Preachers' Aid Society v. England*, supra."

Had both executors qualified, the title in fee for the uses and purposes of the trust and during the continuance thereof would have vested in them jointly. The widow, Katharina, in her individual capacity, would have had no interest in the title to the property, but only the beneficial interest as cestui que trust. The son, Emil, having declined to qualify, the duties and powers of executrix and trustee devolved upon said Katharina as sole executrix. She therefore occupies a dual position, that of trustee and of cestui que trust. As trustee she became vested with the title in fee of all the property of the testator for the purposes and objects of the trust. In her individual capacity she had no estate in the real estate or property, but was entitled to the benefit of the provisions made for her as cestui que trust under the terms of the will. The fee was in her in her representative capacity as executrix and trustee. This fee was vested in the trustee for the purposes of the trust, and the extent and duration of the estate taken by this trustee are measured by the objects of its creation. When such objects and purposes shall, under the provisions of the will, have been subserved, the estate of the trustee will cease to exist. Until that time the title in fee rests in Katharina in her capacity as trustee. When that time shall arrive, the devolution of the title will be as directed by the will. If those on whom the will then devolves the title could be determined at the time of the death of the testator, their right to the estate would be deemed vested in right, to take effect in possession at the termination of the trust. If the persons to take be dubious and cannot be known until the title in the trustee becomes extinct, then the right and title are

contingent and not vested. Courts incline to a construction that will declare the right and title to be vested, and will so hold unless a contrary intention appears in the will. The will here involved provides the title in the trustee shall become extinct when the widow, Katharina, shall remarry or die. The will declares that, upon the remarriage or death of Katharina, "the trust estate hereby created shall at once cease, and the trust property shall thereupon go to and the title to the real estate become vested in my children, * * * share and share alike, and if, in the meanwhile, any or more of my children shall have died leaving a descendant or descendants, said deceased child's share shall go to his or her issue, descendant or descendants." The investiture of title is plainly to occur when the trust has been determined, either by the remarriage or death of the cestui que trust. The persons to take are such of the children of the testator as are then alive, and the descendant or descendants of such, if any, of said children who have died. The estate did not vest in the children of the testator at his death, for the reason it could not then be known that any child of his would survive the termination of the trust and become entitled to take. The testator plainly manifested an intention that those to take should be determined at the time of the expiration of the trust, and there is no legal impediment to the consummation of his intent. Frank C. Kuhn and Adolph A. Kuhn, sons of the testator, Mrs. Bartels and Mrs. Spengler, his daughters, and Tillie I. Kuhn, a granddaughter, may or may not survive the remarriage or death of Katharina. If they survive the trust, they will become vested with an interest in the property which is the subject-matter of the trust; but no right thereto has as yet vested in them, and neither of them may ever become vested with such right. Such was the construction we said, in *Security Ins. Co. v. Kuhn*, 207 Ill. 166, 69 N. E. 822, should be given this will. We there said, speaking of the trust property (page 171, 207 Ill., page 824, 69 N. E.): "There was a future contingency in the unconsumed portion of the trust property existing at the death of the plaintiff, which might be in the form of real or personal property. That interest was limited upon the death of the plaintiff or the uncertain event of her remarriage, and to dubious or uncertain persons who should be living and able to take the property at her death. It cannot be known who, if any, will be the surviving child or children, or the issue or descendant of any such child, to receive the future contingent interest." The chancellor, therefore, correctly ordered that the cross-bills filed by the Chicago Title & Trust Company, and by Mrs. Spengler, Mrs. Bartels, and Tillie I. Kuhn, should be dismissed at the cost of the complainants therein respectively. Because of other errors, the decree, however, must be reversed.

Katharina, the widow, together with the children of herself and the testator, entered into an agreement with the Security Title & Trust Company (now the Chicago Title & Trust Company) which, it seems, the parties construed and understood to, in effect, transfer to the title and trust company the powers and duties possessed by the said Katharina as trustee under the will. The decree accepts this construction of the agreement, and proceeds on the view that the title and trust company possesses the power given the trustee by the will. So far as the performance of those duties and the discharge of the power granted by the will involve the exercise of discretion and judgment, they are not to be delegated. 27 Am. & Eng. Ency. of Law (1st Ed.) 143. Merely ministerial duties connected with the exercise of the functions of a trustee may be performed by an agent, and to that extent, and that only, the agreement is effective. The children of the testator did not take vested interests in the property, as we have seen, and consequently their participation in the execution of the agreement avails no farther than as a possible estoppel against such of them as shall survive the termination of the trust and become entitled, under the will, to be vested with an interest in the trust property. If Katharina Kuhn has, by reason of her years and physical infirmities, become incompetent to exercise the powers and duties of trustee, a court of equity may, and will in a proper case, provide a new trustee. 27 Am. & Eng. Ency. of Law (1st Ed.) 89, 90. Until a new trustee shall in that manner be appointed, all duties and powers devolving on the trustee which involve the exercise of judgment and discretion or are of a personal nature must be discharged by the said Katharina. She may, of course, employ agents and attorneys, or others, to perform merely ministerial duties connected with the trust.

The chancellor interpreted the will with reference to the powers conferred on the trustee as follows: "That Katharina Kuhn has full power to sell the real estate left by said testator for any purpose mentioned in the will, and convey to the purchaser a fee-simple title thereto by virtue of the power vested in her by the terms of the will of said testator, and reinvest the same according to the terms of the will, and to use the proceeds thereof, so far as may be necessary, in payment of taxes, assessments, insurance, repairs, and other necessary charges upon said estate, and also for the purpose of paying for her own support; and that in making such expenditures, and in providing for such support, she is not limited to the income of said estate alone, but may also use such portion of the principal or corpus of the estate as may be required; and that it was the intention of the said testator that his widow, Katharina Kuhn, should have a reasonable support out of his estate, whether the same

be taken from the income alone, or from the principal as well."

We think this construction of the will to be correct. The power of sale and of making other disposition of the trust property, given to the trustee, is so plainly stated there seems no room for the work of construction. That the testator intended to authorize the corpus of the property to be broken in upon, if necessary to the support of the widow, though not so unequivocally manifested, is to be gathered from the will as his true intent. The will authorizes the conversion of real estate into personalty by the trustee, the investment and reinvestment of the proceeds arising from sales or other disposition of the property, real and personal, declares the widow may use and enjoy the income, rents, profits, and proceeds "for her own use and behoof," and that the estate remaining unconsumed "shall go to the remaindermen." These provisions are not consistent with the view that it was the design of the testator that the trustee should preserve a distinction between the income and the corpus of the trust property, and that the widow should be restricted to the use and enjoyment of the income only, and that the body of the trust property should be preserved intact for the remaindermen.

The court also found that said Katharina is now in feeble health, and has been in poor health ever since the death of said Frank Kuhn; that since his death she has undergone a surgical operation for cancer, has once broken her arm, and is constantly suffering from rheumatism and asthma and feebleness due to old age, and that her expenses for surgical and medical attendance have been large; and that since the agreement between the children of the testator and the title and trust company, to wit, March 9, 1896, the widow has received but an average of \$1,200 per year, and that the sum of \$4,491.66 should be paid her by the title and trust company as due to her as a deficiency on the amount which she was reasonably entitled to receive from the date of such agreement, and that the sum of \$2,900 per year is needed for the reasonable care and support of said Katharina Kuhn, and that said sum is a reasonable sum for such purpose under the circumstances of this case, and that said allowance should begin from the date of the filing of the bill herein, to wit, on October 17, 1901. The court also further found that the income from said estate has not been sufficient to pay the taxes, assessments, repairs, and insurance thereon, and that a large sum of money was necessary to redeem from such tax sales, and decreed that the title and trust company, out of any money in its hands belonging to the estate of said Frank Kuhn, deceased, whether the same be income or corpus, should forthwith pay the said Katharina Kuhn the said sum of \$4,491.66, and should annually

pay to her the sum of \$2,900 per annum from the date of filing the bill, less such sums as she has received during the pendency of this suit, and should hereafter pay the said Katharina the sum of \$2,900 per annum during her natural life, or so long as she remains unmarried, out of any moneys that may be realized out of said estate, whether the same be income or corpus.

These findings, and the relief decreed upon them, proceed upon the erroneous theory that the title and trust company has become possessed of the power of a trustee under the will. The executrix and trustee possessed ample power under the will to redeem the trust property from sales for unpaid taxes or special assessments, and all other power necessary to the protection of the trust estate. She has also all needed power to provide for her own reasonable support and maintenance. To accomplish either of these purposes, she may sell, exchange, or otherwise dispose of any of the trust property. She possesses ample power under the will, as construed by the chancellor, to meet every exigency disclosed by the record, and there is no occasion for any enlargement of her power as trustee. If she is physically or mentally incapable of executing such powers and duties, a court of equity may be applied to to supply a successor who is capable and competent to execute the trust. We do not therefore approve of these portions of the decree, and in respect of them the decree is reversed. If the widow is not physically capable of discharging the duties of trustee, of protecting the estate and providing for her own wants out of the trust property, and application is made to a court of equity for the appointment of a new trustee, all necessary and proper orders of this character may then be entered.

As indicated herein, the decree will be affirmed in part and in part reversed, and the cause will be remanded for such further and other proceedings as to justice and equity shall appertain. The cost in this case will be paid as follows: One-third by the said Katharina Kuhn in her capacity as executrix of the estate of Frank Kuhn, deceased, and out of the assets of the said estate, one-third by the Chicago Title & Trust Company, and the remaining one-third by appellants Emma W. Spengler, Annie Bartels, and Tillie I. Kuhn.

Decree reversed in part, and remanded.

(212 Ill. 108)

CHICAGO, B. & Q. R. CO. v. PEOPLE *ex rel.*
GRIMWOOD *et al.*

(Supreme Court of Illinois. Oct. 24, 1904.)

DRAINS—CONSTRUCTION OF STATUTES—RAILROAD BRIDGES—COMMON-LAW DUTY TO CONSTRUCT.

1. Farm Drainage Act (Hurd's Rev. St. 1901, p. 723, c. 42) § 78, provides that "this act and this repealing section shall not affect other independent laws for drainage and levees not

herein mentioned, but shall be construed as an independent act not affecting other independent drainage laws except as it is a codification and amended successor to the first three acts mentioned in the repealing section and the special provisions of this act for their own class of districts shall apply only to such districts, but the general provisions applicable to districts shall apply to all districts provided for in this act." *Held* to apply only to the various provisions of the farm drainage act, and not to affect the levee act (Hurd's Rev. St. 1901, p. 707, c. 42) so as to make section 56, which is of a general nature, applicable to proceedings under the farm drainage act.

2. It being the common-law duty of a railroad company to make such necessary changes in its bridge across a natural water course as will accommodate the waters which drain through the same though the flow be increased by artificial improvements, requiring it to do so under the provisions of the farm drainage act (Hurd's Rev. St. 1901, p. 687) does not invade any constitutional provision against the taking of property without due process of law or without just compensation.

Appeal from Circuit Court, Kendall County; Geo. W. Brown, Judge.

Petition for mandamus, on the relation of one Grimwood and others, against the Chicago, Burlington & Quincy Railroad Company. The writ was ordered as prayed on demurrer to the petition, and defendant appeals. Affirmed.

Appellees, the drainage commissioners of Drainage District No. 1 of the town of Bristol, Kendall county, filed their petition for a writ of mandamus directed to appellant, requiring appellant to construct, enlarge, deepen, and widen the waterway over and across the right of way of appellant, and to construct a railroad bridge across the waterway so widened and deepened along appellant's railroad. Appellant demurred to the petition. The demurrer was overruled, and appellant elected to stand by its demurrer, and the writ was ordered as prayed. From this order appellant appealed.

Appellees are organized under the farm drainage act, and have adopted the bed of Rob Roy creek as the main drain for the lands of the district. The district includes about 2,000 acres of land, the majority of which is swamp and slough land, which lands, owing to overflow and the continuous presence of water, have, up to the time of the organization of the district, been unfitted for cultivation. Rob Roy creek runs in a southeasterly course through the district and across the appellant's railroad, a portion of the district lying upon each side of the railroad. The creek is a natural waterway, and has been, as alleged in the petition, a natural water course for more than 50 years, and is the natural and only outlet for the land included in the drainage district; and the petition alleges that by the proposed system of drainage no water, other than the water that has its natural drainage into Rob Roy creek, will be carried through the same, and that by the deepening and enlarging of the creek all the lands in said district will be greatly improved, and made good, tillable

lands subject to cultivation. The petition further avers that appellant is a railway corporation doing business in this state, with corporate power to build, construct, operate, and maintain a railroad at and in the township and county aforesaid; that more than 40 years ago appellant constructed a bridge or culvert across Rob Roy creek of the length of 12 feet and of the width of 30 feet, and has continuously owned and used the same from thence hitherto, and that in the construction of said bridge appellant sank and placed in the said Rob Roy creek huge wooden timbers and stone, which it has ever since kept and maintained there, thereby preventing the deepening of said creek by petitioners, as aforesaid, except by the removal of said timbers and stone, and which, if removed, would result in the destruction of said bridge; that the channel so left under the said bridge has, from the time of its construction to the present time, remained at the depth of three feet, and that it is now insufficient to allow the flow of water in the ditch or drain which is proposed to be dug, built, and constructed by the petitioners in their capacity as drainage commissioners; that the said ditch or proposed drain is to be an open ditch as the main waterway for said system of drainage. The petition further shows that on the 24th of June, 1903, appellees gave notice to appellant to construct or enlarge the opening at the intersection of its said railroad with Rob Roy creek, for the uses and purposes of said drain, so as to conform and be equal in size to the same, and of the following dimensions: Width, 23 feet; depth, 9½ feet below the surface of the ground underneath the bridge or culvert at the place of intersection; and by the petition a copy of the notice is made an exhibit thereto and a part thereof. The notice referred to is addressed to the appellant, and is as follows:

"You are hereby notified that a bridge is deemed necessary to be made across the right of way of your company at a place or point in section 17, in the said town of Bristol, where the right of way of your said company is crossed or intersected by what is commonly known as the 'Rob Roy Ditch,' said construction or improvement to be for the use or waterway of a combined system of drainage being constructed in the vicinity under the charge and direction of the drainage commissioners of District No. 1 in the town of Bristol, county of Kendall and state of Illinois, the main ditch of said drainage where it intersects the right of way of your said company at said point being of the width of twenty-three feet and the depth of nine and a half feet, the bridge so to be constructed to be of the width of twenty-three feet in the clear at surface or level of land, to permit at least sixteen feet in the bottom of the ditch; and you are required, in pursuance of the statute case made and provided, to build and

construct such bridge within thirty days from this date."

The petition avers that the present bridge across the said Rob Roy creek is of the value of \$8,000, and that a new bridge of the dimensions required for the accommodation of the ditch as improved will cost not to exceed \$13,000, and that 30 days have elapsed since the giving of the notice to appellant, and that appellant has neglected, failed, and refused to construct and enlarge, in accordance with said notice, the opening under said bridge or culvert.

The demurrer was general, with certain special grounds assigned, as follows: First, that the proceeding is repugnant to section 2 of article 2 of the Constitution of the state of Illinois, in that petitioners seek thereunder to deprive this defendant of property without due process of law; second, the statutes under which petitioners are proceeding are repugnant to section 13 of article 2 of the Constitution of the state of Illinois, in that petitioners seek thereunder to take and damage the private property of the defendant for public use without just compensation; third, the statutes under which petitioners are proceeding are repugnant to section 13 of article 2 of the Constitution of this state, in that petitioners seek to take property of defendant, a corporation, and subject the same to the uses and conveniences of petitioners, without an assessment of the damages that will necessarily be sustained by the defendant, and without awarding to the defendant a trial by jury; fourth, the statutes under which the petitioners are proceeding are repugnant to the fourteenth amendment to the Constitution of the United States, in that thereunder the petitioners seek to deprive defendant of property without due process of law; and, fifth, the statutes under which petitioners are proceeding are repugnant to the fourteenth amendment to the Constitution of the United States, in that thereunder the defendant is denied the equal protection of the laws.

Hopkins, Dolph & Scott (Chester M. Dawes, of counsel), for appellant. Raymond & Newhall, for appellees.

RICKS, C. J. (after stating the facts). Of the grounds relied upon by appellees to sustain the writ awarded, are, *inter alia*, section 40½ of the farm drainage act and section 56 of the levee act.

Section 40½ of the farm drainage act is as follows: "The commissioners shall have the power and are required to make all necessary bridges and culverts along or across any public highway or railroad which may be deemed necessary for the use or protection of the work, and the cost of the same shall be paid out of the road and bridge tax, or by the railroad company as the case may be: provided, however, notice shall first be given to the road or railroad authorities to build or construct such bridge or culvert, and they shall

have thirty days in which to build or construct the same, such bridges or culverts shall in all cases be constructed so as not to interfere with the free flow of water through the drains of the district. Should any railroad company refuse or neglect to build or construct any bridge or culvert as herein required, the commissioners constructing the same may recover the cost and expenses therefor in a suit against said company before any justice of the peace or any court having jurisdiction, and reasonable attorneys' fees may be recovered as part of the cost. The proper authorities of any public road or railroad shall have the right of appeal the same as provided for individual land owners." Hurd's Rev. St. 1901, p. 723, c. 42.

Section 56 of the levee act reads: "When any ditch or drain or other work of enlarging any channel or water-course is located by the commissioners on the line of any natural depression or water-course, crossing the road of any railroad company where no bridge or culvert or opening of sufficient capacity to allow the natural flow of water of such ditch or water-course, is constructed, it shall be the duty of the commissioners to give notice to such railroad company to construct or enlarge such bridge or culvert or opening in the grade of such road, for such ditch or ditches or other work, of the dimensions named in such notice, within twenty days from the service thereof; and any railroad company neglecting, failing or refusing so to do, shall be liable to any owner of land in such district, for all damages to such land sustained by such neglect or refusal; and shall be liable to such district in the sum of twenty-five dollars (\$25) for each day such company shall have neglected or refused to construct such work, after the time fixed in such notice for constructing the same shall have expired, which damages or penalty may be recovered before a justice of the peace, if within his jurisdiction, or before any court of competent jurisdiction." Hurd's Rev. St. 1901, p. 707, c. 42.

Of these acts appellant says that both are repugnant to the various constitutional provisions set forth in its demurrer, and that, if it be conceded that they are valid laws, section 56 of the levee act could have no application to this proceeding; that the Legislature has enacted two entirely separate and independent Codes of law applicable to the subject of drainage and the organization and government of drainage districts; that one is known as the "Levee Act" and the other as the "Farm Drainage Act"; and that a district organized under the one is subject only to the provisions of that act, and those of the other act have no application to such district. In this latter contention we agree with appellant, and deem the question fully settled by the cases of *Gauen v. Drainage District*, 181 Ill. 446, 23 N. E. 633, *Drainage Commissioners v. Volke*, 163 Ill. 248, 45 N.

E. 415, and *McCaleb v. Coon Run Drainage District*, 190 Ill. 549, 60 N. E. 898.

Appellees now urge that section 78 of the farm drainage act, which is the repealing clause or section of that act, makes the sections of the levee act of general application and applicable to the farm drainage act. The language relied upon is as follows: "This act and this repealing section shall not affect other independent laws for drainage and levees not herein mentioned, but shall be construed as an independent act, not affecting other independent drainage laws except as it is a codification and amended successor to the first three acts mentioned in the repealing section, and the special provisions of this act for their own class of districts shall apply only to such districts, but the general provisions applicable to all districts shall apply to all districts provided for in this act."

We are unable to see that the section relied upon can be given the effect that appellees urge it shall have. The farm drainage act provides for various kinds of districts, namely, districts for combined drainage (section 11), subdistricts (section 43), union districts (section 48), special drainage districts (section 49), river districts (section 75), districts by user (section 76), and districts by mutual agreement; and the effect of the repealing clause relied upon is that the provisions relating to these various districts shall apply only to them, but that the provisions of a general nature, that are applicable to "all districts, shall apply to all districts provided for in this act." This latter provision can have no reference to the levee act or any provision in it, but, as we construe it, applies only to the various provisions of the farm drainage act. There are many provisions of a general nature in the farm drainage act that are not repeated under the various special provisions in that act for the specified districts. Such is the provision that bridges shall be made across the drainage ditches in inclosed fields. This provision, by the last clause of the repealing act, and the one now relied upon by appellees, is by that section read into all of the various kinds of districts that may be organized under the act.

The right of drainage through a natural water course or a natural waterway is a natural easement appurtenant to the land of every individual through whose land such natural water course runs, and every owner of land along such water course is obliged to take notice of the natural easement possessed by other owners along the same water course. For the drainage of large areas of land, drainage districts were authorized by the Constitution to be provided for by proper legislative action. But the constitutional amendment was not solely to authorize drainage along the lines of natural water courses. The constitutional provision was an express declaration of the people of the

right of one man to drain his land over and across the lands of another. It was the declaration of the people of the policy of the state that in a country such as this the rights of drainage of the lands, where such large proportions were swamp and overflowed lands, were paramount to the right of the individual who sought to deny such drainage.

The amendment of 1878 of the Constitution, in relation to drainage (article 4, § 31), was not for the purpose of declaring the right of drainage, but was for the purpose of authorizing special assessments upon property benefited thereby. Where lands are valuable for cultivation, and the country, as this, depends so much upon agriculture, the public welfare demands that the lands shall be drained, and, in the absence of any constitutional provision in relation to such laws, they have been sustained, upon high authority, as the exercise of the police power. Upon this subject Mr. Cooley, in his work on Constitutional Limitations (7th Ed., p. 868), says: "Where, under legislative authority, the construction of levees and embankments is required to protect from overflow and destruction considerable tracts of country, assessments are commonly levied for the purpose on the owners of lands lying on or near the streams or bodies of water from which the danger is anticipated. But if the construction should be imposed as a duty upon residents or property owners in the neighborhood, so that they should be compelled to turn out periodically or in emergencies and give special attention and labor to the construction of the necessary defenses against overflow and inundation, it is not perceived that there could be any difficulty in supporting such a regulation as one of police, or of resting it upon the same foundations which sustain the regulations in cities by which duties are imposed on the occupants of buildings to take certain precautions against fires, not for their own protection exclusively, but for the protection of the general public. Laws imposing on the owners the duty of draining large tracts of land which in their natural condition are unproductive and are a source of danger to health may be enacted under the same power, though, in general, the taxing power is employed for the purpose; and sometimes land is appropriated under the eminent domain."

A natural water course, being a natural easement, is placed upon the same ground, in many respects, as to the public right, as is a public highway. At the common law, if a railroad or another highway crosses a natural water course or a public highway, such highway or railroad must be so constructed across the existing highway or waterway, and so maintained, that said highway or waterway, as the case may be, shall not only subserve the demands of the public as they exist at the time of crossing the same, but for all future time. In *Ohio & Mississippi Railway Co. v. Thillman*, 143 Ill.

127, 32 N. E. 529, 36 Am. St. Rep. 359, in speaking of the duty of railroads crossing streams, it is said (page 133, 143 Ill., page 530, 32 N. E., 36 Am. St. Rep. 359): "A railroad company, in constructing its road over water courses, must make suitable bridges, culverts, or other provision for carrying off the water effectually. Angell on Water Courses (7th Ed.) § 465b. The duty imposed by statute upon such company to restore the stream crossed to its former state, or to so restore it as not to impair its usefulness, exists also in the absence of express statutory requirement. Pierce on Railroads, p. 203. The same obligation in such case rests upon the corporation as rests upon a private owner who undertakes to interfere with the water course in the same way."

In *Kankakee & Seneca Railroad Co. v. Horan*, 131 Ill. 288, 23 N. E. 621, in speaking of the contention of the railroad company that the court erred in refusing to give an instruction requested by it, it is said (page 308, 131 Ill., page 626, 23 N. E.): "It, in substance, tells the jury that the appellant, when fixing the culvert for the passage of the water of the Parker slough, a natural water course, was only bound to so construct it that it was no obstruction to the water then flowing into it; but, as to any increase of water caused by the drainage into it by people along the course of the slough, the appellant would not be liable, though the culvert was not sufficient to admit of the passage of such water. We do not subscribe to this doctrine. The Parker slough was a water course, and it was the legal right of any one along its line, for miles above the railroad, where the water naturally shed toward the slough, to drain into it, and no one below, owning land along the slough, would have any legal remedy against such person so draining water into the slough above him for any damage done to his inheritance by means of an increased flow of water caused thereby. In other words, the slough was a legal water course for the drainage of all the land the natural tendency of which was to cast its surplus water, caused by the falling of rain and snow, into it, and this whether the flow was increased by artificial means or not. It would seem legitimately to follow that the railroad company, in providing a passageway for the slough, was bound to anticipate and provide for any such legal increase of the water flow. If it did not, it was doing a wrong and legal injury to any one, situated like the appellee, who received injury in consequence of a failure on its part to do its duty."

In *Cleveland v. City Council of Augusta* (Ga.) 29 S. E. 584, 43 L. R. A. 638, this language is used: "At common law the rule is that, where a highway is made across another one already in use, the crossing must not only be made with as little injury as possible to the old way, but whatever structures may be necessary to the convenience

and safety of the crossing must be erected and maintained by the person or corporation constructing and using the new way."

In the case of *Lake Erie & Western Railroad Co. v. Cluggish*, 143 Ind. 847, 42 N. E. 743, it is said: "The duty of a railroad company to restore a stream or highway which is crossed by the line of its road is a continuing duty; and if, by the increase of population or other causes, the crossing becomes inadequate to meet the new and altered conditions of the country, it is the duty of the railroad to make such alterations as will meet the present needs of the public."

In the case of *Lake Erie & Western Railroad Co. v. Smith* (C. C.) 61 Fed. 885, this language is used: "The duty of a railroad to restore a stream or highway which is crossed by the line of its road is a continuing duty; and if, by the increase of population or other causes, the crossing becomes inadequate to meet the new and altered conditions of the country, it is the duty of the railroad to make such alterations as will meet the present needs of the public. *Cooke v. Railroad Corp.*, 183 Mass. 185. Under a fair construction of section 3903, Rev. St. Ind. 1881 (section 5153, Burns' Ann. St. Ind. 1894), it is the duty of a railroad company to construct its road, when it intersects any highway or stream, in such manner as to afford security for life and property, and this is so whether the way is laid out and opened before or after the construction of the railroad. *Railway Co. v. Smith*, 91 Ind. 119; *National Waterworks Co. v. City of Kansas* (C. C.) 28 Fed. 921."

In *State of Indiana v. Lake Erie & Western Railroad Co.* (C. C.) 83 Fed. 287, it is said: "If, by the growth of population or otherwise, the crossing has become inadequate to meet the present needs of the public, it is the duty of the railroad company to remedy the defect by restoring the crossing so that it will not unnecessarily impair the usefulness of the highway."

In *State v. St. P., M. & M. Ry. Co.*, 35 Minn. 131, 28 N. W. 3, 59 Am. Rep. 313, a railroad company had crossed a public street in the city, and had so obstructed the street with tracks that it became necessary to lower the street or elevate the railroad. The city council determined to lower the street, and notified the railroad company to make the street under its roadway, and the city would make the depression approaching the underneath crossing. The court, in that case, discussing the duty of railroads crossing existing streets, says: "The duty prescribed is to keep, at all times and under all circumstances, the street, at points where they are intercepted by the railroad, in a condition and state of repair so as not to impair or interfere with their free and proper use, and, if this cannot be done with a surface crossing, the company must do it either by carrying their tracks over or under the highway, or the highway under or over their tracks;

and the duty of thus restoring or preserving the free use of the street includes the doing of whatever is needed to accomplish the required end, and which is rendered necessary to be done by reason of the presence of the railroad in the street." And it was held in that case that it was not only the duty of the railroad company to prepare a crossing for the street under its railroad tracks, but it was proper to require it to prepare the depressions or approaches in the street approaching the crossing under the tracks.

The question whether, where no street exists or a drain ditch crosses territory where there is no natural waterway, a railroad can be required, without compensation, to devote a part of its right of way to the public for either a highway or a ditch, is not before us, and we do not decide, but we think that the great weight of authority is that where there is a natural waterway, or where a highway already exists and is crossed by a railroad company under its general license to build a railroad, and without any specific grant by the legislative authority to obstruct the highway or waterway, the railroad company is bound to make and keep its crossing, at its own expense, in such condition as shall meet all the reasonable requirements of the public as the changed conditions and increased use may demand.

The case of *Chicago & Northwestern Railway Co. v. City of Chicago*, 140 Ill. 309, 29 N. E. 1109, was a condemnation for the extension of a street in the city of Chicago across the right of way of the railroad company. The damages assessed to the company for land taken was \$1. The company offered to show the expense of grading and planking the roadway, the making of a gate and a power house from which to operate the same, the salary of a tender, and the cost of repairs, and insisted that all of these matters were proper elements of damage for land not taken. The lower court denied the contention, and this court sustained its judgment, and said (page 323, 140 Ill., page 1113, 29 N. E.): "These items of expense are set up in the cross petition as damages to the property not taken—that is, to the right of way on either side of that portion of the right of way which is to be used as a street. How can grading the approaches, planking the crossing, and erecting gates damage the right of way adjoining the street crossing? The expenses which they necessitate may require a deduction from the revenues of the company, but there is no proof to show that there is any such injury or inconvenience as reduces the capacity of the corporation to transact its business. Not the grading or planking or gates, but the use of the crossing by the public, may result in the stoppage or slower movement of trains and in the increased danger of accidents, but we have held that no damages can be allowed for these inconveniences. (Citing authorities.) Uncompensated obedience to a regulation en-

acted for the public safety under the police power of the state is not a taking or damaging, without just compensation, of private property or of private property affected with a public interest." In *Illinois Central Railroad Co. v. Willenborg*, 117 Ill. 203, 7 N. E. 698, 57 Am. Rep. 362, it was held that the statutory requirement for railroads to construct farm crossings for the use of adjoining landowners was the exercise of the police power, and that such statute was applicable alike to railroads built before and after its passage. To the same effect as the foregoing cases are *Chicago & Northwestern Railway Co. v. City of Chicago*, 140 Ill. 309, 29 N. E. 1109; *Ohio & Mississippi Railroad Co. v. McClelland*, 25 Ill. 140; *Chicago, Rock Island & Pacific Railroad Co. v. Moffitt*, 75 Ill. 524; *People v. Chicago & Alton Railroad Co.*, 67 Ill. 118.

Most of the foregoing cases are upon the common-law duty of railroads to keep highways and waterways over which they cross in such condition as will meet all public requirements, and the duty in such cases is treated as a continuing duty. Those cases not based upon the common-law duty are where statutes have been enacted for their regulation under the police power of the state, or where statutes merely declaratory of the common-law duty in such cases have been enacted. If it is the common-law duty of appellant to make the necessary changes in its bridge and opening across Rob Roy creek as will accommodate the waters which naturally drain through the same, although the flow be increased by artificial means, if the statute in question is but declaratory of the common-law duty, or is the exercise of the police power, then it is clear that there is no such taking of appellant's property as invades the various provisions of the Constitution relied upon in the demurrer. The power exercised would not be that of eminent domain. "The police power is to be clearly distinguished from the right of eminent domain, and the distinction lies in this: that in the exercise of the latter right private property is taken for public use and the owner is invariably entitled to compensation therefor, while the police power is usually exerted merely to regulate the use and enjoyment of property by the owner, or, if he is deprived of his property outright, it is not taken for public use, but rather destroyed in order to promote the general welfare of the public, and in neither case is the owner entitled to any compensation for any injury which he may sustain in consequence thereof, for the law considers that either the injury is *damnum absque injuria*, or the owner is sufficiently compensated by sharing in the general benefits resulting from the exercise of the police power." 22 Am. & Eng. Ency. of Law (2d Ed.) 916; *Frazer v. City of Chicago*, 186 Ill. 480, 57 N. E. 1055, 51 L. R. A. 308, 78 Am. St. Rep. 296.

In the case at bar it is not proposed to

take the property of appellant, but the proposition is that appellant shall be required, in the use of its property, to conform to the public needs. The operation of its railroad or its charter rights are not to be interfered with. While its charter is not set out in the petition, and its exact provisions are not before us, the presumption will be that its charter is such as is ordinarily granted to construct and operate a railroad between the points therein mentioned. The allegation of the petition is that appellant was organized "with corporate power to build, construct, operate and maintain a railroad at and in the township and county aforesaid," and there is no presumption that it had any greater powers than those set forth in the petition. As said in *Ligare v. City of Chicago*, 189 Ill. 46, 28 N. E. 934, 32 Am. St. Rep. 179: "When a franchise is granted to construct ways or streets across a waterway, there is no implied right to destroy the waterway, but it must be so bridged that its use will not be unnecessarily impaired. *Elliott on Roads and Streets*, 32. If it be conceded that the state may authorize the taking or destruction of a waterway, it devolves on those who claim that the state has done so to show it, and, since that is not done by simply showing power to lay out, open, and improve streets across waterways, no such power is here shown." And while to conform to the writ awarded in this case may, as was said in *Chicago & Northwestern Railroad Co. v. City of Chicago*, supra, "require a deduction from the revenues of the company," it does not interfere with the exercise of its rights under its charter or any of its charter rights.

Appellant has cited and relies upon *Bailey v. Philadelphia*, etc., Railroad Co., 4 Har. 389, 44 Am. Dec. 593, and *Washington Bridge Co. v. State*, 18 Conn. 53. We have examined those cases and do not think they apply. In the first case mentioned, the charter was to locate and construct a railroad between Philadelphia and Baltimore, and, if it should be necessary to pass over any navigable stream, a sufficient draw was required to be made in each bridge for the passage of vessels. The railroad company built a bridge with a draw. Subsequently the Legislature amended the charter of the railroad company, authorizing it to build a closed bridge where it had theretofore had a bridge with a draw. The closed bridge was accordingly built in compliance with the terms of the charter. Subsequently an act was passed giving damages to landowners that might be sustained by reason of said bridge being constructed without any draw or passage thereunder. The court held that, inasmuch as the defendant had complied with the special provisions of its charter, it had vested rights, and was not liable to the action authorized by the subsequent statute.

The case of *Washington Bridge Co. v. State*, supra, was where a corporation was

created by the Legislature for the purpose of constructing a permanent bridge over the Housatonic river, with authority to collect tolls to reimburse the expense of building the bridge. It was provided that as soon as such expense, with interest at 12 per centum, should be reimbursed from the tolls, the bridge and the right of tolls should be subject to such order and regulation as the General Assembly should deem proper. Until that time arrived there was no reservation of power. The charter required the company to build a bridge with a 32-foot draw. Before the bridge had been operated a sufficient time for the company to reimburse itself and to realize the interest provided for in the act, the General Assembly passed an act requiring the bridge company to make its draw 50 feet, and it was held that, the bridge company having built its bridge according to the provisions of its charter, the charter was a contract between the state and the company, under which the company had vested rights.

It would seem manifest that these cases cannot be controlling in the base at bar, where, so far as appears from the pleadings, appellant was given no authority, except the implied authority, to build any bridge whatever. That implied authority was coupled with the common-law duty of appellant to build its bridge over the natural water course, with a view of the future as well as the present contingencies and requirements of such water course, and with the further implied provision that there remained in the state, whenever the public welfare required it, the right to regulate its use. *Ohio & Mississippi Railroad Co. v. McClelland*, supra.

That the state is vitally interested in the reclamation of its swamp and slough lands cannot be gainsaid. We all know that the presence of large bodies of stagnant water, such as are found in swamp lands in this state, produce malaria and breed disease-giving germs of various forms, and that the removal of such bodies of water is conducive to the health and welfare of the public. By the removal of such bodies of water and the subjection of such lands to cultivation they are made to bear their proper proportionate burden to the support of the inhabitants and the commerce of the state. Their value is increased, and thereby their contribution in taxes to the state and local governments is increased. The subject was deemed of such importance that the people, by section 31 of article 4 of the Constitution of 1870, conferred upon the General Assembly plenary powers in making provision for drainage for agricultural and sanitary purposes, and pursuant to that power the General Assembly passed the act under which the appellees are proceeding, declaring that the organization should be for agricultural and sanitary purposes. The drainage districts, organized as are the appellees, under

72 N.E.—15

that law are invested with the right of eminent domain and the power of taxation, upon the theory that they are public utilities and are held to be quasi public corporations. In their organic character they do not represent merely the individual property owners or themselves, but they represent the state in carrying out its policy, as found in the common law and declared by its Constitution and statutes. It has been so often said that it need only be adverted to here, that corporations such as appellant do not hold their property and exercise their franchises strictly in a private right, but that from the nature of their business and their relation to society they are public corporations in a sense and are subject to public control and regulation, though, with their grant of power to traverse the state with their lines of railroad, it cannot be said that their right of private property attaches to every highway and water course over which their roads may be constructed. To so hold would render such enterprises, which are designed for the benefit of the state, obstacles to its progress and a menace to its general welfare. *Ohio & Mississippi Railroad Co. v. McClelland*, supra. Of course, in the exercise of the right of the public interest as against such corporations, the demand must be reasonable and must clearly appear to be for the public welfare. In this case it is not questioned that the improvement of Rob Roy creek, as proposed, is necessary for the proper drainage of the lands comprising the drainage district. The petition alleges that such enlargement is necessary, and that the same cannot be carried on with the obstructions placed in the bed of said creek by appellant. This the appellant does not deny.

Appellant contends that there is a variance between the notice served upon it and the prayer of the petition, and argues that it has an exclusive right of way of much greater width than its bridge that is asked to be removed and replaced, and that the notice to construct a new bridge and remove the obstructions in the waterway is not broad enough to cover the prayer and order of the writ. We have examined the petition, and there is no averment as to the width of appellant's right of way, and we are unable to say, from the proceedings before us, that when appellant has complied with the notice attached to the petition the waterway will not be improved all that is necessary for the proper passage of the waters of the district. Entertaining the views above expressed, and founding our conclusion upon the rights and duties of the parties as found in the common law, we deem it unnecessary to pass upon the constitutionality of section 40½ of the farm drainage act. We think the order for the writ was warranted under the petition and demurrer thereto, and the judgment awarding the same is affirmed.

Judgment affirmed.

(179 N. Y. 315)

PEOPLE v. BONIER.

(Court of Appeals of New York. Nov. 15, 1904.)

CRIMINAL LAW—INSTRUCTIONS—GOOD CHARACTER.

1. On a trial for murder an instruction, at the request of accused, that evidence of good character may in the exercise of sound judgment be sufficient to warrant an acquittal, even if the rest of the evidence should otherwise appear conclusive, should be given.

2. On trial for murder, the evidence against accused was entirely circumstantial, and he produced evidence of his good character in the community in which he had lived for many years. There was nothing in the instructions to cover a request by defendant that the presumption arising from failure to attack it and evidence of good character may be sufficient to raise a reasonable doubt. *Held*, that it was reversible error to refuse the request.

Appeal from Supreme Court, Trial Term, Erie County.

Charles Bonier was convicted of murder in the first degree, and appeals. Reversed.

Philip V. Fennelly, for appellant. Edward E. Coatsworth, Dist. Atty. (Frank A. Abbott, of counsel), for the People.

VANN, J. On the 16th of January, 1904, the defendant was convicted upon an indictment found December 22, 1903, charging him with the crime of murder in the first degree, committed in the city of Buffalo on the 20th of November, 1903, by taking the life of one Franz Freher, with willful and deliberate purpose.

The evidence against the defendant was wholly circumstantial, but it tended strongly to establish his guilt, and clearly warranted the submission of the case to the jury. A careful review of the testimony has led us to the conclusion that the verdict was not against the weight of evidence, and that it should not be disturbed, unless some error, duly raised by exception, was committed, during the trial, of such a nature as to give rise to the presumption that the defendant suffered prejudice therefrom.

Evidence was given by witnesses called in behalf of the defendant tending to show that his general reputation from the speech of people, in the community where he had lived for many years, was good, and that they had never heard anything against him. No evidence was given in behalf of the people in relation to his reputation or character. In charging the jury upon this subject, the court said: "You will take into account the evidence of these two witnesses who testified in behalf of the defendant with reference to his character. They said they had known him, one of them eight months or nine months, and made an investigation of his character and standing, or his reputation perhaps would be better, and, so far as he learned, it was good, and he so reported. The other gentleman had known him some time, and, so far as he knew, his reputation was good. You have a right to

take that into account. He was at liberty to swear six witnesses. He was under no obligation to do so, but he might have done so. It is proper for you to take into account the fact that these witnesses have testified that he was a person of good reputation in the community where he lived, for the purpose of discrediting the weight and probability of the circumstances sought to be established, and, in addition, to create a probability of innocence. No matter what his standing might have been in the community where he lived in the past, he might yet be guilty. So you will observe it is proper to be taken into account by you as bearing upon the probability as to whether or not he is guilty of the crime charged in the indictment." The court had previously charged upon the subject of reasonable doubt that: "It is for the people to prove that the defendant committed the crime, and prove it beyond a reasonable doubt. The case made to convict beyond a reasonable doubt need not be so conclusive as to repel all other possible conclusions. There might be some possible doubt about any given statement of facts, but it is such a doubt as a reasonable man would have with respect to the truth of a fact. That is what is meant by a reasonable doubt. Not that the evidence must be conclusive and absolute beyond peradventure, but that it is reasonably established, and that, therefore, there is no reasonable doubt about it."

The following extract from the record sets forth three consecutive requests to charge presented by the counsel for defendant, the action of the court thereon, and an exception taken to the final ruling: "Mr. Murphy: I ask your honor to charge that, in the absence of any testimony upon the subject of character, the presumption is that the defendant's character is good. The Court: That is true. Mr. Murphy: I ask your honor to charge that there is testimony in this case, and that if the jury believe it—believe the testimony of these witnesses upon the subject of the defendant's character—that that is proof conclusive of good character. The Court: Yes, on that subject I should think so. I will charge it. Mr. Murphy: Now, I ask your honor to charge the jury that the presumption which arises as to the defendant's good character, both from the failure to attack it and from the testimony given, may of itself be sufficient to raise a reasonable doubt as to the defendant's guilt. The Court: That I deny. The jury should consider the evidence of good character for the purposes mentioned. Mr. Murphy: I except."

The exception thus taken raises the only serious question that we have before us for consideration. The law as to the weight which a jury may give to evidence showing that the accused was a person of good repute is so well settled in this state that counsel do not seriously differ as to what the law is, but they differ widely as to whether it was

complied with by the court in this case. We will refer to a few of the authorities and to the reasoning of learned judges in laying down the rule, so that the foundation and force thereof may be understood, before we attempt to apply it to the case in hand.

In an early case upon the trial of an indictment for murder, the court "in connection with many just observations as to the importance and effect of proof of good character, * * * stated to the jury that, where the question was one of great and atrocious criminality, evidence of good character, and of a man's habitual conduct under common circumstances, must be considered far inferior to what it is in the instances of accusations of a lower grade; but still, even with regard to the higher crimes, testimony of good character, though of less avail, was competent." The judgment was reversed because the charge tended to control the weight of the evidence and was calculated to mislead the jury as to the effect which it might receive. The court said: "The principle upon which good character may be proved is that it affords a presumption against the commission of crime. This presumption arises from the improbability, as a general rule, as proved by common observation and experience, that a person who has uniformly pursued an honest and upright course of conduct will depart from it and do an act so inconsistent with it. Such a person may be overcome by temptation and fall into crime, and cases of that kind often occur, but they are exceptions; the general rule is otherwise. The influence of this presumption from character will necessarily vary according to the varying circumstances of different cases. It must be slight when the accusation of crime is supported by the direct and positive testimony of credible witnesses; and it will seldom avail to control the mind in cases where the testimony, though circumstantial, is reliable, strong, and clear. But in cases where the other evidence is nearly balanced, but slightly preponderating against the defendant, the presumption from proof of good character is entitled to great weight, and will often be sufficient to turn the scale and produce an acquittal. I am unable to perceive why this presumption may not, and should not, as a general rule, be as controlling in cases of high crimes as in those of smaller ones. In a case of murder, arson, robbery, or any other great offense, when it is apparent that it must have been planned and committed with great deliberation, and the evidence against the accused is uncertain, why should not proof of good character influence the judgment as powerfully as in any case? I can readily see that in cases of great crimes, evidently perpetrated with but little if any forethought, under the influence of some sudden and powerful motive, such proof will be comparatively weak, but it will be so in reference to any other crime with similar cir-

cumstances. The attending circumstances must, I think, determine the degree of force which evidence of good character should have; it is not in ordinary cases affected by the grade of the offense." *Cancemi v. People*, 16 N. Y. 501, 506.

In a later case, where the indictment was for grand larceny, the court charged that good character is "a fact to be considered by the jury, like every other fact in the case, no matter what the other testimony in the case might be; but when evidence is positive, leading to a conviction, logically and fairly derived, of guilty from all the testimony, the simple fact that a person possesses good character will be of no avail; that it is only in cases where the jury have a well-reasoned doubt, a doubt logically arrived at, arising out of all the testimony, that evidence of good character steps in, and then it becomes the duty of the jury to give a verdict in favor of the prisoner." This was held to be "clearly erroneous, and well calculated to mislead the jury to the prejudice of the prisoner." In giving its reasons, the court said: "There is no case in which the jury may not, in the exercise of a sound judgment, give a prisoner the benefit of a previous good character. No matter how conclusive the other testimony may appear to be, the character of the accused may be such as to create a doubt in the minds of the jury and lead them to believe, in view of the improbabilities that a person of such character would be guilty of the offense charged, that the other evidence in the case is false or the witnesses mistaken. An individual accused of crime is entitled to have it left to the jury to form their conclusion upon all the evidence whether he, if his character was previously unblemished, has or has not committed the particular crime alleged against him. * * * Evidence of good character is not only of value in doubtful cases, and in prosecutions for minor offenses, but is entitled to be considered when the crime charged is atrocious, and also when the testimony tends very strongly to establish the guilt of the accused. It will sometimes of itself create a doubt when without it none would exist." Five judges concurred in this opinion, but two, while agreeing with the doctrine of the majority as to the effect of good character, voted to affirm on the ground that the charge, "looking at the whole of it, was to be construed as instructing the jury that good character was to be considered, like any other testimony, upon the question of guilt, but that previous good character furnishes no defense to a party accused of crime when his guilt is determined by a consideration of all the evidence, and that the charge so construed was not erroneous." *Rensen v. People*, 43 N. Y. 6.

We shall refer to but one more case, which brings the law down to a very recent period. Upon a trial for the crime of rape, the judge in his main charge said: "It is true that

good character weighs for something, and it should weigh when a man is charged with crime. I leave it to you to say to what extent the evidence convinces you with reference to the good character of the defendant, and what weight that character, as it is established, should have upon your consideration of this case." The defendant's counsel requested the court to instruct as follows: "I ask the court to charge the jury that the character of the accused may be such as to create a doubt in the minds of the jury, and lead them to believe, in view of the improbability of a person of such character being guilty, that the other evidence is false." The court declined to so charge, except as charged, and the defendant excepted. While we did not unite in judgment upon another branch of the case, all the judges voted to reverse because this exception raised reversible error. Judge Bartlett, speaking for us all upon this point, said: "This refusal was obvious error, as defendant was entitled to have the jury distinctly instructed that good character will sometimes of itself create a doubt, when without it none would exist. The court had been previously requested by defendant's counsel to charge as follows: 'I ask the court to charge the jury that the jury may, in the exercise of sound judgment, give the person the benefit of good character, no matter how conclusive the other testimony may appear to be.' The court in response charged: 'I leave it to the jury to say what weight good character should have in determining the question of the defendant's guilt or innocence. I think it is a proper subject for their consideration.' Exception was taken to the refusal to charge as requested. The vice of this ruling is the same as in the one already considered. The jury were not clearly informed as to their power in the exercise of a sound discretion. The defendant was entitled to the charge as requested, without change or comment." *People v. Elliott*, 163 N. Y. 11, 57 N. E. 103.

It is therefore the law that evidence of good character may of itself create a reasonable doubt, when without it none would exist, and that upon the request of the accused the jury should be told that such evidence, in the exercise of their sound judgment, may be sufficient to warrant an acquittal, even if the rest of the evidence should otherwise appear conclusive.

The testimony in the case now before us shows that, if the defendant committed the crime charged against him, he did it with deliberation and forethought. It was not the result of sudden impulse, but of careful premeditation and deliberate execution, for the purpose of robbing the victim. Proof of good character is of peculiar value in such a case, especially when the evidence of guilt rests, as it does here, entirely upon circumstantial evidence, because the deliberate perpetration of the gravest of crimes is so inconsistent with an upright and orderly life as to cause

the mind to hesitate and to examine and re-examine the circumstances with the utmost care before accepting them as conclusive proof. The instruction asked was of great moment to the defendant, confronted, as he was, with a strong case against him. Whether his character was good was for the jury to decide, but they were not permitted to give the full effect to that fact, if they found it, which the law authorizes. An innocent man may be so surrounded by adverse circumstances that his only reliance is his naked denial, which ordinarily has but little weight, and proof of good character, which may have great weight. We think that the charge, as a whole, tended to mislead the jury as to the effect which they might give to such evidence. The body of the charge did not cover the point, as the jury were there told that they might consider good character for two purposes: First, to discredit the weight and probability of the circumstances sought to be established; and, second, to create a probability of innocence. In response to a distinct request for an instruction that good character may of itself be sufficient to raise a reasonable doubt, the court denied the proposition of law embraced in the request, but charged that the jury should consider the evidence for the purposes mentioned, apparently meaning the two distinct purposes mentioned *eo nomine* in the body of the charge. No attempt was made to instruct the jury as to the weight which good character may have, independent of any other evidence, and this was the main chance of the defendant.

It is claimed, however, that the request was not technically correct in form, because it included in its assumption the failure of the people to attack character as one of the elements. While we may overlook technical errors in order to affirm in a clear case, we should never invoke technicalities, nor resort to severe or narrow criticism of a request to charge, in order to uphold a judgment of death. As the substance of the request is not criticised, we should disregard informalities when they are all that stand between the doom of the judgment and an absolute right to a new trial. But there was not even a technical error in the request, which was correct in its facts and sound in its law. When the defendant rested, the people had the right to attack his character, because he had opened the door. As the testimony stood just before the people finally rested, they could have called witnesses to show that from the speech of people his reputation was bad, if such was the fact. They did not do so. In other words, they did not attack his character, although they had a right to, and that is all that is stated in the language criticised. The assumption was literally true, and hence could do no harm. The request, when fairly construed, means that from the testimony given by the defendant as to his character, and the failure of the people to

give any evidence on the subject, a reasonable doubt might arise. The request refused should be read in connection with the two requests charged which immediately precede it. The court had already said that, "in the absence of any testimony upon the subject of character, the presumption is that the defendant's character is good"; also that, if the jury "believe the testimony of these witnesses upon the subject of the defendant's character, that is proof conclusive of good character." Then follows the only request which gives point to those previously charged, by stating the effect which good character might have, and the jury were not informed as to their power in this regard, but were left in ignorance of the law upon a subject of supreme importance to the defendant.

It is also claimed that, when the trial justice refused the request and charged that "the jury should consider the evidence of good character for the purposes mentioned," he meant to include, as one of those purposes, that such evidence might of itself raise a reasonable doubt, but this leads to the absurdity that the court both charged and refused to charge as requested. The first response to the request was, "I deny it." What was thus denied? If the response was not a denial of the proposition that the evidence in question might have the effect claimed, it was clearly a refusal to charge that that was the law. What was further said? Simply that the jury might consider the evidence "for the purposes mentioned," obviously meaning those mentioned in the body of the charge, for the learned justice could not have meant for a purpose which he had just declared in effect was not warranted by law. What the defendant asked and should have had was an instruction that such evidence of itself might raise a reasonable doubt. He did not get it. The jury decided the case without knowing the law. The effort to have them told what the law was upon a vital point met with a denial. They went to the jury room not only uninformed, but, as they may have understood the words of the court, misinformed, as to their power. We cannot say judicially that they would have found as they did if they had been properly instructed, and hence we cannot overlook the error under section 542 of the Code of Criminal Procedure. The "technical errors or defects" mentioned in the statute mean such as do not affect a substantial right and could not in reason have changed the result. A presumption of injury conclusively arises whenever it is apparent that the erroneous ruling may have affected the verdict. The exception under consideration raised reversible error, and, unless due effect is given to it, the precedent may hereafter put in jeopardy the lives of the innocent. However clear the guilt of the defendant may appear to be, it is our duty to reverse the judgment of conviction

and order a new trial, not in the exercise of our discretionary power, but in obedience to the command of law.

CULLEN, C. J., and O'BRIEN, MARTIN, and WERNER, JJ., concur. GRAY and HAIGHT, JJ., absent.

Judgment of conviction reversed.

(179 N. Y. 308)

In re HOOPLE'S ESTATE.

COMPTROLLER OF STATE v. HOOPLE.

(Court of Appeals of New York. Oct. 28, 1904.)

TRANSFER TAX—ILLEGAL APPRAISEMENT—RECOVERY—LIMITATIONS.

1. Under Const. art. 7, § 6, providing that neither the Legislature nor any person acting in behalf of the state shall allow or pay any claim which, as between citizens, would be barred by lapse of time, the right to refund the amount of a transfer tax illegally assessed, given by Laws 1896, p. 871, c. 908, § 225, as amended by Laws 1900, p. 916, c. 382, is barred if at the time the demand for the refund is made an action for the same would be barred as between private parties.

2. An executor in October, 1903, applied to vacate that part of an order entered November 29, 1895, assessing a transfer tax which was paid on that day. Laws 1896, p. 871, c. 908, § 225, as amended by Laws 1900, p. 916, c. 382, requires an application for a refund of tax to be made within two years after the statute took effect. Held that a claim for refund was one that, as between citizens, would be barred by the lapse of time; and under Const. art. 7, § 6, the comptroller was prohibited from paying it even if the two-years limitations in the tax law did not apply.

Appeal from Supreme Court, Appellate Division, Second Department.

In the matter of the appraisal of the estate of William H. Hoople. From an order of the Appellate Division (87 N. Y. Supp. 842) affirming an order of the County Court vacating on appeal of William G. Hoople, executor, a former order in so far as it assessed a transfer tax on United States bonds belonging to the estate, and directing the State Comptroller to refund such bonds, he appeals. Reversed.

William H. Hoople died June 17, 1895. In the proceedings taken for the settlement of his estate the surrogate of Queens county rendered a decree, dated November 29, 1895, assessing a transfer tax upon the estate under the provisions of chapter 399 of the Laws of 1892. A portion of the estate consisted of United States bonds, which were included in the property upon which the tax was based. The tax thus assessed was voluntarily paid by the executor on the 29th day of November, 1895. In October, 1896, and again in May, 1897, this court decided that United States bonds could not be subjected to a transfer tax under the act referred to. *Matter of Whiting*, 150 N. Y. 27, 44 N. E. 715, 34 L. R. A. 232, 55 Am. St. Rep. 640; *Matter of Sherman*, 158 N. Y. 1, 46 N. E.

1032. In October, 1903, the executor herein petitioned the surrogate of Queens county to vacate that part of his former decree which related to the tax assessed upon the transfer of United States bonds. The petition was granted, and the surrogate ordered the State Comptroller to refund to the estate that portion of the tax which amounted to \$660. Upon the comptroller's appeal to the Appellate Division that order was affirmed, and the comptroller now appeals to this court.

Jabish Holmes, Jr., Leonard B. Smith, and Frank Julian Price, for appellant. Joseph Rowan and Martin B. Cohn, for respondent.

WERNER, J. (after stating the facts). It is a fundamental principle of our jurisprudence that no action will lie against a sovereign state, or any of its officers, to enforce an obligation of the state without express legislative permission (*People v. Dennison*, 84 N. Y. 272; *Lewis v. State of N. Y.*, 96 N. Y. 71, 48 Am. Rep. 607; *Locke v. State of N. Y.*, 140 N. Y. 480, 35 N. E. 1076; *Smith v. Reeves*, 178 U. S. 436, 20 Sup. Ct. 919, 44 L. Ed. 1140; *Flagg v. Bradford*, 181 Mass. 315, 63 N. E. 898); and when a state does abdicate this attribute of sovereignty, and permits itself to be sued, the citizen who benefits by such an act of grace acquires no vested right thereby, but simply a privilege voluntarily granted by the state, which may be hedged about with terms and conditions, and may be withdrawn as freely as it was given. *Beers v. Arkansas*, 20 How. (U. S.) 527, 15 L. Ed. 991; *Parmenter v. State of N. Y.*, 135 N. Y. 154, 81 N. E. 1035; *Baltzer v. North Carolina*, 161 U. S. 240, 16 Sup. Ct. 500, 40 L. Ed. 684; *Railroad Co. v. Tennessee*, 101 U. S. 337, 25 L. Ed. 960; *Railroad v. Alabama*, 101 U. S. 832, 25 L. Ed. 973. In the light of these principles it is obvious that the statutes under discussion (chapter 399, p. 816, Laws 1892; chapter 284, p. 150, Laws 1897; chapter 382, p. 916, Laws 1900) invested the respondent with no absolute right, but conferred upon him a mere privilege, the extent and duration of which depended entirely upon the language conferring it. When this tax was paid, chapter 399, p. 816, of the Laws of 1892, was in force. By section 6 of that act it was provided that, when a transfer tax had been erroneously paid into the state treasury, the comptroller was authorized upon satisfactory proof to require the amount of any erroneous or illegal transfer tax to be refunded to the persons who had paid the same, provided, however, that all applications for such refunding should be made within five years after the payment of the tax. Upon the codification of the tax law (chapter 908, p. 795, Laws 1896) this provision, without change, became section 225 of the statute. In 1897, by chapter 284, p. 152, of the Laws of that year, this section was so amended as to confer upon the surrogate having jurisdiction of the pro-

ceedings power to modify or reverse an order fixing a transfer tax by directing a refund of the amount of any moneys paid in excess of the tax as fixed by the order of modification or reversal, but this new privilege was coupled with the condition that no application for such refund should be made after one year from such reversal or modification. It is to be noted that, while the provision just referred to did not limit the time within which an order fixing a transfer tax could be modified or reversed, no application for a refund of the tax could be made after the lapse of a year from the time of such modification or reversal. Thus the law stood until April 11, 1900, when chapter 382, p. 916, of the statutes of that year, inaugurated another change to the effect that if, within two years from the date of the entry of an order fixing a transfer tax, such order should be modified or reversed by the surrogate having jurisdiction of the proceedings, any moneys paid on account of such tax in excess of the amount fixed by the order as modified or reversed should be refunded to the persons who paid the same, but that no application for such refund should be made after one year from such reversal or modification. The tax herein was paid in November, 1895. The law then in force (chapter 399, p. 816, Laws 1892) gave the respondent five years in which to apply for a refund of any part of the transfer tax erroneously paid. This period had not expired when the amendment (chapter 284, p. 150, Laws 1897) went into effect, apparently providing for an unlimited period in which to apply for a modification or reversal of the original order, but requiring the application for the refund to be made within one year after such modification or reversal. Then came the present statute, which, as we have seen, limits the periods within which both the applications for modification or reversal and for a refund must be made. In October, 1903, the respondent applied to the surrogate of Queens county for an order modifying the original order which fixed the transfer tax herein. Nearly eight years had then elapsed since the entry of the order fixing the tax, and the comptroller insisted that the surrogate was without jurisdiction. This objection was overruled, and the order of modification was granted. In affirming the decision of the surrogate the learned Appellate Division applied the rule that statutes of limitation are purely prospective in their effect, unless a contrary legislative intent is declared in express terms or by necessary implication.

We think the rule invoked has no application to the statutes under consideration, for they are not mere statutes of limitation; but, even if it had, it would not help the respondent. By section 6 of article 7 of the state Constitution it is provided that "neither the Legislature, the canal board, nor any person or persons acting in behalf of the state, shall audit, allow, or pay any claim which, as be-

tween citizens of the state, would be barred by lapse of time." An action for the recovery of money paid by reason of an illegal or erroneous tax is regarded as an action for money had and received to which the six-years statute of limitations applies. *Brun-
dage v. Village of Port Chester*, 102 N. Y. 494, 7 N. E. 398; *Trimmer v. City of Rochester*, 134 N. Y. 76, 31 N. E. 255. As the claim here presented was one which, as between citizens of the state, would have been barred by lapse of time, it seems clear that the comptroller would not have been authorized to audit, allow, or pay it, even if the two years' limitation in the statute of 1900 did not apply. *Gates v. State of N. Y.*, 128 N. Y. 221, 28 N. E. 378. It is to be observed, moreover, that if the statute of 1900, with its two years' limitation, is to be treated as purely prospective, the same test must be applied to the act of 1897, in which event the respondent is relegated to the statute of 1892 with its five years' limitation, which had elapsed by more than three years before he sought relief.

The case of *Parmenter v. State*, supra, relied upon by the respondent, does not conflict with these views. In that case the claim was presented after the state board of audit had been abolished and the state board of claims had been created. There was no limitation of time within which a claim could be presented to the board of audit, but the act creating the board of claims limited its jurisdiction to claims which had accrued within two years before they were filed. As *Parmenter's* claim might have been filed at any time with the board of audit, but had accrued more than two years prior to the creation of the board of claims, it was held that the change operated to deprive him of a tribunal in which his claim could be presented, and therefore the constitutional provision above referred to had no application.

Without further discussion of the subject, we conclude that the order appealed from should be reversed, and the application denied, with costs.

CULLEN, C. J., and GRAY, O'BRIEN, MARTIN, and VANN, JJ., concur. HAIGHT, J., absent.

Order reversed, etc.

(179 N. Y. 325)

TENEMENT HOUSE DEPARTMENT OF
THE CITY OF NEW YORK v.
MOESCHEN (two cases).

(Court of Appeals of New York. Nov. 15,
1904.)

CONSTITUTIONAL LAW—TENEMENT ACT—POLICE
POWER—EQUAL PROTECTION OF LAWS.

1. Laws 1901, p. 912, c. 334, § 100, as amended by Laws 1902, p. 937, c. 352, § 47, generally known as the "Tenement House Act," requiring all school sinks in the existing tenement houses in cities of the first class to be removed and replaced by water-closets, is a proper and

constitutional exercise of the police power of the state for the protection of the public health.

2. The fact that the tenement house act (Laws 1901, p. 912, c. 334, § 100, as amended by Laws 1902, p. 937, c. 352, § 47) is applicable to tenement houses in cities of the first class only does not render it a violation of the fourteenth amendment to the United States Constitution, forbidding any state to deny to any person within its jurisdiction equal protection of the laws.

3. The provision of Laws 1901, p. 912, c. 334, § 100, as amended by Laws 1902, p. 937, c. 352, § 47, requiring all school sinks in existing tenement houses in cities of the first class to be removed, does not violate the constitutional provision against taking private property for public use without just compensation, in so far as it applies to existing buildings.

Appeal from Supreme Court, Appellate Division, First Department.

Two actions by the tenement house department of the city of New York against Katie Moeschén. In the first action, appeal by permission from a judgment of the Appellate Division (85 N. Y. Supp. 1148), affirming the determination of the Appellate Term (84 N. Y. Supp. 577), permitting a judgment of the Municipal Court in favor of plaintiff; and, in the second action, appeal by defendant, by permission, from an order of the Appellate Division (85 N. Y. Supp. 704), affirming an order of the Special Term (85 N. Y. Supp. 19), granting injunction to enjoin defendant from maintaining a school sink on certain premises in the city of New York. Affirmed.

In both cases the same question has been certified to this court, to wit: "Is section 100 of chapter 334, p. 912, of the Laws of 1901 of this state, constitutional?" This act is entitled "An act in relation to tenement houses in cities of the first class." Short title, "Tenement House Act." Section 100 is as follows: "In all now existing tenement-houses, all school sinks, privy vaults or other similar receptacles used to receive fecal matter, urine or sewage, shall before January first, nineteen hundred and three, be completely removed and the place where they were located properly disinfected under the direction of the department of health. Such appliances shall be replaced by individual water-closets of durable non-absorbent material, properly sewer connected, and with individual traps, and properly connected flush tanks providing an ample flush of water to thoroughly cleanse the bowl. The seats of the water-closets shall be hinged and attached to the bowl of the closet. Each water-closet shall be located in a compartment completely separated from every other water-closet. The floors of the water-closet compartments shall be water-proof as provided in section ninety-five of this act. Such water-closets may be located in the yard if necessary, and if so, long hopper closets may be used; all traps, flush tanks and pipes shall be protected against the action of frost. There shall be provided at least one water-closet for every two families in every now existing tenement house. Except as in this section otherwise provided such water-clos-

ets and all plumbing in connection therewith shall be in accordance with the ordinances and regulations in relation to plumbing and drainage."

Louis Marshall, Adolph Bloch, and William L. Mathot, for appellant. John J. Delany, Corp. Counsel (Theodore Connolly, of counsel), for respondent.

BARTLETT, J. (after stating the facts). The defendant is the owner of a tenement house (No. 332 East Thirty-Ninth street) in the city of New York valued at \$16,500, in which she has an equity above incumbrances of about \$3,500. The defendant was duly served with an order on the 11th day of April, 1903, by the plaintiff herein, ordering her to remove the school sink from said property, and to replace the same by one water-closet for every two families in the building, under said section 100. Defendant was also informed in the notice that, if she failed to comply with the terms thereof, proceedings would be instituted against her according to law. These premises were occupied by 20 families, aggregating 48 persons, more or less. The defendant having failed and refused to comply with the order, the actions already referred to, for the recovery of the penalty provided by said act, and for an injunction, respectively, were commenced. The defense interposed in each case is the unconstitutionality of section 100. The learned Appellate Division wrote an opinion in the action begun in the Supreme Court for an injunction, and, in determining the appeal in the action in the municipal court of the city of New York, adopted that opinion.

A question is discussed in the briefs on this appeal, that the introduction by defendant of testimony and proof was proper. In view of the fact that this testimony and proof were admitted over the objections and exceptions of the plaintiff, and that no appeal has been taken from such rulings, this question is not before us, and we express no opinion in regard to it.

It is well settled in this court and in the Supreme Court of the United States that the constitutionality of a statute may be determined by considering its language and the material facts of which the court can take judicial notice. *People ex rel. Kemmler v. Durston*, 119 N. Y. 569, 578, 24 N. E. 6, 7 L. R. A. 715, 16 Am. St. Rep. 859; *Health Department of N. Y. v. Rector, etc.*, 145 N. Y. 32, 50, 39 N. E. 833, 45 Am. St. Rep. 579; *Powell v. Pennsylvania*, 127 U. S. 678, 684, 685, 8 Sup. Ct. 992, 32 L. Ed. 253; *Schollenberger v. Pennsylvania*, 171 U. S. 1, 8, 18 Sup. Ct. 757, 43 L. Ed. 49. It is not the hardship of the individual case that determines the question, but rather the general scope and effect of the legislation as an exercise of the police power in protecting health and promoting the welfare of the community at large.

It is a well-recognized principle in the decisions of the state and federal courts that the citizen holds his property subject not only to the exercise of the right of eminent domain by the state, but also subject to the lawful exercise of the police power by the Legislature. In the one case, property is taken by condemnation and due compensation; in the other, the necessary and reasonable expenses and loss of property in making reasonable changes in existing structures, or in erecting additions thereto, are *damnum absque injuria*.

The single question is presented in this case whether the legislation under consideration is a lawful exercise of the police power, imposing upon the citizen only such expenses as are reasonable. We are of the opinion that, considering the facts in the case, the language of the section under review, and the expenses incurred in making the necessary changes required, the legislation is a proper exercise of the police power. There is much important and persuasive evidence of which we are permitted to take judicial notice.

The recent history of legislation on this subject is as follows: In 1884 the tenement house committee, acting under legislative command, submitted a report to the Senate February 15, 1885 (Senate Document No. 86 of 1885), showing the condition of the old privy vaults existing in the city of New York, and recommended, "the abolition of all privy vaults in the city limits upon all property contiguous to all streets or avenues where sewers are laid." A law to that effect was passed (chapter 84, p. 96, of the Laws of 1887) as an amendment to section 653 of the consolidation act. In pursuance of this legislation the board of health abolished the privy vaults, and the owners of tenement houses were ordered to substitute water-closets in the house, or hopper closets or school sinks in the yard. In this report of 1884 the committee said: "School sinks are better than vaults, but water-closets are better than either. Nearly all the inspectors know where water-closets have been introduced in tenement houses, and they believe that, properly located and supervised, water-closets are practicable, even in the worst houses." The Governor in 1900 appointed a committee known as the "Tenement House Commission," in accordance with chapter 279 of the Laws of that year, to make a careful examination into the healthfulness of tenement houses in cities of the first class, and to make "such recommendations as it deems wise to enable the best and highest possible condition for tenement houses in said cities to be attained." This commission submitted its report to the Legislature in February, 1901. At page 149 thereof, after recommending the passage of section 100 of the tenement house act, the commission made the following statement: "These school sinks were in nearly every case found by the com-

mission's sanitary inspectors to be in a horrible condition, and a serious menace to the health of the occupants of such houses and the neighboring houses. From their construction, it is very difficult to flush them, and the inspectors found many cases where they had not been flushed for weeks. In summer the stench is intolerable, and unquestionably causes a good deal of sickness. Moreover, the school sinks found in nearly all the buildings were in a horrible condition—in some cases simply indescribable. The commission therefore recommends that within two years all existing school sinks now used in connection with tenement houses be removed, and proper water-closet accommodations be substituted. The commission has not attempted to specify whether such water-closets shall be placed in the yard or within the tenement house. It has left this to the option of the owner. The commissioners realize that in some cases it might be difficult to protect such water-closets from the action of frost if they are located in the yard, but know that in any case they can be located in the house simply by giving up one room to such purpose. Every consideration of the public health demands that this action be taken, and the commission finds, after having estimates made, that the cost will not be so great as to make this measure an undue hardship upon the owners of tenement houses." This commission submitted a draft of the tenement house act, which was afterwards passed by the Legislature (chapter 334, p. 912, of the Laws of 1901). These reports to the Legislature make it clear that the abolition of the vault in the first instance, and subsequently of the school sink, in tenement houses, was an absolute necessity, in the due protection of the public health in the city of New York.

In *Health Department of N. Y. v. Rector*, etc., 145 N. Y., at page 49, 89 N. E. 889, 45 Am. St. Rep. 579, Judge Peckham uses this language: "That dirt, filth, nastiness in general, are great promoters of disease—that they breed pestilence and contagion, sickness and death—cannot be successfully denied. There is scarcely a dissent from the general belief on the part of all who have studied the disease that cholera is essentially a filth disease. The so-called ship fever or jail fever arises from filth. Most diseases are aggravated by it."

The records of the tenement house department of the city of New York show that there are over 80,000 tenement houses in the city, in only 9,000 of which are there school sinks. In 71,000 of these houses, therefore, and many of them of the cheapest type, there are water-closets, and no school sinks. This fact shows that the necessity of this reform has been generally recognized, and has caused the great majority of tenement houses in the city to adopt the water-closet system, as contemplated by the section under consideration.

This court has recently passed upon the constitutionality of the public health law (Laws 1893, p. 1556, c. 661, § 200, renumbered section 210 by Laws 1900, p. 1484, c. 668, § 2), which provides that no child or person not vaccinated shall be admitted or received into any of the public schools of the state. A large portion of the instructive opinion of Judge Vann is apposite to the cases at bar. *Matter of Viemeister*, 179 N. Y. 235, 72 N. E. 97.

One of the questions of fact litigated was the expense imposed upon the defendant in making this change of closets. A witness in behalf of defendant testified that the expense would range from \$750 to \$2,640, while the witness for the plaintiff placed the outlay at from \$800 to \$1,750. This question, however, has been settled against the defendant by the unanimous affirmance of the Appellate Division.

The counsel for defendant argues that the substitution of the new closets for the old would practically destroy the defendant's equity in her property, as it is heavily mortgaged. While it was proved that the expense involved would not, by a large amount, equal defendant's equity in the premises, it is obvious that the full market value of the property, and not the value above incumbrances, should be taken into consideration when estimating the reasonableness of the proposed outlay to which defendant is to be subjected. Another point to be considered in this connection is that a tenement house relieved of the terribly filthy condition disclosed by the existence of these school sinks, and duly equipped with the individual water-closet, must experience a marked increase of fee and rental value.

Appellant argues that the school sink on the defendant's premises, having been erected in compliance with orders of the board of health some years ago, issued pursuant to a mandate of the Legislature, is property, which the plaintiff is seeking to take without instituting condemnation proceedings and awarding compensation to her for the loss suffered and injury done by such removal and incidental destruction, and therefore offends both the state and federal Constitutions, which provide that private property shall not be taken for public use without just compensation. In support of this proposition the learned counsel cites *Wynehamer v. People*, 13 N. Y. 378, 398; *Matter of Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *People v. O'Brien*, 111 N. Y. 1, 18 N. E. 692, 2 L. R. A. 255, 7 Am. St. Rep. 684; and many other familiar cases, which clearly have no application to the present situation.

We have here an act of the Legislature which is, in part, preventive legislation, looking to the preservation of the public health in the future. A system of drainage is attacked, which is highly dangerous, and which should be surrounded by every reasonable safeguard known to science and

experts in plumbing. *Health Department of N. Y. v. Rector, etc.*, 145 N. Y. 32, 39 N. E. 833, 45 Am. St. Rep. 579.

In *Commonwealth v. Roberts*, 155 Mass. 281, 282, 29 N. E. 522, 16 L. R. A. 400, the question of water-closets was under consideration. The court there said: "There can be no doubt that the statute in question is within the constitutional powers of the Legislature as a police regulation. It is an act for the preservation of the public health, and relates to the disposal of one of the most dangerous forms of sewage. As said by Morton, J., in *Nickerson v. Boston*, 131 Mass. 306, 308: 'It belongs to that class of police regulations to which private rights are held subject, and is founded upon the right of the public to protect itself from nuisances and to preserve the general health. The authority of the Legislature to pass laws of this character is too well settled to be questioned.' See, also, *Commonwealth v. Intoxicating Liquors*, 115 Mass. 153, 155, and cases cited; *Bancroft v. Cambridge*, 126 Mass. 438."

The appellant further insists that this legislation is violative of the fourteenth amendment of the Constitution of the United States, which declares that no state shall "deny to any person within its jurisdiction the equal protection of the laws," since the act is made applicable only to cities of the first class, and to tenement houses only, while all citizens of other cities, and all property owners in cities of the first class owning premises other than tenement houses, are free to use school sinks. To say that the board of health of the city of New York, in the exercise of the police power, cannot, under legislative sanction, apply different rules and regulations in a city of the first class to the densely populated tenement house districts than to the well-conducted houses of the more favored classes, is to overlook the controlling acts and the absolute necessity of enforced changes by the exercise of the police power. The fact that the act under consideration relates only to cities of the first class does not offend the constitutional provisions upon which the appellant relies. It is common procedure for the boards of health in the various cities of the state to secure such grants of power from the Legislature as the necessities of the particular locality may demand. An act necessary for the city of New York might not have the slightest application to Albany or Buffalo.

The appellant makes the further point that the act is rendered unconstitutional by reason of its application to existing buildings. This contention is clearly unsound, under the decision of this court in *Health Department of N. Y. v. Rector, etc.*, 145 N. Y. 32, 43, 44, 45, 39 N. E. 833, 45 Am. St. Rep. 579. Judge Peckham dealt with this point as follows: "Instances are numerous of the passage of laws which entail expense on the part of those who must comply with

them, and where such expense must be borne by them without any hearing or compensation, because of the provisions of the law. *Thorpe v. R. R. Co.*, 27 Vt. 140-152, 62 Am. Dec. 625. One of the late instances of this kind of legislation is to be found in the law regulating manufacturing establishments. *Laws 1887, p. 575, c. 462*. The provisions of that act could not be carried out without the expenditure of a considerable sum by the owners of a then existing factory. Hand rails to stairs, hoisting shafts to be inclosed, automatic doors to elevators, automatic shifters for throwing off belts or pulleys, and fire escapes on the outside of certain factories—all these were required by the Legislature from such owner, and without any direct compensation to him for such expenditure. Has the Legislature no right to enact laws such as this statute regarding factories, unless limited to factories to be thereafter built? Because the factory was already built when the act was passed, was it beyond the legislative power to provide such safeguards to life and health as against all owners of such property, unless upon the condition that these expenditures to be incurred should ultimately come out of the public purse? I think to so hold would be to run counter to the general course of decisions regarding the validity of laws of this character, and to mistake the foundation upon which they are placed. *Coates v. Mayor, etc.*, of N. Y., 7 Cow. 585, 604; *Cooley's Const. Lim.* [5th Ed.] c. 16, p. 706, etc. Any one in a crowded city who desires to erect a building is subject at every turn, almost, to the exactions of the law in regard to provisions for health, for safety from fire, and for other purposes. He is not permitted to build of certain materials within certain districts, because, though the materials may be inexpensive, they are inflammable, and he must build in a certain manner. Theaters and hotels are to be built in accordance with plans to be inspected and approved by the agents of the city; other public buildings also; and private dwellings within certain districts are subject to the same supervision; and in carrying out all these various acts the owner is subjected to an expense much greater than would have been necessary to have completed his building if not compelled to complete it in the manner, of the materials, and under the circumstances prescribed by various acts of the Legislature. And yet he has never had a hearing in any one of these cases, nor does he receive any compensation for the increased expense of his building, rendered necessary in order to comply with the police regulations. I do not see that the principle is substantially altered where the case is one of an existing building, and it is to be subjected to certain alterations for the purpose of rendering it either less exposed to the danger from fires, or its occupants more secure from disease. In both cases the ob-

ject must be within some of the acknowledged purposes of the police power, and such purpose must be possible of accomplishment at some reasonable cost, regard being had to all the surrounding circumstances."

We do not deem it necessary to examine in detail other points argued by the appellant, as we are satisfied that the judgment and order appealed from in the respective cases should be affirmed, with costs, and the certified question in each case answered in the affirmative.

We adopt the able opinion of the learned Appellate Division, save that portion of it which discusses the power to introduce testimony and proof at the trial and hearing in the respective cases; the question not being before us, as already stated.

CULLEN, C. J., and O'BRIEN, HAIGHT, MARTIN, VANN, and WERNER, JJ., concur.

Judgment and order affirmed.

(179 N. Y. 338)

McMANUS v. McMANUS et al.

(Court of Appeals of New York. Nov. 15, 1904.)

WILLS—CONSTRUCTION—LEGACIES—CHARGE ON REALTY.

1. Where the personal estate of testator at the time of the making of his will and at his death consisted of deposits in savings banks standing in his name as trustee for his wife, adopted daughter, and sisters, his real estate is charged with taxes, assessments, and repairs on real estate devised to his wife and daughter for life, directed to be paid by the executor, as well as with a legacy to the daughter.

Appeal from Supreme Court, Appellate Division, Second Department.

Action by James V. McManus, executor of John A. McManus, against Elizabeth F. McManus and others. From a judgment of the Appellate Division (83 N. Y. Supp. 751) affirming a judgment of the Special Term construing the will of John A. McManus, plaintiff appeals. Affirmed.

This action was commenced by the executor of John A. McManus, deceased, to obtain a judicial construction of his will in the following respects: As to the validity and effect of the devises to his widow and adopted daughter, contained in the second paragraph, and as to the meaning, correct interpretation, and effect of the fourth paragraph. The case was tried at Special Term, and the learned trial judge made and found findings of fact and conclusions of law. He found: That the testator died in Kings county December 31, 1899, and that his will was admitted to probate January 20, 1900. That he left a widow, the defendant Elizabeth F. McManus; an adopted daughter, Ella Agnes Svenson; a brother Edward, since deceased; a brother James V., the plaintiff in this action; and two sisters, Ellen C. and Anna L.

McManus—who were his only heirs at law and next of kin. That the testator, at the time of his death, owned the real estate therein described, situated in New York and Suffolk counties, which was of the estimated value of \$94,000. That the testator, by paragraph 2 of his will, gave, devised, and bequeathed to his wife the use of the dwelling house No. 77 St. Marks avenue, Brooklyn, and the furniture, etc., therein contained, during her life, unless she should remarry, in which event the use of the same should cease; and in the event of the death or remarriage of his wife he gave, devised, and bequeathed the use of the said house and furniture to his adopted daughter during her natural life; and he also provided and directed that his executor should pay the taxes, assessments, and repairs on said house so long as it should be occupied by his wife or adopted daughter; and upon the death or remarriage of his wife and the death of his adopted daughter he gave, devised, and bequeathed to his two sisters and his two brothers, the survivor or survivors of them, the said house in fee simple absolute. That the fourth paragraph of his will was as follows: "I do hereby give and bequeath to my adopted daughter the sum of five thousand dollars to be paid to her as soon after my decease as possible." That the testator at the time of his death owned and possessed personal property not exceeding in value \$102. That at the time of the execution of the will the testator had deposited the bulk of his personal property in various savings banks, in trust for different members of his family, leaving an amount not so deposited wholly insufficient to pay the legacies provided for in his will. That the testator, at the time of executing the will, knew that his personal property was insufficient to pay the legacies bequeathed in the second and fourth paragraphs; and that the testator endeavored by his will to make provisions for his wife and daughter, and for that purpose intended that the legacies bequeathed in paragraphs 2 and 4, respectively, should become effective. As conclusions of law the court held that the testator at the time of the execution of his will did not own and possess sufficient personal property to provide for the payment of taxes, assessments, and repairs on the premises No. 77 St. Marks avenue, as directed in the second paragraph; that the testator at that time did not own and possess sufficient personal property to provide for the legacy of \$5,000 bequeathed to Ella Agnes Svenson by the fourth paragraph; that the payment of such taxes, assessments, and repairs which the testator by his will directed his executor to pay for the benefit of his wife and daughter constitutes a specific charge and lien upon the real estate of the testator, and a trust for that purpose is imposed by said will upon the executor in order to carry out and give force and effect to the provisions of said will as

set forth in the second paragraph; that the legacy of \$5,000 to Ella Agnes Svenson under the fourth paragraph constitutes a specific charge and lien upon the real estate of the testator. It then provided for the costs and directed judgment. Judgment was entered in accordance with the findings of the trial court. An appeal was taken to the Appellate Division in the Second Department, where the judgment was unanimously affirmed, and the plaintiff thereupon appealed to this court.

Vincent Victory, for appellant. Edward F. Clark and William J. Harding, for respondents.

MARTIN, J. (after stating the facts). The first question presented upon this appeal is how far the findings of fact may be reviewed or considered by this court under a unanimous affirmance. An exception to a finding of fact unanimously affirmed by the Appellate Division presents no question reviewable by the Court of Appeals, and where the facts as found justify the conclusions of law, and no other exceptions appear which present any questions of law, the judgment must be affirmed. *Krekeler v. Aulbach*, 169 N. Y. 372, 62 N. E. 416. Even if the error in the decision of the case upon which the appellant relies is predicated upon undisputed evidence, which is not contained within a finding of fact, it cannot be considered by this court. *Marden v. Dorthy*, 160 N. Y. 39, 45, 54 N. E. 726, 46 L. R. A. 694; *Hilton v. Ernst*, 161 N. Y. 226, 228, 55 N. E. 1056; *Clark v. Nat. Shoe & Leather Bank*, 164 N. Y. 498, 501, 58 N. E. 659. As in this case no valid exception was taken to the admission or exclusion of evidence, the sole question to be determined is whether the facts found by the trial court were sufficient to justify its conclusion that it was the purpose and intent of the testator to charge the legacies mentioned in paragraphs 2 and 4 upon the real estate owned by him at the time of his death. Whether a legacy is charged upon the real estate of a decedent is always a question of the testator's intention. Primarily, the language of the will is the basis of the inquiry, but extrinsic circumstances which aid in the interpretation of the language employed and help to disclose the actual intention are also to be considered. *Le Fevre v. Toole*, 84 N. Y. 95; *Hoyt v. Hoyt*, 85 N. Y. 142; *Scott v. Stebbins*, 91 N. Y. 605; *McCorn v. McCorn*, 100 N. Y. 511, 513, 3 N. E. 480.

It is obvious, as found and held by the learned trial court, that at the time of the execution of the will the testator's personal estate was represented by accounts in various savings banks, opened by him in his name in trust for his wife, his adopted daughter, and sisters, and hence that the only fair conclusion from the evidence is that, when the accounts were opened, the testator intended to create a trust for the

benefit of the beneficiaries named therein, and that he believed he had the right at any time during his life to revoke any of those trusts and change the disposition of such moneys as he saw fit, and that all moneys standing in trust at his death would belong to the beneficiaries named in the various accounts. It was upon that theory only that the trial court was able to harmonize the facts in the case. Moreover, the parties to the action seem to have adopted that theory, for all the trust accounts in existence at the time of the testator's death were subsequently closed by the beneficiaries, and the money appropriated to their own use, without objection on the part of the executor. The testator, when he made his will, must have known that without those accounts his personal estate was insufficient to pay the legacies, taxes, etc., mentioned in the second and fourth clauses of his will, and it is manifest that he intended the provisions made therein for his wife and daughter to become effective. His first duty was to them. Intending that these legacies should be satisfied, and having reason to know that his personal property would be insufficient for that purpose, the legacies should be charged upon the real estate.

It is to be observed that the question in this case is not whether the deposits by the testator of his personal property in different banks in trust for his wife, his adopted daughter, his sisters and brothers, created an irrevocable trust, but is whether, when he made his will with the existing trusts, which substantially embraced all his personal property, he intended that the taxes, assessments, and repairs upon the property which was devised to his wife and daughter during their lives, and his legacy of \$5,000 to the latter, should be paid out of the real estate which had not been specifically disposed of. His intent is not dependent upon the validity of the various trusts, but the proof of their existence bears alone upon the question whether, at the time of the making of the will, he intended that his provisions for his wife and daughter should become effective by applying his real estate to their payment, his personal property having been thus disposed of. It is quite manifest that he understood that the different trusts which he had created would exhaust his personal estate, that the legacy to his adopted daughter and the taxes, etc., must, if paid, be paid from his real estate, and that it was his clear and obvious intention that they should be so paid.

Moreover, in *Matter of Totten*, 179 N. Y. 112, 125, 71 N. E. 748, 752, the following rule was established as the law governing such attempted trusts: "A deposit by one person of his own money, in his own name, as trustee for another, standing alone, does not establish an irrevocable trust during the lifetime of the depositor. It is a tentative trust merely, revocable at will, until the depositor

dies or completes the gift in his lifetime by some unequivocal act or declaration, such as delivery of the passbook or notice to the beneficiary. In case the depositor dies before the beneficiary, without revocation, or some decisive act or declaration of disaffirmance, the presumption arises that an absolute trust was created as to the balance on hand at the death of the depositor." Therefore, under that rule and the proof in this case it is evident that upon the death of the testator, with the existing trusts as to his personal property, he was not in fact possessed of sufficient other personal property to pay either the legacy to his adopted daughter or the taxes, etc., upon the St. Marks avenue real estate. It is also disclosed that from the time of the making of the will, although there were changes, there was practically a continuation of similar trusts in favor of his daughter, brothers, and sisters, which, if paid, would practically exhaust his personal estate. Therefore, even if this court were to examine and review the findings of fact made by the trial court, it would necessarily reach the same conclusion as that reached by the learned trial judge.

We therefore concur in that conclusion, and are of the opinion that, inasmuch as it is found and established by the evidence that the testator knew, at the time of making his will, that his personal property was insufficient to meet the legacies and charges for the payment of taxes, etc., the courts below were justified in holding that he intended that such legacies and expenses should be charged upon the real estate. As was said by Judge Finch in *McCorm v. McCorm*, supra, these legacies and charges for the widow and daughter "were mere mockeries unless meant to be charged upon the real estate." The intention and purpose of the testator to be determined was that which was found to exist at the time of the execution of the will, and cannot be varied or changed by any after-occurring events. *Morris v. Sickly*, 133 N. Y. 456, 31 N. E. 332.

The judgment should be affirmed, with costs.

CULLEN, O. J., and O'BRIEN, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur.

Judgment affirmed.

(179 N. Y. 369)

HILLYER et al. v. LE ROY et al.

(Court of Appeals of New York. Nov. 15, 1904.)

JUDGMENT — LIEN — BANKRUPTCY — FRAUDULENT CONVEYANCE—RIGHTS OF CREDITOR—RECEIVERS.

1. Prior to the filing by judgment debtors of a petition in bankruptcy, a judgment had been entered for more than four months. Held to create a lien on any real estate held by them, and also on any fraudulently transferred.

2. Judgment creditors having a lien on land which their debtors have fraudulently transferred may enforce it by a sale of the land under execution, or sue in equity to have the transfers made declared void, and to compel an accounting by the fraudulent transferees to the extent of the judgment.

3. Where a creditor has obtained a judgment, and the debtor has fraudulently transferred his real estate, a suit in equity to remove the obstruction to the enforcement of their judgment created by the transfer is not a waiver of the benefit of the original judgment; and, where a receiver is appointed to sell the property and apply the proceeds to the debt, he takes no title to the real estate, nor does he acquire any rights for the benefit of creditors generally.

4. Where creditors have obtained a judgment four months before the debtors were adjudicated bankrupts, their right to maintain an equitable action to set aside a fraudulent transfer by the debtor does not vest in the trustee in bankruptcy, as their lien was not subject to the bankruptcy act, and they could pursue any remedy they had for its enforcement without reference to the bankruptcy adjudication.

Appeal from Supreme Court, Appellate Division, Third Department.

Action by Drayton Hillyer and others against William B. Le Roy and others. From a judgment of the Appellate Division (82 N. Y. Supp. 80) modifying and affirming a judgment in favor of plaintiffs, certain defendants appeal. Modified.

The plaintiffs in 1897 recovered a judgment against certain of the defendants, who composed the firm of A. Le Roy & Son. A year and some months afterwards this action was commenced upon the foundation of that judgment, in which the plaintiffs attacked the good faith of certain transfers of real estate and of personal property which had been made by some of the judgment debtors shortly prior to the judgment, and they and their transferees were joined as defendants. It was alleged that the transfers had been made and accepted while the firm was insolvent, and with the intent to hinder and defraud its creditors, and the judgment demanded was that the defendant transferees account to the plaintiffs for the properties thus fraudulently transferred, to the extent of the plaintiffs' judgment; that the defendants be restrained from interfering further with the property; and that a receiver be appointed for the purpose of enforcing the plaintiffs' rights. The answers of the defendants put in issue the allegations of the complaint, so far as the charges of fraud in the transfers were concerned. Subsequently leave was obtained from the court by the defendants to serve a supplemental answer setting forth proceedings in bankruptcy in which the members of the firm of Le Roy & Son had been discharged from their debts, and the answer which was served pleaded the discharge as a complete bar to the action. The petition in bankruptcy was filed by the members of the firm in May, 1899. An adjudication of bankruptcy followed, and in June, 1899, their discharge was granted. This action went to trial upon the issues, and the plaintiffs recovered a judgment in

their favor, which adjudged that certain of the transfers of real and personal property complained of were fraudulent, void, and of no effect as against them; that the bankruptcy proceedings were not a bar to the maintenance of the action; that the plaintiffs had a lien upon the real and personal property fraudulently transferred—and which appointed a receiver of the property, who should sell the same, “or so much thereof as may be necessary to pay plaintiffs in full for their unpaid indebtedness.” Upon appeal to the Appellate Division, in the Third Department, the judgment so recovered was unanimously affirmed, with the modification that so much of it as related to the personal property should be stricken out. The defendants then obtained permission to further appeal to this court.

Alfred L. Becker and Tracy C. Becker, for appellants. Charles E. Rushmore, for respondents.

GRAY, J. (after stating the facts). I think the determination of the learned Appellate Division to have been correct, with this exception, however: That the judgment in the trial court appears to have included as within the lien of the original judgment the mesne rents and profits of the real estate from the time of the fraudulent transfers. That would be incorrect. The accountability for the rents and profits should be from the time of the commencement of the present action in equity to annul the transfers, at which time an equitable lien upon the fund was acquired. *Collumb v. Read*, 24 N. Y. 505.

To take up the discussion of the main question presented by this appeal, the appellants argue that the judgment recovered by the plaintiffs upon the indebtedness of A. Le Roy & Son created no lien against the property transferred, which survived the institution of bankruptcy proceedings. Further, they argue that by bringing this action the plaintiffs had waived and abandoned the lien of their original judgment, if it was one not within the reach of the bankruptcy act. They also say that what right of action may have been in the plaintiffs was lost to them, and had become vested in the trustee in bankruptcy. No question is raised by the appellants as to the conclusiveness upon this court of the determination below that the transfers in question were fraudulent and void as to the respondents.

By section 67, subd. “f,” of the bankruptcy act of July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450], it was provided that “all levies, judgments, attachments, or other liens, obtained through legal proceedings against the person who is insolvent, at any time within four months prior to the filing of the petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt,” etc. The dec-

laration of the section is distinct that the lien therein referred to is only invalid where it has been obtained by the creditor within four months prior to the filing of the petition in bankruptcy, and equally distinct is its meaning that the validity of a lien obtained prior to that interval of time will be recognized. That construction has been given to the statute by the United States Supreme Court. *Metcalf v. Barker*, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122. It was observed in the opinion in *Metcalf v. Barker*—and the observation may be quoted pertinently to the present case—that “a judgment or decree in enforcement of an otherwise valid pre-existing lien is not the judgment denounced by the statute, which is plainly confined to judgments creating liens.” The plaintiffs’ judgment upon the indebtedness of Le Roy & Son to them was recovered and docketed considerably more than four months prior to the filing of the petition in bankruptcy. The effect was to impress upon the real estate of the judgment debtors a lien not only as to such which was then actually held by them, but as to any that had been transferred by them in fraud of their creditors. That is a proposition which is too firmly settled by the decisions of the courts of this state to be now questioned. The property of a debtor, which has been transferred by him in fraud of creditors, still remains, as to them, the debtor’s property, and the lien of the creditor’s judgment attaches to the real estate. The judgment creditor may enforce his judgment by a sale of the land under execution, or he may bring an action to remove the obstruction caused by the debtor’s fraudulent act, and proceed to enforce his judgment by a sale of the land, unembarrassed by the cloud of the transfer. *McElwain v. Willis*, 9 Wend. 548; *Crippen v. Hudson*, 13 N. Y. 161, 166; *Chautauqua County Bank v. Risley*, 19 N. Y. 369, 375, 75 Am. Dec. 347; *White’s Bank of Buffalo v. Farthing*, 101 N. Y. 344, 4 N. E. 734. I assume that this doctrine would receive the assent of the federal court, so far as applicable to cases arising within the state. *Bucher v. Cheshire R. Co.*, 125 U. S. 555, 583, 8 Sup. Ct. 974, 31 L. Ed. 795. The situation, upon the recovery by the plaintiffs of their judgment against Le Roy & Son, was one where they could elect to stand upon their lien, and summarily sell the lands upon execution which their debtors had fraudulently conveyed away, or where, proceeding more cautiously, they might invoke the aid of a court of equity in compelling the satisfaction of their debt. They elected to bring the present action to clear away the obstruction interposed to the collection of their original judgment through the previous transfers, and they have accomplished their purpose through the present judgment. What they sought for and what they have obtained is a decree which adjudges the transfers to have been void, which compels the fraudulent trans-

ferrees of the real estate to account to them to the extent of their claim, and which appoints a receiver to enforce their rights by a sale of the lands, or so much thereof as may be necessary to satisfy the claim. In the case of Chautauqua County Bank v. Risley, supra, upon which some reliance seems to be placed by the appellants, the result of the creditors' action was not only to set aside the fraudulent transfer, but to compel a conveyance of the lands by the debtor to a receiver whom the court appointed for that purpose. In that case the title to the land had vested in the receiver through the conveyance, and had no relation to the original judgment. He then held as a trustee for creditors generally. As it was observed in the opinion in that case, "When the creditor takes this course, instead of falling back upon his legal remedy, he abandons the lien of his judgment, and seeks a satisfaction of his debt out of the debtor's property generally." In the present action the plaintiffs abandoned none of their legal rights to have their claim paid from the proceeds of the real estate fraudulently transferred by their judgment debtors. The bringing of this action cannot be regarded as constituting any waiver or abandonment of the benefit of their original judgment, for it was purely to remove the obstruction in the way of collecting it. *Erickson v. Quinn*, 50 N. Y. 697. The judgment now appealed from has relation only to the rights of the plaintiffs under their original judgment, and narrows the office of the receiver to a sale of the real estate, and the application of the proceeds to the satisfaction of the indebtedness. The receiver took no title to the real estate, nor acquired any rights in the land for the benefit of creditors generally.

Nor did the right to maintain this action become vested in the trustee in bankruptcy. I do not think that the appellants were in any situation to interpose such an objection, inasmuch as such a defense was not pleaded. They had obtained leave to serve a supplemental answer setting up their discharge in bankruptcy and they did so plead, simply. *Dewey v. Moyer*, 72 N. Y. 70, 77. But independently of that consideration, I think that the plaintiffs, having a lien which was not within the operation of the bankruptcy act, were at liberty to pursue any remedy they had for the enforcement of that lien, unfettered by the bankruptcy adjudication.

The judgment appealed from is affirmed, with the modification that any accountability for the rents and profits of the real estate affected shall be from the time of the commencement of this action. No costs should be awarded to either party.

CULLEN, C. J., and BARTLETT, HAIGHT, MARTIN, VANN, and WERNER, JJ., concur.

Judgment accordingly.

(179 N. Y. 352)

LEWISOHN et al. v. HENRY et al.

(Court of Appeals of New York. Nov. 15, 1904.)

WILL—CONSTRUCTION—VESTING OF DEVISE.

1. Testator provided that his residuary estate should be divided into as many shares as he had children, including such as should have died leaving issue, and that one share should be given absolutely to the issue of each child dying before him, and gave to his trustees one share to be held for the benefit of each child who outlived him; the net income to be applied to the support of such child, and on arrival at the age of 25 one-fourth of the corpus to be paid to such child in fee simple and absolutely, and on arrival at the age of 30 one-third of the residue to be paid in fee simple and absolutely to the child; thenceforth the net income of the remainder to be paid to the use of such child during life; all such payments to be free from the debts or control of the husband. The will also provided that on the death of a child his separate estate as it should then exist, with all the gains, etc., should be paid over absolutely to the appointees of such child, and in default of appointment to his surviving issue, and in default of issue to his next of kin. *Held*, that no part of any share of any child vested until the child reached the age specified, as there was no direct gift of the corpus until the time specified for the trustees to convey in fee simple and absolutely, and a claim by an administrator of a daughter who died after the testator, but before she reached the age of 25 years, to one-half of the share set aside for her, on the ground that such half share to be paid to her in two installments—one at the age of 25, and the other at the age of 30—had vested before her death, was untenable.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Walter Lewisoohn and others, executors and trustees under the will of Leonard Lewisoohn, against Rosalie V. Henry and others. From a judgment of the Appellate Division (87 N. Y. Supp. 325) modifying and affirming a judgment entered on report of a referee, Philip S. Henry appeals. Affirmed.

This action was brought to construe the will of the late Leonard Lewisoohn, who died on the 5th of March, 1902, leaving four sons and five daughters as his heirs at law. He left a large estate, consisting mainly of personal property, but including an undivided interest in certain realty. The controversy arose over the seventh paragraph of the will, by which he devised and bequeathed the bulk of his estate in these words:

"Seventh. I direct that my Executors hereinafter named, or such of them as shall qualify and act, divide all the rest, residue and remainder of the property and estate, both real and personal of every kind and description and wheresoever situated which shall belong to me or be subject to my disposal at the time of my death into such number of equal shares as shall be equal to the number of children who shall survive me, and of my children who shall have died before me leaving issue who shall survive me, and set apart one of such equal shares for each of my children who shall survive me, and one of such equal shares for the issue of each

child of mine who shall have died before me, leaving issue me surviving; and convey, transfer, deliver and pay over one of such equal shares to the issue of each one of my children who shall have died before me leaving issue me surviving, in equal shares, per stirpes and not per capita, to whom I give, devise and bequeath the same accordingly; and that my said Executors set apart one of such equal shares for the benefit of each of my children who shall survive me, and I give, devise and bequeath the same to my said Executors and to such of them as shall qualify and act; as Trustees to have and to hold each share so set apart for the benefit of a child of mine (or the portion thereof not paid over and transferred to such child as hereinafter directed), upon a separate trust, for the benefit of such person for whom or for whose benefit the same shall have been set apart as aforesaid during his or her natural life, which trust as to each share of such property or estate by this article of my will hereinbefore directed to be held in trust for the benefit of a child of mine shall be to collect and receive the rents, issues, income and profits of so much thereof as shall be real property and to invest and keep invested so much thereof as shall be personal property with power to call in and change the investments thereof from time to time and to collect and receive the income thereof and after paying thereout all lawful expenses and charges, to apply the net income from the said trust estate arising, from time to time as received, to the use of the person in trust for whom such trust estate shall be held as aforesaid for so long during the life of such person as he or she shall remain under the age of twenty-five years, the income of any such share held in trust for any daughter of mine to be free from the debts, control or interference of any husband she may have; and upon the arrival at the age of twenty-five years, of the person in trust for whom such trust estate shall be so held, to convey, transfer, deliver and pay over one equal fourth part of the capital of such trust estate with all gains and increase of capital thereof, if any, in fee simple and absolutely to such person; and after such person in trust for whom such trust estate shall be held in trust as aforesaid shall have attained the age of twenty-five years, thenceforward for so long during the natural life of such person as he or she shall remain under the age of thirty years to continue to hold the residue of such trust estate, in trust, to collect and receive the rents, issues, income and profits of so much thereof as shall be real property and to invest and keep invested so much thereof as shall be personal property, with power to call in and change the investments thereof from time to time and to collect and receive the income thereof and after paying thereof all lawful expenses and charges, to apply the net income from the said trust estate arising from time

to time as received to the use of the person in trust for whom such trust estate shall be held as aforesaid, the income of such trust estate held in trust for any daughter of mine to be free from the debts, control or interference of any husband she may have; and upon the arrival at the age of thirty years of such person in trust for whom such trust estate shall be held to convey, transfer, deliver and pay over one equal third part of the capital of such trust estate then remaining including all gains and increase of capital thereof, if any, in fee simple and absolutely to such person in trust for whom such trust estate shall be held; and from and after such person shall have attained the age of thirty years thenceforward, during the residue of the natural life of such person in trust for whom such trust estate shall have been held to continue to hold the residue of such trust estate in trust to collect and receive the rents, issues, income and profits of so much thereof as shall be real property and to invest and keep invested so much thereof as shall be personal property with power to call in and change the investments thereof from time to time and to collect and receive the income thereof, and, after paying thereout all lawful expenses and charges, to apply the net income from the said trust estate arising from time to time, as received, to the use of the person in trust for whom such trust estate shall be held as aforesaid, the income of any such trust estate held in trust for any daughter of mine to be free from the debts, control or interference of any husband she may have, and upon the death of such person in trust for whom such trust estate shall be held, to convey, transfer, deliver and pay over the capital of such trust estate as it shall then exist, with all gains and increase of capital thereof, if any, in fee simple and absolutely to such person or persons and in such shares and proportions as the person in trust for whom such trust estate shall have been held, shall by will direct and appoint; and in default of such direction or appointment, or in so far as such direction or appointment may not extend or be effectual, to the issue then surviving of such person in trust for whom such trust estate shall have been held, in equal shares per stirpes and not per capita, or if such person in trust for whom such trust estate shall have been held as aforesaid shall leave no issue him or her surviving, to the next of kin of such person in trust for whom such trust estate shall have been held, in the shares and proportions to which under the laws of the State of New York as they shall then exist, they would be entitled to the same, if the same were personal property and such person in trust for whom such trust estate shall have been held had died possessed thereof intestate."

On the 11th of January, 1903, Florine L. Henry, one of the testator's daughters, died, intestate and under the age of 25, leaving,

her surviving, Philip S. Henry, her husband, and two infant children, Rosalie V. and Leanore Gladys Henry. On the 31st of March, 1903, letters of administration upon the estate of Mrs. Henry were issued to her husband, who duly qualified and has since acted as administrator. The executors of Leonard LewisoHN divided his residuary estate into nine equal parts, one of which they set apart for Florine L. Henry, as required by the will. Philip S. Henry, as administrator, claims one-half of that share, so far as it consists of personal property, and, so far as it consists of real estate, he, as an individual, claims the right of tenant by curtesy therein. The guardian ad litem of the infant children of Mrs. Henry claims that they are entitled to the entire estate, and that their father has no interest therein.

The referee before whom the action was tried sustained the position of the husband and administrator upon the ground that the undivided half that was to be paid to Mrs. Henry in installments vested in her upon the death of her father. The Appellate Division upon appeal reversed this determination, and rendered judgment in favor of the infants, upon the ground that there was no vesting in the daughter, and that her children took the entire trust fund under the will, and no part thereof as next of kin of their mother. From that judgment Philip S. Henry, individually, and as administrator, appealed to this court.

P. J. Rooney, for appellant. F. R. Minrath, for respondents. Campbell E. Locke, for defendants respondents.

VANN, J. (after stating the facts). The general purpose of the testator, as expressed in the seventh clause of his will, was to provide a liberal income for his children as long as they lived, free, as to his daughters, from the debts, control, or interference of their husbands; to give his children one-half of his residuary estate as they grew old enough to be trusted with it—not all at once, however, but part at a certain age, and the rest after an interval of five years—and to give the other half to his grandchildren when it was no longer needed to produce an income for his children. Apparently he wished to do all he could for his children, and at the same time prevent them from wasting his vast estate. He knew that whatever he gave them as a direct, immediate, and vested gift, they could dispose of, and that they might waste it. He wished to give them nothing but the income at first, and that subject to a limitation in the case of his daughters. He intended to keep one half of the principal intact as long as his children lived, so that they might have an assured income, and, as they passed away, to give it in the proper proportions to their issue. The other half he wished to give to his children, but not so that they could dispose of it until

they severally reached an age when maturity of judgment should make them prudent. He sought to effect these objects through a separate trust for the benefit of each child. Accordingly he directed his executors to divide his residuary estate into as many shares as would equal the number of his children, including such as should have died before him, leaving issue. He gave one share absolutely and in terms to the issue of each child dying before him, but, as it turned out, all of his children survived him. The remaining shares he gave to his executors "to have and to hold" as trustees, one share upon a separate trust for the benefit of each child who outlived him, with power to collect rents and profits, to invest, reinvest, and the like. Each trust is express, and in the form permitted by the statute, which provides that in such case "the beneficiary shall not take any legal estate or interest in the property, but may enforce performance of the trust." Real Property Law, §§ 76, 80 (Laws 1896, pp. 571, 572, c. 547). He required his executors and trustees, after paying charges and expenses, to apply the net income of each share to the use of the child for whom it was held in trust until he or she should reach the age of 25 years, when they were to convey and pay over one-fourth of the capital of such trust estate "in fee simple and absolutely" to such child. After this the net income of the residue was to be applied to the use of the child until he or she should become 30 years old, when one-third of the trust estate then remaining was to be conveyed and paid over "in fee simple and absolutely" to such child. Thenceforth the net income of the remainder then left was to be applied to the use of the child during life, with the restriction then as well as previously that in the case of a daughter it should be free from the debts, control, or interference of her husband. Upon the death of a child the trustees were directed to convey and pay over the separate trust estate as it should then exist in fee simple and absolutely to the appointees of such child, and, in default of appointment, to the issue then surviving in equal shares, and in default of issue to the next of kin of such child.

One of the daughters died intestate after her father, but before she reached the age of 25, leaving a husband and two infant children. The administrator of her estate claims one-half of the share set aside for her by the trustees, upon the ground that the proportionate part, which was to be paid to her in two installments—one at the age of 25, and the other at the age of 30—had vested in her before her death. This construction of the will would defeat the primary object of the testator, which was to prevent his children from disposing of any part of the capital of the shares set apart for them, respectively, until they reached a certain age. He was determined that they should not squander his estate, and he took great care to prevent

that result, which he could not prevent in the case of their issue, appointees, and next of kin, owing to the limitations placed by law upon the right to create trusts. If a share vested in each child upon the death of the testator, it was subject to alienation at the will of the owner, for a vested right is alienable, and may be assigned. Whatever one owns, he may sell, even if the date of full possession and enjoyment is not due. 1 Rev. St. (1st Ed.) pp. 723, 725, pt. 2, c. 1, tit. 2, §§ 10, 35; *Paget v. Melcher*, 156 N. Y. 399, 405, 51 N. E. 24. While the general rule favors the vesting of estates, it was adopted by courts as a guide to the probable intention of testators, and is never applied when that intention, as gathered from the entire will, is that the estate should not vest. All rules for the construction of wills yield to the actual intention, when that is reasonably clear to the mind of the judge reading the words of the testator.

The express gift of capital is not to the children, but, first, to the issue of any child dying before the testator; and, second, a gift of what was left to the executors in trust for the children. The trustees took the legal title, with the usual power of management, and with the duty of applying the net income to the use of the respective beneficiaries. They were to "have and to hold" each share until the child for whose benefit it had been set apart should reach a certain age, and "upon arrival" at that age they were to convey and pay over to him or her a part of the capital "in fee simple and absolutely." The use of the word "upon," followed by a direction to convey, indicates that, until the contingency named should happen, there was to be no vesting. So the use of the phrase "in fee simple and absolutely," in directing payment of the installments, and in the direction for final distribution, indicates that, as there was clearly no previous vesting in the case of the latter, none was intended in the case of the former. Said word and said phrase in each instance point to the time of vesting. There was no present gift to any child, but when or provided the child reached the age specified. No part of the capital was to go to the children until the time fixed for absolute transfer to them should arrive. The direct gift to the executors, and the absence of any gift of capital to the children in the first instance, show that there was no intent to vest title in them prior to the date named for distribution. The gift of capital to the children was through the direction to convey, and there was no vesting until the time to convey came around. *Matter of Baer*, 147 N. Y. 348, 354, 41 N. E. 702; *Matter of Crane*, 164 N. Y. 71, 76, 58 N. E. 47. An earlier vesting would serve no useful purpose, and might defeat the object of the testator in guarding against improvidence. The title was to continue in the trustees until the trust ended, subject to payment over of the installments if the ben-

eficiary lived long enough; and upon the death of the beneficiary "the capital of such estate," in the language of the testator, "as it shall then exist with all the gains," etc., was to go to the appointees by will, or, if there were none, to the issue or next of kin. The language used in directing the final distribution at the end of the trust shows that the thought of the testator was that the entire capital might then be intact. He did not speak of the "residue" of the share, as he had previously when he referred to what was left after payment of an installment, and as would be natural if he thought that the distribution by installments would necessarily precede the final distribution. On the other hand, he directed that the capital of the trust estate, "as it shall then exist," should be conveyed by the trustees in fee simple and absolutely to the appointees, issue, or next of kin of the deceased child.

The will, as we construe it, shows no intent that any part of the capital should vest in Mrs. Henry before she became 25 years old, or that the gift over upon her death meant if she died after the age of 30. The time is fixed by the words "upon the death," which are unqualified, and mean a death at any time after the death of the testator, for he had expressly provided for the case of a child who might die before he did. As the testator did not limit the meaning of these words, we cannot, but must read them as he wrote them, adding nothing and omitting nothing. The punctuation, which is relied upon in this connection, is neither exact nor methodical throughout the seventh clause, and hence is of slight importance. In any event, it is a hazardous guide, especially when the testator merely hears the will read, without reading it himself, and should be resorted to only when all other means of interpretation fail. *Kinkele v. Wilson*, 151 N. Y. 269, 277, 45 N. E. 869.

The grammatical construction of the seventh clause is peculiar, for, while it contains over 1,200 words, it consists of but a single sentence. The frequent use of the conjunctive "and" unites into one sentence what otherwise would extend into many. The provisions which are thus in form set forth as grammatically connected are not so united in sense and substance as to be given a co-ordinate operation.

The rule that a clause containing an absolute gift will not be cut down by a later clause unless the latter is as clear and decisive as the former has no application, because there was no direct gift of capital to the children, nor, indeed, any gift of capital to them, direct or indirect, until the time came for the trustees to convey to them "in fee simple and absolutely."

We concur with the learned judges of the Appellate Division in the conclusion that the children of Florine L. Henry took under the will of their grandfather, and not as next of kin of their mother.

The judgment should be affirmed, with costs to the guardian ad litem payable out of the fund.

CULLEN, C. J., and GRAY, BARTLETT, HAIGHT, MARTIN, and WERNER, JJ., concur.

Judgment affirmed.

(179 N. Y. 364)

PRITCHARD v. EDISON ELECTRIC ILLUMINATING CO. OF NEW YORK.

(Court of Appeals of New York. Nov. 15, 1904.)

NUISANCE—ELECTRIC PLANT—DAMAGES.

1. Plaintiff in his complaint alleged that defendant so operated its electric light plant as to discharge on plaintiff's hotel great quantities of soot and cinders, injuring the hotel and the furniture therein, and introduced evidence to sustain such allegations. *Held*, that an instruction that the measure of damage was the actual diminution in rental value was properly refused.

2. Where there was evidence that the rent of the rooms in the hotel had greatly depreciated, an instruction that loss of income from business was not provable as an element of damage was properly refused.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Myron T. Pritchard, executor of Charles H. Haynes, against the Edison Electric Illuminating Company of New York. From a judgment of the Appellate Division (87 N. Y. Supp. 225) affirming a judgment for plaintiff, defendant appeals. Affirmed.

Henry J. Hemmens and Samuel A. Beardsley, for appellant. Frank H. Hardenbrook, for respondent.

HAIGHT, J. This action was brought to recover the damages resulting from the maintenance of a nuisance by the defendant. The plaintiff's testator, on the 19th day of April, 1890, leased from the owners the property known as "Miller's Hotel," situated on West Twenty-Sixth street, New York, at Nos. 37, 39, and 41, for the period of five years, at an annual rental of \$15,000, and at the end of that period he renewed the lease for another period of five years at a rental of \$12,000 per year. In 1888 the defendant constructed and put in operation an electric lighting plant and power station situated upon the same street 41 feet west of the hotel. In the complaint it is alleged that the defendant had so constructed and conducted its property and operated its machinery as to discharge upon the premises of the plaintiff great quantities of soot, cinders, ashes, noisome gases, unpleasant odors, steam, and water condensing from steam, which pervaded the premises of the plaintiff, fouling and injuring the same and the furniture therein, and further made and produced

loud, disagreeable, and incessant noises, and very great jar and vibration, which was transmitted through the premises of the plaintiff, to the injury of the same, causing a great nuisance, and disturbing the rest and quiet of its inmates, and preventing their sleep, and injuriously affecting their health and their quiet and peaceful enjoyment and use of their apartments, to the plaintiff's damages, etc. Two actions were brought by the plaintiff's testator covering different periods of time, which have been consolidated and tried together as one action, resulting in the verdict upon which the judgment appealed from was entered.

Upon the trial a number of exceptions were taken to the admission and rejection of evidence. Some of the rulings may be justly subject to criticism, but we think the answers given by the witnesses were not sufficiently harmful to justify a reversal. The serious question in the case pertains to the rule of damages adopted by the trial court. The jury was charged that: "If the defendant's power station, as operated, was a nuisance, and lessened the profits of this hotel, the damages which the plaintiff may recover are to be limited to the actual loss of profits, such as you find from the evidence were caused to be lost through the defendant's acts in the use and operation of its power station." And again: "Generally, upon the question of the plaintiff's claim that profits were lost, you should first take the gross receipts of this hotel, year by year, as they appear to you from the evidence to have been, and deduct from them, year by year, the rent paid by Mr. Haynes and the running expenses. This would give the net profits of each year." And finally: "You are to notice that at some time after the establishment of the station the rent of the hotel was lessened, and so far Mr. Haynes had less expenses in the running of his hotel. To this extent, if his gross receipts fell off, there would still be no loss, unless the reduction of gross receipts was greater than the reduction of rents. The same considerations would apply to any reduction of the running expenses of the hotel after the year 1888, since your comparison of profits before and after the station was established must be based upon the net profits in each year; that is, profits over and above the actual rent and running expenses year by year. You are to make this comparison, gentlemen, for the purpose of finding whether there was a loss during the period after the defendant's station was in operation. If there was a loss, you are then to consider how much of it was reasonably caused by the defendant's act in maintaining the power station. And the damages which you may award in this action would be the amount of loss which you find to have been caused by the nuisance from November 22d, 1892, to November 1st, 1898."

The plaintiff's evidence tended to show

¶ 1. See Nuisance, vol. 37, Cent. Dig. §§ 118-120.

that the premises had been conducted for many years as a family hotel, and that but few rooms were reserved for transients; that in the renting of rooms or apartments the board or meals were included; and that the gross income from the rental of rooms by the year is shown by Exhibit 9, from which it appears that in 1883 the rents received amounted to \$50,376.22. From this there was a gradual falling off each year, until 1886, when the amount received was but \$40,963.56. From this there was a greater increase in rents, even after the establishment of the defendant's plant, until 1891, when the amount received was \$46,307.75. During the next year there was a falling off of \$6,000, and of the next year of \$4,000, and of a gradual decline in the following years, until 1896, when the receipts had fallen to \$32,754.49. In 1897 there was again substantial increase in the income. The plaintiff's expert witness Perry gave evidence tending to show there was a depreciation in the rental value of the premises from 1892 down to 1900 of about \$2,000 per year. It appears that at the end of the first lease in 1895 the landlord, in settling with the plaintiff, his tenant, deducted \$9,000 from the rent required by the lease; that in giving the new lease for another five years the rent was reduced \$8,000 per year; and that upon the termination of that lease another reduction was given upon the rent accrued amounting to \$10,250. The running expenses of the hotel either before or after defendant's plant became a nuisance we have not found in the appeal book, so that we have no basis from which we can ascertain the net profits for any year, or as to whether there was any loss of such profits in any year.

The appellant now contends that the charge was erroneous, and that the loss of profits is speculative and uncertain, and does not furnish a correct basis for awarding damages. The trouble, however, with the appellant's contention, is that he has neglected to take any exception to the charge of the court so as to raise a question of law which we have the jurisdiction to review. The judgment has been unanimously affirmed, thus depriving us of the power to review the question as to whether there is any evidence to sustain the verdict.

We are thus brought to the consideration of the exceptions taken to the defendant's request to charge. There are two that bear upon the subject of damages which require consideration. The first is: "The measure of damages applicable to a case of this kind is the actual diminution in rental value by reason of the defendant's acts." This request undoubtedly states the general rule, and the diminution in rental value is one of the items of damages applicable to this case. But the trouble with the request is that it is not the only item of damage applicable. As we have seen, the complaint alleges the fouling of the premises and the

injuring of the furniture from the great quantities of soot, cinders, etc., escaping from the defendant's premises and pervading those of the plaintiff. During the trial there was some evidence given tending to show that the window curtains, windows, and furniture generally would become soiled, and new upholstering necessary much oftener than before the plant became a nuisance, and that the services of an extra man became necessary to do the cleaning, whose services cost from \$20 to \$25 a month. So that, while diminution in rental value becomes an item of damages which the jury might award, in this case there has been alleged, and evidence given tending to prove, other independent items of damages not covered by the diminution in the rental value of the premises. As to whether loss of profits in a business established upon the leasehold premises can be recoverable in any case, we are not called upon to consider, nor do we now determine the question, for the reason that it is not raised by any exception which we have power to review.

The other request to charge is that "loss of income from business is not provable as an element of damage." There may be a loss of income, and at the same time an equal lessening of the expenses of the business, so that the net profits would remain the same. This request, therefore, does not present the question as to whether the loss in net profits from a business is provable as an item of damages. In this case the rent of rooms or apartments in the hotel was a part of the business in which the plaintiff was engaged. We think that the evidence showing the depreciation in the rent of the rooms in the hotel from year to year was competent as bearing upon the question as to whether there was a diminution in the rental value of the whole premises, and that the request to charge under the circumstances was properly refused.

For the reasons stated, the judgment should be affirmed, with costs.

CULLEN, C. J., and GRAY, BARTLETT, VANN, and WERNER, JJ., concur. MARTIN, J., absent.

Judgment affirmed.

(179 N. Y. 345)

PEOPLE v. DAVEY.

(Court of Appeals of New York. Nov. 15, 1904.)

RAPE—PREJUDICIAL EVIDENCE—REVERSAL.

1. On a trial for rape on the person of a girl 12 years of age, after complainant's testimony as to what took place between defendant and another girl on an occasion prior to the commission of the crime alleged was excluded, it was error to permit complainant to state what she said to that girl in defendant's presence on that occasion, where the remark was full of suggestiveness when connected with the other

testimony of complainant, and such error was not cured by immediately striking out such testimony.

Appeal from Supreme Court, Appellate Division, Fourth Department.

William H. Davey was convicted of rape on the person of a girl 12 years of age, and from a judgment of the Appellate Division (88 N. Y. Supp. 1112) affirming a judgment of conviction, he appeals. Reversed.

P. F. King and A. T. Hopkins, for appellant. Burt G. Stockwell, Dist. Atty. (Fred M. Ackerson, of counsel), for the People.

WERNER, J. The assault charged in the indictment, and established by proof upon the trial, is one of those unnatural and revolting crimes which instinctively arouse sentiments of disgust and wrath in the breasts of normal men. The alleged victim was a girl 12 years old, and the alleged assailant was a married man 45 years of age, the proprietor of an automobile garage situated on one of the principal business streets of the city of Niagara Falls. We shall deal with the nasty details of the alleged offense only so far as may be necessary in the discussion of the exceptions presented for review, and, before proceeding with that discussion, it may be well to emphasize a few general observations that will serve to illustrate the direction which appellate scrutiny is sometimes compelled to take in cases of this character. It has come to be one of the accepted maxims of our jurisprudence that appellate courts will not be astute to find mere technical errors upon which to reverse judgments. There are cases, however, in which apparently technical errors may be so prejudicial as to produce the gravest injustice. This may be particularly true of a case in which a defendant accused of an abhorrent and detestable crime finds himself confronted at the very threshold of the courtroom with that subtle, pervasive, and almost ineradicable prejudice which the bare charge of such a crime may engender against him in the minds of those who are to pass upon his guilt or innocence. This lurking possibility may become almost a probability when the charge is one which is calculated to arouse the parent to the dangers which beset his children in their necessary daily intercourse with those outside of the family circle. In such cases reason needs to be safeguarded from prejudice by everything that caution and justice can suggest, and courts should be firm and explicit in impressing upon district attorneys the necessity for strict adherence to rules of evidence and propriety of conduct, so that jurors may, as far as possible, be unbiased and impartial. The application of these general observations to the case at bar leaves little room for doubt that some of the exceptions taken at the trial are so near the danger line, if not in and of themselves fatal, that they may properly be considered in connection with those which

we think are serious enough to justify a reversal of the judgment herein.

The alleged assault is charged to have been committed at the defendant's place of business on or about the 22d day of June, 1903. The direct testimony of the complainant strongly tended to show that the assault was committed on that day. On her cross-examination the complainant was even more explicit, and positively fixed that date as the day of the occurrence. Upon her redirect examination this was somewhat modified by the statement that she had no means of fixing the exact date, but no other date was mentioned. When the defendant presented his side of the case, he showed conclusively that he was in Buffalo during the whole of the day of June 22, 1903, and therefore could not have been in Niagara Falls at the time and place of the alleged assault. As bearing upon that phase of the case, the learned trial court charged the jury, in substance, that, if they should find that the defendant had in fact assaulted the complainant, it was immaterial whether it had been done "on the 22d day of June, or any other day in June, or any day in May." While this was doubtless a correct general statement of the law as applied to a variance between the time fixed in an indictment and that proven upon a trial, or to a case in which time is not of the essence of the crime (Code Cr. Proc. § 298 et seq.; *People v. Krank*, 110 N. Y. 488, 18 N. E. 242; *People v. Jackson*, 111 N. Y. 369, 19 N. E. 54), it was hardly a fair and explicit statement of the rule as it should have been applied to the facts of the case at bar. The only date definitely established by the evidence was that mentioned in the indictment, to wit, the 22d day of June, 1903. While we cannot say judicially that the proof was such as to require a finding that the assault was committed on that day, or not at all, we cannot escape the conclusion that the evidence on this point was so direct and almost unequivocal (even after making allowances for the age of the complaining witness, the subject-matter of her testimony, and the distracting influence of her environment in court upon her youthful mind) as to make the question of the time of the commission of the alleged assault a most delicate and important one, upon the bearing of which, as determinative of the guilt or innocence of the defendant, the jury should have been most fully and carefully instructed. Instead of that, however, the learned trial court barely referred to the evidence tending to show defendant's absence from Niagara Falls at the time of the alleged assault; thus emphasizing, rather than modifying, the previous charge that the time of the commission of the alleged crime was of no importance. When a crime is clearly shown to have been committed, the time of its commission may be purely incidental and insignificant; but when the question of time may be an important factor in determining wheth-

er a crime has been committed, and when, as in the case at bar, there is a complete coincidence of the time specified in the indictment and fixed by the proof, it cannot be said that the matter of time is wholly immaterial, even if the evidence in relation to it is not clearly conclusive. While we should not feel warranted in reversing the judgment upon this exception alone, we have discussed it because it is one of the features which was apparently operative in giving the case a trend that seems to have been prejudicial to the defendant.

Another thing that was, we think, unfair to the defendant, and that must have been damaging in its effect upon his defense, was the production in court of several children of both sexes who were requested to stand up, one after another, in the presence of the jury, during the cross-examination of the defendant. After the latter had been asked if he knew these children, he was interrogated as to certain alleged unnatural and outrageous practices upon them. He denied all these, as, of course, the prosecuting attorney must have anticipated he would; and, since his answers in reference to these collateral subjects were binding upon the prosecution, this branch of the case apparently ended there. But did it in fact end there? The spectacle of these children standing up in open court as silent accusers of a man charged with a nameless outrage upon a little girl was more dramatic and eloquent than volumes of verbal testimony could have been. This theatrical appeal to paternal instinct and wrath left the defendant little, if any, hope for an impartial consideration of his defense. It is true, as suggested by the prosecuting officer, that when the defendant became a witness in his own behalf he laid himself open to attack from every point affecting his credibility or criminality (*People v. Webster*, 139 N. Y. 84, 34 N. E. 730), and, if the practice now under discussion involved nothing more than that, we should not attempt to criticize it. The difficulty lies in the fact that the nature of the charge preferred against the defendant was in itself so likely to provoke passion and prejudice that both court and prosecuting officer should have been careful to guard the defendant against anything that would tend to undue intensification of these sentiments. It is, of course, impossible to measure every development of a particular trial by some general rule; and it is not unusual for counsel, when examining a witness, to ask some person in the courtroom to stand up for identification. It may fairly be argued that what may be done with a single individual may be repeated as often as occasion requires, and from that general proposition we are not prepared to dissent. We simply say that, under the peculiar circumstances of this case, this feature of the trial must have contributed to the creation of an atmosphere that was prejudicial to the defendant, and we may there-

fore examine other phases of the trial with closer scrutiny than would be necessary under different circumstances.

Another exception relied upon by the defendant is that taken to the refusal of the learned trial court to exclude the evidence of the complaining witness as to an occasion prior to the commission of the offense charged in the indictment, when the complainant and a girl named Mamie Meyers are said to have visited defendant's place of business. When the court asked how that evidence could be competent, the prosecuting officer said, "I propose to show what happened right then and there with this girl Mamie Meyers." After an intervening colloquy between counsel and court, in which it clearly appeared that the occurrence referred to took place on some date prior to that set forth in the indictment, and after the court had ruled that the witness should not be permitted to state what she had seen the defendant do to Mamie on the occasion referred to, although the question as clearly indicated the answer as though it had actually been given, the witness was permitted, under objection and exception, to state that she said to Mamie Meyers, in the presence of the defendant, "Good-bye Mamie, I am through with you." This remark, seemingly innocent and harmless when taken alone, is apparently full of suggestiveness and meaning when connected with the context of the testimony given by this witness. It is true that in the next breath this evidence was stricken out by the court; but there can be little doubt that the episode had produced the precise effect for which the evidence was offered. As this evidence was clearly incompetent, it should not have been received, and, although it was subsequently stricken out, the insidious and damaging suggestion which it was intended to convey must have found lodgment in the minds of the jury.

The same method was pursued in the examination of the complainant's mother, who, in answer to a direct question as to whether the defendant had told her that he had taken other girls into his store and cellar, replied that he had said nothing about it. While this answer was not unfavorable to the defendant, the district attorney's question very distinctly conveyed the suggestion to the jury that here was a man who had made a practice of debauching young children. Similar questions have been condemned by this court. *People v. Smith*, 162 N. Y. 530, 56 N. E. 1001; *Cosselman v. Dunfee*, 172 N. Y. 507, 65 N. E. 494.

Other questions are raised, but we forbear from further discussion, since enough has been said to indicate that we think the defendant did not have such a fair and impartial trial as he was entitled to. It must be admitted that the single exception that we have definitely laid hold of hangs by a very slender thread, and, if it stood alone, we should not deem it necessary to reverse this

judgment. But when this exception is considered in the light of all the other prejudicial features of the trial, our duty is obvious.

The judgment of conviction should be reversed, and a new trial ordered.

MARTIN, J., concurs. CULLEN, C. J., and GRAY and HAIGHT, JJ., concur in the result on the ground of the refusal of the court to exclude the evidence of the complaining witness as to what she said to Mable Meyers. BARTLETT and VANN, JJ., concur in the result generally.

Judgment of conviction reversed, etc.

(34 Ind. App. 5)

ZARING et al. v. PERRIN NAT. BANK.
(Nos. 5,026, 5,027.)

(Appellate Court of Indiana, Division No. 2
Nov. 2, 1904.)

APPEAL—INSUFFICIENCY OF RECORD—DEFECTIVE CERTIFICATE TO TRANSCRIPT.

1. Under Acts 1903, p. 841, c. 193, which requires the certificate of the clerk of the trial court to the record on appeal to show that the transcript contains "full, true, and complete copies of all papers and entries in said cause required," a certificate that a transcript contains a full, true, and complete copy of the "entries" only does not authenticate copies of the pleadings in the cause, without which no error can be made to appear authorizing a reversal of the judgment.

Appeal from Circuit Court, Johnson County; W. J. Buckingham, Judge.

Action by the Perrin National Bank against Rufus S. Zaring and others. Judgment for plaintiff, and defendants appeal. Affirmed.

W. A. Johnson, Jas. M. Robinson, W. E. Deupree, and L. E. Slack, for appellants. Miller & Barnett, for appellee.

COMSTOCK, J. This action was brought by appellee against appellants upon a promissory note, payable in a bank in this state, executed by appellants to J. Crouch & Son, and by them assigned to appellee before maturity as collateral security for the payment of an existing indebtedness of the payee to appellee, and to secure future advancements to said J. Crouch & Son. Answers were filed, the cause put at issue, and a special finding of facts made by the court at the request of both parties, on which conclusions of law were stated, and judgment rendered in favor of appellee for \$450.

Before entering upon the discussion of the merits of the cause appellee insists that none of the pleadings are certified by the clerk of the trial court. The first seven alleged errors are based upon rulings of the trial court upon demurrers. The remaining errors claimed are upon the special findings of the court and conclusions of law. The certificate of the clerk attests that the "above and

foregoing transcript is a full, true, and complete transcript and copy of the entries, beginning with the filing of the amended complaint herein, as per præcipe, in the cause of the Perrin National Bank v. Rufus S. Zaring et al., No. 119, and that the bill of exceptions containing the evidence as filed in my office is entered in and made a part of the transcript." It is not certified that the transcript contains copies of the papers of the cause. The certificate should show that the transcript contains "full, true, and complete copies of all papers and entries in said cause required." Acts 1903, p. 841, c. 193. All papers pertaining to a cause embrace entries, complaint, answer, and reply. *Heizer v. Kelly*, 73 Ind. 584. The complaint being the basis of the action, without it no error can appear. The alleged errors founded upon the special findings of the court are not presented, because answers setting up defenses are not certified. The clerk's certificate in No. 5,027, consolidated with this cause, is in the same language as the certificate in this case. For these reasons errors in the ruling upon the pleadings or conclusions of law are not made to appear. It appears, however, from the evidence, that the note in suit was executed in part payment of a horse purchased by the makers thereof from J. Crouch & Son; that the horse proved to be unsatisfactory; that he was taken back by the vendors, and another horse given the purchasers in exchange in settlement of the difference between vendors and vendee. So far as appears, the second horse was satisfactory. It is proper to add that on February 15, 1904, appellee filed its motion to dismiss the appeal. One of the grounds of said motion was that the transcript in said cause was not attested by the seal of the Johnson circuit court. On February 26th appellants asked for and were granted leave to have the clerk of said court amend said transcript and his certificate thereto, by attaching his seal to said certificate. This was done. The certificate, however, as heretofore set out, was not changed. Appellants' attention was called to the certificate both by the motion to dismiss and the brief of appellee. No errors are presented authorizing a reversal of the judgment.

Judgment affirmed.

CAPITAL NAT. BANK v. WILKERSON et al. (No. 4,994.)¹

(Appellate Court of Indiana, Division No. 2
Nov. 2, 1904.)

PLEADING—ALLEGATION OF DEMAND—BANKRUPTCY—RECOVERY OF PREFERENCE BY TRUSTEE—INTEREST—BURDEN AND MEASURE OF PROOF—EVIDENCE OF INSOLVENCY—REVIEW OF RULING EXCLUDING EVIDENCE—NECESSITY OF OFFER.

1. In an action by a trustee in bankruptcy to recover an alleged unlawful preference, a general allegation in the complaint that demand was duly made on defendant for return of such

¹ Superseded by opinion, 75 N. E. 837. See 76 N. E. 258.

preference and refused is sufficient, although it is not alleged by whom it was made, at least where the objection is first made in the appellate court.

2. On recovery of an unlawful preference by a trustee in bankruptcy plaintiff is entitled to interest from the date of demand for the return of the preference and its refusal.

3. In an action by a trustee in bankruptcy to recover a preference under Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], plaintiff has the burden of proving that defendant had reasonable cause to believe that a preference was intended, but it is sufficient if facts and circumstances with respect to the debtor's financial condition are shown such as would put an ordinarily prudent man on inquiry, which would have disclosed the debtor's insolvency.

4. Evidence considered in an action by a trustee in bankruptcy to recover a preference, and held sufficient to sustain findings of the debtor's insolvency, and that defendant had reasonable cause to believe that it was obtaining a preference.

5. On the trial of an action by a trustee in bankruptcy to recover a preference, plaintiff's testimony as to the bankrupt's assets and liabilities at the time of the bankruptcy which was only a few days after the preference was given, during which no substantial change had taken place in the debtor's financial condition, is competent on the issue of insolvency, as well as to show the preferential effect of the payment.

6. To save any question for review on a ruling excluding testimony, the party producing the witness must state what is proposed to be proved by him in answer to the question excluded.

Appeal from Superior Court, Marion County; J. L. McMaster, Judge.

Action by Alfred C. Wilkerson, trustee in bankruptcy and others, against the Capital National Bank. Judgment for plaintiffs, and defendant appeals. Affirmed.

H. J. Milligan and Watkins & Morgan, for appellants. W. A. Ketcham and Lesh & Lesh, for appellee.

WILEY, J. Appellee sued appellant to recover an alleged preference under subdivision "b," § 60, of the National Bankrupt Law of July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]. The complaint was in one paragraph, to which an answer in denial was filed. Trial by the court, finding and judgment for appellee. Appellant's motion for a new trial was overruled. The errors assigned are, first, that the complaint does not state facts sufficient to constitute a cause of action; and, second, that the court erred in overruling the motion for a new trial.

The only objection urged to the complaint is that it does not show a legal demand for the return of the alleged unlawful preference. Upon the question of demand the complaint contains the following: "Plaintiff avers that demand was duly made on said defendant for return of said unlawful preferences, but defendant refused to return the same, or any part thereof." Counsel for appellant assert the proposition that it is necessary in an action of this character to allege a demand by the trustee in bankruptcy against the creditor for the return of the

property, or its value if return cannot be had, and a refusal on the part of the creditor, and until such demand and refusal the holding of the creditor is legal and valid. This is unquestionably true, but it is contended that the complaint does not show a legal demand, because it is not shown who made the demand. The complaint is attacked for the first time in this court, and we think that the averment as to the demand is sufficient. If, in the first instance, appellant had raised the question by moving to make the complaint more specific on the question of demand, its motion might have been well taken. In any event, this averment in the complaint is sufficient to bar another action for the same cause, and, this being true, the complaint will be held sufficient when attacked for the first time on appeal. The rule prevails in this jurisdiction that the total absence from the complaint of an averment of a fact essential to the existence of the cause of action may be raised for the first time on appeal by an independent assignment of error, under section 346 of Burns' Ann. St. 1901, but mere uncertainty or inadequacy of such averment will be deemed to have been waived by a defendant who proceeds with the trial to final judgment without objection. *City of South Bend v. Turner*, 156 Ind. 418, 60 N. E. 271, 54 L. R. A. 396, 83 Am. St. Rep. 200. The complaint before us is not one where a material averment is wholly omitted, and under the averment of demand evidence was admissible to show who made the demand, and when and where it was made.

Appellant moved for a new trial upon several grounds, each of which we will notice in the order in which they have been discussed. It is insisted that the amount of recovery was erroneous, being too large. The complaint avers that the bankrupt, being insolvent, made two payments to appellant upon a pre-existing indebtedness, aggregating \$1,513.17. The judgment was rendered for \$1,623.95, the excess over the \$1,513.17 being for interest. Appellant was not in default until after demand was made for the return of the money, and it is shown that the demand was made April 23, 1902. It has been held that the trustee in such cases can recover interest from the date of the demand. *Cookingham v. Morgan*, Fed. Cas. No. 3,183, 7 Blatchf. 480. Six per cent. of the principal from the date of the demand to the time of judgment, July 15, 1903, is \$110.78. This, added to the principal, makes the judgment mathematically correct.

Appellant contends that the decision of the trial court is contrary to law, and not sustained by sufficient evidence. The two propositions may properly be considered together, as they rest upon the evidence. To properly present the question, it is important to look to the statute. The term "preferred creditors" is defined by Congress in the following language: "A person shall have been

deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class." Bankr. Act July 1, 1898, c. 541, § 60a, 80 Stat. 562 [U. S. Comp. St. 1901, p. 3445]. Subdivision "b," § 60, supra, provides for the recovery of unlawful preferences in the following language: "If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition, or before the adjudication, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person." It is urged that appellee failed to prove that on the dates of the payments to appellant the bankrupt was insolvent. This was an essential fact, and the burden was on appellee to establish it. In the bankruptcy act of 1898 Congress defined insolvency as follows: "A person shall be deemed insolvent within the provisions of this act, whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed or removed or permitted to be concealed or removed with intent to defraud, hinder or delay his creditors, shall not at a fair valuation, be sufficient in amount to pay his debts." Bankr. Act July 1, 1898, c. 541, § 1 (15), 30 Stat. 544 [U. S. Comp. St. 1901, p. 3419]. The evidence fairly establishes the facts that when the two payments were made to appellant, exclusive of them, the bankrupt's property was of the aggregate value of \$1,431.73, and that his indebtedness was \$11,308.12, exclusive of a large sum which he owed to the American Trust & Savings Bank, the exact amount of which was unknown. It is true that the examination made by appellee as to the assets and liabilities of the bankrupt was made on August 5th, being 10 and 13 days, respectively, after the payments, and the above facts ascertained; yet it is shown that the only change in his financial condition between those dates was the transfer of the furniture and fixtures of his bank to appellant. The value of these was fixed at \$1,000, and included in the schedule of assets, shown to be \$1,431.73. We think evidence fully establishes the insolvency of the debtor at the time of the payment to appellant. Before a recovery can be had in a case of this character it is incumbent upon the trustee to prove that the party to whom payment is made had reasonable cause to believe that a preference was being obtained. *Grant v. Bank*, 97 U. S. 80, 24 L. Ed. 971; *Stucky v. Bank*, 108 U. S.

74, 2 Sup. Ct. 219, 27 L. Ed. 640; *Browning, Assignee, v. Hurdle* (C. C.) 18 Fed. 164; *Otis v. Hadley*, 112 Mass. 100; *Brown v. Guichard*, 7 Am. Bankr. Rep. 515, 74 N. Y. Supp. 785; *In re Eggert* (D. C.) 98 Fed. 843.

It is earnestly contended that the evidence does not establish the fact that appellant had reasonable cause to believe that it was obtaining a preference. It is not necessary for the trustee to prove that the creditor had actual knowledge, but both the spirit and letter of the statute are satisfied if the evidence is sufficient to show that he had reasonable cause to believe that the debtor was insolvent, and that he was thus obtaining a preference. *Coburn v. Proctor*, 15 Gray, 38; *Wager v. Hall*, 16 Wall. 584, 21 L. Ed. 504. If the facts and circumstances with respect to the debtor's financial condition are brought home to the creditor, such as would put an ordinarily prudent man upon inquiry, the creditor is chargeable with knowledge of the facts which such inquiry should reasonably be expected to disclose. *In re Eggert*, 102 Fed. 735, 43 C. C. A. 1; *Boudinot, Trustee, v. Hamann*, 117 Iowa, 22, 90 N. W. 497; *Brondenburg on Bankruptcy*, vol. 1, p. 523; *Tiffany v. Lucas*, 15 Wall. 410, 21 L. Ed. 198; *National Exchange Bank v. Pepperdine*, 2 Nat. Bankr. N. 676. It is not necessary to prove that the debtor intended a preference. *Benedict v. Deshel et al.* (N. Y.) 68 N. E. 999; *Pirie v. Chicago Title & Fund Co.*, 132 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171. From a careful consideration of the evidence upon the question as to whether appellant had reasonable ground to believe that it was obtaining a preference, our conclusion is that the record contains ample evidence upon which the trial court could and must have found the fact to exist that it did have reasonable ground to so believe.

Counsel for appellant insist that appellee failed to prove a demand before this action was commenced, and hence, in this regard, the evidence is insufficient to support the finding. We cannot concur in this insistence, for the record shows that a written demand was made.

Appellant predicates error upon the admission of certain evidence, upon overruling its motion to strike out certain evidence, and in rejecting certain offered evidence. Appellee was permitted to testify as to the aggregate indebtedness of the bankrupt, and the evidence was objected to on the ground that it related to his indebtedness at a subsequent time. The evidence of appellee upon this point was so closely connected with the time of the payments to appellant that it was competent as tending to prove insolvency. The investigations of the appellee as trustee, upon which his evidence was based, were made within a few days after such payments, and, as above shown, no substantial change had taken place as to the debtor's financial condition. See *Tennessee, etc., Co.*

v. Sargent, 2 Ind. App. 458, 28 N. E. 215. It was competent for the additional reason that it tended to show that other creditors of the same class would not receive a percentage of their claims equal to that received by appellant.

Mr. A. M. Packard was called as a witness on behalf of appellant. Upon his examination in chief he was asked a question to which an objection was made and sustained. No offer to prove the fact or facts which the question elicited was made. In such case, to save any question, the party producing the witness must state what he proposes to prove by him in answer to the question. Elliott, App. Prac. § 743. The rule as stated has been enforced in a vast number of cases. We refer to note 1, p. 698, Elliott's App. Prac., where the authorities are collected and cited.

For the same reason there is no available error in sustaining an objection to a question asked M. B. Wilson, a witness for appellant, in his examination in chief.

We have considered every question discussed by counsel, and have reached the conclusion that the trial court arrived at the correct result.

The record does not show any reversible error, and the judgment is affirmed.

(186 Mass. 589)

**BORUSZEWSKI et al. v. MIDDLESEX
MUT. ASSUR. CO.**

(Supreme Judicial Court of Massachusetts.
Worcester. Nov. 22, 1904.)

**FIRE POLICY — CONDITIONS — PERFORMANCE —
WAIVER — PROOF — SUFFICIENCY —
CUSTOM — ADMISSIBILITY.**

1. The performance by an assured of the conditions in a policy requiring the assured in case of a fire to render a sworn statement giving the value of the property insured, his interest therein, all other insurance, the purposes for which and the person by whom the buildings in question were used, and the time and manner in which the fire originated, is a condition precedent to the liability of the insurer, unless waived by it.

2. A fire policy stated that the assured, in case of loss, should forthwith render a statement giving the value of the property insured, his interest therein, all other insurance, etc. The insurer, on receiving an informal notice of a loss, sent an adjuster to the place where the property insured was situated. The adjuster was met by the broker who had placed the insurance, he being notified of his coming. The broker stated that an adjuster of another company had visited the premises, and had just left. He also asked the adjuster to go to his office, where he had proofs of loss. The adjuster refused to go to the office or to visit the premises, saying that he did not want to attend to it that day, but would communicate with the broker in a short time. Neither party did anything for about five months, when the assured employed counsel. The insurer, in answer to counsel's letter, stated that the adjuster had learned facts indicating that the fire was not an honest one, and that the fire marshal had written to the same effect, and insisted that the

policy had not been complied with. *Held*, that the insurer did not waive a compliance with the terms of the policy; the conduct of the adjuster, at most, only relieving the assured from rendering the statement forthwith, and the letter insisting on the provisions of the policy.

3. A custom which contradicts a contract whose terms are plain is bad, though a custom is admissible to explain doubtful terms.

4. Where a fire policy requires the assured, in case of a loss, to forthwith render a sworn statement giving the value of the property insured, his interest therein, etc., and makes the insurer liable for the amount due 60 days after receipt of the statement, and does not require the insurer to do anything until such statement has been rendered, a custom which substitutes a mere notice that a fire has occurred, and which makes the insurer liable for the amount of the policy, without regard to the damage done by the fire, in 60 days after such notice, on its failure to send a blank form of proof of loss, or an adjuster to adjust the loss on the ground, is bad.

Report from Superior Court, Worcester County; Francis A. Gaskill, Judge.

Action by Adam Boruszewski and others against the Middlesex Mutual Assurance Company. At the close of plaintiffs' case, the court, on motion of defendant, ordered a verdict for it, and at the request of both parties the court reported the cause to the Supreme Judicial Court. Judgment on the verdict.

John R. Thayer, Arthur P. Rugg, and Henry H. Thayer, for plaintiffs. Fredk. W. Brown, for defendant.

LORING, J. This is an action on a policy issued by the defendant company insuring the plaintiffs against loss by fire upon a dwelling house and barn, and certain personal property contained therein. The defense is that the plaintiffs never have rendered the sworn statement in writing called for by the policy. The plaintiffs' contention is that this has been waived by the defendant, and that they proved a custom making it unnecessary. The case is here on a report by the presiding judge, who directed the jury to return a verdict for the defendant.

The facts relied on by the plaintiffs as constituting a waiver are that the defendant, on receiving an informal notice of the fire, sent an adjuster to Webster, where the property insured was situated. The adjuster notified the broker who placed the insurance that he was coming. The broker met him at the station, and had a talk with him there about the loss. The broker then told him that he had just driven the adjuster of another company to the locus, and that the other adjuster had just left. The defendant's adjuster asked why he had not waited for him. The broker then asked him to go to his office, where he said he had a "proof of loss," but the adjuster refused. He also refused to visit the place of the fire, although the broker offered to "carry him out." He said that he did not want to attend to it that day, as he was anxious to go to Hartford, but told the broker that he would see him or communicate with him in a short time. He left on a train

* 1. See Insurance, vol. 28, Cent. Dig. §§ 1332, 1323, 1350, 1358.

a few minutes later. Nothing was done on the part of either party until nearly five months later, when the plaintiffs retained counsel. In answer to a letter from counsel not put in evidence, the president of the defendant company wrote, stating that their adjuster learned facts when he visited the scene immediately after the fire indicating that the fire was not an honest one; that the fire marshal had written to the same effect, after making an investigation; and insisting that the plain provisions of the policy had not been complied with since the fire. The letter ended with a statement that the company supposed the plaintiffs had failed to comply with the essential conditions through consciousness of wrongdoing.

The question is whether there is anything in this which amounts to a waiver of performance of the clause of the policy requiring the insured, in case of a fire, to render forthwith a sworn statement in writing, giving (1) the value of the property insured; (2) the interest of the insured in that property; (3) all other assurance on it; (4) the purposes for which, and the person by whom, the buildings in question were used; and (5) the time and manner in which the fire originated, so far as known. By the terms of the policy, the insurance money due is payable 60 days after this statement is rendered. The performance of this clause is a condition precedent to the defendant's liability. *Cook v. North British & Mercantile Ins. Co.*, 183 Mass. 50, 66 N. E. 597; *Parker v. Middlesex Co.*, 179 Mass. 523, 61 N. E. 215. See, also, *Audette v. L'Union St. Joseph*, 178 Mass. 113, 59 N. E. 268; *Smith & Dove Mfg. Co. v. Travelers' Ins. Co.*, 171 Mass. 357, 50 N. E. 516; *Johnson v. Phoenix Ins. Co.*, 112 Mass. 49, 17 Am. Rep. 65; *Smith v. Haverhill Ins. Co.*, 1 Allen, 297, 79 Am. Dec. 733; *Shawmut Sugar Refining Co. v. People's Ins. Co.*, 12 Gray, 535. The rendering of this statement is the first step called for by the policy, to be taken by the insured in case of a loss. On such a sworn statement being made and delivered to the company, it is its duty to decide whether it will pay the loss, and to determine the amount due. If the amount of damage done is not agreed upon, it is fixed by arbitration. In either event the amount due becomes payable 60 days after the sworn statement is rendered to the company.

The nearest case in this commonwealth is the case of *Searle v. Dwelling House Ins. Co.*, 152 Mass. 263, 25 N. E. 290. In that case, on receiving informal notice that there had been a fire, the company sent an adjuster to agree on the amount of the loss; understanding that he carried with him blanks on which a proof of loss was to be made in accordance with the adjustment reached. The agent agreed with the insured upon the amount of the loss, item by item, and that was written down. He then told the insured that he would write it out on a proper blank, and send it to her to be signed and sworn

to. The insured heard nothing from the adjuster or the company for some three or four weeks. She then went to the local agent who issued the policy, and he wrote to the company in her behalf. In answer the company refused to pay the loss on another ground. This was held to justify a finding that the presentation of the sworn statement had been waived. In that case the fire took place on October 11, 1885. On May 27, 1886, a sworn statement was rendered. The court ruled that this sworn statement was rendered too late to be a compliance with the policy, and left the case to the jury on the question of waiver. The ground on which this case goes was that the action of the company was inconsistent with an intention to insist on a sworn statement being rendered. For another case where the rendering of a sworn statement was waived altogether, see *Eastern Railroad v. Relief Ins. Co.*, 105 Mass. 574. But in the case at bar there was nothing in what the defendant did inconsistent with an intention to insist on a full compliance with this clause of the policy. Until a sworn statement containing the information called for is rendered, the company is under no duty to take up the question of adjustment of the loss. Before proceeding with the adjustment of a loss, an insurance company, under the Massachusetts standard form of policy, has the right to have the insured commit himself, in writing and under oath, upon the facts to be set forth in the sworn statement, namely, (1) the property covered by the policy in existence at the time of the fire, and the value of it; (2) the plaintiff's interest in the insurance; (3) the insurance on the property; (4) the purposes for which the buildings in question were used; and (5) the history of the fire. But the company is not bound to abstain from all investigation until this condition precedent is performed. In the case at bar the defendant's adjuster went to the town in question, and saw the broker who placed the insurance, and asked for information about the loss. He refused to look at the place where the fire was, refused to go to the broker's office, where, he was told, there was a "proof of loss," and left. There was nothing in this inconsistent with a determination to insist on the policy being performed. The only other thing was his statement to the broker on leaving that he would see him or communicate with him again in a short time. The most that can be claimed for this is that it excused the plaintiffs from rendering the sworn statement until a reasonable time had elapsed, if they or their agents relied on this remark of the adjuster in not rendering the statement forthwith, and there is no evidence that they did rely on it. This remark is not inconsistent with a determination on the part of the insurance company to insist upon the sworn statement's being made out, signed, sworn to, and delivered to it, and the plaintiffs could not have been misled by it. For that

reason the jury were not warranted in finding that the performance of that condition had been waived.

None of the cases cited by the plaintiffs in which it has been held that there has been a waiver of preliminary proofs of loss goes as far as we are asked to go in this case. See *Harrison v. German-American Ins. Co.* (C. C.) 67 Fed. 577; *Tillis v. Liverpool & London & Globe Ins. Co.* (Fla.) 35 South. 171; *Graves v. Merchants' & Bankers' Ins. Co.*, 82 Iowa, 637, 49 N. W. 65, 31 Am. St. Rep. 507; *Brown v. State Ins. Co.*, 74 Iowa, 423, 38 N. W. 135, 7 Am. St. Rep. 495; *Hartford Ins. Co. v. Keating*, 86 Md. 130, 38 Atl. 29, 63 Am. St. Rep. 499. Of the other cases principally relied on by the plaintiffs, it was held in *Weldert v. State Ins. Co.*, 19 Or. 261, 24 Pac. 242, 20 Am. St. Rep. 809, that there was no waiver; and in *Gould v. Dwelling House Ins. Co.*, 184 Pa. 570, 19 Atl. 793, 19 Am. St. Rep. 717, and *Perry v. Dwelling House Ins. Co.*, 67 N. H. 291, 83 Atl. 731, 68 Am. St. Rep. 668, there was an attempt to comply with the provision within the time specified.

The argument of the plaintiffs that the letter of the president was in itself a waiver makes it necessary to state that it was not. It insists that the plain provisions of the policy have not been complied with since the fire.

This brings us to the custom testified to on the part of the plaintiffs, which was, in substance, as follows: In case of a loss the insured notifies the broker of the fire, and he sends notice to the company. The company then either sends a blank form of a "proof of loss," or an adjuster to adjust the loss on the ground, who carries such a blank with him; and the failure of the company to send a blank or an adjuster is a waiver of the condition of the policy "that there be a proof of loss in writing," and the company settles within 60 days for the amount of the policy. It is settled that a custom which contradicts a contract whose terms are plain is bad. A custom is admissible to explain what is doubtful, but, when the terms of the contract are plain, the right of one party to it cannot be taken away by custom. The last case on the point is *Menage v. Rosenthal*, 175 Mass. 358, 56 N. E. 579, where some of the cases are collected. To these should be added *Benson v. Gray*, 154 Mass. 391, 28 N. E. 275, 13 L. R. A. 262 (where also a collection is made of the earlier cases), and *Macomber v. Howard Ins. Co.*, 7 Gray, 257. By the terms of the contract, no notice is required to be sent by the insured until the sworn statement is made out and rendered, and the defendant is under no obligation to do anything about the matter until the plaintiff has committed himself, in writing and under oath, on the matters therein to be set forth. The amount due is not payable until 60 days after this has been rendered. A custom which substitutes a mere notice that a fire has occurred for this statement in writing

on the five points specified, signed and sworn to by the insured, and rendered by him to the company forthwith, and which makes the company liable for the amount of the policy, without regard to the damage done by the fire, in 60 days after informal notice of the fire is given, is bad.

Some confusion seems to have arisen from characterizing the sworn statement called for by the Massachusetts standard form a "proof of loss." This is probably a survival of the practice which had obtained under the policies in use before the standard form was adopted (St. 1873, p. 852, c. 331, and St. 1881, p. 457, c. 166), which usually, if not universally, called for a sworn statement of the amount of loss caused to the property insured by the fire, *inter alia*. But the amount of the loss is not called for in the sworn statement specified in the Massachusetts standard form.

Judgment on the verdict.

(187 Mass. 72)

HASTINGS v. LAWSON.

(Supreme Judicial Court of Massachusetts.
Essex. Nov. 22, 1904.)

WRIT OF ENTRY—DEFENSES—PLEA OF NUL DISSEISIN—ADMISSIBILITY OF EVIDENCE.

1. In a writ of entry, evidence showing that the tenant held the premises under a bond for deed from demandant, that the tenant had complied with the terms on which he purchased, that he could not read and write, and that the bond did not express the terms on which he purchased, was not admissible under the plea of nul disseisin, amounting only to the general issue, because it did not tend to show that the title was not in the demandant, nor that it was in the tenant.

2. In a writ of entry, evidence that the tenant held the premises under bond for a deed, and complied with the terms under which he purchased, though not with the terms of the bond, which had been fraudulently changed, was not admissible as an equitable defense; it not being pleaded, as required by Rev. Laws, c. 173, § 28.

Exceptions from Superior Court, Essex County.

Writ of entry to recover land by Rollin B. Hastings against Mary T. Lawson. There was a judgment for demandant, and the tenant brings exceptions. Overruled.

Peters & Cole, for demandant. N. C. Bartlett, for defendant.

BARKER, J. This writ of entry, to which the tenant pleaded nul disseisin, was tried by the court without a jury. The demandant rested after having put in his deed. The tenant then offered in evidence a bond for a deed from the demandant to the tenant; also certain receipts signed by the demandant for amounts paid under the bond; also certain tax bills and bills for water rates paid by the tenant; and further offered to show that the tenant had paid the taxes and water rates from the year 1898. The tenant also offered to show that she was illiterate and

unable to read and write; that the terms mentioned in the bond were different from those upon which she bought the premises; that she had complied with the terms upon which she claimed she had bought, and had been in possession from the date of the bond until the trial. All this evidence offered by the tenant was excluded. The tenant did not offer to show that she had complied with the terms of the bond as written. The presiding justice ruled that under the plea the only question in issue was the demandant's title, and that the evidence offered by the tenant and excluded was not competent under her plea, and to this ruling the tenant excepted. After finding for the demandant, the case is here upon the tenant's exception to the ruling stated.

The plea, amounting now to the general issue, put the title in issue, and the title only. The tenant could maintain her defense in two ways, namely, by failure of the demandant to show title in himself, or upon proof of title in the tenant. The evidence offered by the tenant did not tend to show that title was not in the demandant, nor that it was in the tenant. It tended to show that if she could have the written contract reformed, and then have specific performance of it as reformed, she would be entitled to have the demandant convey to her his title. If the evidence offered would entitle the tenant to be absolutely and unconditionally relieved against the demandant's claim of title, that evidence could not be received unless the tenant had alleged the facts as provided in Rev. Laws, c. 173, § 28. *Sherman v. Galbraith*, 141 Mass. 440, 442, 5 N. E. 858.

Exceptions overruled.

(187 Mass. 40)

ENOS et al. v. HARKINS et al.

(Supreme Judicial Court of Massachusetts.
Bristol. Nov. 22, 1904.)

INCORPORATED ROMAN CATHOLIC CHURCH—POWER OF TRUSTEES—AIDING OTHER CHURCH.

1. Under Rev. Laws, c. 36, §§ 44-46, providing for the incorporation of a Roman Catholic Church by the signing, filing, and recording of a certificate, that the signers shall be the trustees thereof, and that such corporation may receive, hold, manage, sell, and convey property belonging to the church, no persons but the trustees have any part or voice in the corporate doings.

2. It is within the power of an incorporated Roman Catholic Church to give part of its general funds to a Catholic parish.

Appeal from Supreme Court, Bristol County.

Suit by Fran Enos and others against Mathews Harkins and others. Bill dismissed, and plaintiffs appeal. Affirmed.

Raymond & Mitchell, for appellants.
Chas. W. Clifford and Walter Clifford, for respondents.

BARKER, J. The plaintiffs are 13 members of the Roman Catholic Church, identified in the matter of attendance upon divine wor-

ship, the ceremonies of the church and church discipline, with the body of Roman Catholic priests and laymen commonly called the Church of St. John the Baptist in New Bedford. They bring the bill in behalf of themselves and all others having like ground of complaint. The issues raised by the pleadings have been heard by a master under a rule requiring him to find and report the facts. No exceptions were taken to the report, and, the court below having entered a final decree dismissing the bill, with costs to the defendants, the cause is before us upon the plaintiffs' appeal from that decree.

The principal defendant is a corporation formed on June 4, 1888, under the provisions of Pub. St. 1882, c. 38, §§ 48-50, with the corporate name of "The Corporation of the Church of St. John the Baptist in New Bedford." The defendants Harkins, Doran, Neves, Pitta, and Rogers are members of that corporation. The other two defendants are banks holding on deposit funds of the corporation. The defendant Harkins is the Roman Catholic bishop of the diocese of Providence, within the territorial limits of which diocese New Bedford is situated. The defendant Doran is vicar general of the diocese. The defendant Neves is the pastor of the Church of St. John the Baptist. The defendants Pitta and Rogers are laymen and communicants of that church. The five persons last mentioned are the trustees of the corporation, and Neves is the treasurer.

The alleged ground of complaint is that the corporation is about to pay over and transfer a part of the funds now held by the corporation to the Parish of Our Lady of Mount Carmel, a recently created Roman Catholic parish in New Bedford. This separate parish was constituted on September 5, 1902, by the bishop, acting in conformity with the usages and law of the Roman Catholic Church, by dividing the Parish of St. John the Baptist, and setting off therefrom, as the Parish of Our Lady of Mount Carmel, all the Roman Catholics in New Bedford speaking the Portuguese language as their mother tongue, and residing in New Bedford south of a certain line. The bill, as first amended, alleged, in substance, that the whole fund was one accumulated by the Church of St. John the Baptist, by the gifts and donations of its members and communicants, and the gifts, bequests, and donations of other friends of the church, for the purpose of erecting a new and enlarged church edifice in and for the Parish and Church of St. John the Baptist, which fund is held by the trustees of the corporation, but in trust for the Church of St. John the Baptist; and that the proposed transfer and payment of a part of the fund would be contrary to the express object for which the fund was given, and would be an unlawful and unauthorized disposition of the fund. By another amendment the plaintiffs allege, in substance, that certain further funds derived from pew rents

and various other sources have been received by the trustees, and are held by them by virtue of their office, and have been mingled by them with the funds referred to as having been paid for the specific purpose of building a new church edifice for the Parish of St. John the Baptist, and that all of the funds, though subject to the power and control of the trustees, are nevertheless in trust for the Church of St. John the Baptist. Besides the prayer for an injunction forbidding the proposed transfer, the plaintiffs ask for a decree that all of the funds belong to the corporation of the Church of St. John the Baptist in New Bedford, and that they can be used only for the purposes of the Church of St. John the Baptist.

It appears from the master's report that, while the corporation has received moneys which the donors raised or gave for the express purpose of building a new church edifice, yet, if that part of the fund which is due to moneys so raised or given is subject to a trust for that specific purpose, the proposed payment to the new parish will not affect such trust fund, but will leave it intact. This state of the facts would require a decree for the defendants but for the last amendment to the bill. Under that amendment the plaintiffs now contend that the fund "can only be used for the purposes of the Church of St. John the Baptist," apparently meaning by this expression, quoted from the prayer of their bill as finally amended, the plaintiffs and all other Roman Catholics of New Bedford speaking the Portuguese language as their mother tongue, and not living in the territorial limits of the new Parish of Our Lady of Mount Carmel, regarded as a church distinct from all other churches. In support of this contention they make the claim that the five individual defendants who hold office as trustees of the corporation are not its only members, but that the plaintiffs themselves, and all other like communicants identified with religious worship at the Church of St. John the Baptist, are such members, and that the trustees are merely the governing body of the corporation. While the bill does not show that the plaintiffs, before resorting to the courts, sought redress from the corporation itself or from its officers, the bill was not demurred to; and the master finds that, if such application had been made, it would have been unavailing. See *Dunphy v. Traveller Newspaper Association*, 146 Mass. 495, 16 N. E. 426. The master also finds that upon the division of the parish the bishop determined that a division of the property held by the corporation should be made, and ordered that such division should be made by directing the treasurer of the corporation to pay out of its funds to the new parish the amount of the proposed payment; that, following this order, a meeting of the trustees was called, at which three of the trustees, the pastor and the two laymen, in the absence of the

bishop and the vicar general, the two other trustees, voted that it was the sense of the board that it would be unjust and unwise to give any of the moneys to the new parish; that subsequently, at a new meeting, attended by all the trustees, the vote authorizing and directing the proposed payment was passed by a majority of the trustees, the bishop, the vicar general, and one layman voting in the affirmative, and the pastor and the other laymen in the negative; and that by the canonical law the pastor, or any one of the plaintiffs, or any member of the parish had a right of appeal from the action of the bishop to superior tribunals of the Roman Catholic Church, and that no such appeal has been instituted. The failure to institute such an appeal not having been made a ground of defense to the bill, we have no occasion to consider whether a defense could be founded upon the failure to institute or prosecute an appeal.

It is to be noticed that, except as to the proposed payment, the plaintiffs' contentions raise moot questions only, there being no allegation or finding of any intention on the part of the corporation to dispose of any other portion of its property in any way which would be contrary to the plaintiffs' view of its duty. We do not find it necessary to determine whether the plaintiffs are in any sense members of the corporation. It is plain that under the provisions of Pub. St. 1882, c. 38, §§ 48-50, and of Rev. Laws, c. 36, §§ 44-46, now in force, no persons but the trustees have any part or voice in the corporate doings. A vote duly passed by the trustees is a vote of the corporation. No other communicant or member of the congregation or of the parish can take part in the corporate action. The vote at the earlier of the two meetings called to consider the proposed payment did no more than to express the feeling of the board at that time, and the formal direction to the treasurer to make the payment given by the vote passed at the later meeting must stand as the final and authoritative action of the corporation upon the subject.

We find nothing in the master's report to justify a finding that, aside at least from moneys raised or given for the specific purpose of building a new church edifice, the funds now in the hands of the corporation have been so raised or are so held as to place any limitation upon their application beyond that which attaches to the general funds of any religious society. The only remaining question, therefore, is whether the purpose to which the corporation in due form has decided to apply its property by the proposed payment is one within the general scope of the corporate powers of an incorporated Roman Catholic Church. Of this we have no doubt. The master's report shows that the purpose is one consonant with the usages of that church in this country. There can be no question that it is within the power of any religious

society to devote its general funds to the aid of other churches or religious societies or to home or foreign missions.

Decree affirmed.

(187 Mass. 1)

GILLETTE v. GENERAL ELECTRIC CO.

(Supreme Judicial Court of Massachusetts.

Bristol. Nov. 22, 1904.)

INJURY TO EMPLOYÉ — ASSUMPTION OF RISK.

1. An employé engaged in the work of installing machinery in a power house, who, for the purpose of crossing a pit dug to receive the machinery, instead of going around on the floor, steps on a brace across the end of the pit, plainly designed as a brace, and not as a bridge, assumes the risk, however often the risk had been taken by himself or others.

Report from Superior Court, Bristol County; Chas. A. De Courcy, Judge.

Action by one Gillette against the General Electric Company. A verdict was directed for defendant, and the case is reported. Verdict to stand.

F. A. Pease and T. F. Higgins, for plaintiff. Jackson, Slade & Borden, for defendant.

BARKER, J. The work in hand was the installation by the defendant of an electrical generator in the power house of a railway company. The undertaking was, in its nature, temporary. The building, with its entrances and floors, did not belong to the defendant, and was to be used by it only while it was installing the machinery in the power house. Before the plaintiff, who was a common workman, began his employment there, a pit had been constructed in and below the floor to receive the generator and the fly wheel of the engine which was to drive it. In one part of the pit the lower half of the field piece of the generator had been placed. This half was a metal structure, weighing 16 tons or more, and portions of it rose above the level of the floor 3 or 4 feet. Tackle used to bring into place heavy parts of the machinery to be installed had been hitched to one end of that half of the field piece which had been put in the pit. To prevent the strain of the tackle from moving the field piece in the pit, a brace had been placed between it and the opposite side wall of the pit about 2 feet from the end of the pit. This brace was a stick of lumber 8½ feet in length, 6 inches wide, and 5 inches thick, supported at the end next the field piece by an iron flange of the field piece, and at the other end by the friction of the end of the brace against the perpendicular side wall of the pit; the brace having been put in place by resting one end on the flange, and driving down the other end with a sledge. All this had been done before the plaintiff had any connection with the work. At the end of the brace which was next the field piece rose perpendicularly above the level of the floor a part of the field piece, so that the brace could

not be used for passage directly across the pit; but by stepping from the floor at the end on one side of the pit to the brace, and then to the floor, one wishing to get from one side to the other could cross a corner of the pit, and save a little distance. The part of the pit unoccupied by the field piece was 8½ feet wide and about 20 feet long, and was open, except for the brace. In the prosecution of the work, many pieces of timber were used for blocking, and were moved from time to time as the work demanded, and, when not in use, were left on the floor of the room, making it difficult to get around. The pit was near one corner of the room, and the end of the pit near which was the brace was near the door of the room. The plaintiff had worked for a week in the place described, as a general laborer; moving, blocking, and doing other things. During this time, as he testified, he had seen other workmen and the superintendent frequently use the brace by stepping on it in order to cross the pit, and he testified that he thought the brace was put there to go across. Having occasion to go to a workman who was in the pit, the plaintiff, instead of passing around the end of the pit, stepped upon the brace, and so crossed. Immediately thereafter, having occasion to go to the side of the pit from which he first started, in attempting to return he again stepped upon the brace, when it gave way, causing him to fall into the pit. He sues under the employer's liability act to recover for injuries occasioned by the fall; contending that he was hurt by reason of the negligence of the superintendent in charge, in not having the brace supported at the end next the wall, and in allowing it to be used as a bridge for passage without warning that one end was unsupported.

The circumstances stated distinguished the present case from the decisions on which the plaintiff relies. Here it is plain that the stick of timber which gave way was designed only as a brace. There was no occasion for a bridge across the pit at a point only two feet from the end of the pit, and the rising of the part of the field piece in the middle of the pit's width at one end of brace showed so plainly that it was not a bridge that any one who undertook to step upon it must be taken to have known that it was not put there as a bridge or way. If the plaintiff thought it was put there to go across upon, he was negligent in his examination of the place where he was set to work, and in his deductions from what he saw, and so in his use of the brace as a bridge. In *Dolphin v. Plumley*, 167 Mass. 167, 45 N. E. 87, the sawmill was in permanent use, and the path which the plaintiff took was, if not the only one, that which, upon the evidence, was ordinarily used to go from one end of the mill to the other. So, in *Hanlon v. Thompson*, 167 Mass. 190, 45 N. E. 88, the injury was caused by the rot-

tenness of a floor intended to be permanent, and over which the evidence tended to show that the men were expected to pass. In *Boyle v. Columbian Fireproofing Co.*, 182 Mass. 93, 64 N. E. 726, the hoist was designed to support and to raise and lower heavy articles with safety, and there was evidence tending to show that the workmen not only commonly, but continually, used it, and that it was the only means of access to and from their work which their own employers had furnished, the only other means being ladders furnished by other contractors upon the same building, and also that both of the defendant's superintendents had told their workmen to ride on the hoist, in place of using the ladders, because it saved time. In *Connors v. Merchants' Mfg. Co.*, 184 Mass. 466, 69 N. E. 218, the trapdoor, when closed, formed part of the mill floor; but even this constituted no invitation to use it for passage, another way being provided. In the present case the floor of the room gave access to every portion of the premises which the plaintiff's work required him to visit. The floor itself was in order, and, if the pieces of blocking which incumbered it were in the plaintiff's way, he could remove them from the place where they had been left by himself or his fellow workmen, or he could step over them. When he chose to step upon a brace plainly designed as a brace, and not as a bridge, he did so at his own risk, no matter how frequently the same risk had been taken by himself or others.

Verdict for the defendant to stand.

(187 Mass. 91)

BULLOCK v. BOSTON & H. DISPATCH CO.

(Supreme Judicial Court of Massachusetts.
Essex. Nov. 23, 1904.)

CARRIERS—LOSS OF GOODS—CONNECTING CARRIER—LIABILITY—PRESUMPTIONS—EVIDENCE.

1. A case containing goods was delivered in good order to an initial carrier. When the connecting carrier delivered it to the owner, it was found that some of the goods had been removed and were lost. *Held*, that the loss presumptively occurred on the line of the connecting carrier.

2. On the issue whether a connecting carrier exonerated itself from liability for loss of goods delivered to it by an initial carrier, evidence *held* to justify a finding that the loss occurred on the connecting carrier's line.

Appeal from Superior Court, Essex County; Chas. A. De Courcy, Judge.

Action by Harriette K. Bullock against the Boston & Haverhill Dispatch Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This is an action for the recovery of loss of goods contained in a case delivered to a carrier for transportation. The cause was tried on an agreed statement of facts reciting that the case was in good order and condition when delivered to the initial carrier

and when delivered by it to the connecting carrier, but when delivered by the connecting carrier to the owner some of the goods were not found. It was further agreed that all of the employes of the defendant corporation who handled the case, if present, would testify that they did not open it, or remove anything from it, and that it was not opened by any one in their presence; that the case was received at the office in Boston, then taken in a wagon to the Boston & Maine Railroad, and placed in a car which was sealed by an employe of the corporation, and not unsealed until it reached its destination, when it was unsealed by an employe of the defendant, and at once placed in a wagon belonging to the defendant and driven by an employe of the defendant, who took it to the plaintiff's residence, making one call on the way, when the wagon was left unguarded for a short time, while the defendant's employe entered a store to deliver a package. It is further agreed that the court may draw such inferences from the facts herein stated as it may deem proper.

Chas. H. Poor and Edmund B. Fuller, for appellant. Jos. H. Pearl, for appellee.

LATHROP, J. We find nothing in the facts of this case which distinguishes it from *Moore v. N. Y., N. H. & H. R. R.*, 173 Mass. 335, 53 N. E. 816, 73 Am. St. Rep. 298, and *Cote v. N. Y., N. H. & H. R. R.*, 182 Mass. 290, 65 N. E. 400, 94 Am. St. Rep. 656. There was a presumption of fact that the injury sued for was caused by the last carrier. While the case was submitted to the court below on agreed facts, it was agreed that the court might draw inferences. The finding of that court in favor of the plaintiff was on a matter of fact which we cannot change, unless the facts agreed show, as matter of law, that the last carrier has exonerated itself from liability. We cannot say that they so show.

Judgment for the plaintiff affirmed.

(187 Mass. 65)

BURKE v. CITY OF HAVERHILL.

(Supreme Judicial Court of Massachusetts.
Essex. Nov. 22, 1904.)

MUNICIPAL CORPORATIONS—STREETS—OBSTRUCTIONS—EVIDENCE.

1. Where the concrete sidewalk of a street extended partly across an intersecting street which had no sidewalk, and on one side of the projection of the concrete walk stones had been placed to hold the walk in position, the top of the stones being about six inches above the soil, and their upper surfaces even and in the line of the walk, they did not amount to an obstruction, so as to render the city liable for injuries received by one who stumbled over them.

Exceptions from Supreme Judicial Court, Essex County.

Action by Patrick F. Burke against the city of Haverhill. Judgment in favor of plain-

¶ 1. See Carriers, vol. 9, Cent. Dig. §§ 841, 842.

tiff, and defendant brings exceptions. Exceptions sustained.

Francis H. Pearl, for plaintiff. Essex S. Abbott, for defendant.

BARKER, J. Many exceptions were taken by the defendant in this action to recover for personal injuries occasioned by an alleged defect in a highway in the defendant city. We find it unnecessary to consider any of them but the one to the refusal to order a verdict for the defendant on the ground that the evidence would not justify a finding that there was a defective way. The plaintiff received his injuries by stumbling over certain stones which were a part of and in the westerly edge of a concrete sidewalk on the west side of School street, a public way, where it intersected Gardner street, which was also an open way, but with no sidewalks, and which the plaintiff contended was a public way by prescription, or a private way for which the defendant was responsible as for a public way because it had posted no notices that Gardner street was not a public way, or that it was dangerous. The concrete sidewalk on School street ended about two and one-half feet southerly of the northerly line of Gardner street, continued in a direction to cross School street, and at the line where it ended the concrete was about one and one-half inches above the level of the natural ground. For six inches the concrete of the walk was unsupported upon its westerly edge, and from the termination of the six inches, for a space of two feet to the point of intersection of the northerly line of Gardner street with the westerly line of School street, the concrete of the walk was supported by cobblestones so placed as to be in the westerly line of School street. These stones were about six inches in height above the soil of Gardner street, and their upper surfaces were even, and in the line of the concrete walk. Their purpose was to hold the concrete of the walk in position as a curbstone on the edge of a sidewalk next to the part of a street wrought for the travel of teams holds the material of a sidewalk in place. The cobblestones presented to a traveler about to pass upon the sidewalk from Gardner street an even and regular surface making a step only six inches high, and of the same character as that which the traveler must surmount in going upon any curbed sidewalk from the part of the way devoted to the passage of teams and vehicles. Such steps are commonly found also wherever sidewalks are intersected by driveways or by other streets. If, as in the present instance, they are not more than six inches in height, and present an even surface with a substantially level top not higher than the sidewalk, the material of which they are designed to hold in place, they are no more dangerous to the foot traveler than the ordinary curbstone, and we are of the opinion that a jury ought not to be allowed to find

72 N.E.—17

such construction to be a defect in the way, any more than to find the ordinary curbstone a defect, even when the step is one which a traveler coming to the sidewalk from an intersecting way has to surmount. In *Flynn v. Watertown*, 173 Mass. 108, 53 N. E. 147, on which the plaintiff relies, the end of the crosswalk might have been found upon the evidence to be a foot higher than the part of the street over which the plaintiff went to approach it, and to have been uneven at its upper edge. In *George v. Haverhill*, 110 Mass. 506, the alleged defect consisted of plank two inches wide set transversely across the sidewalk at a point where a construction of brick and of gravel met, and standing in the center of the walk two and one-half inches above the general level of the walk, and at the ends of the plank three inches. In *Marvin v. New Bedford*, 158 Mass. 464, 33 N. E. 605, the defect was a hole or depression in the sidewalk. In *Redford v. Woburn*, 176 Mass. 520, 57 N. E. 1008, and in *O'Brien v. Woburn*, 184 Mass. 598, 69 N. E. 350, the alleged defect was a water shut-off box rising in the sidewalk above its general surface, and in *Nestor v. Fall River*, 183 Mass. 285, 67 N. E. 248, the tree root projected above the level of the walk. In *Samson v. Boston*, 184 Mass. 46, 67 N. E. 866, the pile of paving stones left on the edge of the walk was no part of the construction. If there had been no support for the concrete where it was supported by the cobblestones, its surface must have been so sloped as to make it more dangerous for a traveler than to descend or ascend a perpendicular step only six inches high, for, if left unsupported, the concrete would have disintegrated irregularly, which would have made the walk still more dangerous.

Exceptions sustained.

(163 Ind. 497)

CLEVELAND, C., C. & ST. L. RY. CO. v. NOWLIN et al. No. 20,423.

(Supreme Court of Indiana. Nov. 18, 1904.)

CONDEMNATION—RIGHT OF WAY—PAYMENT OF AWARD—RIGHT OF APPEAL.

1. Under *Burns' Ann. St. 1901*, § 5160 (Rev. St. 1881, § 3907; *Horne's Ann. St. 1901*, § 3907), relative to condemnation of a right of way by a railroad company, providing that on the return of the assessment of damages by the appraisers the company shall pay the clerk the amount assessed, whereupon it may hold the interests in the land so appropriated for the uses of its road; and that such award may be reviewed by the court in which the proceedings are had on exceptions filed by either party within 10 days, provided that, notwithstanding such appeal, the company may take possession of the property, and the subsequent proceedings on the appeal shall affect only the amount of compensation—the right of appeal of the company to the court from such award on exceptions so filed is not affected by its paying to the clerk the amount of the award and taking possession of the land and constructing its road thereon.

Appeal from Circuit Court, Dearborn County; Wm. S. Holman, Special Judge.

Condemnation proceedings by the Cleveland, Cincinnati, Chicago & St. Louis Railway Company against Robert J. Nowlin and others. From a judgment holding that the company was estopped to appeal to the court from the award of appraisers, it appealed to the Appellate Court, whence the case is transferred under Burns' Ann. St. 1901, § 1337u (Acts 1901, p. 590). Reversed.

S. O. Bayless, Roberts & Johnston, L. J. Hackney, and Jno. T. Dye, for appellant. McMullen & McMullens, for appellees.

MONKS, J. Appellant commenced this proceeding under section 5160, Burns' Ann. St. 1901 (section 3907, Rev. St. 1881, and section 3907, Horner's Ann. St. 1901), to condemn real estate owned by appellees for a right of way. After the appraisers returned their award, appellant filed exceptions to the award, and thereafter paid to the clerk of the court below the amount of said award, and took possession of said strip of land described in the instrument of appropriation, and constructed its railroad thereon. Appellees received said money from the clerk, and filed no exceptions to the award. To appellees' answer averring said facts appellant replied that it paid said money to said clerk and took possession of said strip of land without any intention of waiving its right of appeal or of confirming the amount of said award, but solely for the purpose of obtaining the right to enter upon said strip of land and construct its railroad thereon while awaiting the determination of the amount of damages on appeal. The court below held that by the payment of said award to the clerk appellant was estopped from prosecuting its exceptions to said award, and rendered final judgment against appellant.

The question to be determined in this case is whether, in the exercise of the power of eminent domain under section 5160 (3907), supra, a railroad company, if it excepts to the award, pays the amount assessed to the clerk, and takes possession for the purpose of constructing its railway, is thereby estopped from prosecuting its appeal. Appellees insist (1) that appellant, having voluntarily paid the amount assessed, and taken possession of the land and constructed its road thereon, has accepted the benefit of the award, and cannot appeal therefrom, citing McGrew v. Grayston, 144 Ind. 167, 41 N. E. 1027; Sonntag v. Klee, 148 Ind. 538, 47 N. E. 962; Holland v. Spell, 144 Ind. 561, 42 N. E. 1014; Baltimore, etc., Ry. v. Johnson, 84 Ind. 420; section 644, Burns' Ann. St. 1901 (section 632, Rev. St. 1881 and section 632, Horner's Ann. St. 1901); (2) that no appeal can be taken from a judgment by a party who voluntarily pays the same. It is provided by section 644, Burns' Ann. St. 1901 (section 632, Rev. St. 1881, and section 632, Horner's

Ann. St. 1901), supra, that "the party obtaining a judgment shall not take an appeal after receiving any money paid or collected thereon." This provision applies only to judgments which are made appealable to the Supreme and Appellate Courts. It is, however, a general rule that a party who accepts the benefit of a judgment waives the right to prosecute an appeal from it. Holland v. Spell, 144 Ind. 561, 564, 42 N. E. 1014, and authorities cited; Elliott's Appellate Procedure, §§ 150, 151; Ewbank's Manual, § 112. This rule was enforced in Baltimore, etc., Co. v. Johnson, supra, in which it was held that, when benefits are awarded to a landowner in condemnation proceedings under section 5160 (3907), supra, an acceptance of the sum awarded will preclude him from prosecuting an appeal. It has been held by this court, however, that payment of a judgment by a defendant does not estop him from prosecuting an appeal from such judgment. Armes v. Chappel, 28 Ind. 469; Dickensheets v. Kaufman, 29 Ind. 154; Hill v. Starkweather, 30 Ind. 434; Belton v. Smith, 45 Ind. 291; Bruce v. Smith, 44 Ind. 1, 10; Ewbank's Manual, § 112, p. 163; Elliott's Appellate Procedure, 151, 152; 2 Cyc. p. 647, and note 58. Elliott's Appellate Procedure, § 152, says: "It is obvious that there is an essential difference between one who pays a judgment against him and one who accepts payment of a sum awarded by a judgment. Payment by a party against whom a judgment is rendered may often be necessary to protect his property from sacrifice, and what a party does to prevent the sacrifice of his property cannot, with any tinge of justice, be held to preclude him from assailing the judgment." Section 5160 (3907), supra, under which this proceeding was brought, provides that upon the return of the assessment the "corporation shall pay the clerk the amount thus assessed, or tender the same to the party in whose favor the damages are awarded or assessed; and on making payment or tender thereof in the manner herein required it shall be lawful for the corporation to hold the interests in such lands or materials so appropriated * * * for the uses aforesaid. * * * The award of said arbitrators may be reviewed by the circuit court or other court in which such proceedings may be had, on written exceptions filed by either party in the clerk's office, within ten days after the filing of such award: * * * provided, that notwithstanding such appeal, such company may take possession of the property therein described, as aforesaid, and the subsequent proceedings on the appeal shall only affect the amount of compensation allowed." Here is an express grant of the right of appeal from the award of the appraisers, with a provision that, "notwithstanding such appeal, such company may take possession of the property therein described, as aforesaid, and the subsequent proceedings on appeal shall only affect the

amount of the compensation allowed"; that is, while the appeal is pending, the railroad may be constructed on said property. In *Indianapolis, etc., R. Co. v. Brower*, 12 Ind. 374, a condemnation case under a law which contained no proviso in regard to the company taking possession of the property, where there was an appeal, like that in section 5160 (3907), *supra*, the award was paid by the company and was received by the landowner. Thereupon the company appealed, and on motion of the landowner reciting the payment the circuit court dismissed the appeal from the award. This court, in reversing said ruling, said: "It is insisted that, if an appeal is permitted in this case, it is at the expense of the twenty-first section of the Bill of Rights of our state Constitution, which provides that no man's property shall be taken by law, etc., without compensation first assessed and tendered; that upon such assessment and payment to the satisfaction of the owner of the land the applicant is at liberty to enter immediately upon the land thus condemned; and that the payment of the amount assessed, followed by the entry upon the land, was virtual acquiescence in the determination arrived at. We do not view it in that light. We think that under the provisions of the Constitution referred to it was the duty of the appellants to tender the amount assessed before the right to enter could arise. If it was important to the interest of the appellants that the entry should be made immediately, before the appeal from the judgment upon the assessment could be finally disposed of, we think the party seeking to make the entry would not be precluded from further litigating the amount of the damages by making such a tender as would, under the constitutional provision, authorize him to enter on the lands. The tender at that stage of the proceedings would have to be the full amount of the assessment. We do not think the fact that the defendant accepted the tender changes the rights of the parties." It was held in *Fort St., etc., v. Peninsular, etc.*, 103 Mich. 637, 61 N. W. 1007, that the right of appeal is not lost to the condemner by paying the award and taking possession of the land pending the appeal. The following authorities also sustain the view adopted by this court in *Baltimore, etc., R. Co. v. Brower, supra*; *Fort St., etc., Co. v. Backus*, 92 Mich. 33, 52 N. W. 790; *Oliver v. Union, etc., R. Co.*, 83 Ga. 253, 9 S. E. 1066; *Matter of N. Y. W. S. & B. R. Co.*, 29 Hun, 646; *Id.*, 94 N. Y. 287; *St. Louis, etc., Co. v. Evans*, 85 Mo. 307; *Commonwealth v. Hall*, 8 Pick. 440; *Peterson v. Ferreby*, 30 Iowa, 327; *Chicago, etc., Co. v. Phelps*, 125 Ill. 482, 17 N. E. 769; 7 *Ency. Pleading and Practice*, 632, 633; 2 *Lewis on Eminent Domain* (2d Ed.) § 556, p. 1226; *Mills, Eminent Domain* (2d Ed.) § 139.

It has been uniformly held by this court that the payment to the clerk of damages awarded by the appraisers under section 5160 (3907), *supra*, gives the railroad company a right to immediate possession, and a prima facie claim to the land, subject to an appeal in 10 days after the award is filed. If no appeal is taken at the end of 10 days, the title vests and relates back to the date of payment; but, if an appeal is taken, no title vests, and the company has only the rights of a licensee under the statute to hold possession and proceed with the construction of the road pending litigation. When the compensation has been fully fixed on appeal, then the company must pay or tender the additional compensation fixed, if any, and on failure to do so it acquires no title to the land, and its license to hold possession and prosecute its work ceases. *Lake Erie, etc., R. Co. v. Kinsey*, 87 Ind. 514; *Pittsburg, etc., Ry. Co. v. Swinney*, 97 Ind. 586, 592, 593; *Terre Haute, etc., R. Co. v. Crawford*, 100 Ind. 550, 557; *Consumers', etc., Co. v. Harless*, 131 Ind. 446, 452, 453, 29 N. E. 1062, 15 L. R. A. 505, and authorities cited; *Sowers v. Cincinnati, etc., R. Co.* (Ind. Sup.) 71 N. E. 134, 136, 137. In *Pittsburg, etc., R. Co. v. Swinney*, 97 Ind. 586, 592, it is said that the statute here in question "treats the filing of exceptions to the award of appraisers appointed upon the application of a railroad company as an appeal from the award to the court under whose authority the appraisers were appointed, and has, in connection with the authority to appeal in that way, a proviso as follows: 'Provided that, notwithstanding such appeal, such company may take possession of the property therein described, as aforesaid, and the subsequent proceedings on the appeal shall only affect the amount of compensation to be allowed.' This proviso served as a license to the appellant to enter into and to continue in the possession of the property in dispute pending the litigation which became necessary to determine the amount of compensation which it should be required to pay to enable it to acquire title."

It is evident under the authorities cited that when a railroad company appeals from the award within the 10 days allowed, and pays the award to the clerk for the purpose of entering upon the property described in the instrument of appropriation, that such a payment is not a voluntary payment in a legal sense, and the company is not thereby estopped from prosecuting its appeal.

Objection is made to the form of the demurrer to the answer, but a demurrer substantially the same in form was held sufficient in *Lewellen v. Crane*, 113 Ind. 289, 15 N. E. 515; *Young v. Warder*, 94 Ind. 357.

Judgment reversed, with instructions to sustain appellant's demurrer to appellees' answer.

(163 Ind. 476)

DAILY, County Assessor, v. WASHINGTON NAT. BANK. (No. 20,800.)

(Supreme Court of Indiana. Nov. 15, 1904.)

TAXATION—OMISSION TO RETURN PROPERTY—PROCEEDINGS FOR INSPECTION OF BOOKS—APPEAL—PARTIES—AMENDING ASSIGNMENTS OF ERROR.

1. Where a county assessor files an affidavit under Act March 6, 1891, § 34, relative to taxation, as amended by Act March 5, 1901 (Acts 1901, p. 109), stating that he believes a bank has in its possession papers showing an unlawful omission by H. to return property for taxation, and thereon an order is entered awarding to him a writ against the bank to permit him to inspect the property, whereupon the bank appears, and files a petition to amend the order and dismiss the proceedings, the assessor is a party to the judgment denying the petition, and must be made a party to the appeal therefrom by the bank.

2. The Supreme Court has no authority to depart from the requirement of rule 4 (55 N. E. iv) that amendment of the assignment of errors shall not be made after submission of the cause, except on notice and leave applied for in writing.

Appeal from Circuit Court, Daviess County; H. I. Houghton, Judge.

In the matter of the petition of John Daily, county assessor, for writ against the Washington National Bank, to show papers of Francis M. Harned. From a judgment the bank appeals. Appeal dismissed.

Hastings, Allen & Hastings, Padgett & Padgett, and O'Neill & O'Neill, for appellant. Heffernan & Mattingly and Gardiner & Slimp, for appellee.

HADLEY, J. John Daily, as county assessor of Daviess county, filed in the Daviess circuit court his affidavit under section 34 of the "Act concerning taxation," as amended by the act approved March 5, 1901 (Acts 1901, p. 109), stating therein that he believed the Washington National Bank had in its possession and under its control certain specified books and papers tending to show the unlawful omission by one Harned of taxable property, etc. The court entered an order upon the affidavit awarding said county assessor a writ against said bank commanding it to permit said assessor to inspect so much of said books and papers as pertained to the business transactions of Harned with the bank. Upon the entry of said order the Washington National Bank appeared and filed in the cause its verified petition praying the court, for reasons set forth, to set aside, cancel, and annul said order, and dismiss the proceeding. The court, after hearing and considering the petition, overruled it, to which ruling said bank duly excepted, and brings this appeal.

At the outset we are confronted with a motion to dismiss the appeal for an insufficient assignment of errors. The proceeding, when begun, was ex parte John Daily, county assessor of Daviess county. But when the Washington National Bank voluntarily came into the case and challenged

the order made in favor of said assessor, and invoked the judgment of the court upon its petition that the order in favor of the assessor be annulled and the proceeding dismissed, the case from that moment became an adversary proceeding, and Daily, assessor, was as much a party to the judgment appealed from as the Washington National Bank. The record recites: "Comes again the petitioner by his attorneys, and now comes the Washington National Bank by Hastings, Allen and Hastings, and Padgett and Padgett, its attorneys, and files its verified petition, * * * and the court, having heard said petition, and being fully advised," denies the same, to which ruling the bank at the time excepted, and prayed an appeal to the Supreme Court. John Daily, as county assessor of Daviess county, is not made a party to the appeal. Indeed, there is no appellee mentioned either in the entitling or body of the assignment. Not having been made a party, this court has no jurisdiction over the county assessor, and we cannot, therefore, determine the appeal upon its merits. Ex parte Sullivan, 154 Ind. 440, 56 N. E. 911; North v. Davison, 157 Ind. 610, 62 N. E. 447; Kreuter v. English Lake Land Co., 159 Ind. 372, 65 N. E. 4, and cases collated.

In its brief upon the motion to dismiss appellant requests that, if the court concludes that the assignment of errors is insufficient, leave be granted to amend. We have no authority to depart from the requirements of rule 4 of this court (55 N. E. iv). State v. Lankford, 158 Ind. 34, 62 N. E. 624.

Appeal dismissed.

(164 Ind. 389)

FIELD v. CAMPBELL. (No. 20,479.)¹

(Supreme Court of Indiana. Nov. 16, 1904.)

MARRIED WOMEN—SEPARATE ESTATES—CONTRACT OF SURETYSHIP—LIABILITY—BORROWING OF MONEY—STATUTORY DUTY OF LENDER—CHARACTER OF TRANSACTION—LENDER'S DUTY TO DETERMINE—EVIDENCE—WANT OF DUE CARE—MORTGAGES.

1. Under Burns' Ann. St. 1901, § 6964, providing that a married woman shall not enter into any contract of suretyship, whether or not a married woman is a surety or principal on any obligation is to be determined not from the form of the contract, but from whether she received in person or by benefit to her estate the consideration on which the contract depends.

2. Under Burns' Ann. St. 1901, § 6964, making a married woman's contract of suretyship void, there can be no recovery on her suretyship undertaking, except where the facts are such that the person who accepted it was reasonably justified in supposing and did suppose that she was not only a principal in name, but also in fact.

3. Where one who contemplated loaning money directed another to appraise the land offered as security to procure an abstract and to determine whether the title was good and unincumbered, and, if so, to make the loan, the lender was charged with notice of a recorded mortgage.

¹ 1. See Husband and Wife, vol. 26, Cent. Dig. §§ 623, 629, 630.

² Rehearing denied.

4. The question whether one loaning money to a married woman made such an investigation as would warrant him in treating the woman as a principal in the transaction is, when the facts are undisputed, a question of law.

5. In an action on a note and to foreclose a mortgage given by a married woman, evidence considered, and held to show that the lender was guilty of such want of care in attempting to ascertain whether the woman was acting in the transaction as a principal that the obligation, which was one of suretyship, could not be enforced against her; Burns' Ann. St. 1901, § 6904, making a married woman's contract of suretyship void.

6. Where a married woman executes a mortgage on her property, she acting as a guarantor of a debt previously incurred by another, she cannot then legally charge her estate by borrowing money to relieve her property of the mortgage; Burns' Ann. St. 1901, § 6904, making a married woman's contract of suretyship void.

7. The fact that a husband was in need of money to indemnify the sureties on his bond as county treasurer did not render a contract made by the wife, under which she borrowed money to assist the husband, a valid one; Burns' Ann. St. 1901, § 6904, making a married woman's contract of suretyship void.

Appeal from Circuit Court, Washington County; Wm. C. Uta, Special Judge.

Action by John A. Campbell, as administrator of Van R. Noblett, deceased, against Matilda E. Field. From a judgment in favor of plaintiff, defendant appeals. Transferred from Appellate Court under subdivision 2, § 1337j, Burns' Ann. St. 1901. Reversed.

See 67 N. E. 1040; 68 N. E. 911.

Gavin & Davis, M. B. Hottel, J. J. Giles, and McCart & Talbot, for appellant. Elliott, Elliott & Littleton and W. J. Buskirk, for appellee.

GILLETT, J. This is a second appeal. See Field v. Noblett, 154 Ind. 360, 56 N. E. 841. As the action now stands, John A. Campbell, as administrator of Van R. Noblett, deceased, is seeking to recover against appellant on a note and to foreclose a real estate mortgage which she and her husband executed to secure said note. Certain special paragraphs of answer sufficiently present the question of her suretyship. The general denial and special paragraphs of estoppel were pleaded by way of reply. The court found for appellee, and rendered a judgment and a decree in his favor. The question is duly presented whether the finding was contrary to law.

It appears from the evidence that in November, 1890, the term of Joseph J. Field as treasurer of Orange county expired. He was owing at the time, on account of his office, about \$12,000, but the deficit was not discovered until subsequently, when a report was made to the state. January 10, 1891, he and his wife, the appellant herein, executed to his bondsmen a mortgage covering all of the real estate of each of said mortgagors, conditioned to save the mortgagees harmless on account of their suretyship. The

mortgage was recorded January 12, 1891. A few days subsequently Joseph J. Field applied to Van R. Noblett for a loan of the above amount, and proposed to secure the same by a mortgage upon his own real estate. Noblett offered to loan \$9,000 on said real estate, but declined to loan more, for the reason that he regarded the security as insufficient. A few days later appellant applied in person to Noblett to borrow \$3,000 upon her real estate. He asked her if she wanted the money for her own use, and she answered that she did. Noblett stated that he was willing to make the loan, provided the title was good and unincumbered and the land worth \$6,000, she to pay the expense of the transaction. Appellant agreed to his proposition. He then directed one Hicks, who was at the time the cashier of a bank at Orleans, Ind., to appraise the land, and, if it was worth \$6,000, he was authorized to procure an abstract, and determine whether the title was good and unincumbered, and, if so, he was to make the loan. As to the relation of Hicks to the transaction, Noblett testified in part as follows: "I authorized Hicks to go and get the abstract and find out if the—whether it was good and unincumbered, and, if he thought it was, then he might take the mortgage for this amount." On cross-examination Noblett was asked this question: "Didn't you learn, Mr. Noblett, that Mrs. Field and her husband had mortgaged all of his property, and also her property, for the purpose of saving harmless the bondsmen of Mr. Field, while he was treasurer?" The witness answered: "Well, I'd heard say. I knew that. They had some fear about that—that their property was all mortgaged." Hicks appraised the lands offered as security for each loan, and he also procured and passed on the abstracts. Noblett further testified on cross-examination that he received a report from Hicks that the title to the real estate of appellant was good, that there was no incumbrance, and that it would be a sufficient security for \$3,000. Afterwards, on February 2, 1891, Noblett deposited \$12,000 in said bank, taking two certificates of deposit, one for \$9,000 and the other for \$3,000. The latter certificate was indorsed, "Pay to W. T. Hicks, for benefit of Mrs. Matilda Field. Van R. Noblett," and the certificate was turned over to Hicks. The other certificate was apparently placed under the control of Hicks, since he closed up both loans. February 13, 1891, the bondsmen of Joseph J. Field executed to Hicks a power of attorney, authorizing him to release said indemnity mortgage upon the payment to the treasurer of Orange county of \$12,701.74 "on the amount of his (Field's) indebtedness to said county." Hicks drew the notes and mortgages, and consummated both loans on the same day, February 14, 1891. On the morning of that day appellant came to the town of Orleans. She had no knowledge that a

mortgage was to be executed at that time. A person, who was a notary public, met her at a drug store, and she there signed the note and mortgage in question, and also joined her husband in the \$9,000 mortgage on his lands. She then accompanied the person who had taken her acknowledgment to the bank. One Ellis, who was her husband's successor in office, was in the bank at the time. Hicks counted out \$3,000 to her, and she receipted the payment on the certificate. She took the money to the drug store at once, where her husband was in waiting, and handed the money to him. He immediately went with it to the bank. Ellis testified that on that day Field paid him \$3,000 in cash and \$8,334.74 in a check or checks on said bank, and that the aggregate of said amounts was the sum then due from Field according to the footings of the books. Hicks afterwards entered of record a release of the indemnity mortgage. There is and can be no question made upon the evidence that the \$3,000 paid to Ellis was the money received by appellant. We are unable to find that Noblett testified that he believed the statement of appellant that "she desired the money for her own use" to be true.

Counsel for appellant contend that the note and the mortgage sued on are void under section 6964, Burns' Ann. St. 1901. That section is as follows: "A married woman shall not enter into any contract of suretyship, whether as indorser, guarantor, or in any other manner; and such contract, as to her, shall be void." It is the contention of appellee's counsel that the loan was made to appellant upon the representation that she desired it for her own use, and that Noblett was not bound to see to the application of the money which he furnished her. It is settled law in this state that whether or not a married woman is surety or principal on a promissory note or other obligation is to be determined, not from the form of the contract, nor from the basis upon which the transaction was had, but from the inquiry as to whether she received in person or in benefit to her estate the consideration upon which the contract depends. *Field v. Noblett*, 154 Ind. 360, 56 N. E. 841; *Harbaugh v. Tanner* (Ind. Sup.) 71 N. E. 145, and cases cited. It does not admit of question that a married woman may borrow money for herself, and that her subsequent disposition of it, whatever that may be, will not invalidate her promise to repay. *Bouvey v. McNeal*, 126 Ind. 541, 26 N. E. 396; *Cummings v. Martin*, 128 Ind. 20, 27 N. E. 173. If, however, it appears that an elaboration of outward details was, as both parties knew, but a cloak to cover an attempt to conclude a contract in violation of the statute, the indirection in method by which they have proceeded will not avail to save the transaction. *Webb v. John Hancock, etc., Co.*, 162 Ind. 616, 69 N. E. 1006; *Long v.*

Crosson, 119 Ind. 3, 21 N. E. 450, 4 L. R. A. 783. As was said in the case last cited: "Whatever device may be resorted to for the purpose of evading the statute, if the person seeking to enforce the contract knew of or participated in the design, or purposely remained ignorant, courts will deal with the transaction according to its substance, regardless of the form in which it may have been disguised." But it is not necessary that the party loaning the money should actually have been a party to the violation of the statute. Being advised of the fact that the woman is covert, he stands charged with a knowledge of her disability. A married woman has no power to deal as principal if she is in fact a surety. *Vogel v. Lechner*, 102 Ind. 55, 1 N. E. 554; *Andrysiak v. Satkoski*, 159 Ind. 428, 63 N. E. 854, 65 N. E. 286. There can be no evasion of the statute upon the part of the person who accepts an obligation that the woman is powerless to issue, and she could not escape the statutory prohibition except for the fact that she may be bound by an estoppel in pais. As the statute puts a married woman under disability, there can be no recovery upon her suretyship undertaking, except where the facts were such that the person who accepted it was reasonably justified in supposing, and did suppose, that she was not only a principal in name, but also in fact. In all ordinary circumstances, at least, there must be some degree of active diligence upon the part of a lender to ascertain the purpose for which a woman whom he knows to be married is borrowing money. It was said in *Cupp v. Campbell*, 103 Ind. 213, 2 N. E. 565, that: "One contracting an incumbrance on the estate of a married woman cannot, however, deal with her at arm's length, knowing that she is married, and that by law she is prohibited from contracting for the benefit of another; and, knowing that she is about to incumber her separate estate in his favor, he is bound to inquire concerning the consideration, and ascertain, if he may, by reasonable inquiry from her, whether it is for her benefit or for the benefit of another; and, unless misled by the conduct or representations of the wife, he will be held to have acquired a knowledge of the facts which prudent inquiry would have disclosed." There may be a necessity of further inquiry despite the general affirmation of the woman that she desires the money for her own use, in cases where the circumstances are such as to admonish the lender that probably she is seeking to evade the statute. This is the effect of the opinion in *Ward v. Berkshire, etc., Co.*, 108 Ind. 301, 9 N. E. 361, where it was said: "It is not material that there was a secret agreement between the husband and wife, for the appellee could not be prejudiced by any agreement of which it had no notice. The question is, not what facts are known to the mortgagors, but what facts did the appellee have knowledge of, or

ought it, under the circumstances, to be charged with having knowledge of? It is true that the appellee, having notice of Mrs. Ward's coverture, was bound to inquire whether she had capacity to make the contract; but when reasonable care and diligence are exercised the party contracting with the married woman may rely upon her representations. *Cupp v. Campbell*, supra. Here reasonable care and diligence were exercised, for no other person than the married woman could so well inform the lender what she intended to do with the money obtained upon the mortgage, and there were no circumstances indicating that her representations were untrue or even subjecting them to suspicion."

In determining the extent that Noblett had notice of what was to be done with the money received by appellant, it is important to consider what notice he himself had, and the notice, if not the actual knowledge, which his agent, Hicks, had, and the notice based on the record. Notwithstanding any conclusions indulged in by Hicks in his testimony, it is plain that he was an agent of Noblett, not only to appraise the land, but to pass upon the title and conclude the loan. All this was within the scope of his agency, and to the extent that he had notice or knowledge must notice or knowledge be imputed to his principal. It is laid down in *Story on Agency*, § 140, that "notice of facts to an agent is constructive notice thereof to the principal himself, where it arises from, or is at the time connected with, the subject-matter of his agency; for, upon general principles of public policy, it is presumed that the agent has communicated such facts to the principal; and, if he has not, still, the principal having intrusted the agent with the particular business, the other party has a right to deem his acts and knowledge obligatory upon the principal." It was said by Lord Broughman in *Kennedy v. Green*, 3 Myl. & K. 699: "The doctrine of constructive notice depends upon two considerations: First, that certain things existing in the relation or conduct of the parties as in the case between them beget a presumption so strong of actual knowledge that the law holds the knowledge to exist because it is highly improbable that it should not; and, next, that the policy and safety of the public forbid a person to deny knowledge while he is dealing so as to keep himself ignorant, or so that he may keep himself ignorant, and yet all the while let his agent know, and himself perhaps profit by that knowledge. In such a case it would be most iniquitous and most dangerous, and give shelter and encouragement to all kinds of fraud, were the law not to consider the knowledge of one common to both, whether it be so in fact or not." A writer on the law of agency states the doctrine thus: "The principal is chargeable with notice of all the material facts which come to the knowl-

edge of his agent in the transactions in which the agent is acting for the principal. If this were not so, a purchaser would always free himself from possible equities arising from the acquisition of knowledge of adverse rights by purchasing through an agent. It is against the policy of the law to place one who deals through an agent in a better position than one who deals in person." *Huffcutt on Agency*, § 141. "My solicitor," as was said in an English case, "is my alter ego: he is myself. I stand in precisely the position he does in the transaction, and therefore his knowledge is my knowledge; and it would be a monstrous injustice that I could take advantage of what he knows without the disadvantage." *Boursot v. Savage*, L. R. 2 Eq. 134. The fact that the mortgage to the bondsmen of the husband was of record lifts the information which Noblett admits that he had concerning it above the plane of mere rumor, if his answer above the stand is to be so construed. "Any instrument affecting the title which is properly recorded is absolute notice to every one subsequently dealing with the title, irrespective of whether such person has examined the records, or even had an opportunity to make an examination." *Wade on Notice* (2d Ed.) § 97. See, also, *Webb v. John Hancock, etc., Co.*, 162 Ind. 616, 69 N. E. 1006; *McPherson v. Rollins*, 107 N. Y. 316, 14 N. E. 411, 1 Am. St. Rep. 826. Taken as a whole, the authorities warrant the assertion that the notice which the law imputes from notice to an agent, or from the fact that an instrument in the chain of title is properly of record, is the equivalent of actual notice. We are not unmindful that a false representation might sometimes lead a person who contemplated loaning money on real estate security to omit to examine the record, but we fail to perceive how the effect of such a representation would be to prevent an agent from informing his principal of facts which it was nevertheless the agent's duty to communicate, or why that should furnish any reason for not conclusively presuming, as in other cases, that the duty of the agent to communicate facts of importance to his principal was discharged. And the indulgence of this presumption in the case before us, thereby infecting Noblett with the notice of Hicks, makes it just, as we think, to hold that the representation of appellant was not of such a character as to relieve Noblett of the imputation of record notice.

Focusing all elements of notice in Noblett, and we find that before the loan was made he knew that Field and his wife had executed a mortgage of indemnity on all of the property belonging to each of them to the sureties on Field's official bond; that the bondsmen's liability was estimated by them at a sum approximating \$12,000; that Field had sought to borrow \$12,000 on his property, but, not being able to borrow more

than \$9,000, had arranged to obtain the latter sum; that his wife was seeking to borrow on her property a sum equal to the difference between \$9,000 and \$12,000; that, after the full sum of \$12,000 had been promised, and the money deposited in the bank to make the loans, the bondsmen had placed a power of attorney to release the indemnity mortgage in the hands of the agent, in apparent anticipation that an amount approximating the aggregate of the proposed loans would be paid; and, in addition to all this, Noblett had notice that the treasurer was actually in the bank while Field and his wife were closing up their respective transactions with Hicks. The fact that the procuring of said loans and the paying off of Field's public indebtedness were transactions dependent on each other could not have escaped the notice of Hicks, since an obedience to the injunction to see that the land was unincumbered made it his particular duty to ascertain whether the money borrowed was to be used in such a way that, as attorney in fact, he would be able to release the indemnity mortgage.

As to the answer which Noblett testifies that he received from appellant in response to his mild and general question, it must be said, in view of the circumstances, that the meaning of her statement was at least problematical. It might have meant that the money was to be applied for the benefit of herself or of her separate estate, or there was room for the construction that she answered that the money was "for her own use" in the sense of "Is it not lawful for me to do what I will with mine own?" Noblett's inquiry was a very scant one at the best, but in the light of the notice of facts with which he was charged before the loan was concluded it is clear that to have asked appellant the explicit question as to whether she intended to apply the money she was borrowing on her husband's shortage was the least that he could have done by way of inquiry to furnish a basis on which to charge appellant as a principal. Had there been an effort to observe the statute upon the part of Noblett and his agent, we do not understand how they could have failed to perceive that every footprint having to do with the loan in question and its associated transactions indicated that the movement of events was toward the consummation of the incumbering of appellant's estate to raise money to apply on her husband's delinquency. It was said in *Webb v. John Hancock, etc., Co.*, 162 Ind. 618, 69 N. E. 1006—a case very much like this in principle: "It would appear, when all of the facts and circumstances of which appellee had knowledge are considered, that its neglect to make further inquiry can only be explained upon the theory that it desired to remain ignorant. It was not at liberty to close its eyes, and make no further inquiry or investigation, and then, as it does in this action, attempt to

shield itself upon the plea that it was ignorant of the purpose of appellants to evade the law by executing the conveyances in question." The facts being without dispute, the question whether a lender made such inquiry as to warrant him in treating the woman as a principal is a question of law. While she cannot use her disability as a means for the perpetration of fraud upon those who, after due inquiry, have treated her as engaged in the exercise of a power she undoubtedly possessed, yet such is her status that there must be circumstances of due inquiry to authorize her to be charged upon a contract which she has made in defiance of law. The statute represents a legitimate exercise of the power of the Legislature to determine what is expedient. As to such an enactment it may be said that when the legislative department speaks it conclusively determines what the public policy of the state is, and it becomes the business of the courts to enforce the statute in dealing with transactions entered into in violation of its evident spirit, whatever their form, to the end that the declared policy of the state may prevail. The question in this case is whether there was due inquiry. We hold that the meager and almost ambiguous statement which Noblett elicited from appellant, when considered in the light of the fact that the circumstances from the beginning to the end conspired to warn him that she was seeking to violate the statute, was not sufficient to warrant him in dealing with her upon the assumption that she was a principal in the transaction. It was his duty to observe, and follow up by special inquiry, the clear indices of a purpose on her part to evade the law. Bearing in mind the fact that Noblett was not authorized to deal with appellant on the basis of her being *sui juris*, and that the statute is to be enforced against all who cannot claim that after due care they were deceived into the belief that they were dealing with a principal, we deem it clear that there was in the transaction before us such a want of care to ascertain the purpose for which the loan was to be made that the transaction should be condemned as a violation of law. The question is not presented to us as one involving the weight of the evidence. It is a case where the legal effect of the evidence was misapprehended by the trial court. *State v. Forsythe*, 147 Ind. 466, 44 N. E. 593, 33 L. R. A. 221.

We have thus far dealt with the question in hand upon the assumption that the contract of appellant was in fact one of suretyship, and, but for the argument of counsel for appellee, we might close this opinion without discussion of this point. It was decided in *Andryslak v. Satkoski*, 159 Ind. 428, 63 N. E. 854, 65 N. E. 286, that the fact that the payment of a debt by a wife relieves land in which she has an inchoate interest of a mortgage does not authorize her to be

charged as principal. But it is contended that the indemnity mortgage was only voidable, since the statute provides that the class of obligations therein mentioned are void "as to her," thereby making her coverture a personal defense, and that, as she did not elect to avoid the mortgage, but chose rather to pay it, the note and the mortgage in suit were executed by her as a principal. While it is true that in some of our cases it has been stated that the suretyship obligation of a married woman is only voidable, yet such language has been used in pointing out the fact that under the terms of the statute the defense is of a personal nature. If the undertaking was of a character which the statute prohibited, it would not have such a status that her mere subsequent election to waive the defense could operate as a confirmation. See *Vorels v. Nussbaum*, 131 Ind. 267, 31 N. E. 70, 16 L. R. A. 45. It strikes us that to adopt the argument of counsel would be to attach importance to the shadow, rather than to the substance, which is the legislative enactment. Moreover, to hold that a married woman might execute a mortgage upon her property, purporting to render her liable as a guarantor to pay a debt previously incurred by another, and that she might then legally charge her estate by borrowing money to relieve her property of the mortgage, would be judicially to declare the open sesame which would swing wide the door to the nullification of the statute. Whether the lender may be led in some instances to assume that the prior mortgage which his money is used to satisfy is a valid incumbrance is another question. As we have seen, she cannot, except by conduct which is tantamount to deceit, and which actually does mislead, charge herself with any debt except for the benefit of herself or of her estate. The case of *Cupp v. Campbell*, 103 Ind. 213, 2 N. E. 565, fully discusses and disposes of the contention of counsel with which we are now dealing, particularly since the prior mortgage in the case at bar showed on its face that it was executed by way of indemnity. In the case referred to it was said: "The question which remains is, can the wife be held on the notes, and the mortgage in suit be enforced against her separate property, to the extent that the money secured thereby was used in discharging the invalid prior mortgage. We think that this question must be answered in the negative. * * * Where her estate is incumbered in such manner as that she is exposed to the hazard of losing it, even though such incumbrance is for the debt of another, it is manifestly beneficial that she should have the power to relieve it from the peril of such incumbrance; and when she and her husband contract a loan for that purpose it

cannot be said that the consideration for such loan does not inure to her benefit. Where, however, an incumbrance is made on the wife's separate estate to pay the husband's debt, or to remove an incumbrance, which, by the very terms of the statute, she had no power to make, and which exposes her land to no peril whatever, we can discover no ground upon which it can be said that the consideration of an incumbrance so made inures to the benefit of the wife. One seeking to enforce a mortgage against the separate estate of a married woman must show by proof aliunde that the debt secured by the mortgage was either the debt of the wife or that it inured to the benefit of her separate estate. *Bowman v. Kaufman* [80 La. Ann. 1021]. And, if nothing further can be shown than that it was to pay the husband's debt, to secure which a mortgage had previously been made, which was within an absolute statutory prohibition, we think there is a failure of proof. Unless there is at least a bona fide question as to the validity of the incumbrance, resting upon some apparent foundation, the contract is one of suretyship." See, also, *Andryslak v. Satkoski*, 159 Ind. 428, 63 N. E. 854, 65 N. E. 286. It can make no manner of difference that appellant was given a temporary possession of the money. There being no element of estoppel present, her original purpose in borrowing the money, and her subsequent application of it, must be regarded as component parts of what was an entire transaction.

The fact that Field and his wife were in dire need of money at the time of the transaction gave her no enlarged power to borrow money with a purpose to use it in paying the debt of her husband. We make no question about her right to apply her money to pay an indebtedness of his, but we hold that, in the absence of an estoppel, she cannot enter into a valid contract to repay money borrowed by her for that purpose. The stress of circumstances in which the two were involved cannot obscure the meaning of the statute. It was intended to prevent the making of contracts in the nature of suretyship undertakings by married women in all cases. In *Harbaugh v. Tanner* (Ind. Sup.) 71 N. E. 145, it was said: "One of the principal reasons for enacting the statute forbidding married women to enter into contracts of suretyship, and providing that such contracts were void, was to prevent them from squandering or incumbering their property as sureties for improvident husbands;" citing *Cummings v. Martin*, 128 Ind. 20, 27 N. E. 173; *Vorels v. Nussbaum*, 131 Ind. 267, 31 N. E. 70, 16 L. R. A. 45.

Judgment reversed, and a new trial ordered.

(34 Ind. App. 511)

UNION TRACTION CO. OF INDIANA v. SICELOFF. (No. 4,952)*(Appellate Court of Indiana, Division No. 1.
Nov. 15, 1904.)**CARRIERS—STREET RAILROADS—INJURIES TO PASSENGERS—PREMATURE STARTING.**

1. A complaint alleged that plaintiff was thrown with such force to a brick pavement that he was rendered unconscious for six hours; that his head was cut open, and the muscles of his back strained, so that he was and would always be unable to do any manual labor; that in falling he struck his elbows on the pavement so that the flesh was torn away and the bones exposed to view, and plaintiff was then and there rendered a permanent cripple. *Held*, that the complaint was sufficiently specific as to the injuries sustained.

2. A complaint alleging that defendant's street car stopped at a regular stopping place, when plaintiff and other passengers began to leave the car by the rear platform; that the conductor could have seen, and did see, the position of such passengers until they stepped off the car; and that, as plaintiff was in the act of stepping from the lower step, the car was suddenly started with a violent jerk, and that the conductor, without regard to plaintiff's dangerous position, negligently signaled the car to be so started—sufficiently charged negligence on the part of the conductor.

3. Where a street car has stopped for the purpose of permitting passengers to alight, it is the duty of the conductor to know that passengers have alighted before starting the car.

Appeal from Circuit Court, Tipton County; J. F. Elliott, Judge.

Action by William P. Siceloff against the Union Traction Company of Indiana. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

J. A. Van Osdol, W. A. Kittinger, J. R. Coleman, and William Carter, for appellant. H. C. Austill, Alfred Ellison, and W. S. Ellis, for appellee.

ROBINSON, J. Suit by appellee for damages for a personal injury. There was no reversible error in overruling appellant's motion to make the complaint more specific in its averments as to the nature and extent of the injuries claimed to be permanent. Upon this question the averments are that he "was thrown with such force to said brick pavement that he was rendered unconscious for a period of about six hours; that his head hit said pavement with great force, and the skin on the back thereof was cut open; that he fell upon his back with such great force that the muscles thereof were strained and disarranged, and have since become stiff and sore, and the plaintiff is unable to do manual labor of any kind; that in falling he also struck his elbows on said pavement, and the flesh was thereby torn away, and the bones at the elbow joints were exposed to view; that the plaintiff was compelled to and did keep his bed for a period of five weeks on account of said injuries; and was then and there and thereby rendered a permanent cripple, and is not now, nor never will be, able to do and perform

the manual labor that he was able to do and perform [before] receiving the injury herein complained of." After stating what appellee was earning at manual labor before the injury, it is averred, "But that since said time has not been able to do any manual labor of any kind, and has been permanently disabled and crippled by said injury." The complaint sufficiently describes the injuries appellee claims he received. These injuries, he avers, rendered him a permanent cripple. Whether they did or not must be determined from the evidence. If the injuries described permanently disabled appellee, the jury could take that fact into consideration in determining the amount of damages; and this would be true whether he averred that the injuries received were permanent or did not aver it. No question is here presented of an attempt to prove injuries different from those averred. More specific averments as to the injuries received were certainly not essential to advise appellant of the cause of action it was called upon to defend. We fail to see that denying the motion was in any way prejudicial to appellant's rights. See *Ohio, etc., R. Co. v. Selby*, 47 Ind. 471, 497, 17 Am. Rep. 719; *Town of Elkhart v. Ritter*, 66 Ind. 136; *Ohio, etc., R. Co. v. Oosby*, 107 Ind. 32, 7 N. E. 373; *Heltonville, etc., Co. v. Fields*, 138 Ind. 58, 36 N. E. 529; *Indiana, etc., Co. v. Stewart*, 7 Ind. App. 563, 34 N. E. 1019; *American, etc., Co. v. Sick*, 9 Ind. App. 306, 36 N. E. 659. In *Tipton Light, etc., Co. v. Newcomer*, 156 Ind. 348, 58 N. E. 842, cited by counsel, it was the averment as to the alleged negligence that was held insufficient against a motion to make more specific.

The complaint is not open to the objection that it fails to charge negligence. It is averred that the car had stopped at a regular stopping place, and appellee and other passengers began to leave the car by the rear platform; that the "conductor stood on the rear platform of said car, and could have seen, and did see, the position of said passengers at all times from the time they left their seats in the car until they stepped off of the steps thereof"; that as appellee was in the act of stepping from the lowest car step to the street the car was suddenly started with a violent jerk; that the conductor could have seen the position appellee was in at the time, "but did then and there, without regard to the dangerous position in which plaintiff was placed, negligently signal or permit said car to be started, and cause plaintiff to be hurled" to the ground. Whether or not the conductor saw the perilous position of appellee when he caused the car to start, it was his duty, being in charge of the car, and the car having stopped to permit appellee and other passengers to alight, to ascertain and know whether the passengers had alighted before he started the car. See *Terre Haute, etc., R. Co. v. Buck*, 99 Ind. 346, 49 Am. Rep. 168; *Anderson v. Citi-*

*Rehearing denied January 27, 1905.

sens', etc., R. Co., 12 Ind. App. 194, 33 N. E. 1109; Citizens', etc., R. Co. v. Hoffbauer, 23 Ind. App. 614, 56 N. E. 54.

The remaining question argued is that the evidence shows appellee was guilty of negligence contributing to his injury; that it shows that he went upon the steps of the car when in motion and running with increasing speed, and deliberately stepped off. Whether the car had stopped at the street crossing, and while appellee was attempting to alight from the car, and before he had alighted, the car was started, or whether the car was running rapidly, after it had crossed the street crossing, before appellee attempted to alight, were questions for the jury to determine from the evidence; and from a careful consideration of the evidence it is clear that we cannot disturb the jury's conclusion without weighing the evidence. The record discloses some evidence to support the verdict.

Judgment affirmed.

(35 Ind. App. 161)

SISSON et al. v. CARITHERS et al. (No. 4,873).*

(Appellate Court of Indiana, Division No. 2, Nov. 17, 1904.)

HIGHWAYS — ESTABLISHMENT — PETITION — AMENDMENT — COMMISSIONERS' COURT — JURISDICTION.

1. Where the original petition for the establishment of a highway did not contain the names of the owners of the land through which the proposed highway would pass, the commissioners' court properly permitted it to be amended so as to cure such defect.

Appeal from Circuit Court, Vanderburgh County; L. O. Rasch, Judge.

Petition by Joseph Carithers and others for the establishment of a highway, in which Joshua S. Sisson and others file objections. A judgment was rendered in favor of petitioners, and the objectors appeal. Transferred from the Supreme Court. Affirmed.

H. A. Yeager, for appellants. Twinham & McGinnis and Buskirk & Brady, for appellees.

ROBY, P. J. Appellees filed their petition for the location and establishment of a public highway in Gibson county. Viewers were appointed by the board of commissioners in accordance with the statute, and reported that the proposed highway would be of public utility. Appellants, Sisson, Welborn, Hyneman, and Yeager, thereupon filed their remonstrance upon the ground that the proposed highway would not be of public utility. Reviewers were thereupon appointed, and thereafter filed a report in favor of the public utility and establishment of the proposed highway. The description

of the same in both reports was identical. The width in the reviewers' report was fixed at 30 feet, but not stated in the original report. Thereupon each of the appellants filed a separate remonstrance for damages. Reviewers were appointed thereon, who reported, assessing damages as follows: To Sisson, \$100; Welborn, \$40; Hyneman, \$20; Yeager, \$20. The board thereupon ordered that the highway be established as set out in the report, provided the petitioners should pay the damages assessed as aforesaid to the county treasurer within 30 days from February 5, 1901. The petitioners thereupon filed a treasurer's receipt for said sum, and appellants prayed an appeal to the circuit court. Such proceedings were had as that the case was ultimately tried to a jury in the Vanderburgh circuit court; a verdict being returned in favor of the public utility of the proposed highway, and assessing damages to the appellants as follows: Yeager, nothing; Welborn, \$35; Hyneman, \$23.50; Sisson, \$225. Appellants thereupon filed their written motion in arrest of judgment, which was overruled, and judgment rendered upon the verdict.

The eighth assignment of error is that the court erred in overruling appellants' motion in arrest of judgment. The original petition did not contain the names of the owners of the land through which the proposed highway would pass. It was, however, amended in the commissioners' court by the insertion of said names, upon leave granted, and the cause was tried in the circuit court upon such amended petition: The amendment was properly allowed. Hedrick v. Hedrick, 55 Ind. 78. Whatever force the objection originally had was taken from it by the amendment.

One page of appellants' brief is given over to a "plat of proposed highway." The route described in the petition and that adopted by the viewers are thereon shown as being widely divergent, and a substantial portion of the argument is based upon such divergence. The return to a writ of certiorari shows that the identical route set up in the petition is followed in the report of the viewers and reviewers, the apparent difference being due to a clerical omission by the clerk. In accordance with the suggestion made in appellants' reply brief, we "let that pass."

The board of commissioners had original jurisdiction of the subject-matter of this proceeding. Appellants were notified of its pendency, appeared, and vigorously contested the issue. Whatever irregularities might have existed in the proceedings, it is manifest that the court did have jurisdiction at the end as at the beginning.

The question of costs was disposed of by apportioning them among the several parties in a manner which is neither claimed nor shown to have been an abuse of the court's discretion, and which, in so far as the appel-

*1. See Highways, vol. 25, Cent. Dig. § 52.

*Rehearing denied, 73 N. E. 924.

lant Yeager was concerned, is more favorable to him than he might have asked.

We are of the opinion that no substantial error was committed at any stage of the case, and the judgment is therefore affirmed.

(34 Ind. App. 44)

DAVERN et al. v. BOARD OF COMRS OF DECATUR COUNTY. (No. 5,212.)

(Appellate Court of Indiana, Division No. 2.
Nov. 16, 1904.)

HIGHWAYS—CONSTRUCTION—PETITION—STATUTES.

1. Acts 1899, p. 128, c. 97, provides that the county commissioners, when petitioned therefor by 50 freeholders, voters of any township or townships contiguous to each other, and inhabitants of the county where the roads petitioned for are to be improved, shall submit to the voters thereof the question of such improvement, etc. *Held*, that such act did not require that a petition for the improvement of roads in a district containing two or more contiguous townships should be signed by 50 or more voters in each township, but that it was sufficient if it was signed by 50 petitioners in all, some of whom resided in each township.

2. Acts 1899, p. 128, c. 97, providing for the improvement of highways, requires the proceeding to be initiated by a petition to the county commissioners, signed by 50 freeholders, which shall definitely describe the beginning and terminus of each of the roads, giving the general direction of all roads, together with the estimated distances, and declares that, if any part of a road is to be new, it shall be described with such definiteness as will enable any practical land surveyor to locate it. *Held*, that such act contemplated the construction of new roads as well as the improvement of roads already in existence.

Appeal from Circuit Court, Decatur County; Willard New, Special Judge.

Action by Daniel Davern and others against the board of commissioners of Decatur county. A judgment was rendered in favor of defendant, and plaintiffs appeal. Case transferred from Supreme Court. Affirmed.

Davidson Wilson and Jno. F. Goddard, for appellants. Bennett & Davidson and Wickens & Osborn, for appellee.

COMSTOCK, J. Appellants sought to enjoin the board of commissioners of Decatur county from submitting to the voters of Adams and Clinton townships, of said county, at a regular or special election, the question of improving certain roads and highways in said townships, and to improve certain new roads and parts of roads not theretofore opened, laid out, or established, upon the ground that the commissioners did not have jurisdiction of the subject-matter. The court sustained appellee's demurrer to the amended complaint, and its special demurrers to each of the eight separate specifications thereof. Appellants refusing to plead further, judgment was rendered in favor of appellee for costs. These rulings are assigned as error.

The amended complaint, in substance,

shows that on the 6th day of August, 1900, a petition was presented by Charles B. Miller and others, praying for the improvement of certain roads and highways described therein, in Clinton and Adams townships, Decatur county, Ind., by graveling, paving, or macadamizing; when so graveled, paved, or macadamized, to be free of toll. The complaint shows that three copies of the petition were written, and the copies circulated and signed separately—each petitioner signing but one copy—but that these copies were attached together and filed as a single petition. Said petition, before any signatures were obtained, stated, "this petition is written in triplicate and all three of said copies are to be presented together and considered as a single petition." The copy designated as "Exhibit A" was presented by the resident freehold voters of Clinton township, which showed affirmatively that the petitioners were resident freehold voters of said Clinton township, in number 25, and less than 50. The second copy of said petition, designated as "Exhibit B," was presented by resident freehold voters of said Adams township, and in numbers more than 50. The third was presented by the resident freehold voters of said Adams township, and that copy affirmatively showed that the petitioners were freehold voters of said township, and in number 27. On the 7th day of August, 1900, said board of commissioners, passing on said petitions, found that they constituted but a single petition, and were treated by the board and intended by the petitioners as a single petition; that the system of roads was a continuous and connected system extending in and through said township, except the Foster Schoolhouse and Mt. Moriah Roads, which did not connect with each other or any other main road. The said board also found that said petition was signed by 50 freehold voters of Adams and Clinton townships, and appointed a civil engineer and viewers, and ordered an election to be held on a day to be fixed in the future. The petition asked to have improved certain new roads and parts of roads lying wholly within the township of Adams, alleging that said new roads or parts of roads had not previously been opened, laid out, or established; and the petition did not aver that said new roads or parts of roads would shorten the route, straighten the roads, and give better drainage. Said petitions were signed by different persons, circulated, signed, and executed separately and independently of each other. It was alleged that the proposed improvement, including bridges, culverts, and drains, would exceed 4 per cent. of the taxable property of the said township, and the ordering of the proposed improvement was in violation of law, as there was not at the time of the filing of said petition any gravel-road fund for the payment of the expenses and per diem of the engineer and viewers. It is not shown that

any report on said petition or estimate of the cost of the road had been made by the viewers and engineer, nor what would be the cost of the road, nor the value of the taxable property.

Appellants discuss and contend for but two propositions: First, to create a taxing district of two or more townships, the petition should be signed by 50 freehold voters of each township; second, the board of commissioners has no power under the statute to construct a gravel road over a route not already laid out or established according to statute.

Said petition was presented under an act approved February 24, 1899 (Acts 1899, p. 128, c. 97). That part of the act applicable to the question before us reads as follows: "That the county commissioners of any county in this state, when petitioned therefor by fifty (50) freeholders, voters of any township or townships contiguous to each other, * * * inhabitants in such county, where such road or roads are to be improved * * * shall submit to the voters of said township or townships, towns and cities in said township or townships * * *." The words "fifty freeholders, voters of any township or townships contiguous to each other * * * where such roads are to be improved," show that but 50 freeholders are required from one or more of the townships. Construction of a statute is resorted to only when the words employed are ambiguous or of doubtful meaning. Neither of these reasons exists in the language quoted.

It is contended by appellants that the words "any township," when applied to a district composed of two or more townships, have the meaning of "every township"; that the interpretation that only 50 freehold voters are required to petition for all the townships would result in an injustice not contemplated by the Legislature. To quote the illustration given in appellants' brief: "Decatur county is composed of nine townships, eight of which are contiguous with Washington, in which the city of Greensburg is located. Thus, according to appellee's construction, forty-four freeholders, voters of Washington township, and one freeholder from each of the other seven townships, could create a taxing district composed of eight townships." A township is but an artificial municipal division. People in one township may have an interest in the highways of another township. In many instances portions of an adjoining township are nearer than portions of the township in which a freeholder resides. The mere filing of the petition does not create the taxing district. It comes into existence only when "a majority of the voters on said question are in favor of building such road or roads." A tax to construct a road or for other public improvement in one portion of the municipality at the general expense of the taxing district is for a governmental purpose,

and is valid. *Cooley on Taxation* (2d Ed.) 180-183, 146-152, 682; *Elliott on Roads & Streets* (2d Ed.) 83, 450, 460; *Gilson v. Board*, etc., 128 Ind. 65, 27 N. E. 235, 11 L. R. A. 835. The remedy for such taxation, if unwise, unjust, or oppressive, must be sought from the legislative, and not the judiciary, department of the state. *Lowe v. Board*, etc., 156 Ind. 163, 59 N. E. 466.

The case of *Gilson et al. v. Board*, etc., *supra*, is in point, and sustains our construction of the statute. The case involved the purchase of a tollroad passing through the townships of Center, Jackson, and Rush, in Rush county. "Fifty freeholders of the townships of Center, Jackson, and Rush, in Rush county, filed in the office of the auditor of said county a petition, signed by them, praying the board of commissioners of said county to submit to the voters of said townships, at a special election, the question of purchasing a tollroad * * * in the said county. * * * Such proceedings were had under this petition that the road was appraised, the election ordered, notice thereof given, the election held, and a return thereof made to the board of commissioners of Rush county. The board determined that a majority of the votes cast at such election was in favor of the purchase, and thereupon entered an order to purchase the same. A majority of all the votes cast in Center township was against the purchase, but a majority of all the votes cast in the three townships voting at such election was in favor of purchasing the road." The petition was not signed by 50 freehold voters in each township, and, while the opinion does not in terms state that to be unnecessary, but one inference can be drawn from the conclusion reached. The petition in the case last named was filed under an act of the General Assembly approved March 8, 1889 (Acts 1889, p. 276, c. 137), the language of which is almost identical with that of the act governing the case at bar. In the course of the opinion the court says: "This statute not only provides for taxing districts, but it divides such districts into two classes, namely, first, districts composed of a single township, where it determines to purchase a tollroad within its limits; and, second, a district composed of two or more townships, where they jointly determine, by a proper vote, to purchase a tollroad running into or through all the townships voting for such purchase. This case falls within the second class, and, if a majority of the votes cast in that district was in favor of purchasing the tollroad mentioned in the complaint, it was the duty of the board of commissioners of Rush county to make such purchase. The contention that the other townships had no power to vote a tax upon Center township without its consent is not tenable, for the reason that Center township elected to become a part of the taxing district by signing the petition praying the board of commissioners to make a pur-

chase of the tollroad in the manner prescribed by law. Had there been no freeholders found in Center township to sign the petition, then it would have been impossible to vote a tax on the property of that township with which to purchase the tollroad; but, when its freeholders saw fit to join with the other townships in a petition to purchase the road, we think it became a part of the taxing district, and took its chances on the result of the vote upon the question submitted." At page 74, 128 Ind., page 238, 27 N. E., 11 L. R. A. 835, it is stated that, "had it been the intention of the Legislature that the purchase should depend upon the result of the election in each township, it is reasonable to assume that the Legislature would have provided for several petitions and several elections, and would have made no provision for joint petitions and joint elections"; thus holding inferentially, at least, that the petition and election are joint, and not several. In the recent case of *Brown et al. v. Miller et al.* (Sup.) 71 N. E. 122, it is expressly held that it is sufficient if the petition be signed by 50 or more freeholders of the taxing list, whether the same is composed of one township or more.

The portion of the act pertinent to appellant's second proposition is as follows: "If any part of the road or roads is to be new road or roads they shall be described with such definiteness as will enable any practical land surveyor to locate them." Page 130, supra. Immediately preceding the foregoing quotation, the statute reads: "Provided further that the petition of the fifty freeholders aforesaid shall clearly and definitely describe the beginning and terminus of each road or roads, giving the common name and general direction of all roads together with their measure or estimated distances." The statute manifestly contemplates new roads, as well as those already in existence. *Brown et al. v. Miller et al.*, supra. Appellants cite *Crow v. Judy*, 139 Ind. 562, 38 N. E. 415, in support of the proposition that "the board of commissioners have no power under the statute, to construct a gravel road where no highway previously existed. The petition in that case was filed under an act of the General Assembly approved March 3, 1877 (Acts 1877, p. 82, c. 47), being sections 5091 to 5096, inclusive, of the Revised Statutes of 1881. That case holds that sections 5091 and 5092, supra, make no provision for opening new roads. No language equivalent to that used in reference to new roads, under the act under consideration, appears in said sections 5091, 5092. Since the decision the Legislature amended the act conferring the power to establish any portion of such improvement petitioned for upon lands where there are no highways established at the time the petition is filed. Acts 1901, p. 72, c. 51. In the case of *Gipson v. Heath*, 98 Ind. 100, cited in *Crow v. Judy*, the petition was

filed under section 5091, supra (Acts March 3, 1877, p. 82, c. 47), authorizing the construction of a highway upon a new route when necessary to shorten or straighten a road, to secure a better route, or for the purpose of drainage. The reasonable construction of the act under which these proceedings were had authorized the action of appellee.

Counsel for appellee earnestly contend that the copies of the petition filed as exhibits with the complaint are not the basis of the action, and without them the facts stated are not sufficient to constitute a cause of action; that appellants had another and adequate remedy than injunction; and that for each of these reasons, if for no other, the demurrer to the complaint was properly sustained. The exhibits were not the basis of the action, but upon these questions we have not deemed it necessary to pass.

Judgment affirmed.

(34 Ind. App. 22)

ELLISON v. TOWNE. (No. 4,101.)

(Appellate Court of Indiana, Division No. 1.
Nov. 15, 1904.)

CONTRACTS—ACTIONS—PLEADING—PARA-
GRAPHS—ATTACK—EXHIBITS.

1. Though a complaint as a whole may be attacked by assignment of error for want of sufficient facts, without regard to the number of paragraphs it may contain, such initial attack cannot be made on the paragraphs severally of a complaint containing a number of paragraphs.

2. Burns' Ann. St. 1901, § 455, provides that the execution of a written contract includes the subscribing and delivery thereof, and section 365 declares that, when any pleading is founded on a written instrument, the original, or a copy thereof, must be filed with the pleading. *Held* that, where a complaint in an action on a contract averred that plaintiff and defendant entered into a contract in writing, "a copy of which is filed herewith, whereby," etc., and the body of the writing purported to be an executory contract between defendant on the one part and no person on the other, and was signed by plaintiff alone, it could not be presumed that defendant's name in the body of the instrument was placed there by way of signature; and, in the absence of an averment to such effect, the pleading did not show a completed contract, and was therefore demurrable.

Appeal from Circuit Court, Allen County; John H. Aiken, Judge.

Action by Herbert N. Towne against Thomas E. Ellison. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Hugh G. Keegan, for appellant. T. W. Wilson, for appellee.

BLACK, C. J. The appellee's complaint consisted of four paragraphs, the first of which was amended. The appellant, in his assignment of errors, by specifications thereof addressed, respectively, to the several paragraphs, has sought to question their sufficiency separately. Though the complaint

¶ 1. See Appeal and Error, vol. 2, Cent. Dig. § 1237

as a whole, however many paragraphs it may have, may be attacked by assignment of error for want of sufficient facts, such initial attack cannot be made upon the paragraphs severally of a complaint containing a number of paragraphs.

It is also assigned that the court erred in overruling the demurrer to the amended first paragraph. A demurrer addressed to the separate paragraphs of the original complaint was overruled, and thereafter the appellee filed his amended first paragraph, and no demurrer thereto appears to have been filed. The overruling of the demurrer to each of the other paragraphs is properly assigned as error. The specification relating to the fourth paragraph is expressly waived in the brief for the appellant. In the second and third paragraphs the appellee sought the recovery of damages for the appellant's breach of an alleged contract in writing, a copy of which is filed with the complaint as an exhibit. The instrument thus declared upon as a written contract purports in the body thereof to be an agreement, the appellant being named as one of the parties, but no person being named as the other party. In the places where the name of the other party should appear there are blank spaces filled with dashes. The writing expresses some things to be done by the appellant and many things to be done by "——," there being no name but that of the appellant in the body of the instrument, at the end of which is the following: "Signed.—H. N. Towne." This written instrument, not signed by the appellant, is filed with the paragraphs of complaint as an exhibit showing an entire contract in writing on which the suit is based. Therefore, to make the paragraphs in question sufficient on demurrer, the instrument exhibited should show on its face all that is necessary to an express contract of the person sued thereon. The form of the instrument indicated that it was intended to be executed by both the parties to the contract when completed. In the body of the writing it purports to be an executory contract between the appellant on the one part, and no person, or no named or designated person, on the other part; and it is signed by the appellee alone. It is averred in each of these paragraphs that the appellee and the appellant entered into a contract in writing, "a copy of which is filed herewith, whereby," etc. It cannot be presumed that the name of the appellant in the body of the instrument was placed there by him by way of his signature to the contract, in the absence, at least, of an averment to such effect; the form of the instrument indicating that it was to be signed at the end thereof by both parties thereto. The execution of the instrument by the appellant as his written contract included the subscribing and the delivery thereof by him. Section 455, Burns' Ann. St. 1901; *Wild Cat Branch v. Ball*, 45 Ind. 213; *Globe Accident Ins. Co. v. Reid*, 19

Ind. App. 203, 47 N. E. 947, 49 N. E. 291. The complaint must proceed upon a consistent theory. The second and third paragraphs proceed for recovery of damages as for breach of a written contract filed as an exhibit and controlling the averments of the pleading, the writing being not in the form of a unilateral contract, but in the form of an executory agreement not executed by the appellant.

It is not intended to intimate that upon proper facts pleaded the writing might not be made available in an action brought by the party who signed against the party who did not sign; but in such case it would not be proper to make the writing an exhibit. The statute provides: "When any pleading is founded on a written instrument or on account, the original, or a copy thereof, must be filed with the pleading." Section 365, Burns' Ann. St. 1901. If the action is not founded on the written instrument, as such, all the facts constituting the cause of action should be stated in the complaint itself "in plain and concise language, without repetition, and in such manner as to enable a person of common understanding to know what it intended" (section 341, subd. 2, Burns' Ann. St. 1901), though, if it constitute a part of such facts, the incomplete instrument may be inserted in the body of the pleading, with proper averments relating to it. We think the court erred in overruling the demurrer to the second and third paragraphs of the complaint.

Judgment reversed.

(34 Ind. App. 52)

DILLIER v. CLEVELAND, C., C. & ST. L. RY. CO. (No. 3,488.)

(Appellate Court of Indiana, Division No. 1.
Nov. 17, 1904.)

WRONGFUL DEATH—ACTIONS—ABATEMENT—
DAMAGES—PERSONS ENTITLED—DEATH
OF BENEFICIARY.

1. Burns' Ann. St. 1894, § 285, provides that on death by wrongful act of another the personal representatives of the deceased may maintain an action if the deceased might have done so had he lived, and that the damages shall inure to the exclusive benefit of deceased's widow and children, if any, or next of kin. *Held*, that where deceased died leaving a widow, but no children, no right of action existed for the benefit of deceased's brothers, who were his next of kin.

2. Burns' Ann. St. 1901, § 285, provides for the maintenance of an action for wrongful death for the exclusive benefit of the widow and children, if any, or the next of kin, in case deceased could have maintained an action for the injury had he lived. Section 282 declares that, where actions survive, they may be commenced by or against the representatives of the deceased to whom the interest in the subject-matter of the action has passed. Section 283 declares that a cause of action for injury dies with the person of either party, except in case of an action for wrongful death, etc.; and section 284 declares that all other causes of action, except actions for promises to marry, etc., may

¶ 2. See *Death*, vol. 15, Cent. Dig. § 82.

be maintained by or against the representatives of the deceased party. *Held*, that where deceased died as the result of the alleged negligence of a railroad company, leaving a widow and no children, and the widow died pending suit to recover for deceased's death, the action thereupon abated; the right having vested in the widow and being extinguished by her death.

Appeal from Circuit Court, Delaware County; Geo. H. Koons, Judge.

Action by Dove S. Dillier, as administratrix de bonis non of the estate of William H. Fortner, deceased, against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company. From a judgment in favor of defendant notwithstanding a verdict in favor of plaintiff, plaintiff appeals. Affirmed.

Ellis & Waterhouse, Nathan N. Spence, and Geo. W. Cromer, for appellant. John T. Dye, for appellee.

BLACK, C. J. This was an action to recover damages for the death of William H. Fortner, the appellant's intestate, caused by the appellee by "violently, wrongfully, unlawfully, and negligently" running its locomotive engine against him when he was crossing the railroad upon a street in the city of Muncie, Delaware county. Ongolia Fortner, widow of the intestate, became the administratrix of his estate, and as such instituted the action. Upon suggestion of her death, the appellant, Dove S. Dillier, administratrix de bonis non of the estate of William H. Fortner, deceased, was substituted as the plaintiff, and an amended complaint was filed by her, in which it was alleged, amongst other things, that the intestate left surviving him his widow, Ongolia Fortner, who was dependent upon him for support, and also left surviving him his three brothers, named, who were alleged to have been dependent upon him for support, and to be still living. On motion of the appellee, the court rendered judgment in its favor upon the special findings of the jury in answer to interrogatories returned with a general verdict in favor of the appellant.

It appears from the answers of the jury that the intestate left surviving him his widow, above named, and that the blood relations surviving him were his two brothers and one half-brother, named, being the persons mentioned as his brothers in the amended complaint; that he never had any children; that his widow had died more than one year after the commencement of this action; that she had no children. Being asked who lived with the intestate, dependent upon him for support, the jury answered, "His wife, Ongolia Fortner." Being asked to give the names of the person or persons dependent upon the intestate for support at and just before the time of his death, the jury answered, "Ongolia Fortner, his wife." An interrogatory was as follows: "If prior to his death Fortner had been rendering aid and assistance in the keeping or

support of any person or persons, then give the names of such person or persons." To this the jury answered, "Ongolia Fortner." Another interrogatory was as follows: "If he had rendered aid and assistance in the support of any person or persons, were they related to him, and, if so, what relation?" to which the jury answered, "His wife." To the question, who lost the means of support by the death of the intestate, the answer was, "His wife." The jury found that the sum of \$1,000 was the actual pecuniary or money damages sustained by any and all persons who lost by his death; that his wife sustained pecuniary or money damage in that amount (which was the sum awarded the appellant by the general verdict).

It thus appears that the jury specially found that the only person who suffered any pecuniary loss through the death of the intestate was his widow, who had died since the commencement of the action, and therefore that his next of kin did not suffer any pecuniary damage, the action, commenced by the personal representative during the lifetime of the widow, having been prosecuted to verdict by the administratrix de bonis non of the estate of the deceased husband after the death of the widow; that he left surviving him no children or descendants of children, but left, as the blood relations surviving him, two brothers and a half-brother, to whose support he had not rendered any aid or assistance, and who did not suffer any pecuniary loss through his death. Our statute providing for such an action, in force at the death of the intestate and at the death of his widow, provided: "When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action, had he lived, against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages cannot exceed ten thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased." Section 285, Burns' Ann. St. 1894. An amendment of this section in 1899 (section 285, Burns' Ann. St. 1901) does not change the law applicable to such a state of facts as here involved. It is provided that in all cases where actions survive they may be commenced by or against the representatives of the deceased to whom the interest in the subject-matter of the action has passed (section 282, Burns' Ann. St. 1901); also, that a cause of action arising out of an injury to the person dies with the person of either party, "except in cases in which an action is given for an injury causing the death of any person, and actions for seduction, false imprisonment, and malicious prosecution" (section 283, Burns' Ann. St. 1901); and that all other causes of

action survive, and may be brought by or against the representatives of the deceased party, except actions for promises to marry (section 284, Burns' Ann. St. 1901). The action must be brought, and must be maintained to the end, by the personal representative of the person for whose wrongful death the damages are sought. He pursues the remedy, not for the benefit of his decedent's estate, but as a convenient trustee specially designated by the statute to recover and distribute the damages for the beneficiaries recognized as such by the statute. Of these there are two classes: First, the widow and children, if there be such persons; and, second, other persons who are next of kin to the person for whose wrongful death the action is maintained. If there be persons entitled to damages of this first class, the damages would be awarded for the exclusive benefit of such persons. Persons of the second class would not be entitled to damages, and there could be no recovery for their benefit, if there were persons entitled of the first class. The right of action accrues upon the death of the intestate. The widow of the appellant's intestate survived him, and, there being no children, the right of action existed for her benefit alone, and there never was any right of action for the benefit of the brothers or "next of kin" of the intestate. Besides, in any event, there could be no recovery for their benefit, as it appears sufficiently that they were not dependent upon him for support, and had no recognizable expectancy of pecuniary benefit from the continuance of his life. The recovery awarded by the general verdict was not given by the jury for their benefit. For whose benefit, then, was it intended, the widow, the sole beneficiary, at the accruing of the action, being dead?

The damages recovered at the suit of the personal representative, while not held by him for the decedent's estate, are to be distributed by him exclusively to the widow and children of his intestate, or to the next of kin of his intestate, in the same manner as that in which he, as executor or administrator, would distribute to them the personal property of his intestate's estate. When the widow died the action in which she had been the equitable plaintiff could not be revived or prosecuted further by her personal representatives for the benefit of her estate, but, if further maintainable, could be carried on only by the personal representative of her deceased husband. If damages recovered by the personal representative in such case were paid over by him to the personal representative of the deceased widow, in what capacity, or for what uses or purposes, would he receive them? If he should use and distribute them as executor or administrator of the deceased widow's estate, he would pay them out to her creditors and the distributees of her estate. She had no children, and her heirs could not be the heirs

of the deceased husband, or persons to whom the appellant could distribute personal property of his intestate. If damages recovered by the appellant should be by him paid to the personal representative of the widow or to her heirs at law, the damages would inure to persons not contemplated by the statute as beneficiaries—persons who were not dependent upon the appellant's intestate, or entitled to anticipate pecuniary benefit from the continuance of his life. Unless at the commencement of the action, and also at the time of awarding the damages, there be living some person or persons of whom it can be said that the law implies damage from the death of the plaintiff's decedent, or who, being next of kin to him, may be said to have suffered pecuniary loss through his death, there can be no recovery under the statute. If the action had been commenced for the benefit of children of the intestate, as well as his widow, then upon the death of the widow, who was also the administratrix originally prosecuting the suit, it doubtless might have been further continued by an administrator de bonis non for the benefit of the surviving children; but it appears that upon the death of the widow there was no person for whose benefit the action could properly be maintained.

The exception in section 283 of "cases in which an action is given for injury causing the death of any person" seems to be intended to limit the preceding provision that "a cause of action arising out of an injury to the person dies with the person of either party" only to the extent to which rights of action for injury causing death given by other statutory provisions are inconsistent with the preceding part of that section; that is, that the death of the injured person, notwithstanding such preceding portion of the section, shall not destroy the right of the person or persons authorized by other statutes to sue the wrongdoer as in such other statutes provided. Except, however, so far as the terms themselves of such other statutes are inconsistent with the preceding portion of the section, a cause of action arising out of personal injury dies with the person of either party. The statutes authorizing actions for death caused by wrongful act or omission are in derogation of the common law, and may not properly be extended beyond the legitimate meaning of the words employed in them. The action under section 285 will not lie unless the plaintiff's decedent, if living, might have maintained an action for the injury. Yet the action brought by the personal representative is different in its purposes and results from an action brought by the injured person himself. The right of action of the person injured dies with his person. If such an action be pending, it abates at his death. The exception in section 283 does not save it from the operation of the preceding part of that section. The right of action in his personal represent-

ative under section 285 is a new and independent one, and the action of the personal representative is not merely a continuation of such action pending at the death of the injured person. *Hilliker v. Citizens' Street R. Co.*, 152 Ind. 86, 52 N. E. 607; *Pittsburgh, etc., R. Co. v. Hosea*, 152 Ind. 412, 53 N. E. 419; *Stout v. Indianapolis, etc., R. Co.*, 41 Ind. 149; *Indianapolis, etc., R. Co. v. Stout*, 53 Ind. 143. In *Hamilton v. Jones*, 125 Ind. 176, 25 N. E. 192, it was held that the action under section 285, *supra*, cannot be maintained against the personal representative of the wrongdoer, as a claim against his estate. If the exception in section 283 cannot be regarded as saving the cause of action from extinction in case of the death of the wrongdoer, neither can it be regarded as saving it in case of the death of all the beneficiaries for whom alone the action is maintainable. If there be any right in the personal representative, in whose name the action must be brought and maintained, to pursue the statutory remedy after the death of the beneficiary, such right must be found in the terms of our statutes. The right and the remedy being provided by statute, the right must be pursued in the mode indicated by the statute, and not otherwise. See *Loague v. Memphis, etc., R. Co.*, 91 Tenn. 458, 19 S. W. 430. In *Tiffany's Death by Wrongful Act*, § 87, it is said: "The action for death, being an action for tort, falls within the common-law rule that such an action does not survive the death of the party in whose favor it existed. It is immaterial that the nominal plaintiff is the administrator or the state." In a note to section 87, *Tiffany's Death by Wrongful Act*, it is pointed out that the remark in *Jeffersonville, etc., R. Co. v. Hendricks*, 41 Ind. 48, 77, that the children of daughters of the intestate dying after the commencement of the action would inherit the share of such deceased daughters, was a dictum upon a matter not involved in the decision. Such unnecessary expression in that case or other cases in the Reports cannot be regarded as controlling decisions. "The provisions of statutes allowing actions of tort to survive are strictly construed, so as not to extend the exceptions beyond the clear intent of the Legislature." *Woodward v. Chicago, etc., R. Co.*, 23 Wis. 400. In that case it was also said: "The position that the action does not abate because the nominal plaintiff, the administrator, still lives, and is ready and willing to prosecute it, seems scarcely worthy of serious thought. The administrator is a mere trustee, so made by the statute, with power to sue for the benefit of his cestui que trust, or the person beneficially interested. He has no right except in virtue of the right of the real party in interest, and, if the right of that party is lapsed or lost, so that no

recovery can be had upon it, it follows that the action can be no longer maintained. As already observed, whether there is a person in being entitled, under the statute, to the money recovered, *and whom the administrator represents* [these italics are ours], is one of the facts in issue, which must be proved before any recovery can be had. It appears that the person so entitled died, and that the right of action expired with him; and for that reason, if for no other, the judgment of nonsuit must be affirmed." In *Railroad v. Bean*, 94 Tenn. 388, 29 S. W. 370, it was held, under the statutes of Tennessee, that the exclusive beneficiary was that person or class of persons who was entitled to the recovery at the death of the deceased when the cause of action accrued. The statutes gave the right of action to the widow, and, in case there was no widow, to the children of the deceased, or to his personal representative, for the benefit of the widow or next of kin, free from the claims of creditors. In that case the deceased left no children, but left surviving him his widow and his father. The action was brought, as it might be, under the statutes, by the administrator, the widow being named as the beneficiary in the declaration. The widow having died, the question was whether upon her death the suit abated, or might still be prosecuted for the benefit of the father, the next of kin. It was said: "The right of recovery having once vested in the widow, it did not pass upon her death to her personal representative; neither did it revert in the next of kin of the deceased, for the reason that no provision is made in the statute for such contingency. The cause of action, upon the death of the person to whom it survived, or for whose benefit it might be prosecuted, was thereby extinguished. * * * The right of action, however, does not pass to any person, or survive to any beneficiary, excepting those appointed in the statute as entitled to recovery when the cause of action accrued." When an action is authorized by statute to be brought by an individual in his or her own right, as a parent, whatever may properly be said as to the right of his or her personal representative to maintain the action for recovery on account of what may be regarded as loss to the estate (a matter not now before us), we are of the opinion that the action under section 285 is not maintainable for any purpose after the death of all persons for whose exclusive benefit, under the terms of that section, the right of action accrued upon the death of the injured person, whether the death of such beneficiaries be before action brought, as provided in that section, or during its pendency. The proper result was reached in the court below. Judgment affirmed.

64 Ind. App. 615)

CITY OF NEW ALBANY v. STIRR. (No. 4,985.)*(Appellate Court of Indiana, Division No. 2
Nov. 18, 1904.)**MUNICIPAL CORPORATIONS—STREETS—STEAM
ROLLERS—FRIGHTENING HORSES—
STATUTES—IDEM SONANS.**

1. Burns' Ann. St. 1901, § 2044, providing that any person using a traction or road engine on a public street in an incorporated town or city shall send a person in advance not less than 50 yards to warn approaching teams, does not apply to a steam roller used in making or repairing city streets.

2. The words "Stirr" and "Stier" are idem sonans.

Appeal from Circuit Court, Floyd County; Jas. K. Marsh, Special Judge.

Action by Joseph Stirr against the city of New Albany. From a judgment for plaintiff, defendant appeals. Reversed.

Joseph S. Foley and B. F. Watson, for appellant. Herter & Hester, for appellee.

WILEY, J. Appellee recovered a judgment against appellant for personal injuries alleged to have resulted from its negligence. The amended complaint is in two paragraphs, to each of which a demurrer was overruled. Answer in denial. Appellant's motion for a new trial was overruled. Appellant asks a reversal upon two grounds: First, that the trial court erred in overruling its demurrer to each paragraph of amended complaint; and, second, that it was error to overrule its motion for a new trial.

The only question discussed under the motion for a new trial is based upon the action of the court in giving instructions 3 and 4. As these instructions relate to the same questions presented by the demurrer to the amended complaint, they may properly be considered in connection therewith. If the complaint states a cause of action, under the theory upon which it proceeds, then the instructions correctly stated the law applicable to the facts. There is no material difference in the two paragraphs of complaint, and a statement of the facts relied upon in one will suffice for both. By the first paragraph the facts exhibited are as follows: Appellant is an incorporated city. That it maintained a fire department. That appellee was an employé of the city in its fire department. That, as such employé, one of his duties was to exercise the horses used for drawing fire engines. That he was engaged in that duty, when the horses he was exercising became frightened at an engine owned by the city, by its being propelled through one of the public streets, and that appellant neglected to send some one in front of the engine, at least 50 yards, to warn persons of its approach. The theory of the complaint will appear from the following averment: "Plaintiff further avers that the defendant was at said time, and for several years previous thereto had been, the owner

of a traction or road engine which was propelled by steam power, and which was used by the defendant for the purpose of rolling and repairing its macadamized and other streets; that on said day the said traction engine of the defendant, being in charge of one of its servants and agents, who was acting for the city in that behalf, was being propelled and driven northwardly along said Thirteenth street of said city, and towards said engine house, for the purpose of reaching a point on Vincennes street more than five (5) blocks away, where it was to be used in street repairs, but not for the purpose of repairing said Thirteenth street; that when the plaintiff had come out of said engine house and had reached said Market street with said horses as aforesaid, the said traction engine had reached a point on said Thirteenth street about one hundred and twenty (120) feet south of said Market street, and about one hundred and sixty (160) feet distant from where the plaintiff was with said horses; that said traction engine was then and there blowing off steam, and making loud and unusual noises, and allowing smoke to escape from the smokestack thereof, making unusual sights, all of which was naturally calculated to frighten horses and teams; that the defendant and its officers and agents wholly failed, while propelling and using said engine on said highway and street as aforesaid, to send some person in advance of said engine, not less than fifty (50) yards, to warn all persons approaching, in charge of a horse or team, of his or their proximity to such engine; that, if the said defendant had sent some person in advance of said engine for said purpose, he would have been within thirty (30) feet of the plaintiff, and could have so notified him of its approach, and that the plaintiff, being so notified, could have prevented said horses from running away. Plaintiff further says that he did not know of the approach of said traction engine, nor that the same was in said neighborhood; that, as a direct result of the failure of the defendant to so send some person in advance to give said warning, and in so failing to warn the plaintiff of the approach of said engine, and because of the presence of said engine at said place, making said noises and presenting said unusual appearance, said horses in charge of the plaintiff were caused to take fright and run away."

It is clear that appellee bases his right to recover upon the failure of appellant to perform a duty placed upon it by statute. That statute is as follows: "Any person or owner of a traction or road engine shall, while using the said engine on any public highway, street or alley of any incorporated town or city, send some person in advance of said engine, not less than fifty yards, to warn all persons approaching, who are in charge of a horse, team or teams, of their proximity to such engine." Section 2044,

*Rehearing denied. Transfer to Supreme Court denied.

Burns' Ann. St. 1901. "And it shall be the duty of the engineer in charge of said engine, or the owner thereof, upon the approach of said horse, team or teams, to drive said engine to one side of the road or street when practicable, and to stop said engine until said horse, team or teams, have passed said engine, and the whistle of said engine shall not be sounded while said horse, team or teams are passing." Section 2045, Burns' Ann. St. 1901. Section 2046 fixes a penalty for a violation of any of the provisions of the statute. This statute was enacted in 1889 (Laws 1889, p. 428, c. 229), and its title is as follows: "An act to make it unlawful for any person, or any owner of any traction or road engine, to run the same or use the said engine upon the public highway, street or alley of any incorporated town or city in violation of this act, and fixing penalties for the violation of this act." The rule by which the theory of a pleading is to be determined is well defined in this state, and that is, it must be construed upon the theory which is most apparent and clearly outlined by the facts stated in it. That is, it must be judged from its general scope and tenor, and must proceed upon some definite theory. *Boyd v. Bloom*, 152 Ind. 152, 52 N. E. 751; *Cleveland, etc., Ry. Co. v. Stewart*, 24 Ind. App. 374, 56 N. E. 917; *Pittsburgh, etc., Ry. Co. v. Sullivan*, 141 Ind. 83, 40 N. E. 138, 27 L. R. A. 840, 50 Am. St. Rep. 313. The theory of the complaint, measured by the rule above stated, is that appellee's injuries resulted from the failure of appellant to observe the duties imposed upon it by statute, in not sending some person 50 yards in front of a traction or road engine it was using on a public street, to warn persons who might be approaching in charge of horses. The force of the allegations in this regard are materially lessened, if not wholly destroyed, by the additional averment that the engine was to be used for "street repairs." And this brings us to the consideration of the class of engines contemplated by the Legislature in the act, and the evil or danger incident to the public it was intended to remedy or avoid. It is a historical fact that the use of "traction or road engines" had become quite prevalent in all rural districts of the state at about the time of the passage of this statute. They were in general use, and at certain seasons of the year were propelled upon and over public highways to draw and run threshing machines. Such engines were calculated to frighten horses. It was recognized that they were a modern and necessary improvement, and greatly to the interest of the farming community. They had a right to traverse the public highways, and, to protect the traveling public, the Legislature wisely placed upon those who owned or operated them the duty of requiring them to send some person in advance to give warning to persons approaching who were in charge of horses.

We have no doubt but what this was the purpose and intention of the Legislature in passing the act. If the statute is applicable to cities, in operating steam engines, in the improvement of streets, propelling street rollers, etc., then the facts pleaded state a cause of action. We cannot believe that the statute is applicable where steam engines are used in cities in the improvement of streets, for the application of the statute would be impracticable. Courts take into consideration common knowledge and experience, and conditions existing, and objects to be attained by the Legislature in enacting a law. The rule, succinctly stated, is as follows: "In order to ascertain the intention of the Legislature the court should look to the letter of the statute, to it as a whole, to the circumstances under which it was enacted, to the old law, if any, to the mischief to be remedied, to other statutes, and to the conditions of affairs when the statute was enacted." *State Board of Tax Commissioners v. Holiday*, 150 Ind. 216, 49 N. E. 14, 42 L. R. A. 826. The expression in the statute, "traction or road engine," as used by the Legislature, and in the sense and connection in which it is used, does not embrace the character of engine used in propelling steam rollers, etc., used in the repair of streets. We know that "traction or road engines" are not so used. We have a statute (section 7083, Burns' Ann. St. 1901) which gives a right of action to an employe who may be injured by the negligence of a person in the service of a designated corporation who has charge of a locomotive, engine, or train upon a railway, etc. In the case of *Jarvis, Receiver, v. Hitch*, 161 Ind. 217, 67 N. E. 1057, appellee was in the employment of appellant as receiver of a railway company, and was injured by the alleged negligence of a servant of appellant who was in charge of a machine known as a "pile driver." The pile driver consisted of a steam engine placed upon one end of a flat car, and the driver, used in raising the hammer, placed at the other end of the car, all forming one machine, containing machinery by which the car was moved from place to place on the railroad track by means of the motive power of the engine. Appellee based his right to recover upon subdivision 4 of section 7083, supra, known as the "Employers' Liability Act." The court, in construing the expression in the statute, "locomotive engine," said: "We think it is clear that the steam pile driver was not a 'locomotive engine,' within the fourth subdivision of section 1 of the act of 1893 (Acts 1893, pp. 294, 295, c. 130; section 7083, Burns' Ann. St. 1901). By the term 'locomotive engine,' used in said clause, is only intended an engine constructed and used for traction purposes on a railroad track." It was further held in that case that whether the machine alleged in the complaint to be a "locomotive engine" was such, within the meaning of said fourth

subdivision, was a question to be determined by the court, and not by the jury. To the same effect is the case of *Murphy v. Wilson*, 48 L. T. N. S. 788, 52 L. J. Q. B. D. 524, 525, to which we refer without comment. While the complaint uses the language of the statute, in the first instance, in describing the engine, subsequent averments show that appellant was not violating the statute, in view of the whole context, for it is averred that it was to be used in repairing a street. A traction or road engine, as contemplated by the statute, is one which is propelled by steam, and used to go from place to place upon public highways, having motive power, not only sufficient to propel itself, but also to draw loads; and this is the character of engines the Legislature had in mind when it used the expression "traction or road engine." We know that municipal corporations do not use traction or road engines for this purpose, and, in addition to this, the complaint itself shows that appellant was not using an engine of the character contemplated by the statute.

Construing the complaint most strongly against the pleader, and by the theory which is most apparent and clearly outlined by the facts stated in it, and according to its general scope and tenor, as we must, we are led to the conclusion that the theory of appellee's complaint is that he seeks a recovery upon the proposition that it was actionable negligence for appellant to neglect to send some one forward at least 50 yards to warn appellee, who was in charge of horses and approaching the engine. Upon that theory, the complaint does not state a cause of action.

Appellee has interposed a motion to dismiss the appeal for the reason that the name of appellee, "Stirr," has been changed in the record to "Stier." The affidavits pro and con in support of and against the motion show that one of the counsel changed the name in the record in good faith, honestly believing that the correct name was "Stier." In any event the two names are *idem sonans*. There is no merit in the motion, and it is overruled.

Judgment reversed, and the trial court is directed to sustain appellant's demurrer to the complaint.

(34 Ind. App. 100)

ANDERSON et al. v. INDIANAPOLIS
DROP FORGING CO. et al.
(No. 5,134.)

(Appellate Court of Indiana, Division No. 2.
Nov. 22, 1904.)

CONTEMPTS—PROCEDURE—ANSWERS OF DEFENDANT—CONCLUSIVENESS—CRIMINAL CONTEMPTS—CHANCERY CONTEMPTS—INJUNCTION—PERSONS AFFECTED.

1. Pickets for a labor union, although not made defendants in an injunction suit, are amenable to the injunction restraining the union, and all persons confederated or conspiring with it, from obstructing the business of plain-

tiff and its employees, where they have actual notice of such injunction.

2. Either at common law, or under the express provisions of Burns' Ann. St. 1901, § 1025, a person accused of a criminal contempt is entitled to an acquittal and discharge on his sworn denial of the facts charged; and, in case of his failure to deny, his punishment may be assessed without the hearing of evidence.

3. Burns' Ann. St. 1901, § 1025, expressly confers the right of appeal from an order adjudging one guilty of a criminal contempt.

4. Burns' Ann. St. 1901, §§ 1024-1026, relative to contempts of court, prescribing the penalties and the methods of procedure, and authorizing, among other things, an acquittal on a sworn denial of the facts charged as a contempt, but which provides that nothing therein contained shall be construed as affecting proceedings against any party for contempt "for the enforcement of civil rights and remedies," has no application to contempt proceedings in chancery, brought for the violation of the injunctive process of the court, in which the rule has always been that the truth of defendant's answers to interrogatories may be controverted, and the whole matter inquired into and ascertained by the court.

5. Courts have an inherent power to enforce their decrees and command respect for their processes, and such powers cannot be abridged, limited, or taken away by the Legislature, either directly or indirectly, by attempting to define the offense, or undertaking to regulate procedure.

6. Parties who appear to contempt proceedings cannot complain of lack of process.

Appeal from Superior Court, Marion County; Vinson Carter, Judge.

Contempt proceedings instituted as ancillary to an injunction suit by the Indianapolis Drop Forging Company and others against James Anderson and others. From an order adjudging defendants guilty of contempt, they appeal. Affirmed.

Groninger & Groninger, for appellants.
Edenharter & Mull and F. El. Matson, for appellees.

ROBY, P. J. The Marion superior court on the 1st day of July, 1903, adjudged the appellants guilty of contempt, fined each of them \$25 and costs, and ordered that they stand committed until said fines and costs were paid. On November 8, 1902, the Indianapolis Drop Forging Company filed its complaint for, an injunction in said court against the White River Lodge International Association of Machinists and 42 other persons named. On the 13th day of December following, a temporary injunction was granted against certain named defendants, and "all persons now or hereafter aiding or abetting them or confederating or conspiring with them, or any or either of them; the said parties being thereby enjoined from interfering with, hindering, obstructing, or stopping any of the business of said forging company, or its officers, agents, servants, or employees, in the operation of its factory and business located in the city of Indianapolis, and from molesting, compelling, inducing, or attempting to induce, by threats,

¶ 2. See Contempt, vol. 10, Cent. Dig. §§ 212, 222.

intimidation, violence, or force, any of its employes to refuse or fail to do their work or discharge their duties as such employes, or to leave its service." The decree is specific and comprehensive, and of considerable length. Its purport is as indicated. On June 24, 1903, said forging company filed its motion, supported by affidavit, for a rule requiring appellants and one Edward J. Collins to show cause why they should not be attached for contempt of court, for violating said temporary injunction. The motion recited the entry of the injunction aforesaid, and stated that the appellants, though not parties to the suit, had notice and knowledge of said order of injunction long before the happening of the matters alleged, and, with such notice and knowledge, willfully violated, and caused to be violated, said order of injunction in respect to the matters more fully set forth in the affidavit of Louis A. Beyers, attached and made a part of the motion. The affidavit of said Beyers is, in substance, that he is a die sinker by trade, and is and has been ever since September, 1902, in the employment of said forging company; that on June 6, 1903, as he was leaving its shop at the noon hour, he was, without provocation on his part, waylaid, assaulted, and beaten by the appellants, who at the time were claiming to do picket duty for defendant White River Lodge at the factory of said company; that, while they were so assaulting and beating him, his brothers, Fred and John Beyers, came up and interfered in his behalf, whereupon appellants called affiant and his said brothers scabs, and threatened to strike them with stones which they had picked up; that thereafter appellant Anderson caused affiant and his two brothers to be arrested and brought before the police court on the false charge of committing an assault with intent to kill upon him, the said Anderson, thereby interfering with the employment of affiant and his said brothers, all of which, as affiant believes, was in violation of the injunction heretofore granted and now in force. A rule to show cause was thereupon issued and served, and thereafter, said parties appearing, evidence was heard, the said Collins found not guilty, and a judgment as aforesaid entered against the appellants. The allegations connecting said Collins with the contempt charged, not having been sustained, are not set out in the foregoing summary of the proceeding.

The appellants were amenable to the injunction if they had actual notice thereof, although not made defendants in the original action. *Ex parte Lennon*, 166 U. S. 548, 17 Sup. Ct. 658, 41 L. Ed. 1110; *American Steel, etc., v. Wire Drawers* (C. C.) 90 Fed. 605; *High, Injunctions*, § 1444.

Appellants' claim for a reversal of the judgment against them depends upon the provisions of "the act touching contempts of court, prescribing penalties that may be

inflicted therefor, and the methods for proceeding therein," approved March 31, 1879 (Acts 1879, p. 112, c. 35), as amended March 1, 1881 (Acts 1881, p. 10, c. 6; sections 1024-1028, Burns' Ann. St. 1901). By section 8 it is provided that "in all cases of indirect contempt the person charged therewith shall be entitled, before answering thereto or being punished therefor, to have served upon him a rule of the court against which the alleged contempt may be committed, which said rule shall clearly and distinctly set forth the facts which are alleged to constitute such contempt, and shall specify the time and place of such facts with such reasonable certainty as to inform the defendant of the nature and circumstances of the charge against him, and shall specify a time and place at which he is required to show cause in such court why he should not be attached and punished for such contempt, which time the court shall, on proper showing, extend so as to give the defendant a reasonable and just opportunity to purge himself of such contempt. * * *" By section 9 it is further provided: "If the defendant shall fail to appear in said court, at the time and place specified in the rule provided for in the last preceding section, to answer the same, or, if after having appeared thereto, the defendant shall fail or refuse to answer touching such contempt, the court may proceed at once, and without any further delay, to attach and punish him or her for such contempt; but if the defendant shall answer the facts set forth in such rule, by showing that, even if they are all true, they do not constitute a contempt of court, or by denying, or explaining, or confessing and avoiding them, so as to show that no contempt was intended, then, and in every such case, the court shall acquit and discharge the defendant; * * * and the defendant having appeared to such rule, may except, file a bill of exceptions, and appeal to the general term, and to the Supreme Court, in the same manner as in cases of direct contempt." By section 10 the provisions of the act are made to apply to all proceedings for contempt in all courts of record in this state, except the Supreme Court thereof: "provided, however, that nothing herein contained shall be construed or held to embrace, limit or control any proceeding against any officer or party for contempt, for the enforcement of civil rights and remedies." Contempts of court for which punishment is inflicted for the primary purpose of vindicating public authority are denominated criminal, while those in which the enforcement of civil rights and remedies is the ultimate object of the punishment are denominated civil contempts. "Proceedings for contempt are of two classes—those prosecuted to preserve the power and vindicate the dignity of the courts, and to punish for disobedience of their orders, and those instituted to preserve and enforce the rights of private parties to suits,

and to compel obedience to orders and decrees made to enforce the rights and administer the remedies to which the court has found them to be entitled. The former are criminal and punitive in their nature, and the government, the courts, and the people are interested in their prosecution. The latter are civil, remedial, and coercive in their nature, and the parties chiefly in interest in their conduct and prosecution are the individuals whose private rights and remedies they are instituted to protect or enforce. *Thompson v. Railroad Co.*, 48 N. J. Eq. 105, 108, 21 Atl. 182; *Hendryx v. Fitzpatrick* (C. C.) 19 Fed. 810; *Ex parte Culliford*, 8 Barn. & C. 220; *Rex v. Edwards*, 9 Barn. & C. 652; *People v. Court of Oyer & Terminer*, 101 N. Y. 245, 247, 4 N. E. 259, 54 Am. Rep. 691; *Phillips v. Welch*, 11 Nev. 187, 190; *State v. Knight*, 3 S. D. 509, 513, 54 N. W. 412, 44 Am. St. Rep. 809; *People v. McKane*, 78 Hun, 154, 160, 23 N. Y. Supp. 981, 4 Bl. Comm. 285." In the former class, "in cases at common law the defendant will be discharged if, by his answers to interrogatories filed, he makes such a statement as will free him from imputed contempt, and opposing testimony will not be heard." At common law always, and by the terms of section 1025, a sworn denial of the facts charged entitled the accused to his discharge. *Wilson v. State*, 57 Ind. 71; *State v. Earl*, 41 Ind. 464; *Fishback v. State*, 131 Ind. 304, 30 N. E. 1088; *Stewart v. State*, 140 Ind. 7, 39 N. E. 508; *Shirk et al. v. Cox*, 141 Ind. 301, 40 N. E. 750. Failing to deny the contempt punishment was assessed without hearing evidence. *Haskett v. State*, 51 Ind. 176; *Hawkins et al. v. State*, 125 Ind. 570, 25 N. E. 818; *Whittem v. State*, 36 Ind. 196; *Middlebrook v. State*, 43 Conn. 267, 21 Am. Rep. 650; *People of Ill. v. Wilson & Shuman*, 64 Ill. 195, 16 Am. Rep. 528; *Rapelje on Contempt*, § 1. Section 9, supra, is declaratory of the common law, and gives to the defendant, in unmistakable terms, the right of appeal, which is denied in some jurisdictions, and, prior to such statute, debated in our own. *State v. Tipton*, 1 Bl. 166; *Hunter v. State*, 6 Ind. 423; *Whittem v. State*, 36 Ind. 196. Neither section 8 nor section 9 was intended to apply to cases in chancery, where it has always been the rule that "the truth of the defendant's statements in reply to interrogatories filed may be controverted on the other side, and the whole matter inquired into and ascertained by the court. * * * Without the power to enforce these decrees by punishing disobedience in violation of them, a court of chancery would be worse than useless, and for this reason the practice on the point we are considering differs from that of a court of common law. For, if the answer of defendant in questions of contempt were conclusive, a decree might lose all its vitality and not be enforced at all. The temptation in many cases to defeat the efficacy of the decree by sturdy denial of the

imputed contempt might be too strong for the virtue of the party. The rule therefore is regarded as well settled in England and in this country that, in chancery, testimony will be heard to contradict as well as to support the truth of a statement made by one against whom proceedings for contempt have been instituted." *Underwood's Case*, 2 Humph. 46; *In re Debs*, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1093. That the act of 1879 and its amendment were not designed to affect cases falling within this class is put beyond all manner of doubt by the concluding provision of section 10—that the act shall not apply to any proceeding "for the enforcement of civil rights and remedies." *Reck v. State*, 72 Ind. 255. It is not, therefore, necessary to refer to the inherent power of the courts to enforce their decrees and command respect for their processes. The existence of such powers is essential to the maintenance of our system of government. No Legislature can abridge, limit, or take away such power, either directly or indirectly, by attempting to define the offense or undertaking to regulate procedure. The Legislature of Indiana has not attempted to do so. It follows that appellants were not entitled to be discharged upon their verified answer.

The appellants appeared to the proceeding. They cannot, therefore, complain of lack of process. The evidence supports the finding. The learned judge of the superior court was constrained to the action taken by the appellants themselves.

Judgment affirmed.

(34 Ind. App. 25)

ASCHOFF v. CITY OF EVANSVILLE. (No. 4,862.)

(Appellate Court of Indiana, Division No. 2.
Nov. 15, 1904.)

MUNICIPAL CORPORATIONS—WATERWORKS—
NEGLECT—INJURY TO ADJACENT
PROPERTY OWNER.

1. Where a city's water pipe burst under the extra pressure during the extinguishment of a fire, the city is not liable for damages resulting from water flowing into an adjacent cellar; in the extinguishing of fires and in making arrangement therefor the city acting in its governmental capacity.

2. The city is liable for damages by flooding an adjacent cellar because of negligence in failing to keep in repair water pipes in the street used by its fire department in the extinguishment of fires, as in so doing it acts in its corporate, and not its governmental, capacity.

Appeal from Superior Court, Vanderburgh County; Jno. H. Foster, Judge.

Action by Peter Aschoff against the city of Evansville. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

Logsdon, Chappell & Veneman, for appellant. A. W. Funkhouser, for appellee.

¶ 1. See *Municipal Corporations*, vol. 36, Cant. Dig. §§ 1557, 1568, 1574.

ROBY, J. Appellant's complaint was in six paragraphs, to each of which appellee's demurrer for want of facts was sustained. Refusing to plead further, judgment was rendered against him, from which he appealed.

It is alleged in the complaint that appellant suffered two separate injuries occurring practically in the same manner. The first, second, and third paragraphs of complaint relate to the first occurrence, while the fourth, fifth, and sixth paragraphs are based upon the latter one. The substance of the first paragraph is: That appellant on the 22d day of July, 1901, occupied a building situated on a certain lot in Evansville, at the southeast corner of Vine and Fifth streets, consisting of a two-story brick building, with a cellar the full width of the building, and extending back about 70 feet. Part of the first and all of the second floor were used by him as a dwelling, and in the front part of the first floor he conducted a saloon. That on said day he had a large and valuable stock of goods and other personal property stored in said cellar, which was dry, well ventilated, and proper for such use. That on said day, and long prior thereto, appellee was a municipal corporation organized under the laws of this state, and that by virtue of its charter it was the owner and in the absolute management, control, and possession of the only system of waterworks within its limits, consisting of a pumping station, mains, pipes, hydrants, and plugs, for protecting the property of its citizens from fire, and for supplying them with water at certain fixed charges, according to the amount used. That it was appellee's duty to supervise the construction and maintenance, operation, altering, and repairing of said system of waterworks. That, as a part thereof, it had erected and on said date maintained a water plug in the sidewalk near appellant's building, connected by certain mains and pipes with its pumping station, through which water was forced and transmitted in pursuance of the objects for which said system was operated and maintained. That on said day, while plaintiff was engaged in transacting his business and living in the said building as aforesaid, a fire broke out in some building near plaintiff's premises, and, for the purpose of procuring water to extinguish it, appellee, by its firemen and employes, attached a line of hose to said water plug, and turned on the water with great force, and threw the same upon said fire. That extra power and pressure were added at the pumping station, and the water was being driven with great force through said plug and its connections, by reason of which a certain pipe connecting said water plug with the water mains burst and fell to pieces, causing and permitting the water flowing through said pipe and plug to force its way through and underneath the walls of appellant's building into his cellar, filling it with "mud, slush, slime, and water to the

depth of twelve feet," damaging and destroying his goods and other personal property stored therein, and causing him great expense in cleaning said cellar, all to his damage in the sum of \$500. That immediately after the bursting of said pipe as aforesaid, and before the damage had resulted as aforesaid, appellee was notified of the breaking of said pipe in time to have prevented said damage to plaintiff's property, which it was then and there its duty to do, but he avers that it and its representatives willfully refused and neglected to do so for a long time, and until after said cellar was completely filled as aforesaid, causing such loss and damage. That said damage was caused by the "negligence of the defendant, its said waterworks inspector, agents, servants, and employes, in failing and refusing and neglecting to shut off the water from running through said broken pipe and plug into said cellar as aforesaid, all to plaintiff's damage," etc. In the second paragraph the general situation is described, and it is averred that said water plug and its connecting pipe "were on said date, and for a long time prior thereto, defective, and rusted, cracked, corroded, worn out, and wholly insufficient and unsafe for the purposes for which it was intended, all of which the defendant, its servants and employes, at the time of the damages hereinafter complained of, and for a long time prior thereto, well knew, and that defendant, its waterworks agents and representatives, had for a long time prior thereto negligently and carelessly failed to repair said plug and its connecting pipes, and that while the water was being driven with great power and force through said water plug and its connections, and by reason of the defective, cracked, corroded, and worn-out condition of the said water plug and its connecting pipe as aforesaid, and on account of the carelessness and negligence of the defendant, its waterworks agents and representatives, in failing and neglecting to replace or repair said water plug and its connecting pipes, as it was in duty bound to do, the said water plug and its connecting pipe thereupon broke, burst, and fell to pieces, permitting the water flowing through the same to escape," etc. In the third paragraph appellant averred that said water plug and its connecting pipe "were located and established by defendant long years ago, and on the 22d day of July, 1901, and for a long time prior thereto, had become defective, rusted, cracked, corroded, worn out, and wholly insufficient and unsafe for the purposes for which they were intended, of which the defendant, its servants and employes, at the time of the damages hereinafter complained of, and for a long time prior thereto, knew; that for many years prior to the year 1900 the only pumping station and machinery owned, operated, and used by the defendant in connection with the operation of said waterworks system, by which water was pumped

into and forced through said mains, pipes, plugs, and hydrants throughout said city, was old, insufficient, and inferior in power and capacity; and that, prior to the damages hereinafter complained of, the defendant had erected and completed a new, modern, and much more powerful pumping station and machinery, and operated, and was on said date operating, the same, by means of which water was and is pumped into and forced through the old mains, pipes, plugs, and hydrants theretofore used in connection with the old pumping station as aforesaid with much more and greater pressure, force, and power than used or could be used with said old pumping station, as defendant well knew; that at all times, in the event of fire, an extra and additional fire pressure was and is added at the pumping station, to increase the volume of water transmitted through said mains, pipes, plugs, and hydrants, and the pressure and power so added to the said new pumping station during times of fire was and is much stronger, and casts a much larger volume of water, and with much more force and pressure, than was or could be had under and by said old and inferior pumping station, all of which defendant then and there well knew; that the said mains, pipes, plugs, and hydrants, and particularly said plug and its connecting pipe, located at the corner of Fifth and Vine streets, as aforesaid, by reason of long and continuous use and service prior to the damage hereinafter complained of, had become and was defective, cracked, corroded, worn out, and wholly insufficient to withstand the increased volume, force, and pressure in times of fire exerted by said new and powerful pumping station, and at the same time did at diverse times and places frequently burst, crack, and become useless and unsafe, and said water plug and its connecting pipe became and were unsafe and unfit, from said named causes, to withstand the great force and pressure in time of fire of said new pumping station, all of which defendant then and there well knew; yet plaintiff avers that the defendant carelessly and negligently failed to repair and replace the worn and defective parts of said old mains, pipes, plugs, and hydrants, and carelessly and negligently failed, prior to the injuries herein complained of, to replace or repair said water plug and its connecting pipe, * * * as it was in duty bound to do; that said defendant from time to time hires and employs * * * waterworks inspectors and representatives, whose duty it was to examine and determine the condition, quality, and safety of said mains, pipes, plugs, and hydrants, and who, by the exercise of reasonable diligence and ordinary skill and care, could have discovered the unsafe and unsound and dangerous and defective condition of said water plug and its connecting pipe as aforesaid in time to have so repaired or replaced the same as to enable them to withstand the extra force, pressure,

and volume of water caused in times of fire by said new and powerful pumping station." Then follow averments similar to those in the first paragraph, attributing the injuries complained of to the "negligent acts and omissions aforesaid."

The statute in force at the time of the occurrence complained of provided for the appointment of waterworks trustees by the mayor of the city, with power to appoint necessary agents and make necessary regulations to assess and collect water rent from parties supplied with water; no charge to be made for supplying water for the extinguishment of fires, for furnishing and supplying connections for fire department purposes, or for other public uses specified. A tax to pay for waterworks "shall be assessed on all the taxable property of said city and collected each and every year in the usual manner of levying and collecting tax of said city." Such trustees represented the city. *Rhobidas v. City of Concord* (N. H.) 47 Atl. 82, 81 L. R. A. 381, 85 Am. St. Rep. 604; *McAvoy v. New York*, etc., 54 How. Prac. 245. "The rule seems to be firmly established that a municipal corporation is, for the purposes of its creation, a government possessing, to a limited extent, sovereign powers, which, in their nature, are either legislative or judicial, and may be denominated governmental or public. * * * And being public and sovereign in their nature, the corporation is not liable to be sued either for a failure to exercise them, or for errors committed in their exercise. But when duties of a purely ministerial character are expressly enjoined by law on such corporations, or arise by necessary implication, they are responsible for any damages resulting to individuals from a neglect to perform them, or for their performance in an improper manner." *Brinkmeyer v. City of Evansville*, 29 Ind. 187-191; *City of Anderson v. East*, 117 Ind. 126, 19 N. E. 726, 2 L. R. A. 712, 10 Am. St. Rep. 35; *Vaughtman v. Town of Waterloo*, 14 Ind. App. 649, 43 N. E. 476. In constructing and maintaining sewers and drains, municipalities act in a ministerial capacity, and for their neglect in such construction or maintenance they are liable, under the same rules and to the same extent that a natural person would be. *City of Valparaiso v. Cartwright*, 8 Ind. App. 429, 35 N. E. 1061; *City of Ft. Wayne v. Coombs*, 107 Ind. 75, 7 N. E. 743, 57 Am. Rep. 82; *Weis v. City of Madison*, 75 Ind. 241-250, 39 Am. Rep. 135; *Murphy v. City of Indianapolis*, 158 Ind. 238, 63 N. E. 469; *Leeds v. City of Richmond*, 102 Ind. 372, 1 N. E. 711; *Dillon, Municipal Corporations*, § 954; *A. & E. Encycl. of Law*, 1196. In the extinguishment of fires, and in making arrangements therefor, the municipality acts in its governmental capacity, and is not liable for damages caused by the negligence of its fire department. *Robinson v. City of Evansville*, 87 Ind. 334, 44 Am. Rep. 770; *Brinkmeyer v. City of Evansville*, supra; *Davis v. Lebanon*, etc.

(Ky.) 57 S. W. 471; *Wright v. Augusta*, 78 Ga. 241, 6 Am. St. Rep. 256; *Mendel v. Wheeling*, 28 W. Va. 233, 57 Am. Rep. 665; *Butterworth v. City of Henrietta* (Tex. Civ. App.) 61 S. W. 975. Nor is it liable for the negligent construction, maintenance, or use of appliances for the extinguishment of fires. *Hayes v. City of Oshkosh*, 33 Wis. 314, 14 Am. Rep. 760; *Edgerly v. Concord*, 62 N. H. 8, 13 Am. St. Rep. 533; *Tainter v. Worcester*, 123 Mass. 311, 25 Am. Rep. 90; *Edgerly v. Concord*, 59 N. H. 78. A water plant maintained by a municipality for the use of its fire department only comes within the reason of these authorities, and it has been held that such municipality thereby performs a governmental function, and is not liable for negligence therein. *Miller v. Minneapolis*, 75 Minn. 131, 77 N. W. 788. Where the water system is conducted by the municipality in part for profit, even if principally for public purposes, the municipality is liable for damages caused by its negligent management. *Chicago v. Selz, etc.*, 104 Ill. App. 376. And where it supplies water to its citizens, and charges therefor, it acts in its private capacity, although such waterworks system is also used for the extinguishment of fires. So acting, "it stands on the same footing as would any individual or body of persons upon whom a like special franchise had been conferred." *Western Saving Fund Soc. v. Philadelphia*, 31 Pa. 183; *Esberg-Gunst Cigar Co. v. City of Portland* (Or.) 55 Pac. 961, 43 L. R. A. 435, 75 Am. St. Rep. 651; *Rhobidas v. Concord*, supra; *Logansport v. Dick*, 70 Ind. 65, 36 Am. Rep. 166. A municipality operating a plant for its own use and that of its inhabitants is therefore liable for injuries to adjoining property resulting from its negligence (*Boothe v. Fulton*, 85 Mo. App. 16); for causing adjoining land to be overflowed (*Elsenmenger v. St. Paul Water Board*, 44 Minn. 457, 47 N. W. 156); for negligently permitting water to escape from its water pipe, thereby frightening a horse (*Baker v. North-east Borough*, 151 Pa. 234, 24 Atl. 1079); for undermining a highway by water leaking from the pipes (*Hand v. Brookline*, 126 Mass. 324; *Dammann v. St. Louis*, 152 Mo. 186, 53 S. W. 932; *Rumsey v. Philadelphia*, 171 Pa. 63, 32 Atl. 1133); for throwing a stream of water into adjoining rooms (*Yik Hon v. Spring Valley Waterworks*, 65 Cal. 619, 4 Pac. 666). There are cases contrary to the foregoing, but they are exceptions to the general trend of decision. *Springfield Ins. Co. v. Keeseville*, 148 N. Y. 46, 42 N. E. 405, 30 L. R. A. 660, 51 Am. St. Rep. 667.

The first paragraph of complaint counts upon the negligence of appellee and its representatives in "refusing and neglecting to shut off the water from running through said broken pipe and plug into said cellar." The use alleged to have been made of the waterworks system at the time of the injury complained of was a purely governmental one, namely, extinguishing fire. For an injury in-

cidental thereto there is no right of recovery. To shut off the water might have involved an entire cessation of efforts to extinguish such fire. Appellee is not liable for its refusal to so act, and the demurrer to the first paragraph of complaint was therefore properly sustained.

The basis of the second paragraph is found in the alleged negligent failure of appellee to keep said plug and its connecting pipes in repair. This duty devolved upon it, and for negligence therein it is liable, in the absence of facts relieving it therefrom. It affirmatively appears that the defective pipe was a connection of the hydrant. It is argued that it was therefore an appliance used in extinguishing the fire, quite as much as the hose attached to the same hydrant, through which the same water was conveyed; that the use made of hydrants or plugs is not a private one, but that they are adapted only to public purposes, as must be judicially known; and that therefore the private character of the waterworks does not extend to them or their connections. The waterworks system is an entire thing. The city is charged with the duty of using reasonable care in its construction and maintenance. Such duty applies to the system, and not to detached portions thereof. The hydrant is undoubtedly adapted to use in putting out fire, but a waterworks system, in the construction of which reasonable care is used, will not contain defective and insufficient hydrants. The hose used by the firemen is not a part of the waterworks. The pipe which is alleged to have been defective was a part thereof. It also appears from the pleading that the pipes burst under fire pressure. It will be assumed, as against the pleader, that without the strain incident to such increased pressure the injury complained of would not have occurred. This pressure was applied in the discharge of a governmental function, and, if the necessity was an unusual one, not to have been anticipated, the question presented would be one of great difficulty; but it does not appear from the complaint that the pressure was not one to have been anticipated. The waterworks, when constructed, was designed to serve the double use of the city in its governmental capacity and in its private capacity, and was thus maintained. The duty was therefore incumbent upon the city to maintain the plant so constructed that it might be reasonably safe for either use. Reasonable care in constructing and maintaining the plant required that the water pipes be reasonably sufficient to resist such pressure as they were likely to be subjected to, whatever the reason for it might be. Inasmuch as the appellee is directly charged with negligence in failing to replace parts of its waterworks system which had become defective, corroded, and worn out, such paragraph was sufficient as against the demurrer.

The duty of the municipality to repair and maintain being one on account of a negligent

discharge of which it may be liable for damages, and the waterworks being considered as an entity, it follows that the third paragraph also states a cause of action.

The judgment is reversed and the cause remanded, with instructions to overrule the demurrers to the second, fifth, third, and sixth paragraphs of complaint, and for further proceedings.

(24 Ind. App. 61)

INDIANA NATURAL GAS & OIL CO. v. LEER. (No. 4,874.)

(Appellate Court of Indiana, Division No. 1.
Nov. 17, 1904.)

**GAS CONTRACTS—CONSTRUCTION—TERMINATION
—DEATH OF GRANTOR—INNOCENT
PURCHASERS.**

1. An owner of real estate, in consideration of \$10, on April 3, 1889, sold to defendant's assignors all the gas and oil thereunder, with the right to enter the land to drill for oil, the grantees agreeing to drill a well on the premises within 12 months, or pay to the grantor a yearly rental until such well was drilled. Upon failure to pay the rental, the instrument was to be null and void; and the grantor was to have one-eighth of the oil produced and gas from the well or wells for light and heat in the dwellings on the premises free of expense, and the grantees were to furnish the grantor gas in lieu of rental by November 1, 1889. *Held*, that such contract entitled the grantor to gas for use in his dwelling house in lieu of rental, though no wells were drilled on his premises, and, such gas having been furnished, the grantees were not in default for failure to furnish gas from wells developed on the premises or pay rent.

2. Where a landowner, in April, 1889, contracted for the sale of gas and the development of gas wells on his farm, and in September, 1893, plaintiff acquired title to a part of the land by a deed from the heirs of the landowner with knowledge of the development contract and of the construction that had been given to the same by the parties, plaintiff was not an innocent purchaser, and was therefore bound by such construction.

3. Where a contract for the development of gas land required the grantees to develop the land, pay certain rentals, or to furnish gas for the grantor's use in lieu of rentals, the lease did not terminate at the grantor's death, though possession had not been taken by the lessees, and no development work had been undertaken, gas having been furnished to the grantor as agreed.

Appeal from Circuit Court, Delaware County; Jos. G. Lefler, Judge.

Suit by Charles Leer against the Indiana Natural Gas & Oil Company. A judgment was rendered in favor of plaintiff, and defendant appeals. Reversed.

W. O. Johnson, Frank Ellis, and Blackledge, Shirley & Wolf, for appellant. Chas. T. Parker, for appellee.

ROBINSON, J. Suit to quiet title. The first paragraph of complaint is the ordinary action to quiet title. The second paragraph avers that appellee owns in fee the northeast quarter of the northwest quarter of section 36, deriving his title September 21, 1893, by deed from the heirs of Isaac Rybolt, deceased; that on April 3, 1899,

Isaac Rybolt signed and acknowledged a written instrument by which, in consideration of \$10 and the covenants therein contained, he "hereby grants to Smith and Zeigler, heirs or assigns, all the gas and oil in and under" the north half of the northwest quarter of section 36; grantees to have the exclusive right to enter on the land and drill for oil or gas, erect buildings, machinery, and the like, grantors to use the land for farming purposes; grantees agreed "to drill a well upon said premises within twelve months from this date, or thereafter pay to the first party a yearly rental of \$20 until said well is drilled"; upon failure to pay the rental when due, the instrument should be null and void, and neither party should be held to any accrued liability; grantor to have one-eighth of oil produced, \$25 for the first and \$200 for each subsequent gas well so long as gas was transported off of the premises; grantor to have, "free of expense, gas from the well or wells, to use at his own risk, to light and heat the dwellings on the premises"; grantees "may at any time reconvey this grant and thereupon this instrument shall be null and void." "It is understood that second party will furnish first party gas in lieu of rental by the first of November, 1889, or this lease shall be null and void." The complaint avers that the instrument was afterwards assigned to appellant; that no well has been drilled, or any payment made thereon, and that appellee has received nothing in consideration for appellant's holding the grant; that the consideration therefor was the development and exploration for gas and oil, to the end that both grantor and grantee should share its profits; that the immediate adjoining territory is being operated, and gas wells have been put down and are being put down on all sides of appellee's land, and are taking and will take all the gas and oil from beneath appellee's land; that appellant is holding the same for speculative purposes; that heretofore, and a long time prior to the bringing of this suit, appellee notified appellant to develop the land, and that, if the same was not developed at once, he demanded a surrender and reconveyance and release of record; that appellant failed and refused to drill and operate thereon after such notice, and still refuses so to do. The demurrer to the second paragraph of complaint was overruled.

Appellant's amended answer alleges that on April 3, 1889, Isaac Rybolt owned in fee the land described in the complaint, together with 40 acres adjoining; that both tracts composed one body of land, and was held by and owned by Rybolt as one farm; that on the above date Rybolt executed the written instrument; that the grantees assigned the same to appellant; that in June, 1891, the real estate was divided, and the northwest quarter of the northwest quarter of section 36 became the property of John Rybolt, and he was at the beginning of this action own-

er of the same; that the only dwelling house or houses on any part of the 80 acres on April 3, 1889, or at any time since, was and is on the 40 acres owned by John Rybolt; that no dwelling house has been upon that part of the land described in the complaint; that it was mutually understood and agreed by the parties to the instrument that the grantees and their successors should furnish gas free for the dwellings on the premises at the time of the making of the conveyance in lieu of all rentals mentioned therein; that at all times since the parties have so considered it, and appellant and its predecessors have at all times furnished gas free to the dwelling house, and the same has been accepted by Isaac Rybolt and his successor, John Rybolt, in lieu of all rentals; that at and prior to the time appellee purchased the real estate he had notice of the conveyance of April 3, 1889, and notice of such practical construction placed thereon by appellant and his grantors and Isaac and John Rybolt, and of the furnishing of gas free; that no other claim has ever been made under the conveyance until the bringing of this action; that the grantees paid Isaac Rybolt \$10, provided to be paid in the contract, which was accepted by him in consideration thereof; that the grant has never been re-conveyed by appellant or its predecessors, or that any rights granted therein have ever been abandoned; that appellant disclaims all interest in the land except as alleged in the answer. The demurrer to this answer was sustained.

Overruling the demurrer to the second paragraph of complaint and sustaining the demurrer to the answer are assigned as errors.

Following the reasoning in the case of *Consumers' Gas Trust Co. v. Littler* (Ind. Sup.) 70 N. E. 363, we think the complaint must be held sufficient. The fact that the notary public before whom the instrument was acknowledged did not attach the words "notary public" to his signature is immaterial, as the body of the acknowledgment sets out his name and states that he is a notary public. The grantees agreed to drill a well within 12 months from April 3, 1889, or thereafter pay a yearly rental of \$20 until the well was drilled; that is, the grantees had the 12 months within which to drill a well, and if, at the end of that time, no well had been drilled, they were thereafter to pay the yearly rental. The grantees further agreed to furnish the grantor gas to light and heat the dwellings on the premises, with pipe to conduct the same, all free of expense; but this free gas was to be from "the well or wells in use." This evidently means this gas was to come from a well or wells on the premises. This free gas might or might not be furnished before the closing part of the first year. The grantees, under the agreement, could complete the first well any time before the expiration of the 12

months, and not until the well on the premises was completed was the grantor to have free gas under the above clause. Another clause was added that "it is understood that second party will furnish first party gas in lieu of rental by the first of November, '89, or this lease shall be null and void." As the other parts of the instrument did not bind the grantees to pay any rental or furnish any free gas during the first year, this provision might have been intended to cover that year. But as the other provisions only conditionally bound the grantees to furnish free gas, and as the furnishing of free gas was manifestly one of the inducements that led to the making of the contract, the clause could be construed as the answer alleges the parties did construe it. In order to get gas at an earlier date, and not depend upon the uncertainty of finding gas on the premises, free gas was to be furnished by November 18th in lieu of rental. The answer alleges that free gas has at all times been furnished for the only dwelling on the premises, and has been accepted in lieu of rentals, and that appellee purchased the land in question with full notice and knowledge of the conveyance and of the construction that had been given the contract, and that no other claim has ever been made under the conveyance until the bringing of this action. The complaint was filed February 5, 1902. It cannot be said that appellee was an innocent purchaser. The answer shows that appellee is attempting to terminate the lease at a time when appellant is doing what it agreed to do. We do not mean to say that the lease or grant may be continued indefinitely without an effort to develop the territory for oil or gas. See *Consumers' Gas Trust Co. v. Littler*, supra; *Consumers' Gas Trust Co. v. Crystal Window Glass Co.* (Ind. Sup.) 70 N. E. 366; *Consumers' Gas Trust Co. v. Ink* (Ind. Sup.) 71 N. E. 477; *Consumers' Gas Trust Co. v. Worth* (Ind. Sup.) 71 N. E. 489; *Consumers' Gas Trust Co. v. Howard* (Ind. Sup.) 71 N. E. 493. It cannot be said that the lease was at an end from the death of Isaac Rybolt, even though possession had not been taken. If the lessees had not obligated themselves to perform any covenant, the case might be different; but they agreed to drill a well within a certain time, or thereafter pay a yearly rental. The demurrer to the answer should have been overruled.

Judgment reversed.

(25 Ind. App. 362)

ABBOTT et al. v. INMAN. (No. 5,025.)
(Appellate Court of Indiana, Division No. 2.
Nov. 23, 1904.)

INTOXICATING LIQUORS — LICENSE — REMONSTRANCE — DETERMINATION OF NUMBER OF VOTERS — APPEAL — REFUSAL TO GRANT JURY TRIAL.

1. Refusal to grant a jury trial cannot be complained of by separate assignment of error on appeal.

*Rehearing denied. Transfer to Supreme Court denied.

2. Under Burns' Ann. St. 1901, § 7283i, providing that no liquor license shall be granted if a majority of the voters of the ward for which the license is asked remonstrate, and that the number constituting a majority shall be determined by the vote cast in the last election, persons who have, because of redistricting, ceased to be voters in a ward since the last election, cannot be counted in determining the number of voters.

Appeal from Circuit Court, Putnam County; Geo. A. Knight, Special Judge.

William T. Inman filed an application for a license to sell intoxicating liquors, to which John B. Abbott and others filed a remonstrance; and, from a judgment approving the action of the board of county commissioners in issuing a license, remonstrants appeal. Reversed.

Moore Bros., Lyon & Peck, and S. A. Hays, for appellants. C. C. Matson and Woolen & Woolen, for appellee.

COMSTOCK, J. The appellee, William T. Inman, on March 2, 1903, filed with the board of commissioners of Putnam county, Ind., his application for a license to sell intoxicating liquors in the Third Ward of the city of Greencastle, Ind., at retail, under the act of March 11, 1895 (Acts 1895, p. 248; section 7283a-7283k, Burns' Ann. St. 1901). Notice was given as required by law, and the premises where sales were to be made were described. At the proper time J. B. Abbott and 198 other voters of the Third Ward of said city filed a remonstrance against granting said license. Said applicant in due time filed with the auditor of said county a paper containing the names of 31 persons, purporting to be withdrawals from said remonstrance. The case came on for hearing before said board on application, remonstrance, and withdrawals. After the evidence was submitted, the board found that said remonstrance was not signed by a majority of the legal voters of said Third Ward, as the law requires, and entered an order granting said applicant a license, as prayed for in his petition. From this order and finding the remonstrants appealed to the circuit court. When the case was called in the circuit court, said remonstrants, by their attorneys, filed a motion for a struck jury. To this motion the objection of the attorneys of the applicant was sustained, to which ruling the remonstrants excepted. Upon application of remonstrants, a change of venue was granted from the regular judge, and the Honorable George Knight was appointed and qualified to try said cause. Upon request of the remonstrants, the court made a special finding of facts, stated conclusions of law thereon, and rendered judgment in favor of appellee. The special findings are, in substance, as follows: The city of Greencastle was prior to May 13, 1902, a municipal corporation, and divided into three wards. The Third Ward of said city included all the territory lying south of Hanna street therein. Said ward was at said time

divided into two voting precincts—the East and the West—and an election for mayor was held in said city on May 6, 1902. At said election the aggregate vote cast in said ward for mayor was 320—150 being cast in the East Precinct and 170 in the West Precinct—and that the total number of persons who voted at said election in said West Precinct was 176. On the 13th day of May, 1902, the common council of said city redistricted said ward, for ward purposes, into four wards, and took off of the original Third Ward, as it existed at the time of said election, that part of the West Precinct of said Third Ward which lies south of Hanna street, north of Olive street, and west of College avenue, and put it into said new Fourth Ward, and said original Third Ward was not otherwise changed thereby, but included all the territory lying south of Hanna street, except said four blocks. At the March session, 1903, of the board of commissioners of said county, appellee applied for license to sell intoxicating liquors in the Third Ward of said city; having previously given notice of his intention to file such application. On February 27th, three days before the meeting of said board at its March session, a remonstrance in writing was filed with the auditor of said county, signed by the plaintiff John B. Abbott and 198 other voters of the Third Ward of said city, remonstrating against granting a license to said applicant for the sale of intoxicating liquors. Of the 198 persons whose names were attached to said remonstrance, 22 had revoked said power by withdrawing their names therefrom before the filing of said remonstrance, by written withdrawal filed with the auditor the day before the remonstrance was filed. Of the remaining 177 names upon said remonstrance, 10 were the names of persons who were not legal voters in the Third Ward of said city at the time said remonstrance was signed. Of the remaining 167 persons whose names were signed to said remonstrance, 14 resided at the time of the signing and filing thereof in the territory lying south of Hanna street, west of College avenue, and north of Olive street, and were not residents and legal voters of said Third Ward of said city, as the same was bounded at the time of the filing of the remonstrance. The remonstrance was duly signed by 153 legal voters of said Third Ward of said city who resided in and were legal voters in that territory included in said Third Ward of said city as it existed and was bounded at the time of filing by defendant of his application, and at the time of filing said remonstrance. Of the 176 voters who voted in the West Precinct of said Third Ward as it existed at the election on May 6, 1902, 28 resided at the time of such election in that part of said ward lying south of Hanna street, west of College avenue, and north of Olive street, and which was on the 13th day of May, 1902, transferred to, and made a part of, the Fourth Ward of said city of Greencastle.

No election has been held in said city or in said Third Ward, as it existed at the time of the filing of defendant's petition and of the filing of said remonstrance, since the creation of the said Third Ward, and the last election held in said city for election of officers was held May 6, 1902.

The conclusions of law are as follows: "(1) That the remonstrance ought to be, and hereby is, dismissed; (2) that the applicant, Inman, ought to recover his costs herein against the remonstrants." To the conclusions of law, and to each of them, the appellants excepted.

The errors relied upon for a reversal are, first, the action of the court in refusing a trial by jury; second, the conclusions of law, and each of them.

As claimed by appellee, the first specification of error is not presented, because it should be set out as a reason for a new trial, and the record contains no such motion. Such question cannot be presented by separate assignment of error. *Alley v. State*, ex rel., 76 Ind. 94; *Childers v. First National Bank*, 147 Ind. 430, 46 N. E. 825; *Ketcham v. Brazil*, etc., 88 Ind. 515; *Mattingly v. Paul*, Id. 95.

We are not advised that the precise question raised by the second specification of error has been decided. The statute governing the issuing of a license (section 9 of said Acts of 1895) provides that no license to retail intoxicating liquors shall be granted if before the time named a remonstrance in writing, signed by a majority of the legal voters of any township or ward for which a license is asked, shall be filed with the auditor of the county, against the granting of such license. It further provides that the number to constitute a majority of the voters in the ward or township shall be determined by the aggregate vote cast in said township or ward for candidates for the highest office at the last election preceding the filing of such remonstrance; that is, that the remonstrance is to be signed by a majority of the legal voters of the ward, and the majority is to be determined by the aggregate votes therein. *Massey v. Dunlap*, 146 Ind. 350, 44 N. E. 641; *Wilcox v. Bryant*, 156 Ind. 379, 59 N. E. 1049. The manifest purpose of the statute is to permit the legal voters of the particular district at the time of the filing of the remonstrance and petition to say whether such license shall issue. It was not contemplated by the Legislature that between an election and the filing of an application for a license a ward would be redistricted, nor would it be a reasonable interpretation of the statute to hold that such action by a common council would deprive the resident voters of the ward of the right to express their will in the premises. Under fixed conditions, the statute prescribes how that number is to be determined; that is, the number of votes cast is to serve as the basis for computation. The voters of the ward, as defined when the re-

monstrance and petition are presented, are to have an opportunity to be heard upon the petition. The remonstrants, no longer residents of the new ward, are not entitled to be considered; but, on the other hand, if they are not permitted to remonstrate, they are not to be counted in the aggregate of legal voters, when it affirmatively appears that they are no longer voters of the ward to be affected. It is found in the case at bar that a number of the voters had been, after the election, by a change in the ward lines, taken out of such ward. With the vote cast at said preceding election as a basis, the number of legal voters at the time of the remonstrance may be determined by deducting from said vote the number whose residence has been changed by said action of the common council. In construing a statute the courts will ascertain, if possible, the legislative intent, and carry out the intention when ascertained, although in doing so the strict letter of the statute may not be followed. *Parvin v. Wimberg*, 180 Ind. 561, 30 N. E. 790, 15 L. R. A. 775, 30 Am. St. Rep. 254; *Cleveland, etc., Co. v. Backus*, 133 Ind. 513, 33 N. E. 421, 18 L. R. A. 729; *Pittsburg, etc., R. Co. v. Backus*, 133 Ind. 625, 33 N. E. 432; *Lime City Bldg., etc., Ass'n v. Black*, 136 Ind. 544, 35 N. E. 829; *State v. Myers*, 146 Ind. 36, 44 N. E. 801; *State, etc., v. Holliday et al.*, 150 Ind. 216, 49 N. E. 14, 42 L. R. A. 826.

Under the view taken by the learned trial court, a remonstrance might be rendered wholly unavailing if no election had previously been held in a ward in which license was sought. In the case before us the court found specially that, after the last preceding election, a part of the Third Ward in question, as it existed at that election, was taken to form a part of the Fourth Ward, so that the Third Ward as it existed at the time of the election was not identical with the Third Ward as it existed when appellee's application was acted upon. The court also found the aggregate vote as it originally existed, and the exact number of voters in the part detached therefrom. The vote of the Third Ward at the time appellee's application was acted upon is thus determined by deducting from the number of voters (320) in the original Third Ward the number of votes taken out of the ward by redistricting the same, to wit, 28, the remainder being 292. The court, in finding that the remonstrance was duly signed by 153 legal voters of said Third Ward as it existed at the time appellee filed his application, thereby found that the same was signed by a majority of the voters of the ward at that time. The statute fixes a convenient rule for determining the number of voters at a given time. This rule, however, ought not to exclude from consideration pertinent facts transpiring since said election. Appellee cannot reasonably complain of a construction of the statute in harmony with its purpose, and which gives to the legal resi-

dent voters of a given territory a voice in a matter affecting their interest as citizens and as individuals.

The judgment is reversed, and the trial court directed to restate the conclusions of law, and render judgment in accordance with this opinion.

(34 Ind. App. 80)

FIRST NAT. BANK OF PETERSBURG, IND., v. BEACH. (No. 4,996.)

(Appellate Court of Indiana, Division No. 2.
Nov. 17, 1904.)

NOTES—CONSIDERATION—PATENT RIGHT—STATUTORY REQUISITES—DEFENSES—FAILURE OF CONSIDERATION—PLEADING—FRAUD—APPEAL—REVIEW OF EVIDENCE.

1. Burns' Ann. St. 1901, § 8130, provides that it shall be unlawful for any person to sell any patent right, or the right to sell a patented article in any county in the state, without first filing with the clerk of the county court copies of the letters patent, with an affidavit that such patent is genuine and has not been revoked, etc. Section 8131 declares that any person who may take any obligation in writing for the right to sell an article so patented shall insert in the body of the obligation the words, "Given for a patent right," or, "Given for the right to manufacture a patented article." *Held*, that an answer alleging that notes sued on were given for the right to use and sell a patented article, but that the notes did not contain any statement required by section 8131, and that no affidavit required by section 8130 had been filed, stated a sufficient defense.

2. Burns' Ann. St. 1901, § 277, provides that all actions by assignees shall be without prejudice to any set-off or other defense existing at the time of or before notice of the assignment, except actions on negotiable instruments transferable in good faith before due; and section 7517 declares that whatever defense or set-off the maker of any note or bill had before notice of assignment against an assignor or against the original payee he shall have also against their assignees. *Held*, that since the assignee of a note not payable at bank takes the same subject to all defenses existing in favor of the original payor, it was not necessary to the sufficiency of a defense of want of consideration for a note sued on by an assignee that it should be alleged under such sections that the defense existed before notice to defendant of the assignment, where such note was not payable at any bank.

3. An allegation in an answer in a suit on a note that the same was given without any consideration is tantamount to an averment that the defense existed from the date of the contract.

4. In an action on a note given for a transfer of a right to sell a patented article in certain counties, a paragraph of the answer alleging that plaintiff was induced to execute the contract by the seller's fraud in making false representations, specified, as to the salability of such article, and with reference to the sales actually made in surrounding towns by the seller, etc., was sufficient.

5. Acts 1903, p. 341, c. 193, § 8, providing that, in all cases not now or hereafter triable by a jury, the Supreme and Appellate Courts shall, if required by the assignment of errors, carefully weigh the evidence, etc., does not authorize a review of the weight of the evidence on appeal in an action triable by a jury but in which a jury is waived.

Appeal from Circuit Court, Pike County;
E. A. Ely, Judge.

Action by the First National Bank of Petersburg, Ind., against Thomas L. Beach. A judgment was rendered in favor of defendant, and plaintiff appeals. Affirmed.

E. P. Richardson and A. H. Taylor, for appellant. J. W. Wilson, S. G. Davenport, and T. H. Dillon, for appellee.

WILEY, J. Appellant sued appellee upon two promissory notes payable to the order of A. Borders, and assigned by indorsement in writing to appellant before maturity. The notes were not payable at any bank within this state. Appellee answered in six paragraphs, to each of which a demurrer was addressed; and such demurrer was overruled as to the first, fourth, and fifth paragraphs, and sustained as to the second, third, and sixth. Appellant replied in three paragraphs, but as no question is presented, arising under either paragraph of reply, it is unnecessary to refer further to them. The cause was tried by the court, resulting in a general finding and judgment for appellee. Appellant's motion for a new trial was overruled, and by its assignment of error it is entitled to have considered the action of the court in overruling its demurrer to the first, fourth, and fifth paragraphs of answer, and also in overruling its motion for a new trial.

In his first paragraph of answer, appellee seeks to build his defense upon the fact, as alleged therein, that the original payee of the note had not complied with the statute in regard to the sale of patent rights. The sum and substance of that paragraph of answer is that the Model Commissary Company, by A. Borders, its attorney in fact, sold to appellee ten dozen articles, claimed by it and him to be patented articles, protected by United States patent dated June 26, 1900, and called a "model commissary," and the exclusive right to sell said patented articles in a designated territory and during a designated period; that at the date of the execution of said notes said company, by its attorney in fact, or its attorney in fact, executed three other writings to the appellee, one of which gave him the sole and exclusive privilege, as dealer, to sell said model commissary in said territory, and the other a bill of sale for ten dozen model commissaries at \$4.50 each, with payment on each commissary of \$2 each; and that said writings, together with said notes, constitute one contract, copies of all of which writings are filed as exhibits. It is further alleged that the sole and only consideration for said notes was ten dozen of said articles sold to appellee, which articles were represented and claimed by said company to be patented articles, or patent-right articles, and the exclusive right to sell the same in the territory designated. It is also charged that said Model Commissary Company, by A. Borders, its attorney in fact, had not, nor had any one else, filed with the clerk of the court

of said Pike county, Ind., a copy of its letters patent, nor was any affidavit filed that such letters were genuine and had not been revoked and annulled, and that the Model Commissary Company (A. Borders, attorney in fact) had full authority to sell or barter said articles claimed to be of patent right, nor was any affidavit so filed, giving the name, age, occupation, and residence of said alleged payee or his agent. It is further alleged that there is no clause in said notes, or either of them, containing the statement, "Given for a patent right," or "Given for a right to manufacture a patented article," or words which clearly state what was the consideration for which the notes were given. By his fourth paragraph of answer the appellee admits the execution of the notes sued on, that the same were purchased by plaintiff before maturity, and that they were both due and unpaid, but alleges that each of said notes was given without any consideration. The fifth paragraph sets up fraud in procuring appellee to execute the notes. This paragraph avers that at the time of making the sale to him of the patented articles, and at the time he executed the notes, the said Model Commissary Company, by its attorney in fact, claimed to the appellee that said model commissaries were patent rights and protected by United States patent, and that he relied upon said statements at the time, and believed them to be true; that there was not inserted in the body of said notes, or either of them, "Given for a patent right," or, "Given for the right to manufacture a patent right," or words which clearly stated the consideration for which the notes were given. It is also averred: That appellee had never had any experience in the purchase and sale of a patent right, nor any articles called or claimed to be a patent right, and that he knew nothing about how to sell or dispose of said commissaries, but had to rely on all the statements so made by said company, and the statements made to him by said Borders. That said Borders was a shrewd dealer and trader in patent rights, and knew all about the business, and he knew that the appellee knew nothing about it. That, as a further inducement to appellee to make said purchase and execute said notes, said Borders exhibited to appellee a large bunch of orders for said commissaries, claiming that there were more than 200 of them, executed by almost every business and professional man in the town of Petersburg, and every leading farmer in Washington, Madison, Clay, and Jefferson townships, in Pike county, Ind., and said that they were orders that he (Borders) had taken himself for said commissaries, and that he had four other men working for him, who had taken as many as he had; that it was an article that everybody wanted, and that there was no trouble to sell it; and that he (Borders) would make over \$5,000 in his profits from the sale of said commissaries

on individual orders in said county. That, in truth and in fact, said Borders had not made said sales and taken said orders. That, if the names of said parties were on said orders, said Borders, or some one at his instance, had put them there without authority, and that, in truth and in fact, said articles could not be easily sold, and but few people wanted them. That, as an additional inducement to appellee to execute said notes, said Borders claimed that he had been in Rockport, in Spencer county, Ind., just before coming to Pike county, and that he had, while there, taken a large number of orders for said commissaries, to wit, 35, from the most influential and reliable people in and around Rockport, and that there would be no trouble to sell the commissaries in that county, and that, if appellee would make said purchase and execute said notes, he (Borders) would turn over to this appellee all of said orders in Spencer county, and let him have that county to operate in, and that he relied on said statements and believed them to be true, and that said articles would be of easy sale and great demand in said county, and, so relying upon and believing said false and fraudulent statements, he did make said purchase aforesaid, and executed his notes sued upon, when, in truth and in fact, as he afterwards found, there were only 20 of said orders, and most of them were forgeries, to wit, 15 of them, and that said commissaries would not sell in said county, and were not in demand. The answer further charges that Borders and his other men acting with him, for the fraudulent purpose of cheating, swindling, defrauding, and inducing citizens of Pike county, and the appellee in particular, to execute said notes, prepared and carried with him large numbers of papers purporting to be individual orders for commissaries from the professional and business men of the town of Petersburg, and representative farmers of said Washington, Jefferson, Madison, Clay, and Logan townships, in Pike county, and, in the course of the negotiations of sales for territory and ten dozen commissaries, would exhibit these pretended orders to this appellee, and say to him, "See the individual orders I have taken," and then pretend to run over and read the names of the most influential men in said township; that said acts on the part of said Borders did induce appellee to believe, by said acts and his statements as to the said easy sales, that said commissaries were in great demand, and of easy and quick sale, by reason of which he was induced and caused to execute the notes in suit, and, but for said acts and statements, he would not have made said trade and executed said notes; that, after the execution of said notes, appellee ascertained that all of said acts and statements made by said Borders were false, and made for the purpose of inducing appellee to execute same, and that no individual orders

had been taken from certain persons (naming them), and from none of the others whose names were called over as parties who had made individual purchases of said commissaries, and that they were not of ready sale and easily disposed of; that, by said means of said false and fraudulent acts, statements, and inducements, this appellee was persuaded to, and did, execute said notes; and that the articles so purchased, and for which the notes were given, were of no value, and would not sell, all of which said Borders knew at the time, etc.

Under the first paragraph of his answer, appellee seeks to defend against the notes upon the ground that the original payee had failed to comply with the provisions of the statute regulating the sale of patent rights (sections 8130, 8131, Burns' Ann. St. 1901). In the case of *Bank v. Jones*, 26 Ind. App. 583, 58 N. E. 852, 84 Am. St. Rep. 310, a paragraph of answer substantially like the one under consideration was held bad, but the contract which formed the basis of the action was executed before the amendment of the statute in 1899. The original act (Burns' Ann. St. 1894, § 8131) only applied to the intangible right secured by letters patent, and not to articles manufactured and sold under the patent. Appellant insists that the case last cited does not correctly state the law, and urges that it should be overruled. We cannot concur in that insistence, for the decision rested upon the statute as it existed when the contract was made, and was in harmony with the decisions of the Supreme Court. In a subsequent appeal of the case (*Jones v. Bank*, 69 N. E. 466) this court adhered to the former decision. We approve both decisions. See, also, *Hankey v. Downey*, 116 Ind. 118, 18 N. E. 271.

The Legislature in 1899 amended the original law in a material respect, and the contract sued on here was executed since that amendment, and the sufficiency of the first paragraph of answer must be measured and determined by its provisions. The amended section is as follows: "It shall be unlawful for any person to sell or barter or offer to sell or barter, any patent right, *the whole, any part thereof*, or any right which such person shall allege to be a patent right, or sell, barter, grant or license, or offer to sell, barter, grant or license *the right to manufacture, use or sell the patented article, whether either of said rights be exclusive or non-exclusive*, in any county within the state, without first filing with the clerk of the court of such county copies of the letters patent, duly authenticated, and, at the same time, swearing or affirming to an affidavit before such clerk that such letters patent are genuine, and have not been revoked or annulled, and that he has full authority to sell or barter, *grant or license the right so patented, or any part thereof, and the right to manufacture, use and sell the patented article*, which affi-

davit shall set forth his name, age, occupation and residence, and if any agent, the name, occupation and residence of his principal. A copy of this affidavit shall be filed in the office of said clerk, and the clerk shall give a copy to the applicant, who shall exhibit the same to any person on demand." Section 8130, Burns' Ann. St. 1901. "Any person who may take any obligation, in writing, for which any patent right, or right claimed by him or her to be a patent right, *or the right of manufacture, use or sell, the article so patented, whether the said right, or either of them be by sale, grant or license, exclusive or non-exclusive*, shall form a whole or any part of the consideration, shall, before it is signed by the maker or makers, insert in the body of said written obligation above the signature of said maker or makers, in legible writing or print, the words, 'Given for a patent right,' or 'Given for the right to manufacture a patented article,' or words which clearly state the consideration for which the note was given." Section 8131, Burns' Ann. St. 1901. It will be observed that material provisions are added to the statute by the amendment indicated by italics. The amended statute places an inhibition against the sale or offer to sell, not only a patent right, but makes it unlawful to "offer to sell, barter, grant or license the right to manufacture, use or sell the patented article, whether either of said rights be exclusive or non-exclusive," without first filing the required affidavit. The amendments made in 1899 to section 8131, supra, are very significant and material in the determination of the question we are now considering. Formerly the statute only required that when any obligation in writing was given for a patent right, or a right claimed to be a patent right, before it was signed by the maker, it should be indorsed, "Given for a patent right." Now the statute is extended to the sale of the right to manufacture, use, or sell the article so patented, whether the said right, or either of them, be by sale, grant, or license, exclusive or nonexclusive, or shall form the whole or any part of the consideration, and requires the additional indorsement, "Given for the right to manufacture a patented article," or words which clearly state the consideration for which the note was given. In this case the notes sued on, as averred in the first paragraph of answer, were given, not for a patent right, but for the right to "use or sell the patented article." Under the amended statute the vendor had no right to make such sale, or to take written obligations therefor, without first complying with the provisions of the statute, by filing the required affidavit, and by indorsing on the notes, before they were signed by the maker, the words, "Given for the right to manufacture a patented article, or words which clearly state the consideration for which the note [notes] were given." The paragraph of answer under considera-

tion fully shows wherein the provisions of the statute were wholly ignored, and, measured by the statute, states a complete defense in bar. The demurrer to it was properly overruled.

Appellant's counsel argue that the fourth paragraph of answer is bad, for failing to aver that the defense existed before notice to appellee of the assignments, and cite sections 277, 7517, Burns' Ann. St. 1901, and several authorities. Neither the statute nor the authorities are in point. The assignee of a note not payable in bank takes the same subject to all defenses existing in favor of the original payor. *Reagan v. Burton*, 67 Ind. 347; *Sims v. Wilson*, 47 Ind. 228; *Watts v. Fletcher*, 107 Ind. 891, 8 N. E. 111; *Henry v. Gilliland*, 103 Ind. 177, 2 N. E. 360. The sum and substance of this paragraph is that the notes sued on were executed without any consideration whatever. Such fact constitutes a defense in bar, and under the averment the defense existed from the date of the contract.

The fifth paragraph of answer, to which a demurrer was overruled, sets up fraud in the procurement of the execution of the notes by the original payee. The paragraph falls very far short of being a model pleading, and the facts relied upon are loosely stated; but its general averments are sufficient to bring it within the rule declared in *Jones v. Bank*, supra, and, upon the authority of that case, we must hold that the demurrer was properly overruled.

The remaining question for decision is raised by a proper assignment alleging error in overruling appellant's motion for a new trial. Counsel for appellant urge that the evidence does not sustain the finding and judgment, and also that under the act of 1903 this court is authorized to weigh the evidence. It is sufficient to say, first, that there is some evidence in the record which supports the finding and judgment, and, under the well-established rule in this state, we cannot disturb that finding; second, appellant's counsel seem to have misconstrued or misunderstood the provisions of section 8 of the act approved March 9, 1903 (Acts 1903, p. 341, c. 193). More than that, in referring to the statute they have misquoted it. This, of course, was unintentional on their part; and, as they have quoted it in their brief, it does authorize an appellate court, in cases of this character, to award judgment according to the clear weight of the evidence, etc. As quoted in their brief, the statute reads as follows: "In all cases now, or hereafter triable by a jury, the Supreme and Appellate Courts shall, if required by the assignment of errors, carefully consider and weigh the evidence and admissions heard on the trial," etc. They have omitted the very important word "not," preceding the word "now," for the statute is that "in all cases not now, or hereafter triable by a jury," etc. This cause

was triable by a jury, but, because a jury was waived and it was tried by a court, it does not make the statute applicable here.

The judgment is affirmed.

(34 Ind. App. 107)

**MIDLAND STEEL CO. v. CITIZENS' NAT
BANK OF KOKOMO. (No. 4,709.)**

(Appellate Court of Indiana, Division No. 1.
Nov. 23, 1904.)

NOTES—NEGOTIABILITY—LAW OF FOREIGN JURISDICTION—EVIDENCE—BONA FIDE HOLDER—EQUITABLE DEFENSES—COMPLAINT—SUFFICIENCY—DEPOSITIONS TAKEN IN FOREIGN STATE—ADMISSIBILITY—POWER OF NOTARY.

1. In an action on a note made by a corporation, a complaint alleging that the corporation had, before the execution of the note, adopted the name and official title of its president in which to execute notes in the ordinary course of business, and that it executed the note in suit, a copy of which, showing signature by the president, was set out, was sufficient, without alleging that the note was executed in the usual course of business.

2. In an action on a note executed by a corporation, it is unnecessary for a complaint setting out a copy of the note, stating that it was for value received, to allege that it was executed for a debt of the corporation.

3. In an action on a note which is nonnegotiable, under the law of this state, because payable in another state, a complaint seeking to establish the negotiable character of the note under the law of the state where it is payable cannot be held good as stating a cause of action on a nonnegotiable note, but is demurrable unless the law of the foreign state is well pleaded.

4. The liability of the maker of a note payable in another state is determined by the law of that state.

5. Under the statute providing that the unwritten or common law of any other of the United States may be proved as a fact, it may be shown in a suit on a note made here and payable in another state that by the decisions of the highest court of that state, irrespective of any statute, such a note is regarded as negotiable.

6. The decision on a former appeal is the law of the case on retrial only so far as the facts remain the same.

7. Failure or want of consideration is no defense to an action on a note by a bona fide purchaser unless want of notice of such defenses is also negatived.

8. The common law is presumed to be in force in another state.

9. Under the common law a notary has no authority to administer oaths or take depositions.

10. Under Burns' Ann. St. § 422, providing that depositions may be taken within or without the state before any notary, a deposition taken before a notary in another state may be used in the state, although, by the laws of the state where the deposition was taken, a notary has no power to take a deposition.

Appeal from Circuit Court, Henry County; John M. Morris, Judge.

Action by the Citizens' National Bank of Kokomo against the Midland Steel Company. From a judgment for plaintiff, defendant appeals. Affirmed.

§ 8. See Common Law, vol. 10, Cent. Dig. § 14; Evidence, vol. 20, Cent. Dig. § 161.

Ryan & Thompson and Elliott, Elliott & Littleton, for appellant. Blackledge, Shirley & Wolf and Forkner & Forkner, for appellee.

ROBINSON, J. Suit by appellee, as indorsee upon a promissory note payable at a bank in Pittsburgh, Pa., to the order of the Muncie Land Company. This is the second appeal. *Midland Steel Co. v. Citizens' National Bank*, 26 Ind. App. 71, 59 N. E. 211. The note in suit is as follows: "Midland Steel Company. \$2,000. Muncie, Ind., April 23, 1896. Four months after date we promise to pay to the order of the Muncie Land Company two thousand dollars, value received, negotiable and payable without defalcation or discount, at the Union National Bank, Pittsburgh, Pa., with interest at six per cent. per annum from date. R. J. Beatty, President." The amended complaint avers that appellee is a banking corporation at Kokomo, Ind.; that appellant is a manufacturing corporation organized under the laws of Indiana, and with its office and place of business at Muncie, Ind.; that, prior to the execution of the note in suit, appellant adopted the name and style of "R. J. Beatty, President," in and by which to execute the commercial obligations, bills of exchange, and promissory notes in the usual course of appellant's business; that, on the date named, appellant, by and in the name of "R. J. Beatty, President," executed to the Muncie Land Company the above note, whereby appellant promised to pay the land company the amount named as therein specified; that after the execution of the note, and before it became due, the Muncie Land Company sold, transferred, and indorsed the same, in writing, and for a valuable consideration, to appellee; that appellee purchased the note in the usual course of business, without notice of any defense; that at the time the note was executed, and up to the present time, the note was and is negotiable under the rules of the law merchant, as the law was determined and adjudged by the highest judicial tribunals of Pennsylvania, and that the indorser thereof, before maturity, in the usual course of business, and without notice of any defense, took the same free from all defenses, and that, under such laws, appellee so held the note; that, at the maturity of the note, appellee presented the same for payment at the Union National Bank of Pittsburgh, where the same was payable, and payment was refused; and that thereupon appellee caused the note to be duly protested.

It is first argued against the sufficiency of the complaint that it is not averred that the note was executed by appellant in the usual and ordinary course of its business, nor that it was executed for a debt of the corporation, nor that the Muncie Land Company or the appellee took it as the note of the appellant. The complaint avers that, at and prior to the execution of the note in suit,

appellant adopted and used the name and style of "R. J. Beatty, President," in and by which to execute notes in the usual and ordinary course of its business; that, on the date named, appellant, by and in the above name, "executed and delivered to the Muncie Land Company" its promissory note, a copy of which is set out in the complaint; that, by the terms of the note, appellant, by the above name, promised to pay the land company the sum mentioned, for value received; that after the execution of the note, and before it became due, the payee, for a valuable consideration, sold and transferred the same by written indorsement to appellee, who took the same in the usual course of business, without notice of any defenses thereto. It is seen that it is averred that appellant executed the note, which implies both a signing by appellant and a delivery by appellant. In that respect the complaint shows a complete contract. *Nicholson v. Combs*, 90 Ind. 515, 46 Am. Rep. 229; *Prather v. Zulauf*, 38 Ind. 155. Where a pleading avers the execution of a promissory note, and gives a copy, it need not otherwise show a promise to pay. *Reynolds v. Baldwin*, 93 Ind. 57. An averment that the note was executed renders an averment that the note was signed surplusage. *Jaqua v. Woodbury*, 3 Ind. App. 289, 29 N. E. 573. A corporation may contract a debt or execute a note when necessary in the furtherance of its legitimate objects, and it is averred that, when the note was executed, appellant was a corporation. Unless the contrary appears, it must be presumed that it exercised the power in a legitimate way. We fail to see the necessity of an averment that the note was executed in the usual course of business. Nor was it necessary to aver that it was executed for a debt of the corporation. It is averred that appellant executed the note by the name of "R. J. Beatty, President," and the note states it was for value received. In *Second National Bank v. Midland Steel Co.*, 155 Ind. 591, 58 N. E. 833, each of the several paragraphs of complaint was held sufficient. The note sued on in that case and the note in the case at bar are the same, except as to the date and time of payment. We do not understand that case to hold that the averments contended for by appellant are necessary. See, also, *Midland Steel Co. v. Citizens' National Bank*, 26 Ind. App. 71, 59 N. E. 211.

It is also argued that the law of Pennsylvania, where the note is payable, is not well pleaded. The note sued on is not governed by the law merchant. It is not payable at a bank in this state, and is subject to defenses in the hands of a bona fide holder for value. It is, no doubt, true that the complaint, aside from any averments as to the law of Pennsylvania, states a cause of action upon the note as a nonnegotiable instrument. But if the complaint is held good upon that theory only, the demurrers to appellant's an-

swers should not have been sustained. This is the effect of the ruling upon the former appeal. *Midland Steel Co. v. Citizens' Nat. Bank*, supra. However, the theory of the pleading is that the note is negotiable under the laws of the state of Pennsylvania, and it must be good upon the theory upon which it proceeds, or it will not be good at all.

In pleading the Pennsylvania law, the complaint avers "that at the time said note was executed as aforesaid, and at the time it was indorsed and taken by this plaintiff as aforesaid, and for many years prior thereto, and up to the present time, it was and is the common and unwritten law of the state of Pennsylvania, as ruled, established, and adjudicated by the highest judicial courts of that state, that said note was and is negotiable according to and under the rules of the law merchant, as determined and adjudicated by the highest judicial courts of said state, and that the indorsee thereof before maturity in the usual course of business, without notice of any defenses thereto, took the same freed from all defenses thereto, and that under and by the said laws of the state of Pennsylvania the plaintiff took and now holds said paper free from all defenses thereto; that promissory notes payable to order or bearer, containing the words 'negotiable and payable without defalcation or discount' at a bank in said state, were and are negotiable by indorsement, and by indorsement before due, for which, in good faith, the holder takes the same freed from all defenses thereto, and set-off and cross-demand."

It is quite true there is no common law, strictly speaking, peculiar to the state of Pennsylvania or Indiana. Neither is the general law merchant one thing in Pennsylvania, and another in Indiana. In applying the principles of the general law merchant to a contract, the law of the forum and of the place of the contract is the same. "The whole current of authorities," said the court in *Platt v. Eads*, 1 Blackf. 81, "from the commencement of the history of our jurisprudence down to the present day, goes to establish the doctrine that the custom of merchants is and always has been regarded as a part of the common law of England, and that bills of exchange, both foreign and inland, are under its regulation. It is a law of a general nature, and not local to that kingdom, and is there recognized and acknowledged by the courts as a part of their system, from the circumstance of its universal application and use in all mercantile transactions throughout the commercial world; being in those cases a rule of decision to which all nations agreed, and of which all courts take notice."

As we have already observed, promissory notes at common law and under the law merchant were not, in this state, negotiable, so as to be free from defenses in the hands of a bona fide holder; and the note in suit,

as it is not payable at a bank in this state, is not commercial paper under the law of this state. However, it seems that the law of the foreign state need not necessarily be statute law. Our statute provides that "the unwritten or common law of any other of the United States * * * may be proved as facts by parol evidence." And in *Alford v. Baker*, 53 Ind. 279, where the court had under consideration a note made in Kentucky, and payable at a bank in that state, it is said: "Where the law of another state, claimed to be different from the common law, is involved in a judicial proceeding in this state, it becomes matter of fact in such proceeding, and must be proved, and, indeed, alleged, unless the question arises in such a way as to render the pleading unnecessary. If by any statute of Kentucky, or by the general course of the decisions of the courts of that state, such note is placed upon the footing of bills of exchange, and governed by the law merchant, that fact might have been, but was not, shown. Our statute makes provision for the proof both of the written and unwritten law of another state."

As the note was made in Indiana and payable in Pennsylvania, appellant, the maker, is liable according to the law of Pennsylvania. He is presumed to have contracted with reference to the law of that state. *Hunt v. Standart*, 15 Ind. 33, 77 Am. Dec. 79; *Alford v. Baker*, 53 Ind. 279; *Browning v. Merritt*, 61 Ind. 425; *Lindeman v. Rosenfield*, 67 Ind. 248, 33 Am. Rep. 79; *Fordyce v. Nelson*, 91 Ind. 447; *Kopelke v. Kopelke*, 112 Ind. 435, 13 N. E. 695; *Sondheim v. Gilbert*, 117 Ind. 71, 18 N. E. 687, 5 L. R. A. 432, 10 Am. St. Rep. 23.

We must presume, in the absence of proof to the contrary, that the common law prevails in Pennsylvania. However, a decision of the highest court of that state upon some branch of the common law may not be in harmony with the decisions in this state. But if the highest judicial tribunal of that state has declared that a note like that in suit may be taken by a good-faith purchaser for value freed from all defenses, that is the law of that state. And this would be true whether the decisions of that state were under a statute or not. A foreign court could question the decisions of the courts of this state upon any branch of the common law only upon the ground that it did not agree with the premises or the reasoning of the court. If the foreign court may question such a decision, it might question a decision of the courts of this state in interpreting one of its own statutes, but it is conceded that this the foreign court cannot do. The foreign court is the only tribunal competent to decide upon the common or the statute law of its own state, and we fail to see any reason for permitting such decisions to be questioned in the one case, and not permitting them to be questioned in the other. The contract in question

was made with reference to the law of the state where it was to be performed. "The law is a silent factor in every contract." *Long v. Straus*, 107 Ind. 94, 6 N. E. 123, 57 Am. Rep. 87; *Foulks v. Falls*, 91 Ind. 315. We think the complaint sufficiently pleads the law of Pennsylvania, and that, upon the theory that the note in suit is negotiable under the law of the place where it was to be paid, the pleading is good against a demurrer.

Error is also assigned upon the court's sustaining the demurrer to the second, third, and fourth paragraphs of appellant's answer. The first paragraph of answer is the general denial. The second paragraph is substantially the same as the answer set out in the opinion on the former appeal. *Midland Steel Co. v. Citizens' Bank*, 26 Ind. App. 71, 74, 75, 59 N. E. 211. The third paragraph pleads, in effect, a failure of consideration. The fourth paragraph alleges that the note was given without any consideration. The fifth paragraph is substantially the same as the second, but concludes, "Wherefore, defendant says it did not execute said note, and that the same is not its act or deed," and is verified. Upon the former appeal the complaint sought to recover upon the note as a nonnegotiable instrument. In the case at bar the complaint shows that the note is negotiable under the law of Pennsylvania, and, as to its commercial qualities, is governed by the law of that state. The second and third paragraphs of answer upon the former appeal, which were substantially the same that they were here, were held sufficient. But the decision on the former appeal is the law of the case only in so far as the facts remain the same. *Eckert v. Binkley*, 134 Ind. 614, 33 N. E. 619, 34 N. E. 441; *State ex rel. v. Christian*, 18 Ind. App. 11, 47 N. E. 395. The second, third, and fourth paragraphs of answer fail to allege that when appellee purchased the note it had notice of the facts pleaded in these answers as a defense. The complaint avers that before the note was due the payee sold and transferred it by written indorsement to appellee; that appellee purchased the note before maturity for a valuable consideration paid to the payee, in the usual course of business, and without notice of any defenses on the part of the maker. A defense by the maker, as against the original payee, is of itself insufficient, but should contain also a denial of appellee's want of notice, or some equivalent averment. *Bunting v. Mick*, 5 Ind. App. 289, 31 N. E. 378, 1055; *Bradley, Holton & Co. v. Whicker*, 23 Ind. App. 380, 55 N. E. 490. See, also, *Sondheim v. Gilbert*, supra; *National Bank v. Morgan*, 165 Pa. 199, 30 Atl. 957.

Appellant acknowledged service of notice that on a certain day appellee would, "before some officer authorized to take depositions," at a certain office in Chicago, Ill., take the deposition of Ross J. Beatty, to be

used in evidence on the trial. The deposition was taken at the time and place named in the notice, before a notary public in Cook county, Ill. The notary certifies that the witness was by her "first duly sworn according to law," that the deposition was reduced to writing by her, that it was taken at the time and place named in the notice, and that appellant attended the taking thereof by attorney. The certificate is signed by the notary, and the notarial seal affixed. It is argued that the motion to suppress the deposition and the objection to its introduction in evidence should have been sustained, because it does not appear that a notary public in Illinois has any authority to take depositions or administer oaths. There is no statement in the certificate that the notary has such authority. A notary public is a public officer, and possesses certain powers under the common law by virtue of his office. We must presume that the common law exists in Illinois, and of the common law powers of a notary we may take notice. But under the common law a notary had no authority to administer oaths. *Teutonia, etc., Co. v. Turrell*, 19 Ind. App. 469, 49 N. E. 852, 65 Am. St. Rep. 419; *Berkery v. Reilly*, 82 Mich. 160, 46 N. W. 436; *Keefer v. Mason*, 36 Ill. 406; *Trevor v. Colgate*, 181 Ill. 129, 54 N. E. 909; *Proffatt on Notaries*, § 24; *John's Am. Notaries*, § 79. Nor has a notary at the common law any authority to take depositions. "The common law," said the court in *Burt v. Pyle*, 89 Ind. 398, "did not authorize a notary public to take depositions. Such authority is conferred only by statute." The statute of this state confers upon a notary, among others, the power to administer oaths generally, and to take and certify affidavits and depositions. *Burns' Ann. St. 1901*, § 8039. And section 8040 makes the official certificate of a notary public in this state, attested by his seal, presumptive evidence of the facts therein stated in cases where by law he is authorized to certify such facts. Section 464, *Burns' Ann. St. 1901*, provides that "certificates or instruments, either printed or written, purporting to be the official act of a notary public of this state, of the District of Columbia, or of any other state or territory of the United States, and purporting to be under the seal and signature of such notary public, shall be received as presumptive evidence of the official character of such instrument and of the facts therein set forth." The certificate of the notary complies with the requirements of section 434, *Burns' Ann. St. 1901*; and, had the deposition been taken before a notary in this state, the certificate manifestly is sufficient. It is under the seal and signature of the notary, and this, under the statute, entitles it to be received as presumptive evidence of the official character of the instrument, and also of the facts set forth in the certificate. The certificate states that the person before whom the deposition was taken is a notary public

within and for Cook county, Ill. It is true, we cannot presume that a notary public in Illinois has authority to administer oaths and to take depositions. But under section 422, Burns' Ann. St. 1901, is it necessary that a notary public should have authority under the laws of that state to take a deposition which is to be used in the courts of this state? That section provides, "Depositions of witnesses, taken within or without the state, may be taken, according to the regulations hereinafter provided, before any judge, justice of the peace, notary public, mayor or recorder of a city, clerk of a court of record, or commissioner appointed by the court to take depositions." That is, the depositions of a witness may be taken without the state before a notary public, if taken in compliance with our statutory requirements. Formerly the statute provided that when a deposition was to be taken within the state no commission was necessary, but when taken out of the state a commission should issue to the officer designated. 2 Rev. St. 1876, p. 143, § 260. But the present statute does not require a commission when the deposition is to be taken within or without the state, if within the United States, and requires a commission only when taken out of the United States. Burns' Ann. St. 1901, § 437 (Rev. St. 1881, § 433). A notary public is a public officer not merely in the state from which he receives his appointment, but an officer recognized by all the states. His seal need not be authenticated. It proves itself. The statute recognizes a notary public in another state as an officer before whom a deposition may be taken. It has conferred upon him that authority, and it is immaterial whether the foreign state has conferred upon him such authority or not. If a court should designate some one as a commissioner to take a deposition in a foreign state, it would be immaterial whether or not such foreign state had conferred authority upon commissioners to take depositions. Such state might, by designating before whom depositions could be taken, exclude commissioners. But that would not affect the right of the commissioner to act. The same is true of a notary public designated by the statute. Our statute gives authority to a notary to take a deposition, and to administer the oath to the deponent. And by providing that a deposition without the state may be taken before a notary public, the statute confers upon the foreign notary the same authority in the matter of taking a deposition as that given a resident notary to take a deposition in this state. The statute requires that such deposition shall be taken according to the requirements of our statute, and the certificate shows that this was done. See *Thompson v. Wilson*, 34 Ind. 94; *Dumont v. McCracken*, 6 Blackf. 355.

Counsel for appellant cite the case of *Teutonia, etc., Co. v. Turrell*, 19 Ind. App. 469, 49 N. E. 852, 65 Am. St. Rep. 419, as controlling in the case at bar. In that case it

was held that whether a notary public in Ohio has power to take affidavits is a matter of which the courts of this state cannot take judicial notice; and an affidavit in attachment taken by a notary in that state was held insufficient for the reason that no attempt had been made to comply with the statute (section 483, Burns' Ann. St. 1901), which expressly provides how an affidavit taken in another state may be received and used in the courts of this state. We adhere to the decision in that case, but fail to see anything in it controlling in the case at bar, which is governed by another and different statute.

Objection is made to certain evidence introduced, but, upon a careful consideration of the questions thus raised, we fail to find any reversible error. There was a trial by the court, and a special finding of the facts, with conclusions of law; and, from the whole record, we think the case was fairly tried, and determined upon its merits.

Judgment affirmed.

(71 Ohio St. 50)

CHARLES v. FAWLEY et al.

(Supreme Court of Ohio. Nov. 1, 1904.)

APPEAL—DISMISSAL NUNC PRO TUNC—ERROR—TIME OF FILING PETITION—APPEAL FROM COMMON PLEAS—NOTICE.

1. Judgments and orders may be entered nunc pro tunc in furtherance of justice only, and when an order dismissing an appeal is so entered by the circuit court a petition in error for its reversal may be filed in the Supreme Court at any time within four months from the date of its actual entry.

2. An act to amend the statutory requirement respecting notice of an intention to appeal from the judgment of the court of common pleas to the circuit court, with a view to a trial de novo, relates to the remedy, and, unless the amending act expressly provides otherwise, a party may, under favor of section 79, Rev. St. 1892, give such notice in the mode prescribed by the statute in force at the commencement of the original action.

(Syllabus by the Court.)

Error to Circuit Court, Highland County.

Action by one Charles against one Fawley and others. From a judgment of the circuit court dismissing an appeal from the common pleas, Charles brings error. Reversed.

Suit was brought by one of the parties in the court of common pleas of Highland county June 14, 1901, for the partition of real estate. On October 13, 1902, a final judgment was rendered in the case, and the plaintiff in error, being dissatisfied therewith, entered upon the journal of the court of common pleas notice of his intention to appeal to the circuit court. The amount of the appeal bond was fixed, and the bond was executed. On November 19, 1902, the defendants in error filed in the circuit court a motion for the dismissal of the appeal upon the ground that the appellant had not filed a written notice of his intention to take such

appeal. On April 22, 1903, the circuit court entered an order as of November 19, 1902, sustaining such motion and dismissing the appeal. The present petition in error was filed in this court on May 22, 1903, for the reversal of the order of dismissal.

H. M. Huggins and L. R. Duckwall, for plaintiff in error. J. F. Wilson, for defendants in error.

SHAUCK, J. (after stating the facts). We do not inquire whether the circuit court may, for any purpose, enter an order of this character *nunc pro tunc*. Orders may always be so entered in furtherance of justice, and it may be assumed that for some purposes the order in the present case might operate from the earlier date. We have only to inquire whether the appellant's right to prosecute error for the reversal of that order was thereby defeated, his petition in error having been filed in this court for that purpose within four months of the date when the order was actually entered by the circuit court, but not within four months of the date when, by its terms, it was to operate. In support of the conclusion that it was so defeated it is urged that the statute limiting the time within which petitions in error may be filed began to run not on April 22, 1903, when the order was actually entered, but on November 19, 1902, when, by its terms, it was to take effect. We are urged to adopt this view although the circuit court is a court of record, and although it is imperatively required that the transcript of its record to be filed here with the petition in error must contain the order or judgment whose reversal is sought. Since the right to prosecute error did not accrue until the order became a matter of record, the sum of the contention for the defendants in error is that an order which may be entered *nunc pro tunc* only in furtherance of justice has the effect to defeat the right to prosecute a proceeding in error which is expressly conferred by the statute.

The petition in error having been filed within four months after the entry of the order whose reversal is sought, we have to inquire whether the circuit court properly dismissed the appeal. By its terms the order of dismissal appears to have been made because the appellant had not, within three days after entry of the final judgment in the court of common pleas, filed a written notice of his intention to appeal, in accordance with the requirement of section 5227, Rev. St. 1892, as amended March 25, 1902 (93 Ohio Laws, p. 66), and in force when the order was entered. The circuit court so concluded, although the record contained notice of such intention entered upon the journal of the court of common pleas in accordance with the requirement of the section before said amendment and as it was in force when the suit was instituted in the court of common pleas. The amending act of March

25, 1902, makes no provision respecting its operation or effect, except that it "shall take effect and be in force from and after its passage." Consistency of interpretation is of first importance, and it requires us to assume that the Legislature has knowledge of the acts which it has passed, and that this act was so passed in view of the provisions of chapter 5, relating to the operation of statutes. Section 79 is a part of that chapter, and it provides that: "Whenever a statute is repealed or amended, such repeal or amendment shall in no manner affect pending actions, prosecutions, or proceedings, civil or criminal, and when the repeal or amendment relates to the remedy, it shall not affect pending actions, prosecutions, or proceedings, unless so expressed; nor shall any repeal or amendment affect such causes of action, prosecution, or proceeding, existing at the time of such amendment or repeal, unless otherwise expressly provided in the amending or repealing act." That the effect of this section is to prevent the application of the amendment of March 25, 1902, to the present case would seem to be clear. That it prevents the application of an amending statute to the right of appeal in an existing case, in the absence of a provision in the amending statute expressly making it so applicable, is the sole point decided in *Bode, Adm'r, v. Welch*, 29 Ohio St. 19. In the opinion it is said that it matters not whether the right to appeal is to be regarded as a subsisting cause of action or proceeding, or whether the case in which the right exists is to be regarded as a pending action or proceeding. The conclusion of the circuit court is not supported by any of the decisions respecting proceedings in error for the reversal of the judgment. Such proceedings recognize the termination of the original case. To institute them it is required that a petition in error be filed in the reviewing court, and to acquire jurisdiction of the person of the adverse party there must be the issuance and service of summons; whereas the steps necessary to effect an appeal are taken in the court having jurisdiction of the original action, and the adversary party is bound thereby without summons. An obvious analogy is found in the doctrine of *lis pendens*, where the distinction between appeals and proceedings in error in this respect is recognized. The property which is the subject of a suit is bound by its event not only while the case is pending in the court of first resort, but also while it is pending in a court to which it may be taken by appeal; but where a review of the judgment is sought by proceedings in error the suit is regarded as ended by the judgment of the court of first resort. This distinction was recognized in *Heirs of Ludlow v. Kidd's Ex'rs*, 3 Ohio, 541, where Sherman, J., speaks of an appeal as a proceeding in the original cause, and concludes that its effect is to continue the cause and suspend the decree of

the inferior tribunal until the judgment of the tribunal to which the appeal is taken.

The conclusion of the circuit court is not reconcilable with the provisions of the statute or with the decided cases, and its order dismissing the appeal will be reversed.

SPEAR, C. J., and DAVIS, PRICE, CREW, and SUMMERS, JJ., concur.

(71 Ohio St. 76)

STATE ex rel. MARTIN v. THOMPSON et al.
(Supreme Court of Ohio. Nov. 1, 1904.)

ELECTION—TWO CERTIFICATES FOR COUNTY OFFICES—WRITTEN OBJECTIONS—VALIDITY OF UNOBJECTED CERTIFICATE—COMMON PLEAS COURT—JURISDICTION—RESTRAINING DEPUTY STATE SUPERVISOR, WHEN—MANDAMUS—PROCEDURE IN NOMINATIONS.

1. Where two certificates of nominations for county offices, both claiming to be the regular nominations of the same political party, are filed, and written objections are duly filed to one of such certificates and none to the other, a controversy is thereby raised as to the validity of the latter certificate, and as to it the other certificate and the written objections thereto operate as written objections within the meaning of section 2966-23, Bates' Ann. St.; and the court of common pleas is without authority to restrain the deputy state supervisors of the county from considering such certificates and the controversy arising thereon, and from certifying to the state supervisor of elections their failure to arrive at a decision thereon; and such court is without authority to require the deputy state supervisors, by mandamus or otherwise, to cause the names appearing in the certificate to which specific objections were not filed to be printed on the official ballot.

(Syllabus by the Court.)

Application by the state, on the relation of J. C. Martin, for writ of mandamus to F. W. Thompson and others. Writ granted.

The facts appear in the petition, answer, demurrer to the second and third defenses of the answer, and reply to the first defense, as follows:

"The relator says: That he is a Republican elector of Brown county, Ohio. That the defendants F. W. Thompson, Isaac Bowser, W. E. Hall, and C. C. McBeth are deputy state supervisors of elections for Brown county, Ohio, and constitute the board of deputy state supervisors for said county, and that H. P. Jennings is the clerk of said board. That on the 19th day of September, 1904, there was filed with the said board of deputy state supervisors a certificate purporting to be a certificate of nomination for officers to be voted for at the November election of said county, signed by J. D. Houston, chairman, and J. W. Galbreath, secretary, of a Republican county convention held at Georgetown, Brown county, Ohio, on September 19, 1904. That on said same day, to wit, September 19, 1904, there was filed with the said board of deputy state supervisors a certificate of nomination signed by J. C. Martin as chairman and Thomas J. Leeds and J. C. Newcomb as secretaries of

the Republican county convention held at Georgetown, Brown county, Ohio, on said 19th day of September, 1904. Both certificates hereinbefore mentioned purported and claimed to be certificates of nominations made by the Republican Party of Brown county, Ohio, for officers to be voted for at the November election, 1904. That thereafter, on the 24th day of September, 1904, exceptions and objections in writing were filed with the said board of deputy state supervisors to the certificate of nomination of the list of candidates certified by J. C. Martin, Thomas J. Leeds and J. C. Newcomb. That on the 2d day of October, 1904, said exceptions and objections came on for hearing before said board of deputy state supervisors, who, having considered the objections and exceptions, and having heard the evidence offered by the contending parties, were and are unable to agree, and no decision can be arrived at by said board as to which of said list of candidates so certified should be placed upon the official ballot as the candidates of the Republican Party in said county. Section 2966-23, being section 10 of the ballot law, provides, amongst other things, that objections or questions arising in the course of nomination of candidates for county officers shall be decided by the board of deputy state supervisors of said county, and such decision shall be final; but in case no decision can be arrived at the matter in controversy shall be submitted to the state supervisor of elections, who shall summarily decide the same and his decision shall be final. That said board of deputy state supervisors and the members thereof and said clerk fail and refuse to submit the question in controversy to the state supervisors of elections as required by law. Relator has no other adequate remedy. Wherefore relator prays that a mandate may issue commanding said defendants, and each of them, to submit to the state supervisor of elections the matter in controversy arising out of the filing of said certificates of nomination, the objections thereto, and the failure and refusal of said board to decide said matter.

"Now come W. E. Hall and C. C. McBeth, two of the defendants, and for their answer to the petition and the alternative writ awarded by this court say:

"First Defense. Prior to and at the time of the filing of the petition in said action in this court and at the time of the application for the alternative writ issued in this case another action was pending in the court of common pleas of Brown county, Ohio, between the same parties in the relation of J. D. Houston upon the same subject, and involving the same questions presented by the petition in this action. Wherefore the said defendants pray that the petition herein and the alternative writ issued on the same be dismissed, at the costs of the relator.

"Second Defense. They admit the allegations of the petition as to the filing of the

certificates of nomination referred to therein, and as to the action of the said deputy state supervisors of elections on the objections filed to the certificate signed by J. C. Martin, as chairman, and J. C. Newcomb and T. J. Leeds, as secretaries, but they say that the certificate signed by J. D. Houston, as chairman, etc., was filed first, and that no objections or exceptions were ever filed to the certificate signed by said J. D. Houston, as chairman, and J. W. Galbreath, secretary, and that they have never refused to certify to the inability of the said deputy state supervisors of elections to come to any decision as to the objection filed to the certificate of nomination signed by said J. C. Martin, as chairman, and T. J. Leeds and J. C. Newcomb, as secretaries.

"Third Defense. They adopt and make a part of this defense the allegations of their first defense, as though repeated herein, and further say in the action referred to in said defense the defendants were restrained and enjoined from certifying to the state supervisor of elections any disagreement of the deputy state supervisors of election as to the certificate of nomination signed by said J. D. Houston, as chairman, etc., and that they have never refused to certify their disagreement as to the certificate of nomination signed by said J. C. Martin, as chairman, etc.

"And now, having fully answered, they pray to be dismissed, with their costs.

"Now comes the relator, and demurs to the second and third defenses of the answer of defendants W. E. Hall and C. C. McBeth herein on the ground that they do not set forth facts sufficient to constitute a defense. Now comes the relator, and for reply to the first defense in the answer of defendants W. E. Hall and C. C. McBeth says he denies each and every allegation contained in said first defense of said answer; and relator further says that the suit referred to in the first defense of said defendant's answer was not between the same parties as is this cause before the court; that the motive of said action referred to in said first defense is fully disclosed in the certified copy of the petition in said cause, and which is attached to this reply, and made part thereof; and relator further says that no other petition has ever been filed in the court of common pleas of Brown county, Ohio, involving any of the matters in controversy in this cause, except the petition of which the attached is a true copy. The relator says: That he is a Republican elector of Brown county, Ohio. That the defendants F. W. Thompson, Isaac Bower, W. E. Hall, and C. C. McBeth are the deputy state supervisors of elections for Brown county, Ohio, and together, while in session, constitute the board of deputy state supervisors of elections within and for said county. That W. E. Hall is the chief deputy and H. P. Jennings is the clerk of said board. That on the 19th day of September, 1904, plaintiff and other Republicans of Brown

county, Ohio, deposited for filing with said chief deputy, W. E. Hall, and thereby filed with said deputy state supervisors of elections, a certificate sworn to by J. D. Houston, as chairman, and J. W. Galbreath, as secretary, of a certain Republican convention held at Georgetown, Brown county, Ohio, on said 19th day of September. A true copy of said certificate, with the possible exception of the arrangements of names, is hereto attached, marked 'Exhibit A,' and made a part hereof. That at the time said certificate was so filed with said W. E. Hall as chief deputy the said H. P. Jennings was absent from the county of Brown aforesaid, or, if not absent, could not be found, so as to deposit said certificate with him. That no exceptions were ever filed to said certificate, and said certificate is still on file. That on said 19th day of September, 1904, but after the certificate above referred to had been filed with said board, another and different certificate was filed with said W. E. Hall, as chief deputy aforesaid. Said last-mentioned certificate purports to be a certificate of the nomination of other and different candidates by the Republican Party of said county for the county offices mentioned in said certificate first filed with said W. E. Hall as aforesaid. Said second certificate was sworn to by J. C. Martin, as chairman, and Thos. J. Leeds and J. C. Newcomb, as secretaries, of what purported to be another and different convention of Republicans, and, with the exception of perhaps the arrangement of the names and the order in which they appear, a true copy of said certificate is hereto attached, marked 'Exhibit B,' and made a part of this petition. That on the 24th day of September, 1904, J. D. Houston and J. W. Galbreath, as Republican electors of Brown county, Ohio, duly filed with said board exceptions and objections in writing to said last-mentioned certificate for reasons stated in said exceptions, and such proceedings were had by said deputy state supervisors of elections that on the 2d day of October, 1904, said exceptions came on for hearing before them assembled as a board, and over the objections of attorney representing said exceptions said deputy supervisors attempted to determine which of said certificates was the one that should be held as valid by them, and not the question of the exceptions to said last-filed certificate. Said deputy state supervisors did not agree on the issues which they tried, and directed their clerk, the defendant H. P. Jennings, to certify both of said certificates to the Secretary of State of the state of Ohio for his decision; also directing him to certify to said Secretary of State their inability to agree as to which certificate was the valid and genuine certificate, for the purpose of having said Secretary of State determine which should be used by said deputy state supervisors in making up the official ballot to be voted at the next November election in said county; and,

unless said deputy supervisors and said clerk are restrained by an order of this court, they will make such certificate to said Secretary of State. Your relator says that the first certificate mentioned herein should be recognized as the true and valid certificate of the nominations by said Republican Party, and the names therein contained should be printed on the official ballot, and voted at the election in said county to be held November 8, 1904, for the reason that it was filed first in time, and that no exceptions have ever been filed to it. Your relator therefore prays that said deputy state supervisors and said clerk thereof be restrained by an order of this court from certifying said certificate first herein mentioned to said Secretary of State for any consideration whatever, or making any certificate in reference thereto, or of them failing to agree on the validity thereof that a writ of mandamus issue commanding said defendants Frank W. Thompson, Isaac Bower, W. E. Hall, and C. C. McBeth to cause the names appearing on the first certificate mentioned herein to be printed on the official ballot to be voted for at the election to be held in said county on the 8th day of November, 1904, as the only Republican ticket to be voted for in said county for said offices at said election, and for all proper relief."

Charles Kinney, for relator. G. Bambach and O. E. Young, for defendants Hall and McBeth.

PER CURIAM. The court of common pleas improperly ordered that the defendants should be restrained from certifying to the Secretary of State that they were unable to agree concerning the validity of the certificates and nomination papers which had been filed with them, and from making any certificate whatever in relation to the certificate filed by J. D. Houston, chairman, and J. W. Galbreath, secretary; and likewise erred in commanding the defendants to cause the names appearing on the said certificate filed by Houston and Galbreath to be printed on the official ballot. This Houston certificate could not be "deemed valid," within the meaning of section 2966-23, Bates' Ann. St., if objections were duly made in writing within five days after the filing of the certificate. The statute does not prescribe the form of such objections, but it does require that they shall be in writing. The filing on the same day of another certificate of nominations for the same offices, to which objections were afterwards formally filed by Houston and Galbreath, necessarily operated as objections in writing to the Houston certificate; because section 2966-18, Id., provides that "any convention representing a political party . . . may make one nomination for each office to be filled at the following election," and, there being in this instance two certificates, each claiming to rep-

resent the Republican Party, each ex necessitate disputes the regularity and authority of the other, and therefore operates as a protest against the other. Hence the Houston certificate could not be deemed valid for the reason that there had not been filed an objection to it in writing. When the defendants failed to agree upon a decision of this controversy, it was their plain statutory duty to certify that fact to the Secretary of State, and, in our opinion, there was no warrant in law for interfering with that duty by the intervention of the court of common pleas. See *Chapman v. Miller et al.*, 52 Ohio St. 166, 39 N. E. 24; *Randall et al. v. State*, 64 Ohio St. 57, 59 N. E. 742. The demurrer to the answer will be sustained, and the prayer of the relator for a peremptory writ of mandamus will be granted.

Writ allowed.

SPEAR, O. J., and DAVIS, SHAUCK, PRICE, and CREW, JJ., concur. SUMMERS, J., absent.

(71 Ohio St. 85)

STATE v. RIPPETH.

(Supreme Court of Ohio. Oct. 25, 1904.)

OLEOMARGARINE—RESTRICTIONS IN SALE OF—
SALE FOR ANALYSIS—ADULTERATION
OF FOOD.

1. A person who sells or delivers oleomargarine containing coloring matter to any person interested or demanding the same for analysis as provided in section 4200-7, Bates' Ann. St., is guilty of a violation of section 4200-16.

Crew, J., dissenting.

(Syllabus by the Court.)

Error to Circuit Court, Tuscarawas County.

One Rippeth was convicted of selling oleomargarine in imitation of butter, and on error the judgment of conviction was set aside in the circuit court, and the state brings error. Reversed.

The defendant in error was charged, by affidavit filed with P. A. Garver, a justice of the peace in and for Franklin township, Tuscarawas county, with having unlawfully sold and delivered to one Martin Cowen oleomargarine to the amount of one pound, which oleomargarine then and there contained artificial (yellow) coloring matter, the name of which coloring matter was unknown to the affiant; contrary to statute in such case made and provided, etc. On this affidavit the defendant was put upon trial to a jury of 12 men. The purchaser of the said oleomargarine, Martin Cowen, is an inspector in the dairy and food department of the state of Ohio, and it appeared upon the trial that on the 17th day of January, 1901, the said Martin Cowen entered the grocery of the defendant in error, presented his card, which contained his name, address, and official capacity, then and there stating to said de-

¶ 1. See Food, vol. 23, Cent. Dig. §§ 7, 11, 12.

fendant in error that he was a state food inspector, and that he desired to see his oleomargarine. The defendant in error took said Cowen around his counter and showed him the oleomargarine, which was done up in pound packages. Cowen said to Rippeth, "I would like to have a pound of this oleomargarine for analysis," whereupon Rippeth said, "All right," and delivered the oleomargarine, and accepted the market price therefor. The same was taken to a chemist—Prof. Hobbs—and was analyzed by him, and proved to contain coloring matter. At the close of the testimony offered by the state the defendant made a motion to the justice to direct a verdict in his behalf. The court overruled this motion, and, no evidence being offered by the defense, the case was argued by counsel, and, after a charge by the court, was submitted to the jury, who returned a verdict of guilty. Motion to set aside the verdict was filed by the defendant, and overruled by the justice. A bill of exceptions was prepared, signed, and allowed, and proceedings in error prosecuted in the court of common pleas, where the judgment of the justice of the peace was affirmed. On petition in error in the circuit court the judgment of the court of common pleas was reversed, and this proceeding in error is prosecuted to reverse the judgment of the circuit court and affirm the judgment of the court of common pleas.

Roscoe J. Mauck, Henry Bowers, and Wade H. Ellis, Atty. Gen., for the State. James G. Patrick, for defendant in error.

PER CURIAM. Section 4200-16, Bates' Ann. St., makes it a penal offense for any person to "sell or deliver" any oleomargarine which contains coloring matter. This is a police regulation, imposing a penalty irrespective of criminal intent; and it contains no exception in favor of any person, nor as to whom the prohibited article may be sold or delivered, nor for what purpose. The dealer in the adulterated article has it in his possession for sale, and sells or delivers the same at his peril. He cannot shield himself by the plea of ignorance in regard to its character, nor by the plea that he made the sale for analysis, or for any other purpose. *State v. Kelly*, 54 Ohio St. 166, 43 N. E. 163; *State v. Hutchinson*, 56 Ohio St. 82, 46 N. E. 71.

Judgment of the circuit court reversed, and judgment of the court of common pleas affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICK, and SUMMERS, JJ., concur.

CREW, J. (dissenting). I cannot concur in the conclusion reached by a majority of the court that the judgment of conviction in this case was right and should be affirmed.

The affidavit filed in this case before the magistrate, and upon which the defendant, A. S. Rippeth, was put upon trial and convicted, charged that he, "A. S. Rippeth, did unlawfully sell and deliver unto one Martin Cowen a certain article, to wit, oleomargarine to the amount of one pound, which oleomargarine then and there contained artificial (yellow) coloring matter, the name of which coloring matter is unknown to this affiant; contrary to the statute in such case made and provided, and against the peace and dignity of the state of Ohio." The offense charged in this affidavit is the unlawful sale and delivery to Martin Cowen of oleomargarine containing artificial coloring matter, contrary to the statute in such case made and provided; and to warrant a conviction of the defendant upon this affidavit it was incumbent upon the state to establish and prove the particular offense therein charged, to wit, the unlawful sale and delivery to Cowen. The undisputed testimony in this case establishes the fact that Martin Cowen was an inspector in the dairy and food department of the state of Ohio, and that the oleomargarine furnished and delivered to him by Rippeth was furnished and delivered at the request or demand of Cowen, and for the sole purpose of analysis. Section 4200-16, Bates' Ann. St., provides that: "No person shall manufacture, offer or expose for sale, sell or deliver, or have in his possession with intent to sell or deliver, any oleomargarine which contains any methly [methyl], orange, butter yellow, annato, analine dye, or any other coloring matter." Section 4200-7 provides that: "Every person manufacturing, offering or exposing for sale, or delivering to a purchaser, any drug or article of food included in the provisions of this act, shall furnish to any person interested, or demanding the same, who shall apply to him for the purpose, and shall tender him the value of the same, a sample sufficient for the analysis of any such drug or article of food which is in his possession." And by section 4200-8 it is provided that: "Whoever refuses to comply, upon demand, with the requirements of section four [section 4200-7], and whoever violates any of the provisions of this act, shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding one hundred dollars nor less than twenty-five dollars, or imprisoned not exceeding one hundred nor less than thirty days, or both." It will be observed that above section 4200-7 is not merely directory, but is in terms peremptory and mandatory, and a failure to comply with its provisions is by section 4200-8 made a misdemeanor punishable by fine or imprisonment, or both. If, then, the sample of oleomargarine furnished and delivered by Rippeth to the inspector, Cowen, on his demand, and for the purpose of analysis, was oleomargarine which Rippeth was "offering or exposing for sale," then such

furnishing and delivery by Rippeth was, by force of the provisions of section 4200-7, made compulsory, and such furnishing would not, therefore, in legal intendment, amount to or constitute a sale, inasmuch as in such transaction one of the essential elements of the contract of sale is wanting, viz., the voluntary assent of the seller. Furthermore, section 4200-7, as we have seen, peremptorily commands and requires a dealer in oleomargarine to furnish to the inspector, or any person demanding the same, on demand and tender of the price, a sample of such oleomargarine for the purpose of analysis, and a penalty is provided for his refusal so to do. So that what was done by Rippeth in this case in the matter of furnishing or delivering to Cowen, the inspector, this sample of oleomargarine, was that only which the statute itself commanded and required him to do in that behalf, and such furnishing by him was, therefore, a compliance with and an obedience of the positive mandate of the statute, rather than a transgression or violation of its provisions and requirements, and was, therefore, not unlawful. The statute having made the furnishing of a sample, for the purpose of analysis, obligatory and compulsory, a furnishing for such purpose is not a crime, and cannot rightfully be made a predicate for the criminal prosecution of the person so furnishing said sample.

I do not question the constitutionality of section 4200-7, or the authority of the Legislature to enact such statute. The provisions of said section requiring the manufacturer or dealer, upon demand and tender of the price, to furnish, for the purpose of analysis, a sample of the article offered or exposed for sale by such manufacturer or dealer, is, I think, a reasonable provision and requirement, and such a one as it is within the authority of the Legislature to enact as an appropriate and necessary means for making effectual the various provisions of the so-called "pure food laws," which laws have for their purpose the protection of the public health. But I cannot assent to the interpretation and effect given the provisions of this section and that of section 4200-16 by the majority of the court. Certainly, I think it could never have been intended by the Legislature that such compulsory furnishing, although the price be accepted by the dealer, should, within the meaning of section 4200-16, constitute an unlawful sale, or that such transaction should of itself furnish grounds for the criminal prosecution of the person so furnishing or delivering said sample. To so construe this statute as to give it such effect is not only to impute to the Legislature an intention to exercise a power which clearly it does not possess, but is to make the statute itself invalid; for the Legislature is without right to make unlawful and criminal the doing of the very thing which by

positive enactment it commands and enjoins to be done. A construction that gives to this statute such an effect and produces such a result offends against reason and good conscience, renders the statute invalid, and should not, therefore, be adopted. Section 4200-7 is, as stated in the majority opinion of the court, a police regulation, and it was doubtless thereby intended to provide a means whereby the state could procure, by compulsory process, from the manufacturer or dealer in any drug or article of food, a sample thereof for the purpose of analysis, to the end that evidence of adulteration, etc., might thus be obtained, for the use in a proper case, and the enforcement of the "pure food laws" thereby be made the more effectual. But it was never intended by the Legislature that the furnishing or delivery of such sample for the purpose of analysis, in obedience to the express command of the statute, should itself be unlawful, or that such compulsory furnishing for such purpose should be a crime; and I shall lose my respect for the law when it so far loses its character for justice as to make highly penal the doing of an act the performance of which it peremptorily commands and enjoins as a duty.

For the reasons above stated I am of opinion that the judgment of the circuit court reversing the judgment of conviction in this case was right, and should be affirmed.

(71 Ohio St. 13)

STATE ex rel. GALLINGER et al. v. SMITH,
County Auditor.

(Supreme Court of Ohio. Nov. 1, 1904.)

PERSONAL PROPERTY TAX—ENTRY AS UNPAID—
MANDAMUS TO AUDITOR—DELINQUENT
TAXES—DUTIES OF COUNTY OFFICERS.

1. In making up annually the delinquent tax duplicate required by section 2855, Rev. St. 1892, the county auditor is required to enter on such duplicate only the taxes on personal property remaining unpaid, as shown by the treasurer's books and the delinquent record as returned by him to the auditor at the time of his next preceding semiannual settlement in August. And where, in making up such delinquent duplicates, former auditors in previous years have omitted to carry forward and enter thereon from year to year the unpaid personal taxes upon a former delinquent duplicate or duplicates, so that such former delinquent taxes are not shown by the treasurer's books or the delinquent record returned by him to the auditor at the time of such semiannual August settlement, a peremptory writ of mandamus will not be awarded to compel the present auditor to bring up and enter upon the current delinquent duplicate such delinquent personal taxes so omitted by his predecessors, the right to require him so to do not being clear, and the duty not being one specifically enjoined upon him by law.

(Syllabus by the Court.)

Error to Circuit Court, Crawford County.

Application by the state, on the relation of Charles Gallinger and others, for writ of mandamus to J. I. Smith, county auditor.

From a judgment dismissing the petition, relators bring error. Affirmed.

This was a proceeding in mandamus commenced originally in the circuit court of Crawford county on December 26, 1903, to compel the auditor of said county to place upon the delinquent tax duplicate for the year 1903 the unpaid delinquent taxes standing charged upon the delinquent tax duplicate of said Crawford county, from the year 1890 to 1902, and to deliver such delinquent duplicate, when so made up, to the county treasurer of said Crawford county for collection. Relator's petition, omitting caption and verification, is as follows:

"The plaintiff says that Charles Gallinger is the duly elected, qualified, and acting prosecuting attorney of Crawford county, Ohio, and that this action is brought in the name of the state of Ohio on the relation of said prosecuting attorney and the board of county commissioners of Crawford county, Ohio, on behalf of the state of Ohio and said county of Crawford, to compel the performance of a legal duty, as hereinafter set forth, on the part of the defendant, J. I. Smith, who is the duly elected, qualified, and acting county auditor of Crawford county, Ohio. Plaintiff says that large amounts of unpaid personal taxes stand charged on the original and delinquent tax duplicates of Crawford county, Ohio, for the years 1890, 1891, 1892, 1893, 1894, 1895, 1896, 1897, 1898, 1899, 1900, and 1901, and the same are legal taxes due said county and state; that said taxes are not barred by any statute of limitations, are not omitted taxes, and have never been left off or dropped from said original and delinquent tax duplicates of said years, or ordered left off or dropped from subsequent duplicates, or otherwise canceled or discharged; that the persons from whom said unpaid taxes are due and owing are solvent, and have sufficient property to satisfy the same; that said taxes for said years, by reason of non-payment, have become and are delinquent; that the same have not been entered or placed on the delinquent tax duplicate of said county for the year 1903; that said taxes amount to more than \$50,000; and that it is the duty of the defendant, as such auditor, to place and enter said unpaid and delinquent taxes for said years on the delinquent tax duplicate of said county for the year 1903, in order that the same can be collected by the treasurer of said county, but said defendant has refused to perform said duty, and still refuses to do so.

"Plaintiff further says that on December 19, 1903, the board of county commissioners of Crawford county, Ohio, at its office, in due session convened, made certain findings and orders and passed certain resolutions on a hearing before said board on the matter to have entered and placed on the delinquent tax duplicate of said county for the year 1903 the unpaid and delinquent personal taxes standing charged on the original and

delinquent tax duplicates of said county from the year 1890 to 1901, inclusive, and on said hearing, after due inspection of the books and various tax duplicates and lists, examination and evidence, said board of county commissioners found that unpaid personal taxes of former years, to wit, from 1890 to 1901, inclusive, standing charged against persons on the tax duplicates of said county for the years in which the personal property was listed by said persons, and the taxes computed thereon placed on said duplicates by the auditor, were not entered on the delinquent tax duplicate made out by the county auditor about September 15, 1903, which latter duplicate was on the said 19th day of December, 1903, in the hands of the county treasurer for collection of the taxes standing charged thereon; that said unpaid and delinquent personal taxes for said years not entered or placed on said delinquent duplicate of 1903 at the date of said hearing amounted to more than \$50,000, due the county and state from the persons against whom the same stand charged on the original and delinquent tax duplicates for each of the years from 1890 to 1901, inclusive; that said persons have sufficient means and property with which to pay said taxes, and which property can be subjected to the payment thereof by sale on executions issued on judgments obtained in civil actions brought by the county treasurer against such delinquents.

"On said hearing said board of county commissioners further found that it has been the uniform and unbroken practice of all the county auditors of said county, in making out the delinquent tax list or duplicate each year for the treasurer to collect, to place and enter on such delinquent list and duplicate only the unpaid taxes on personal property appearing due and unpaid from the original tax duplicate of the preceding year, and that none of said auditors entered or placed on such delinquent duplicate any unpaid delinquent taxes standing charged against persons on any delinquent tax duplicate theretofore; that none of such unpaid and delinquent taxes were left off or dropped, or ever ordered to be dropped or left off, by said auditors from the delinquent tax duplicates of any year on account of any partial payment of taxes or supposed settlement thereof, or otherwise; that by so making out said delinquent tax duplicates under said practice there became, were, and are in said county as many delinquent tax duplicates as there are years, and are unsettled and unpaid, and that none of said delinquent tax duplicates, nor that of the present year, contained or contains the unpaid delinquent taxes standing charged on any delinquent tax duplicate of the preceding year, but all the delinquent duplicates contained and contain only the unpaid taxes standing charged against persons on the original tax duplicate of the preceding year; and said board further found that by reason of the law the county treasurer

had no power or authority to collect by civil action the unpaid and delinquent taxes due the county and state unless the unpaid and delinquent taxes prior to 1902 standing charged against persons on the original and former delinquent duplicates were entered and placed on the delinquent tax duplicate of 1903, provided for by section 2855 of the Revised Statutes of Ohio, and in the hands of the treasurer for collection, and that the unpaid and delinquent taxes could be collected by the treasurer by civil action if the same were entered and placed by defendant on the delinquent tax duplicate of 1903, in the hands of said treasurer for collection at the time of said hearing.

"For the purpose of enforcing the collection of said unpaid and delinquent taxes not entered and placed on the delinquent duplicate of 1903 (made out by said auditor about September 15, 1903), and to enable the county treasurer to collect said taxes, said board of county commissioners duly passed a resolution at said hearing ordering and directing the defendant county auditor to forthwith enter and place on said delinquent tax duplicate of 1903 so as aforesaid made out by him, and then in the hands of said treasurer for collection, all the unpaid and delinquent taxes of former years standing charged against persons on the various tax duplicates of said county from the year 1890 to 1902, in accordance with law and the findings of said commissioners as aforesaid, and that when said auditor had so entered and placed said unpaid and delinquent taxes on the delinquent tax duplicate of 1903 he should place the same in the hands of said treasurer for collection of the taxes standing charged thereon; and further ordered that said findings, orders and resolutions be entered on the commissioners' journal.

"Plaintiff avers that said findings, orders, and resolutions were thereupon duly entered on said journal by the defendant auditor. Plaintiff avers the fact to be that it has been the uniform and unbroken practice of all the county auditors of said county in making out and preparing the delinquent tax duplicate in said county for any year to place and enter on such delinquent duplicate for such year only the unpaid taxes on personal property appearing due and unpaid from the original duplicate of the preceding year in the hands of the treasurer for collection, and not to enter or place thereon any unpaid and delinquent personal taxes appearing due and unpaid from any delinquent tax duplicate of a preceding year; that no unpaid and delinquent taxes on any delinquent tax duplicate of said county was left off or dropped by any auditor, or ordered dropped or left off, from the delinquent list or duplicate for the following year on account of any partial payment of such taxes or supposed settlement thereof, or otherwise; that none of the delinquent tax duplicates of said county contain the unpaid delinquent taxes standing

charged on any delinquent tax duplicates of the preceding year.

"Plaintiff avers that in making out the delinquent tax duplicate of said county in 1890 between the semiannual settlement in August and September 15, 1890, the then county auditor entered thereon only the unpaid taxes on personal property and penalty that remained due and unpaid on the current tax duplicate of 1889, which had been in the treasurer's hands for collection of the taxes thereon, and no delinquent and unpaid personal taxes of the year 1889 on the delinquent duplicate of that year remaining unpaid were carried forward and entered on the delinquent tax duplicate made out in 1890 as aforesaid; that in making out the delinquent tax duplicate of said county in 1891 between the semiannual settlement in August and September 15, 1891, the then county auditor entered thereon only the unpaid taxes and penalty that remained due and unpaid on the current tax duplicate of the preceding year, to wit, 1890, which had been in the treasurer's hands for collection of the taxes thereon, and no delinquent and unpaid personal taxes of the year 1890 on the delinquent duplicate of that year remaining unpaid were carried forward and placed on the delinquent tax duplicate made out in 1891 as aforesaid; and that the same method and practice in making out and preparing the delinquent tax duplicates of said county, was pursued by all the county auditors of said county for all the succeeding years to the present time, and the delinquent duplicates for all of said years are still open for the voluntary payment of taxes by any person who may wish to pay the same standing charged against him.

"Plaintiff says that the delinquent tax duplicate of said county made out by the defendant auditor between the semiannual settlement in August and September 15, 1903, and now in the hands of the treasurer for collection of the taxes entered and placed thereon, contains only the unpaid and delinquent taxes on the original tax duplicate of the year 1902, and does not contain the unpaid and delinquent taxes due said county and state prior to the year 1902 of taxes; that by reason of the law the county treasurer of said county has no right or authority to collect the unpaid delinquent taxes of former years not placed on the delinquent duplicate of the year 1903 by civil action, and that by reason of the defendant auditor refusing to enter said unpaid and delinquent taxes of former years, amounting to over \$50,000, due said county and state, on said delinquent tax duplicate for 1903, said treasurer cannot proceed to collect said taxes from the persons from whom the same are due and owing by any of the means provided by law for the collection of taxes, and as long as the same are not placed on the delinquent duplicate of 1903 the same cannot be collected in 1903 by any means provided by

law for the collection of the same; and the plaintiff avers that the facts contained in said findings, orders, and resolutions are true.

"Plaintiff says there is no adequate and plain remedy in the ordinary course of the law whereby the defendant auditor can be made to enter and place said unpaid delinquent taxes standing charged on the delinquent tax duplicates of years prior to that for the year 1903 and on the original duplicates of years prior to the year 1902 on the delinquent tax duplicate of said county for the year 1903, and there is no plain and adequate remedy in the ordinary course of the law whereby said unpaid and delinquent taxes of years prior to that of 1902, amounting to said sum of more than \$50,000, due said county and state as aforesaid, can be collected from the persons who owe the same, unless the peremptory mandamus herein prayed for is granted; and that, unless the peremptory mandamus herein prayed for is granted at once, and said taxes entered on said delinquent duplicate, so that the proper means can be exercised to enforce the speedy collection of said taxes, there is great danger that some of the persons who owe said unpaid and delinquent taxes will become insolvent, and otherwise dispose of their property, so as to defeat the county and state in the collection of said delinquent and unpaid taxes; and plaintiff avers that the right to require the performance on the part of said defendant auditor of said act and duty as per the law, the findings, orders, and resolutions of said board of county commissioners and the facts hereinbefore set forth is clear, and that no valid excuse can be given by said defendant auditor for not performing the same.

"Wherefore plaintiff prays that a peremptory writ of mandamus be allowed herein in the first instance requiring and compelling said defendant auditor to place and enter the unpaid and delinquent taxes standing charged on the delinquent tax duplicates of Crawford county, Ohio, from the year 1890 to 1902, inclusive, upon the delinquent tax duplicate of said county for the year 1903, and that, when so entered and placed thereon, and such tax duplicate made out as hereinbefore set forth, said auditor shall deliver the same into the hands of the county treasurer to collect the taxes thereon as provided by law, and for such other relief as may be necessary."

To this petition the defendant on January 2, 1904, filed the following answer:

"The defendant, J. I. Smith, for answer to the petition for a peremptory writ of mandamus herein against him, says he is the duly elected, qualified, and acting county auditor of Crawford county, Ohio; that he here waives notice and enters his appearance as such defendant herein, and waives the issuance of an alternative writ. He admits the allegations of plaintiff's petition to be true, and, admitting the same to be true,

he says he ought not to be required to enter the unpaid and delinquent taxes of former years on the delinquent tax duplicate of said county for the year 1903 for the reason that said treasurer can proceed to collect said taxes by civil action without the same being entered and placed on the delinquent duplicate of 1903. Wherefore defendant prays he may go hence."

On January 26, 1904, the relators, by leave of court, filed the following amendment to their petition:

"The plaintiffs, for amendment to the petition herein, say: That at the time of the hearing of said matter to have entered and placed on the delinquent tax duplicate of said county for the year 1903 the unpaid and delinquent personal taxes standing charged on the delinquent tax duplicates of said county from the year 1890 to 1902 before said board of county commissioners on said 19th day of December, 1903, as averred in plaintiff's petition, said board of county commissioners further found, and plaintiffs so aver the fact to be, that among the unpaid and delinquent personal taxes due said county and state were those standing charged on the tax duplicates of 1892, 1893, 1894, 1895, and 1896, amounting to \$1,048, against one J. C. F. Hull, of Bucyrus, in said county and state, who had made personal verified returns of his taxable personal property in said county for each of said years, and after said Hull had made such returns thereof the county auditor of said county computed the taxes thereon, and placed the same on the original tax duplicates of said county for each of the years as per the returns made by said Hull as aforesaid, for each of said years, and that said taxes so charged on said tax duplicates for each of said years have never been paid, and the same are still due and owing from the said Hull. Said commissioners at said time further found, and plaintiffs so aver the fact to be, that it had been the uniform and unbroken practice of all the county auditors of said county, in making out the delinquent tax lists and delinquent tax duplicates of unpaid personal taxes in said county for any year, to place and enter on such delinquent list and duplicates only the unpaid personal taxes appearing due and unpaid from the original tax duplicate of the preceding year, and that none of said auditors entered and placed on such delinquent list and duplicate any unpaid delinquent personal taxes standing charged against persons on any delinquent tax duplicate theretofore; that by reason of such uniform and unbroken practice on the part of said county auditors in so making up the delinquent tax lists and duplicates of said county the taxes aforesaid of the said J. C. F. Hull were left off of, and not entered on, the delinquent tax lists and delinquent tax duplicates of said county for the years 1896, 1897, 1898, 1899, 1900, 1901, and 1902, and that neither said Hull's unpaid de-

linquent personal taxes aforesaid nor those of any other person were left off or dropped from the delinquent tax lists and duplicates aforesaid for any of said years on account of any partial payment or supposed settlement of such taxes or otherwise, but the same were left off of and not entered on such delinquent tax lists and duplicates solely by reason of said method and practice aforesaid. And said commissioners then further found, and plaintiffs so aver the fact to be, that by reason of the law as laid down in the case of Alexander, county treasurer of said county, against said Hull, decided by the Supreme Court of Ohio, the county treasurer has no power or right to collect by civil action any unpaid delinquent personal taxes of said years due from said Hull or any other person to said county and state, unless the unpaid delinquent personal taxes of said Hull, or those due from other persons, are entered and charged on the delinquent tax duplicates of said county for the year in which the civil action to enforce collection and payment of said taxes is brought; that after the said taxes of said Hull for each of said years became delinquent, the same were not carried forward on any delinquent tax list and duplicate of said county for the succeeding years, and the same were not and are not entered and placed on the delinquent tax list and delinquent duplicate of said county for the year 1903 (made out by said auditor as averred in the petition), although said taxes were never paid or otherwise discharged by said Hull, who, ever since the year 1892 has been, and still is, solvent, and has more than sufficient means and property with which to pay his said unpaid delinquent personal taxes, and which property can be subjected to the payment of said taxes by sale on execution issued on judgment obtained in civil action by the county treasurer against said Hull. That for the purpose of enforcing the collection of said unpaid and delinquent personal taxes of said Hull, not entered and placed on the delinquent tax lists and duplicate of said county for the year 1903, as averred in the petition, and to enable the county treasurer of said county to collect the unpaid and delinquent personal taxes of the said Hull, as aforesaid, and other delinquents, said board of county commissioners duly passed the resolution mentioned in plaintiff's petition, ordering and directing the defendant county auditor to forthwith enter and place on a delinquent tax duplicate of said county for the year 1903 all the unpaid and delinquent personal taxes due as aforesaid, including those of the said Hull, and that when so entered and placed on such duplicate the same be then delivered and placed in the hands of the county treasurer for collection of the taxes standing charged thereon from the persons owing the same, and to be collected by said treasurer by any of the means provided by law for the collection of such taxes. The

said findings, orders, and resolution concerning said unpaid and delinquent personal taxes of said Hull were and are embodied in the findings, orders, and resolution mentioned in the petition herein, and were and are entered on the commissioners' journal of said county by said auditor.

"Plaintiffs say that the defendant auditor has refused and still refuses to enter and place said unpaid and delinquent taxes of said Hull and other persons owing delinquent taxes of years prior to those of 1903 on a delinquent tax duplicate of said county for the year 1903, and place the same into the treasurer's hands for collection; and said defendant auditor has refused and still refuses to make out and prepare a delinquent tax duplicate for said county for the year 1903, containing the names and amounts of such delinquent taxes due from the delinquent taxpayers who owe delinquent personal taxes prior to said year, and refuses to enter the name of said Hull and the amount of his said unpaid and delinquent taxes on a delinquent tax duplicate of said county for the year 1903, by reason whereof said treasurer cannot proceed to collect said taxes for and in behalf of said county and the state of Ohio; all of which things aforesaid said auditor refuses to do to the great and irreparable injury of the public welfare. Said taxes are part of the public revenue of said county and of the state of Ohio.

"Plaintiffs say there is no adequate and plain remedy in the ordinary course of the law whereby said defendant auditor can be made to enter and place said unpaid and delinquent personal taxes standing charged on the delinquent tax duplicates and duplicates mentioned in the petition against the persons owing the same on a delinquent tax duplicate of said county for the year 1903, and the names of the persons owing the same and the amounts of such delinquent taxes due from each on such delinquent tax duplicate, and be made to do the things herein complained of which he refuses to do, and there is no plain and adequate remedy in the ordinary course of the law whereby said unpaid and delinquent taxes of said Hull and other delinquents can be collected by said treasurer and as part of the public revenue; that the right to require the performance on the part of said defendant auditor of said acts and duties as per the law, the findings, orders, and resolution of said board of county commissioners and the facts herein set forth is clear, and that no valid excuse can be given by said defendant auditor for not doing and performing the same.

"Wherefore plaintiffs pray that a peremptory writ of mandamus be allowed herein in the first instance requiring and compelling said defendant auditor to place and enter the unpaid and delinquent taxes on personal property of the said J. C. F. Hull and of the other persons whose taxes on personal property is due and unpaid and delinquent

for the years aforesaid, and standing charged on the tax duplicates of said county for said years as due and unpaid, upon a delinquent tax duplicate of said county for the year 1903; that said defendant, as such auditor, be required and ordered to prepare and make out a proper delinquent tax duplicate for said county for the year 1903, as provided by law, and place and enter thereon the names of the persons whose taxes are due, unpaid, and delinquent for the years aforesaid, together with the respective amount of such taxes due and owing from each to said county and state, so that said public revenue can be collected as aforesaid; that he be required to do the acts and things herein set forth; and that he deliver to the county treasurer the delinquent duplicate of said county for said year 1903, with the names of such delinquents, and amounts of taxes due from each thereon, for collection of the same, and for such other and further relief as may afford plaintiffs who sue on behalf of said county and state the necessary relief."

To this amendment to the petition the defendant on said 26th day of January, 1904, answered as follows:

"The defendant, for answer to the amendment to the petition filed by the plaintiff relators herein, says: He admits the allegations of said amendment to the petition to be true, but he says that he ought not to be required to enter and place said unpaid and delinquent taxes on a delinquent tax duplicate of said county for the year 1903, for the reason stated in his answer to the petition of plaintiffs."

Thereupon, on the same day, to wit, January 26, 1904, the cause was heard and submitted to the circuit court of said Crawford county upon the pleadings aforesaid. The circuit court found and adjudged that the relators were not entitled to a writ of mandamus as prayed for, and thereupon the relators' petition and the amendment thereto and the case were by said court dismissed at the costs of said relators. The purpose of the present proceeding in error is to obtain a reversal of this finding and judgment of the circuit court.

Charles Gallinger, for plaintiffs in error.
A. S. Leuthold and Harris & Sears, for defendant in error.

CREW, J. (after stating the facts). The respondent in this case, J. I. Smith, as county auditor of Crawford county, Ohio, in the answers filed by him to relators' petition and the amendment thereto, admits the truth of the allegations of said petition and amendment, and pleads by way of justification and as matter of excuse for the nonperformance by him of the acts performance of which it is sought to compel by mandamus, that "he ought not to be required to enter the unpaid and delinquent taxes of former

years on the delinquent tax duplicate of said [Crawford] county for the year 1903, for the reason that said treasurer can proceed to collect said taxes by civil action without the same being entered and placed on the delinquent duplicate of 1903." This court having decided in the case of *Hull v. Alexander*, Treasurer, 69 Ohio St. 75, 68 N. E. 642, that "the action by the county treasurer for the collection of delinquent personal taxes authorized by section 2859, Rev. St. 1892, must be for taxes standing charged on the duplicate of the current year, or the delinquent duplicate," it follows that these answers tender no issue with the allegations of relators' complaint, and as defenses are wholly insufficient in law. This case therefore stands in this court as if upon a general demurrer to relators' complaint, and the sole question presented on this record for our consideration is, does relators' petition, as amended, state facts sufficient in law to entitle them to a peremptory writ of mandamus, as prayed for in said petition? This, we think, must be answered in the negative. It must now be accepted as a thoroughly well-settled rule that a peremptory writ of mandamus will not, in any case, be granted, unless the right of the relator thereto be clear, and the act performance of which is desired be one of absolute obligation on the part of the person or officer sought to be coerced; and before such writ will be allowed the relator must show not only a clear legal right to have done the specific act desired, but to have it done by the particular person or officer sought to be coerced; and a plain dereliction of duty must be established against such person or officer before the writ will be awarded. In *Selby, Auditor, v. State ex rel. King*, 63 Ohio St. 543, 59 N. E. 218, *Shauck, C. J.*, says: "The office of the writ of mandamus is clearly indicated by the definite terms of section 6741 of the Revised Statutes [of 1892]. The writ is there defined in accordance with the view taken by the courts at the time of the adoption of the Constitution and the vesting of jurisdiction of the action. The writ may issue to command the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station.' It may not issue to compel the performance of an act not so enjoined." Section 2855, Rev. St. 1892, provides as follows: "Immediately after the semi-annual settlement in August, the county auditor shall, annually, make a tax-list and duplicate thereof of all the taxes on personal property remaining unpaid, as shown by the treasurer's books, and the delinquent record as returned by him to the auditor, which tax-list and duplicate shall contain the name, valuation, and amount of personal property taxes due and unpaid, and ten per centum penalty added to the said taxes; and he shall deliver said duplicate to the treasurer on the fifteenth day of September, annually."

This section prescribes when, how, and from what the delinquent duplicate shall be made up by the county auditor, and it contains the only authority conferred, and the only obligation or duty imposed, by law upon county auditors with respect to the entering of delinquent personal taxes upon the tax duplicate. By the provisions of this section such delinquent duplicate is to be made up by the auditor by entering thereon "all the taxes on personal property remaining unpaid, as shown by the treasurer's books and the delinquent record as returned by him to the auditor." It will be observed that by the provisions of this section this delinquent duplicate is to be made up by the county auditor annually, immediately after the semi-annual settlement with the county treasurer in August of each year, and is required to contain only such unpaid delinquent taxes on personal property as shall be shown by the treasurer's books and the delinquent record returned by him to said auditor. This statute, in terms, only requires, and we think was only intended to require, the county auditor, when making up such delinquent duplicate in any year, to place and enter thereon for the current year such taxes on personal property as remain due and unpaid as shown by the treasurer's books and the delinquent record then (at the time of such settlement) returned by the treasurer to said auditor. This statute (section 2855) has been in force substantially in its present form for almost 30 years, and it is conceded by counsel for relators that the uniform practical construction placed upon said statute by the officers charged with its execution has been that the same imposes upon county auditors, in the making up of said delinquent duplicate, the obligation or duty to carry into such duplicate only the taxes upon personal property appearing as due and unpaid upon the last preceding tax duplicate as returned by the treasurer to the auditor at the time of his semiannual August settlement immediately preceding the time of making up such delinquent duplicate. While the practical construction thus adopted cannot be admitted as absolutely controlling, it is, nevertheless, we think, deserving of consideration, and should, perhaps, be regarded as decisive in a case of doubt, or where the obligation imposed or the duty enjoined is not plain and specific. *Union Insurance Co. v. Hoge*, 21 How. 35, 16 L. Ed. 61; *Mathews v. Shores*, 24 Ill. 27; *Solomon v. Commissioners of Cartersville*, 41 Ga. 157; 26 *Encyclopedia of Law*, 635. The duties of the county auditor with respect to making up the delinquent tax duplicate are such only as are prescribed by statute, and a court is without right to require of him the performance of any service in that behalf not specifically enjoined upon or required of him by law. If it be granted that by section 2855 the duty is imposed upon the coun-

ty auditor, in making up the delinquent duplicate, to carry forward onto such duplicate all of the taxes on personal property theretofore charged in any previous year and remaining unpaid, regardless of whether such delinquencies are shown by the treasurer's books as returned by him to the auditor at the time of his semiannual settlement in August next preceding the time of the making up of such delinquent duplicate, then, and in that event, it became and was the duty of the predecessors in office of the respondent herein, J. I. Smith, who became auditor of Crawford county October 20, 1902, in making up the delinquent duplicate for the years previous to the year 1902, to enter thereon all overdue and unpaid taxes on personal property charged on any and all delinquent duplicates prior to said year 1902; and, while the omission of the several auditors in previous years to so make up such delinquent duplicates and to enter thereon such unpaid personal taxes would not excuse or relieve the present auditor, J. I. Smith, from the performance of any duty specifically imposed upon him in that behalf, yet before he can be compelled by mandamus to make a new or additional duplicate for the year 1903, and bring forward and enter thereon all delinquent taxes on personal property from the year 1890 to the year 1902—a service which, if required at all, was one imposed by law upon his predecessors in office—his obligation so to do must be clear, and the duty one "which the law specifically enjoins," otherwise the relief, if any is to be had, must come from the Legislature, and not from the courts. In this case it is not claimed by relators in their petition that the respondent, J. I. Smith, as auditor of Crawford county, in making up the delinquent tax duplicate of said county for the year 1903, omitted therefrom any taxes on personal property that were shown to be due and unpaid by the treasurer's books or the delinquent record as returned to said auditor at the time of the semiannual settlement in August, 1903; the only complaint on the part of relators being that said auditor neglected, and now refuses, to carry into said delinquent duplicate for 1903 the delinquent personal taxes omitted to be carried forward by former auditors for the years from 1890 to the year 1902. We are of the opinion, therefore, that the particular service which it is sought to compel the respondent in this case to perform is not one which the statute "specifically enjoins upon him as a duty resulting from his office," and, the right of relators to the relief asked not being clear, a peremptory writ of mandamus was properly refused by the circuit court.

Judgment affirmed. -

SPEAR, C. J., and DAVIS, PRICE, and SUMMERS, JJ., concur.

(71 Ohio St. 55)

STATE ex rel. HILDEBRANT v. STEWART.

(Supreme Court of Ohio. Oct. 14, 1904.)

CONDUCT OF ELECTIONS—PROCEDURE IN NOMINATIONS—DUTIES OF ELECTION BOARDS—CHIEF DEPUTY OF STATE SUPERVISORS—EFFECT OF ADJOURNMENT—LIMITATION OF POWER TO FILE CERTIFICATE OF NOMINATION.

1. Section 2966-23, Bates' Ann. St., requires that objections or other questions arising in the course of nominations for candidates for district offices "shall be considered by the chief deputy state supervisors and clerks of said election boards of the several counties comprising the district"; but such chief deputies are not thereby constituted a board with continuing functions, nor a board in any sense. *Randall v. State*, 59 N. E. 742, 64 Ohio St. 57, approved and followed.

2. When such chief deputy state supervisors and clerks have been called together to consider objections to and controversies concerning rival nominations, and they have considered the same, and rendered their decision thereon, and adjourned sine die, their functions as to such objections and controversies are at an end, and such decision is final, in the sense that it is so far conclusive as to those objections and controversies that the same cannot be again considered by the said chief deputy state supervisors and clerks, nor by those succeeding them in office.

3. The requirement of section 2966-22, Bates' Ann. St., which provides that certificates of nomination and nomination papers of candidates for offices to be filled by the electors of a district, etc., shall be filed with the chief deputy state supervisor of the county in the district, etc., containing the greatest number of inhabitants, as ascertained by the last federal census, not less than 25 days' previous to the day of election, is a limitation upon the power to so file, and is not intended to require that objections and other questions arising in the course of nominations of candidates shall be kept open and undecided until 25 days before the day of the election.

(Syllabus by the Court.)

Application by the state, on the relation of Charles Q. Hildebrant, for a writ of mandamus to R. I. Stewart, chief deputy state supervisor of elections for Greene county. Petition dismissed.

The petition is as follows:

"The relator represents to the court:

"That the Sixth Congressional District of Ohio is composed of the counties of Brown, Clermont, Clinton, Greene, Highland, and Warren, in said state. That said Greene county had at the last federal census the largest population of any of said counties. That for the period of one year next preceding the first Monday in August, 1904, defendant was the duly chosen, qualified, and acting chief deputy state supervisor of elections for Greene county. That on or about the 13th day of April, 1904, relator filed with defendant, as such chief deputy state supervisor of elections for Greene county, a paper purporting to be a certificate of the nomination of the relator for Congress by a delegate congressional convention of the Republican Party, duly called and held on the 12th day of April, 1904, at Wilmington, in Clinton county, in said district. Within five days there-

after, objections to said certificate were filed by Thomas E. Scroggy and others with the defendant, as chief deputy state supervisor of elections as aforesaid. That on or about the 14th day of April, 1904, said Thomas E. Scroggy filed with the defendant, as chief deputy state supervisor of elections for Greene county, a paper purporting to be a certificate of the nomination of the said Thomas E. Scroggy to Congress by a delegate congressional convention of the Republican Party duly called and held on the 12th day of April, 1904, at Wilmington, Clinton county, in said district. That within five days thereafter objections to said certificate were filed with the defendant, as chief deputy state supervisor of elections as aforesaid, by the relator and others.

"That thereafter, to wit, on or about the 19th day of May, 1904, a meeting was held at Xenia, Greene county, in said district, of the then chief deputy state supervisors of elections of each of the counties aforesaid, and of the then clerks of the election boards of said several counties comprising said district. At said meeting said board claimed to have authority and jurisdiction to finally determine and pass upon the validity of said certificates of nomination filed by the relator and by Thomas E. Scroggy, respectively, and upon the objections filed to each of said certificates. That before proceeding to the determination of the validity of said nominations, and before passing upon said objections to each of said nominations, respectively, the said board determined and announced that in its deliberation thereon it would receive only affidavits filed by or on behalf of each of said candidates, and in support of said several objections, and would entertain only written arguments upon the matter, and that its consideration of said evidence and arguments would be in executive session. That relator, in writing, protested against the manner of said deliberation, and requested that said hearing be public, and that he, the said relator, have an opportunity to see the affidavits filed in support of the objections to his claimed certificate of nomination, and for the further opportunity to present affidavits in reply thereto. But notwithstanding said protest and request, said meeting was held in executive session, and this relator was not permitted to be present at said meeting, or to read the affidavits filed in support of the objections to his claimed certificate, or to offer counter affidavits thereto.

"That at said meeting held on the day and date aforesaid, and composed of the then chief deputy state supervisors and clerks of the boards of elections of the several counties aforesaid, the said board, under its claim of authority and jurisdiction in the premises, adopted the following resolution: 'Resolved, that the objections of Thomas E. Scroggy et al. to the certificate of nomination of Charles Q. Hildebrant be

sustained, and the certificate of nomination of the said Hildebrant be stricken from the files.' That at said meeting the said board, under its claim of authority as aforesaid, adopted also the following resolution: 'Resolved, that the objections of said Charles Q. Hildebrant et al. to the certificate of nomination of Thomas E. Scroggy be overruled and that Thomas E. Scroggy be declared the nominee of the regular Republican convention under the call of the congressional committee of the Sixth Congressional District of Ohio, held at Wilmington, Ohio, on the 12th day of April, 1904, and that his nomination be certified by the chief deputy state supervisor of the county containing the greatest number of inhabitants at the last federal census, to wit, Greene county, to the several chief deputy state supervisors of the other counties of said Sixth Congressional District of Ohio, as required by law.'

"That thereafter, on the first Monday in August, 1904, the terms of office of certain of the deputy state supervisors of elections in each of the said counties expired, and the state supervisor of elections, in accordance with law, duly appointed the successors to said deputy state supervisors whose terms so expired. That said successors duly qualified and entered upon the discharge of their duties. That thereafter in each of said counties composing the Sixth Congressional District the deputy state supervisors, as then appointed, qualified, and acting, met and organized in accordance with the statutes, electing in each of said counties a chief deputy state supervisor and a clerk of the board of elections, as required by law, and that, under said organization had as aforesaid, the defendant became the chief deputy state supervisor of elections of said Greene county; being the county having at the last federal census the largest population of any county in said Sixth Congressional District.

"That on or about the 19th day of September, A. D. 1904, a majority of said newly-chosen chief deputy state supervisors of elections and clerks of the boards of elections of the said counties comprising the said Sixth Congressional District convened and entered upon the consideration of the claimed certificates of nominations theretofore filed by the relator and by the said Thomas E. Scroggy, as hereinbefore more fully set forth. That said meeting was called by notice, signed by a majority of the chief deputy state supervisors of elections and clerks of the election boards of said counties, duly served upon all the chief deputy state supervisors of elections and clerks of the election boards of said several counties. That at said meeting the majority of said chief deputy supervisors of elections and clerks of the boards of elections of the counties comprising the said Sixth Congressional District, having heard all the evidence presented in support of the objections theretofore

filed, and having considered the same, did make the following finding of facts, to wit:

"That all the chief deputy state supervisors of elections and clerks of the board of deputy state supervisors of elections of the counties of Brown, Clermont, Clinton, Greene, Highland, and Warren, being the counties composing the Sixth Congressional District of Ohio, have each and all had due and legal notice of the time, place, and purpose of this meeting. That Charles Q. Hildebrant and Thomas E. Scroggy have each had due and legal notice of the time, place, and purpose of the meeting. That there are on file with R. I. Stewart, chief deputy state supervisor of elections for Greene county, Ohio, which said county has the largest population of any county in said district, according to the last federal census, the certificates of nominations of Charles Q. Hildebrant and Thomas E. Scroggy, each of whom claims to be the regularly nominated candidate for the Republican Party for representative in Congress for said district. That to each of said certificates of nomination there are on file with said R. I. Stewart, as chief deputy state supervisor of elections as aforesaid, certain objections. That on the 19th day of May, 1904, the chief deputy state supervisors of elections and clerks of the boards of elections of the said counties comprising said congressional district attempted to make its finding and order as to who was the regularly and duly nominated Republican candidate of said district, over the objections and protest of the said Charles Q. Hildebrant. That said chief deputy state supervisors of elections and clerks, notwithstanding said objections and protest, did order that the certificate of nomination of the said Charles Q. Hildebrant be stricken from the files, and did order that the certificate of nomination of the said Thomas E. Scroggy be by the said R. I. Stewart, as chief deputy state supervisor of elections as aforesaid, certified to the boards of deputy state supervisors of elections of the said several counties composing said Sixth Congressional District as the Republican candidate for representative in Congress for said district. That the term of office of each of said chief deputies and clerks making said orders as aforesaid expired by operation of law on the first Monday of August, 1904, next succeeding the making of said order. That said finding and order were made upon ex parte affidavits, limited in number, with privilege denied to either of said candidates to see said affidavits, or to file counter affidavits thereto, or to appear in person or by counsel before said board at said pretended hearing. That the action of said board was had in secret. That the members of said board, by the action of eight members thereof, were kept together in a room locked and guarded by one or more sergeant at arms on the outside of said room, and were not permitted to separate until they made said finding and order. That said order and finding were made upon

insufficient evidence. That many of the statements contained in the affidavits filed on behalf of Thomas E. Scroggy are untrue, and that said Charles Q. Hildebrant was denied the privilege of filing counter affidavits to refute and deny the same. That the finding and order of said chiefs and clerks as aforesaid made on the 19th day of May, 1904, were fraudulently, corruptly, and collusively procured. Each and all of the above and foregoing finding of facts is made upon sworn testimony of reputable witnesses before us at a public hearing had by us at the village of Loveland, Clermont county, Ohio, on the 14th day of September, 1904.

"It is therefore ordered and decreed by a majority of eight of the chief deputy state supervisors of elections and clerks of the board of deputy state supervisors of elections of said counties composing the Sixth Congressional District of Ohio that the said finding and order so far as aforesaid made on the 19th day of May, 1904, striking the certificates of nomination of the said Charles Q. Hildebrant from the files, and ordering the certificate of nomination of Thomas E. Scroggy to be certified to the board of deputy state supervisors of elections of said several counties comprising said district as the Republican candidate for Congress, was made upon insufficient testimony, and is fraudulent, corrupt, collusive, and void, and the same is hereby set aside and held for naught.

"Coming now to a consideration of the question arising upon the filing of the certificates of nominations of Thomas E. Scroggy and Charles Q. Hildebrant, and the objections thereto, we find from the evidence the following facts:

"That on the 5th day of March, 1904, the Republican congressional committee of the Sixth Congressional District of Ohio issued a call for a congressional convention to be held at Wilmington, Ohio, on the 12th day of April, 1904, for the purpose of nominating a candidate for representative in Congress, two delegates and two alternates to the national Republican convention, and one presidential elector, fixing a representation in said convention at 139 delegates and 139 alternates, and apportioned the same among the counties as follows: Brown county, sixteen delegates, sixteen alternates; Clermont county, twenty-five delegates, twenty-five alternates; Clinton county, twenty-two delegates, twenty-two alternates; Greene county, twenty-six delegates, twenty-six alternates; Highland county, twenty-six delegates, twenty-six alternates; Warren county, twenty-four delegates, twenty-four alternates; of which number seventy would be necessary for a choice.

"The said call also provided for a temporary organization as follows: W. C. Bishop, chairman; Andrew Jackson, secretary; S. S. Outcalt, sergeant at arms.

"That said counties duly elected delegates and alternates in pursuance of said call of said congressional committee. That the

regular and duly elected delegates from Brown county, sixteen in number, Clermont county, twenty-five in number, Clinton county, twenty-two in number, and Warren county, twenty-four in number—being eighty-seven in all, and a majority of all the duly elected delegates—met at Wilmington, Ohio, on the 12th day of April, 1904, in pursuance to said call of said congressional committee, and was presided over by said temporary organization so as aforesaid provided by said congressional committee, except the secretary, Andrew Jackson, who voluntarily absented himself, and Seymour S. Tibbles was chosen in his stead, which said organization was made permanent. That said convention regularly nominated Charles Q. Hildebrant as the Republican candidate for representative in Congress, and one presidential elector, and two delegates and alternates to the national Republican convention, and that each of said nominations was duly certified by the officers of said convention to the properly constituted authorities to secure and file the same. That the delegates and alternates so as aforesaid chosen to the national Republican convention were recognized by the national Republican committee, and placed by it on the temporary roll of said national Republican convention, and by the action of the committee on credentials were placed on the permanent roll of said convention. That the delegates in the Republican state convention from Clermont county were selected by the same county convention and at the same time that said delegates to said congressional convention were selected, and, on a contest before the Republican state central committee, were placed on the temporary roll of said convention, and by the action of the committee on credentials placed on the permanent roll call of said convention. That the regular delegates from the counties of Greene and Highland—being fifty-two in all, and less than a majority of the whole number of the legally elected delegates to said convention—refused to attend and participate in its proceedings, but voluntarily absented themselves. That shortly afterward said delegates met in the street in Wilmington, and from there adjourned to the West House, and from there to the dining room of the Odd Fellows Temple, and there went through the form of nominating Thomas E. Scroggy for representative in Congress for said Sixth Congressional District, and which said nomination was certified to said R. I. Stewart, chief deputy state supervisor of elections of Greene county, Ohio, and which certificate of nomination is the one on which the said Thomas E. Scroggy bases his right and claim to be the Republican candidate for representative in Congress for said district.

"It is therefore ordered and decided by the chief deputy state supervisors of elections and clerks of the boards of elections of the several counties comprising the Sixth Congressional District of Ohio that the said

Charles Q. Hildebrant is the regularly and duly nominated Republican candidate for representative in Congress for the Sixth Congressional District of Ohio, and the chief deputy state supervisor of elections of Greene county is hereby ordered to certify the certificate of nomination of Charles Q. Hildebrant to the boards of supervisors of elections of all counties comprising the Sixth Congressional District as the regularly nominated Republican candidate for representative in Congress for said district. It is further ordered and decided that said Thomas E. Scroggy is not the regularly nominated Republican candidate for representative in Congress for said district, and said chief deputy state supervisor of elections of Greene county is hereby ordered not to certify the nomination of said Thomas E. Scroggy to said boards of deputy state supervisor of elections. And it is further ordered by the board that an order of this board, signed by all the members participating in this meeting, and setting forth the determination of the board in said contest, issue to the said several boards of deputy state supervisors of each and all of said counties, commanding them that they place the name of Charles Q. Hildebrant on said ballot as such Republican candidate as aforesaid.

"Relator further represents to the court that defendant, as the chief deputy state supervisor of elections of Greene county—being the county having at the last federal census the largest population of any county in said Sixth Congressional District—has refused, still refuses, and will continue to refuse to certify the nomination of relator as found as aforesaid. Relator further says that his right to require the performance of the said act of the defendant as aforesaid is clear, and that no valid excuse can be given for not performing it, and that the relator has no plain or adequate remedy in the ordinary course of the law. Wherefore relator prays that a writ of mandamus issue to said defendant, as chief deputy state supervisor of Greene county as aforesaid, commanding him forthwith to certify the nomination to Congress of the relator by the regular Republican congressional convention of the Sixth District as aforesaid to the deputy state supervisors of elections in all the other counties in said Sixth Congressional District as aforesaid, and for all other and proper relief."

The defendant answered as follows:

"The defendant, for answer to the writ issued to him, says the mode of proceeding adopted by the board composed of the chief deputy, supervisors and clerks of the county boards of elections of the six counties comprising the Sixth Congressional District of the state of Ohio was agreed upon by them unanimously, without suggestion or interference by either candidate for the nomination. It was agreed upon in writing on the 10th day of May, A. D. 1904, and such action

was immediately communicated by letter to both Hildebrant and Scroggy. The board convened in Xenia by agreement on the 19th day of May, A. D. 1904—all the members being present—to consider the objections filed to the nominations, respectively, of said Scroggy and Hildebrant. No communication was received by the board, or any member thereof, to the knowledge of defendant, until the meeting of the board at Xenia on the 19th of May, when the following motion was filed by counsel for Hildebrant:

"State of Ohio, Greene County—ss: In Re the Matter of the Objections of Thomas E. Scroggy to the Certificate of Nomination of Charles Q. Hildebrant as a Candidate of the Republican Party for Representative in Congress for the Sixth Congressional District of Ohio. Before the board of supervisors of election within and for the Sixth Congressional District of Ohio. Motion. Comes now Charles Q. Hildebrant, who claims to be the regular and duly nominated candidate of the Republican Party of the Sixth Congressional District of Ohio for representative in Congress, and moves this honorable board to adjourn its sittings to the city of Loveland, Ohio, and to reconvene at said city of Loveland on Monday, the 23d day of May, A. D. 1904, and that it order all witnesses whose affidavits have been herein filed, and such others as it may deem necessary, to appear before it and submit to an oral examination under oath touching the several matters in issue herein, and that all the proceedings of this board shall be open to the public, to the end that the full truth relating to the several matters and things herein in issue may be fully known by all the voters in said Sixth Congressional District of Ohio. O. Q. Hildebrant, by Hayes & Swaim, Thorp & Miller, and Smith & Cleveneger, His Attorneys."

"Said motion contained the following indorsement: 'Filed May 19, 1904. Miles Bicking, Clerk of Board. Motion not seconded. No action taken on same.' A member of the board offered the said motion, but there was no second, and no action taken upon it. The board proceeded to act upon the various objections, and took action as stated in the petition, the vote being eight to four in favor of the certificate being awarded to Thomas E. Scroggy, all of which was duly made a matter of record. No protest or objection, other than that stated in the motion above, was made in writing or verbally by Charles Q. Hildebrant to the organization of the board, its method of proceeding, or its right to proceed; and both parties voluntarily submitted a large number of affidavits in writing sustaining their respective claims, and filed written briefs and arguments in support thereof. No request was made by Charles Q. Hildebrant, or any one on his behalf, for permission to inspect the affidavits filed on behalf of Judge

Scroggy. Said board fully, honestly, and carefully considered the questions submitted to it; convening at 10:30 a. m. on the morning of the 19th, and sitting until it reached a conclusion on the morning of May 20th; adjourning for dinner and supper on the 19th of May, in the usual manner, and for the usual time. After its finding, it adjourned without day. This defendant did not call the meeting which subsequently met at Loveland on the 14th day of September, nor was he present at the same, nor more than eight members of the said board. And no one was present on behalf of Thomas E. Scroggy.

"Defendant further avers that on the 9th day of September, A. D. 1904, as chief deputy state supervisor of the district, he certified to each one of the deputy state supervisors in each of the other five counties of the district the name of Thomas E. Scroggy as the regular Republican nominee of the Sixth Congressional District, with orders to place his name upon the official Republican ballot in each of said counties to be voted for at the next regular election in November.

"This defendant takes no issue upon the false and malicious statements in the finding of the pretended board on the 14th day of September, A. D. 1904, to the effect that the action of the board on the 20th day of May, A. D. 1904, was corruptly, fraudulently, and collusively made, because said statements are not made or alleged by the said Hildebrandt, nor sworn to by him, nor by any person on his behalf, although, if material or put in issue, he emphatically denies the same.

"The defendant having fulfilled the duties required of him by law, and the action of the board of which he is a member, prays to be dismissed, with his costs."

The relator demurred to the defendant's answer upon the ground that the same does not state facts sufficient to constitute a defense.

Hayes & Swain, Smith & Clevenger, G. P. Thorp, W. C. Thompson, and Ellis G. Kinkadee, for relator. John A. McMahon, C. C. Shearer, Charles Darlington, M. R. Snodgrass, and R. L. Gowdy, for defendant.

DAVIS, J. (after stating the facts). We do not know, and we have not inquired, which of these contestants is the rightful candidate of the Republican Party. That inquiry is not before us in this proceeding.

The relator charges that he has no plain or adequate remedy in the ordinary course of the law. If the relator had alleged that the decision of the chief deputy state supervisors and clerks of the election boards of the several counties comprising the district had been fraudulently and corruptly procured, he might, perhaps, be said to have

disclosed that he did have an adequate remedy by the ordinary processes of the law in a court of equity, but he makes no such allegation. That which he does allege in respect to fraud is that the second meeting of chief supervisors and clerks, on September 14, 1904, found "that the finding and order of said chiefs and clerks as aforesaid, made on the 19th day of May, 1904, were fraudulently, corruptly, and collusively procured." But the legality of the meeting of September 14th, and its authority to make any finding or order whatever, is the very question which is raised here, or, to state the question in another form, was the decision of the chief deputy supervisors and clerks which was made on the 20th day of May, 1904, conclusive? The relator asserts that his right to the remedy which he seeks is clear, and that no valid excuse can be given for nonperformance of the duty which he alleges to rest upon the defendant, yet, after careful deliberation and very earnest discussion, this court has not been able to concur in this contention. On the contrary, a majority of the court concur in the opinion that the relator clearly has no right to the relief sought. The discussion of this case might well end here, for the writ of mandamus never could issue in cases of substantial doubt as to the relator's right, nor to compel an officer to do an act which he has no legal right to do in the absence of the writ. However, the practical importance of the question involved justifies some further explanation.

Section 2966-23, Bates' Ann. St., requires that objections or other questions arising in the course of nomination of candidates for district offices "shall be considered by the chief deputy state supervisors of elections and clerks of said election boards of the several counties comprising the district." Such chief deputies and clerks are not thereby constituted a board with continuing functions, nor a board in any sense. *Randall v. State*, 64 Ohio St. 57, 59 N. E. 742. They are individually required to consider objections and other questions arising in the course of nominations when they arise. "Such objections and other questions" arise when "duly made in writing within five days after the filing" of the certificates of nomination and nomination papers; and certificates of nomination and nomination papers of candidates for district offices must be filed, as required by section 2966-22, Bates' Ann. St. "not less than twenty-five days previous to the day of election." The latter provision does not authorize the chief deputy state supervisors of elections and the clerks of the election boards of the several counties of the district to keep open more than a reasonable time, and until 25 days before the election, a controversy which has been properly submitted to it, but is a limitation on the power to file such certificates and nomination papers,

requiring that they shall be filed not later than 25 days before the election; and it is only intended to indicate to conventions and others who seek to make nominations and get them upon the ballot that they must take action in proper time before that date in order to make the nomination effectual. So that when a certificate of nomination and nomination papers have been filed, no matter when, the statute is mandatory that the same, "if in apparent conformity to the provisions of this act, shall be deemed to be valid unless objection thereto is duly made in writing, within five days after the filing thereof." But if objections have been so filed, or other questions respecting the nomination have arisen in the course of the nomination, it thereupon becomes the duty of the several chief deputy state supervisors and clerks to consider them, and to make a decision thereon; and the statute is mandatory in regard to their decision—"their decision shall be final."

As to the suggestion of complications which may arise if rival nominations continue to be made and nomination papers continue to be filed up to the limit of the statute, we have only this to say: That we are not speculating over the statute to ascertain whether it is so contrived as to provide for every conceivable contingency. We are considering only the case presented in this record. Here there were only two rival nominations, and both candidates and their friends had invoked the jurisdiction of the tribunal provided by the statute. That tribunal, so far as we have been advised, and as it is to be presumed, proceeded strictly within the statute to a decision, and the statute says that such decision shall be final. When the officials whom the statute designated were called together to determine that controversy, and had proceeded in due course to a decision, their functions as to that controversy were at an end. This was the view taken by this court in *State ex rel. v. Donnewirth*, 21 Ohio St. 216, and a like principle was applied in *State ex rel. v. Miller*, 62 Ohio St. 436, 57 N. E. 227, 78 Am. St. Rep. 732. The following authorities also cited by counsel for the defendant support the same conclusion: *McCrary on Elections*, §§ 267, 268; *Roemer v. Canvassers*, 90 Mich. 27, 51 N. W. 267; *Bowen v. Hixon*, 45 Mo. 340. This court held in *Chapman v. Miller et al.*, 52 Ohio St. 166, 176, 39 N. E. 24, that "the statute provides that the questions shall be summarily decided, and that the decision shall be final"; that is, that the decision is conclusive, not subject to review. This was the construction then given to the section now under review, and it was followed in *Randall et al. v. State*, 64 Ohio St. 57, 59 N. E. 742, all the judges concurring.

We are therefore unable to perceive that the meeting of supervisors and clerks in September had any authority to reconsider the controversy after it had been decided in

May, and after the meeting which had been called to decide that controversy had adjourned sine die.

Demurrer to answer overruled, and petition dismissed.

SPEAR, C. J., and DAVIS, PRICE, and SUMMERS, JJ., concur.

(179 N. Y. 375)

McHUGH v. MANHATTAN RY. CO.

(Court of Appeals of New York. Nov. 15, 1904.)

INJURY TO EMPLOYÉ—QUESTION FOR JURY—NEGLIGENCE OF SUPERINTENDENT.

1. Where there is evidence that plaintiff's decedent, when last seen, was about to make a coupling between a car and an engine; that no one saw him come out; that the coupling was made; and that his body was found at about the place where it was made—the time when and the manner in which the accident happened to him through alleged negligence of defendant railroad company in starting its train is a question for the jury.

2. Where one, in the absence of the regular train dispatcher, had been accustomed for three years to perform his duties, his act in starting a train while plaintiff's decedent was coupling or attempting to withdraw to a place of safety was not a mere detail of work, under the employers' liability act (Laws 1902, p. 1748, c. 600, § 1), but that of a superintendent, for whose negligence the railway would be liable.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Kate McHugh, administratrix of Frank McHugh, against the Manhattan Railway Company. From a judgment of the Appellate Division (85 N. Y. Supp. 184) affirming a judgment for defendant, plaintiff appeals. Reversed.

Herbert C. Smyth and Millard F. Tompkins, for appellant. Joseph H. Adams and Charles A. Gardiner, for respondent.

CULLEN, C. J. This action is brought under the employers' liability act (chapter 600 p. 1748, Laws 1902), the plaintiff having given the notice to the defendant required by that statute. The plaintiff's intestate was a coupler in the employ of the defendant in its yard at Rector street, in the city of New York. At this point the elevated trains coming from the north were switched over to the north-bound track. An engine stood on that track, ready to be attached to what had been the rear of the incoming train. When the train was brought to a stop, the engine was backed down to the train and coupled with it, while the engine at the other end of the train was detached. The deceased's business was to couple the waiting engine to the train. In the performance of this duty, it was necessary for him to go between the engine and the car platform, couple the drawbar on the engine to that on the car by a link and pin, connect the two pieces of vacuum hose by which the brakes are operated, and fasten two

safety chains from the engine to the car, one being on each side of the car. At this yard one Coleman was the train dispatcher. By the rules of the company, he had "charge of the yard and the sidings at stations where trains are made up, the movement of trains therein and of the yard force employed at those points." Rule 188. The enginemen were directed to obey the orders of the "train dispatcher in regard to shifting, making up trains and starting from terminals while engines are in train service." Rule 123. It was the duty of the train dispatcher to stand on the platform, where he could observe the coupling of the fresh engine to the train. When that was done, and the time for departure had arrived, by pressing a button he sounded an electric gong which notified the conductor and guards on the train that the train was ready to start. The signal to start was thereupon transmitted by the guards and conductor to the engineer, who would then start the train. In the ordinary operation of the road, about two minutes elapsed from the time the train entered the station from the north till it started on its return trip. Coleman discharged other duties, which at times required him to turn over the management and dispatch of the trains to his telegraph operator or train clerk, one Flanagan, who acted for Coleman on this occasion. Such was the ordinary course of business as it had continued for three years. On the occasion of the accident which is the subject of this suit, the plaintiff's intestate was last seen between the car and the engine, apparently about to make the coupling. Shortly after Flanagan sounded the gong for the train to move, and after the signal had been transmitted by the guards and conductor to the engineer, the train started. In a very short period a cry was heard from underneath the car, the train stopped, and deceased was found crushed at the rear truck of the forward car. The engineer testified that about eight seconds elapsed from the time the dispatcher sounded the gong till the train started and he heard the cry of the deceased. A witness not connected with the road says that about a second of time elapsed between the two occurrences. The engineer states that his engine moved some 10 or 11 feet before he stopped it. On going to the rear of his engine he found that the coupling had been completely effected. Flanagan was not put on the stand by either side. At the close of the evidence the court dismissed the complaint, and this ruling has been affirmed by the Appellate Division by a divided court.

It is quite evident that there are three questions involved in this case: (1) The sufficiency of the evidence to show how the accident happened. (2) If it happened while the deceased was coupling the train, or before he had withdrawn from between the car and engine to a place of safety, was Flanagan negligent in giving the signal for the

train to start? (3) Was the defendant, under the statute, liable for Flanagan's negligence in this respect? As to the second question, the learned Appellate Division was of opinion that, if Flanagan started the train before the deceased had withdrawn from between the car and engine, he was guilty of negligence, or at least the jury might so find. We think the proposition too clear to require any discussion. The third question—as to the liability of the defendant for the negligence of Flanagan—the learned court did not determine, but placed its decision affirming the nonsuit below on the ground that the plaintiff had not shown where the deceased was at the time Flanagan had sounded the gong, or that he was then actually engaged in his work. It was said by the learned court: "It is as reasonable to suppose that he [deceased] had stepped back from the car, having completed his work of coupling the train with the engine, and that in some way his clothing was caught by the train, or as the train started he slipped and fell, or that he attempted to cross between the engine and the car to the platform, as it is to suppose that the starter started the train when the deceased was between the engine and the car." To this view we cannot assent. It was a question of fact for the jury to determine how the accident occurred. We concede that there must be some evidence upon which the jury can base its determination, and that determination must not be mere conjecture. But the only person, with the possible exception of Flanagan, who knew the exact position of the deceased when the train started, was the deceased himself. "If he had survived the accident, it would have been necessary for him, in order to meet the burden of proof, to state what he did and what he tried to do, fully and explicitly; but, as he is dead, less evidence is required of his personal representatives." *Schafer v. Mayor, etc., of N. Y.*, 154 N. Y. 466, 48 N. E. 749. The last position in which the deceased was seen before the accident was standing at the platform of the car, ready to make the coupling. That he went between the cars and made the coupling is certain, not only from the testimony of the engineer of the train, but from the fact that the train moved; and there is no evidence to show that from that position he ever came out. If the engineer's estimate of the distance his engine moved—10 or 11 feet—is correct, the place where the deceased was found under the cars would seem to indicate that he had been struck down at the very place where he made the coupling. In addition to this, when there is considered the very brief period of time during which the deceased was compelled to do the several parts of his work—putting the link through the drawheads, connecting the vacuum hose, and fastening the safety chains—we think the jury might well have found that the train was started before the deceased, after the completion of his work, had

been able to get out from between the cars.

It may be conceded that, apart from the provisions of the employers' liability act, the defendant would not have been liable to its employés for the negligence of either Coleman or Flanagan. *Loughlin v. State of N. Y.*, 105 N. Y. 159, 11 N. E. 371. By that statute, however, a new liability was imposed on the master. Section 1 gives an employé or his personal representative, in case the injury results in death, the right to compensation where he has been injured by reason "of the negligence of any person in the service of the employer intrusted with and exercising superintendence, whose sole or principal duty is that of superintendence, or in the absence of such superintendent, of any person acting as superintendent with the authority or consent of such employer." The learned counsel for the respondent concedes that Coleman was a superintendent, within the terms of the statute. Coleman's own evidence was sufficient to justify a finding that the defendant consented to Flanagan's acting as his substitute in starting the trains from the yard. But the learned counsel for the respondent contends that the particular duty of seeing that the coupling was made and the coupler safely withdrawn, and thereupon giving the signal to start the train, whether performed by Coleman or Flanagan, was not in the nature of superintendence, but merely a detail of the work, for negligence in the discharge of which duty by either employé the defendant was not liable under the statute. This is the most serious question presented by the case. Doubtless, had the train been started by the engineer without a signal, or had the conductor or one of the guards improperly given a signal for the train to move, it would have been the act of a fellow servant, and the defendant would not have been liable therefor. But it does not follow that the act of a train dispatcher in sending out the train is to be regarded in the same light, or as of the same character. There are many acts, the nature of which is such as to clearly establish their character, whether of ordinary labor or of superintendence, and this regardless of whether the act may be done on a particular occasion by a superintendent or by an ordinary workman. On the other hand, there are many acts which are indeterminate in their character, and whether they are to be deemed acts of superintendence or not may depend on the manner in which the business is conducted, and the rank and position of the employé to whom the performance of those acts is intrusted. Thus we said in *Eaton v. N. Y. C. & H. R. R. Co.*, 163 N. Y. 391, 57 N. E. 609, 79 Am. St. Rep. 600: "The question whether a faulty act or omission complained of is negligence in the discharge of the duty of the master, as such, or is a detail of the work, may depend on the manner in which the work is carried on." In the present case, under the defendant's rules already quoted, and the ordinary conduct of its

business, the making up of the trains and their dispatch from the yard were functions imposed on the superintendent or train dispatcher as a part of his duty as such. Both were duties or functions of superintendence. The failure of Flanagan, if there were such, was in his failure to properly supervise the preparation of the train, and in failing to ascertain that the engine had been connected with the cars, and that the employé engaged in that labor had withdrawn to a place of safety. If he had done this work properly, and the accident had been caused by mistake of some other employé in transmitting Flanagan's directions, the question would be entirely different. *Hankins v. N. Y., L. E. & W. R. Co.*, 142 N. Y. 416, 37 N. E. 466, 25 L. R. A. 396, 40 Am. St. Rep. 618. The case at bar is quite similar to one decided by the Supreme Court of Massachusetts under a statute substantially the same as our own. In *Davis v. N. Y. & N. H. R. Co.*, 159 Mass. 532, 34 N. E. 1070, the plaintiff was one of a gang of workmen employed in repairing tracks. It was the duty of the foreman of the gang to warn the workmen of the approach of trains. By failure to give such warning, the plaintiff was run down. A recovery by the plaintiff was upheld. There may not be entire harmony between the various Massachusetts decisions that have arisen under this legislation. Possibly they give more weight to the consideration of the general character of the foremen's or superintendents' duties, and less to the character of the particular act in which the misconduct occurs, than we would be disposed to accord to those factors. Nevertheless the case cited seems well justified on principle, and its authority has not been impaired by any subsequent decisions of the Massachusetts courts.

The judgment should be reversed and a new trial granted; costs to abide the event.

O'BRIEN, BARTLETT, HAIGHT, MARTIN, VANN, and WERNER, JJ., concur.

Judgment reversed, etc.

(179 N. Y. 386)

MEAD v. COOLIDGE et al.

(Court of Appeals of New York. Nov. 15, 1904.)

WILL—CONSTRUCTION—TRUST FUNDS—DEATH OF BENEFICIARIES.

1. Testator devised the whole of his residuary estate to executors to create four independent trusts, one for the benefit of testator's son. On the death of the other beneficiaries the corpus of each trust estate was to be added to that of the son, and on his death his trust fund was to be paid to the next of kin of testator then living. The other trust funds were also to be so distributed as they might from time to time be added to the trust fund designated for testator's son. It was also provided that, if the son died before testator, his fund was to be paid to testator's next of kin at the time of testator's death. *Held*, that on the death of the son after the testator, but before that of the beneficiaries

in the other three trusts, the principal of each fund on the death of the beneficiaries passed to testator's next of kin.

Appeal from Supreme Court, Appellate Division, Third Department.

Action by Royal P. Mead against Jonathan M. Coolidge and others. From a judgment of the Appellate Division (86 N. Y. Supp. 1140), affirming a judgment of the Special Term construing the will of George W. Lee, plaintiff appeals. Affirmed.

The will of George W. Lee, who died on May 7, 1901, provided for the disposition of his residuary estate as follows:

"Sixth. All the rest and residue of my estate whatever, both real and personal, and wherever situate, I give, devise and bequeath to the executors hereof in trust, however, to use and dispose of the same as follows, viz.: The said executors (as trustees) shall at once divide said 'rest and residue' into four separate trust funds and they shall thereupon designate one of such funds for my brother, James Lee, another for my sister, Sarah Snyder, another for my sister, Nancy Holland, and the other for my son, Forest T. Lee. Each of the trust funds designated for my brother and sisters shall be of such an amount as shall be deemed by the said trustees amply sufficient to produce a net income of three hundred dollars (\$300) per year. The trust fund designated for my said son shall include all of such 'rest and residue' which shall remain after taking therefrom the amounts necessary to provide the three funds for my brother and sisters," etc.

The seventh paragraph directed the investment of the trust funds for his brother and sisters, the payment to each beneficiary of the sum of \$300 per year, and that the surplus income of each trust fund should be added to the income of the trust fund to be designated for his son, and should be disposed of in the manner directed for the income of that fund. It then provided that, "upon the death of the beneficiary (my brother or sister) for whom the trust fund shall have been designated, the principal of said trust fund shall be added to the principal of the trust fund to be designated for my said son, and thereafter shall be held, used and disposed of by the said trustees in the manner hereinafter provided for the disposition of the principal of the said trust fund to be designated for my son." In the ninth paragraph, the principal of the trust fund designated for the son, upon his death, was to be paid over to the next of kin of the testator and he, further, directed that "the provisions in this paragraph contained, providing for the final disposition of the principal of the trust fund to be designated for my son, shall be construed to apply to and regulate the disposition of the principal of the trust funds to be designated for my brother and sisters, as such last mentioned trust funds may from time to time be added

to the trust fund designated for my son." The tenth paragraph provided for the disposition of these trust funds, in the event that the testator's son should not survive him, in the following language:

"Tenth. In the event that my said son, Forest T. Lee, shall not survive me, I give, devise and bequeath to my next of kin * * * the portion of my estate which, if my son had survived me, would have constituted the trust fund hereinafter directed to be designated for him; including herein the principal of each of the trust funds mentioned in the 'Seventh' paragraph hereof, upon the death of the beneficiary for whom such fund shall have been designated, and also the principal of the trust fund mentioned in the 'Fourth' paragraph hereof, in the event of the death of said Kate Ide, before she shall arrive at the age of twenty-one years."

The testator left, him surviving, a son, his only child, and, as his next of kin, the brother and two sisters mentioned in his will, and certain children of other brothers and sisters. The son died unmarried and intestate in February, 1902. Nancy Holland, the sister, died in March, 1902. The brother, James Lee, died in October, 1902. The other sister, Mrs. Snyder, still survives. The plaintiff is a brother of the testator's first wife, who was the mother of Forest Lee, testator's only child, and he has brought this action for the construction of the will; claiming that, as to the three trust funds created by the testator for his brother and sisters, he died without having disposed of them, in the event that has actually happened. Judgment was rendered against his contention by the trial court, and that judgment the Appellate Division, in the Third Department, has affirmed.

A. Armstrong, for appellant. Edward M. Angell, for respondents Sarah J. Snyder et al. C. H. Sturges, for respondent A. A. Howard. Stephen Brown, for respondent executors.

GRAY, J. (after stating the facts). I entertain no doubt as to the correctness of the judgment in this case. It is not reasonably possible, upon the reading of this will, to say that the testamentary scheme is not manifest. It is clear that the testator proposed, in the event of his son's death, that all of the residuary estate of which he was disposing should go to his next of kin—a description which, in the event of his having descendants, should be restricted to them, as he specifically directs in the eleventh clause. The event that has happened is the death of his son childless before that of either of testator's brother or sisters for whom the trust funds in question were created. This fact furnishes the basis for the appellant's argument that the situation which actually arose has not been provided for. In effect, it is argued that there is no express

gift, and none can be implied, of the three trust funds in the event which has happened, and hence as to so much of his residuary estate the testator has died intestate. It is true, of course, that the particular event which has happened is not described in the will, and that we may infer that the testator did not suppose that his son would fail to survive the older lives; but that will not suffice to defeat the evident testamentary scheme. This is not like the cases to which the appellant refers us, and which *Vernon v. Vernon*, 53 N. Y. 351, and more recently *Brown v. Quintard*, 177 N. Y. 75, 69 N. E. 225, conspicuously illustrate, where there was no gift whatever of the remainder. If we consider the seventh clause, we find this provision for the disposition of the trust funds created for the testator's brother and sisters upon the death of a beneficiary, namely, that "the principal of said trust fund shall be added to the principal of the trust fund to be designated for my said son, and thereafter shall be held, used and disposed of by the said trustees in the manner hereinafter provided for the disposition of the principal of the said trust fund to be designated for my son." There is no dispute about the right of the testator's next of kin to the principal of the son's trust fund under the provisions of the ninth clause, which contains the gift to them, and in that clause we have the pertinent language that the provision for the final distribution of the principal of the son's trust fund "shall be construed to apply to and regulate the distribution of the principal of the trust funds for my brother and sisters, as such last mentioned trust funds may from time to time be added to the trust fund designated for my son," etc. Then, in the tenth clause, we find the testator providing, if his son should not survive him, for the gift to his next of kin of "the portion of my estate which * * * would have constituted the trust fund hereinbefore directed to be designated for him; including herein the principal of such of the trust funds mentioned in the 'Seventh' paragraph hereof, upon the death of the beneficiary." Now, these various provisions would, without any doubt whatever, imply the gift in remainder of the several trust funds to the testator's next of kin, were it not that in the seventh and ninth clauses the direction is contained, or the fact is assumed, that, upon the death of a beneficiary, his or her trust fund should be added to the son's trust fund. Hence the contention of the appellant that as the son's trust fund by reason of the event of his earlier death, is nonexistent, the inability to comply with the direction of these clauses by the prior addition of each trust fund, as it fell in, to the son's fund, results in a failure to have made a final disposition thereof. There may be room for such an argument, but I do not perceive its force. While the courts will not make wills for testators whose testamentary expressions are unin-

telligible or hopelessly conflicting, or defective to so great an extent as to come under the condemnation of accepted rules for the construction of wills, they will adopt a meaning which effectually and lawfully disposes of the property according to a manifest intention of the testator. The only difficulty in this case is that a condition intermediate between the creation and the eventual vesting of the estate in those designated to enjoy it in remainder became impossible. It could not be added to the trust estate created for the testator's son, for that had fallen in and had been disposed of. But evidently that was not of the essence of the testator's gift. At most, it must be regarded as incidental to the testator's plan, and as measuring a period of time within which the rights of the testator's next of kin would still be contingent. We have observed that that class was to take, if the testator's son failed to survive him; and that is, in my judgment, such conclusive evidence of an intention to give all of the residuary estate to the testator's next of kin, if he had no descendants through his child, as to support a gift by implication in the event—which has now happened—of his son's failing to outlive the periods of the trust estates created for his uncle and aunts. The condition that they should severally be added to the son's estate became impossible of performance, and as, in itself, it was not one essential to, but merely suspensive of the vesting of, the gift, it should be disregarded. If a minor part of the testamentary plan, as I think it to be, it must be subordinated to the effectuation of that plan.

We might hold, from the irresistible evidence of the testator's intention, that there was a gift by implication of the trust estates as they fell in, or, perhaps more correctly, that the direction in the seventh and ninth clauses was not an essential condition of a right in the next of kin to take, and that the prior death of the son merely accelerated the vesting of the estates in the members of that class.

For these reasons, I advise the affirmance of the judgment. Under the circumstances, I think no costs should be awarded.

CULLEN, C. J., and O'BRIEN, MARTIN, and WERNER, JJ., concur. BARTLETT and VANN, JJ., not voting.

Judgment affirmed.

(179 N. Y. 596)

GOLDBERG v. MARKOWITZ et al.
(Court of Appeals of New York. Nov. 22, 1904.)

APPEAL—PRACTICE—CALENDAR.

1. On appeal from a judgment for money, where no extraordinary circumstances or ques-

¶ 1. See Appeal and Error, vol. 3, Cent. Dig. §§ 3191, 3192.

tions of public importance are involved, the cause will not be added to the existing calendar, though appellants are entitled to preference.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Manuel Goldberg against Mary Markowitz and others. From the judgment, defendants appeal. Motion to put on calendar and prefer under Code Civ. Proc. § 791, subd. 4, and section 793. Denied.

George C. Coffin, for the motion. Abraham H. Sarasohn, opposed.

HAIGHT, J. This case is entitled to preference under section 791, subd. 4, Code Civ. Proc., but it is not upon the present calendar. The judgment is for a sum of money, involving no question of public importance. It is not our practice to add cases to the existing calendar, even though they are entitled to preference, unless some question of public importance is involved, or the circumstances are extraordinary.

The motion to prefer and put case upon the calendar should be denied, with \$10 costs.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, VANN, and WERNER, JJ., concur.

Motion denied.

(179 N. Y. 289)

READY v. J. L. FULTON CO.

(Court of Appeals of New York. Nov. 22, 1904.)

CONTRACT—CONSTRUCTION—DAMAGES.

1. A contract for the purchase of stone provided that the vendor should furnish to the purchaser not less than 5,000 and no more than 8,000 cubic yards of stone, and that, if more than 5,000 were required, three weeks' notice should be given for the extra amount. The vendor sued for a breach of contract before 5,000 yards had been delivered. *Held*, that he could only recover damages for the difference between the stone furnished and the 5,000 yards referred to in the contract, there being no agreement that he should furnish the stone for any particular work, or for use in any particular place, nor allowing the vendor to furnish more than 5,000 yards without notice from the purchaser that more was required.

Bartlett, J., dissenting.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by David Ready against the J. L. Fulton Company. From a judgment of the Appellate Division (88 N. Y. Supp. 627) affirming a judgment for plaintiff, defendant appeals. Reversed.

The action was to recover damages for the breach of a contract by which the plaintiff agreed to sell and deliver stone to the defendant. The plaintiff claimed upon the trial that under this contract there were 8,000 cubic yards of stone sold. The defendant claimed that the quantity was but

5,000 cubic yards. The court construed the contract in favor of the plaintiff, and the defendant excepted. It was conceded that the plaintiff had delivered 2,668 cubic yards, which, at the price specified, amounted to \$9,072.34. Payments had been made amounting to \$5,823.21, leaving a balance of \$3,249.13. A dispute arose between the parties concerning the quality of the stone being delivered, whether it was delivered in accordance with instructions; the plaintiff contending that the stone was of the quality and kind required by the contract, the defendant alleging that it was not. When 2,668 cubic yards had been delivered, the defendant refused to receive any more, alleging that the stone tendered was not such as it was entitled to under the contract. The plaintiff claimed that this refusal was unjustified, that he was wrongfully deprived of profits on the remaining 5,332 yards of the 8,000 yards, and claimed judgment for \$8,581.13. On the other hand, the defendant claimed that the contract contained a warranty as to the stone sold and delivered, which had been broken; that it was entitled to recover damages; and sought to set off these damages against the unpaid balance due the plaintiff. The jury rendered a verdict in favor of the plaintiff for \$5,977.40, which was \$2,728.27 more than the balance unpaid for the stone actually delivered, and consequently must have been for damages to the plaintiff because of the defendant's refusal to receive the stone tendered.

The contract was as follows:

"Buffalo, N. Y., August 2nd, 1897.

"This agreement, signed in duplicate, by David Ready, of Oil City, Pa., and the J. L. Fulton Company of Chicago. Mr. Ready agrees to furnish and the J. L. Fulton Company agrees to buy not less than five thousand and no more than eight thousand cubic yards of stone from Ready's Quarries at Oil City, at a price of \$3.40 per cubic yard, F. O. B. cars, Buffalo, W. N. Y. & P. R. R. delivery; and the stone to include all such stone as may be required for face stone, bridge-seats, coping and backing. If more than five thousand yards are required, three weeks' notice is to be given for the extra amount. Mr. Ready agrees to start shipments on or about August 5th, of five cars per day, and to increase the same to an average of ten cars per day at any time thereafter, on one week's notice so to do. Terms of payment: Pay by New York draft on the 25th of each month for all stone furnished in the preceding month. The specifications for this work permit the use of stone from twelve to thirty inch courses; and it is agreed that stone is to be gotten out in as thick courses as possible under these specifications, as it is the essence of this contract to gain this point. Stone is to be as well quarry-squared as practicable and all face stone to have beds of at least one and one-quarter times their rise. All stone to be acceptable to the

engineer and four thousand pounds railroad weight shall constitute a cubic yard of stone and be the basis of payment.

"[Signed] David Ready,
"J. L. Fulton Company,
"By D. H. Lawton, Vice-Pres."

John Cunneen and V. H. Riordan, for appellant. Charles A. Dolson, for respondent.

MARTIN, J. (after stating the facts). Practically the only controversy between the parties necessary to be determined upon this appeal is the proper construction of the written agreement made by and between them for the purchase and sale of a quantity of stone of not less than 5,000 nor more than 8,000 cubic yards. The defendant received less than 5,000 yards, and refused to accept more. Therefore the question is whether the plaintiff was entitled to recover damages for the defendant's not having received stone to the amount of 8,000 yards, or whether the recovery should be limited to the portion of the 5,000 yards which the defendant refused to receive.

By the provisions of the contract the plaintiff agreed to sell and the defendant to buy not less than 5,000 nor more than 8,000 cubic yards of stone. It then stated the price, the place where the stone was to be delivered, and that it was to include such as might be required for face stone, bridge seats, coping, and backing. Then followed the provision that, "if more than five thousand yards are required," three weeks' notice should be given for the extra amount. On the trial the court held as a matter of law and charged the jury that under the written agreement between the parties the defendant was obliged to receive the full 8,000 cubic yards of stone mentioned therein, that it was liable for damages in not having done so, and refused to charge that it was only obliged to receive 5,000 yards. Although parol evidence was introduced upon the trial, ostensibly to aid in the construction of the contract, that evidence was finally disregarded and rendered immaterial by the court in directly holding, as a matter of law, that the plaintiff was entitled to recover damages for the defendant's refusal to receive that portion of the 8,000 yards which it refused to accept. That evidence was likewise disregarded by the Appellate Division, which also held that the contract was to be construed as one providing for the furnishing and purchase of all the stone required for certain work to be done by the defendant, the only limit being from 5,000 to 8,000 cubic yards. We are unable to perceive how this contract can be limited or extended by reason of the defendant's necessity in regard to any particular job or work. No work was described therein; none was referred to, or in any way made to constitute an element of the agreement between the parties. The court below seems to have reached the conclusion that

the defendant's liability under this agreement was governed, not by the language employed therein, but by some unmentioned situation of the defendant and its necessities under some particular contract, or in relation to some particular work that was being carried on or performed by it for some third person. We do not understand how it is possible to extend or control this contract upon the theory that the stone to be furnished by the plaintiff was required for some particular work. The argument is that the word "required," as used in the contract, refers not to the demand or requirement of the defendant, but to its necessities in performing some individual contract. We think the contract is not susceptible of any such construction.

It is to be observed that the written instrument executed by the parties contains no agreement upon the part of either the plaintiff or the defendant that the former shall furnish the latter stone for any particular work, or to be used in any particular place. Nor does it contain any provision authorizing the plaintiff to furnish more than 5,000 yards unless the defendant should give notice that more than that amount was required by it. The contract is a mere personal agreement between the parties, making no reference to any particular work or particular condition of either the plaintiff or the defendant. By it the plaintiff agreed to furnish and the defendant to receive and pay for at least 5,000 yards of stone at the price named. Thus there was an absolute agreement to purchase that amount of stone, and no more. It then contains a conditional provision to the effect that, if more than 5,000 yards were required by the defendant, it should give the plaintiff three weeks' notice that it would require such extra amount; thus plainly disclosing that the contract was absolute to purchase 5,000 yards, with an added provision that, if an extra amount of 3,000 yards should be required by the defendant, then a certain notice should be given by it to the plaintiff. Until such notice was given by the defendant requiring the extra 3,000 yards of the plaintiff, the defendant was not obliged to accept more than 5,000 yards, nor to pay any damages for not having done so.

As already suggested, this contract was clearly a personal one, containing promises on the part of each of the parties which were to be performed by him or it, with no reference to any particular business or contract. The provision that, if more than 5,000 yards were required, three weeks' notice was to be given for the extra amount, shows that the 8,000 yards were regarded by the parties as an extra amount which the defendant might or might not require, and it was to be received and furnished only in case it should be required by the defendant, and the proper notice given. In other words, the requirement provided for by the con-

tract was a requirement by the defendant, could only be rendered effective by notice furnished, and was not a necessity which should exist by reason of some contract or business which formed no part of the agreement.

The court below seems to have relied upon the decisions in *Miller v. Leo*, 35 App. Div. 589, 55 N. Y. Supp. 165, affirmed 165 N. Y. 619, 59 N. E. 1126, and *Brawley v. United States*, 96 U. S. 168, 24 L. Ed. 622. An examination of those cases at once discloses that they have no bearing upon the question involved in this case, as the facts and the principles which were there applied are wholly unlike those involved or applicable here. In the *Miller Case* the contract specifically related to material to be furnished for the erection of two houses, and the agreement between the parties was to sell and purchase all the materials of the class mentioned that were necessary or required for such building. There the amount and character of the materials were to be determined by the requirements of certain work, while in this case the agreement in no way related to any particular work or job to be performed by the defendant, but the character and amount of the material to be furnished were expressly provided for by the contract. As to 5,000 cubic yards, the agreement was absolute to purchase and sell. As to the 3,000 it depended upon the defendant's option and its giving notice requiring its delivery. In the *Brawley Case*, when examined, it will be found that there the question as to the amount of wood which was to be delivered was to be determined by the post commander. Although the amount mentioned in the contract was 880 cords, it was held that, where the commander notified the contractor that he required but 40, his determination was final, and the government was not liable for any number of cords beyond the 40 delivered.

The case of *Farquhar Co. v. New River Mineral Co.*, 87 App. Div. 329, 84 N. Y. Supp. 802, is more nearly like the case at bar. There the contract was to sell from 200 to 300 tons of iron of a certain brand, and it was held that it obligated the vendor to deliver 200 tons in any event, and also an additional 100 tons if such additional quantity was ordered by the vendee, and that the option with respect to the 100 tons could not be exercised by the vendor, but only by the vendee.

We are of the opinion that the courts below erred in their interpretation of the contract in suit; that the defendant was required to accept only 5,000 cubic yards; and, consequently, that the plaintiff could recover damages for the nonacceptance of only that amount, less the amount furnished, and that the judgment should be reversed.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

BARTLETT, J. (dissenting). The material portion of the contract in this case reads: "Mr. Ready agrees to furnish, and the J. L. Fulton Company agrees to buy not less than five thousand and no more than eight thousand cubic yards of stone from Ready's quarries at Oil City at a price of \$3.40 per cubic yard, f. o. b. cars Buffalo, W. N. Y. and P. R. R. delivery; and the stone to include all such stone as may be required for face stone, bridge seats, coping and backing. If more than five thousand yards are required, three weeks' notice is to be given for the extra amount." The word "required" in this contract is ambiguous standing alone, and was fully explained by both parties at the trial. It is alleged in the complaint that the defendant was engaged in constructing stonework for the Terminal Railway of Buffalo, which required a large quantity of stone. This allegation is admitted in the answer, and on the trial the defendant's counsel said: "I admit, that the defendant used more than eight thousand yards of the kind of stone mentioned in the contract, and used them in the masonry of the Terminal Railway of Buffalo." This record clearly discloses that the stress of the trial was on questions of fact. The plaintiff claimed that he had delivered 2,668 cubic yards of stone under the contract, and that the defendant wrongfully refused to receive further deliveries. The defendant claimed, in substance, that the stone delivered was defective in quality, and not quarried in the manner provided by the contract. These questions of fact were bitterly contested. The jury found for the plaintiff, and the Appellate Division unanimously affirmed the judgment entered on the verdict.

It seems to me impossible, on reading the evidence, to reach any other conclusion than that the word "required" in the contract referred to the work on the Terminal Railway of Buffalo; that more than 8,000 cubic yards of stone, of the kind mentioned in the contract, were required in the prosecution of that work; and that defendant's refusal to proceed under the contract was for the reasons already stated. The effect of the admission above quoted was to render unimportant the ruling of the trial judge, as a question of law, that the contract on its face was for the sale of 8,000 cubic yards of stone. More than 8,000 cubic yards were required for the work contemplated by both parties when they entered into this contract, and that portion thereof which was originally conditional became operative by reason of this fact and the stipulation conceding it.

The verdict of the jury for \$5,977.40 was very favorable to the defendant under the circumstances. The sum of \$3,249.13 thereof was for stone actually delivered, and the balance of \$2,728.27, the amount of plaintiff's damages for stone undelivered, being \$1 per cubic yard, as testified to by him, only exceeds 5,000 cubic yards by 396.27 cubic

yards. It is true that the amount of \$1 per cubic yard as plaintiff's profit, lost by defendant's refusal to accept further deliveries, was established by his own testimony. As there was no conflict as to the amount of his loss of profits, assuming that the defendant was bound to have accepted further deliveries, and there were no circumstances from which an inference against the fact testified to could be drawn, this court has held that the plaintiff's case, resting on his own evidence, does not require submission to the jury. *Kelly v. Burroughs*, 102 N. Y. 93, 6 N. E. 109. In that case Judge Danforth said: "The mere fact that the plaintiff, who testified to important particulars, was interested, was unimportant, in view of the fact that there was no conflict in the evidence, or anything or circumstance from which an inference against the fact testified to by him could be drawn." It seems to me a great hardship that this plaintiff should be compelled to go down to another trial when the defendant stands before the court convicted of a breach of its contract and liable to respond in such damages as the plaintiff has sustained.

I vote for affirmance.

CULLEN, C. J., and O'BRIEN, HAIGHT, VANN and WERNER, JJ., concur with MARTIN, J. BARTLETT, J., reads dissenting opinion.

Judgment reversed, etc.

(179 N. Y. 393)

COMESKY v. VILLAGE OF SUFFERN.

(Court of Appeals of New York. Nov. 22, 1904.)

VILLAGES—CHANGING GRADE OF STREET—COMPENSATION—APPOINTMENT OF COMMISSIONERS.

1. Under Laws 1897, p. 420, c. 414, § 159, providing that a village having exclusive control of a street may change the grade thereof, and, if any building or land adjacent thereto is injured thereby, the change shall be deemed a taking of such adjacent property for public use, and further providing for application to the Supreme Court for appointment of commissioners to determine the compensation, the court has no jurisdiction to appoint such commissioners unless the village has exclusive control of the street, and has changed the grade thereof to the injury of adjacent property, and the owner has presented to the trustees of the village a verified claim for damages within 60 days after change of grade.

2. Where claimant, under Laws 1897, p. 420, c. 414, § 159, petitioned the Supreme Court to appoint commissioners to award damages for change of grade in a village street, and an answer denied all the facts alleged except that the village had jurisdiction of the street, and alleged that the only work done was to conform certain inequalities to an established grade and to lay sidewalks with the consent of the petitioner, who had waived the claim set forth in petition, the court had no jurisdiction, without proof of the facts in dispute, to appoint commissioners to award compensation, and an

award made and confirmed without giving the village an opportunity to establish the facts put in issue by the answer is void.

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Frank Comesky against the village of Suffern and others. From a judgment of the Appellate Division (81 N. Y. Supp. 1049) affirming an order of the Special Term confirming report of commissioners appointed to assess damages sustained by reason of the change of grade, the village appeals. Reversed.

Henry Bacon, Joseph Merritt, and Frank S. Harris, for appellant. Arthur S. Tompkins, for respondent.

MARTIN, J. Independently of the village law (Laws 1897, p. 420, c. 414, § 159) the respondent possessed no right to recover damages caused by the change of grade complained of. There was no encroachment upon or actual interference with his premises, and the improvement was made for the benefit of the public and in a proper manner. Under these circumstances, in the absence of any statute providing for compensation, remote or consequential damages arising from the change of grade could not be recovered. *Radcliff's Ex'rs v. Mayor, etc.*, of Brooklyn, 4 N. Y. 195, 53 Am. Dec. 357; *Fries v. N. Y. & H. R. R. Co.*, 169 N. Y. 282, 283, 62 N. E. 358, and cases cited. Thus the respondent's rights and remedies are dependent upon the provisions of section 159, which provides: "If a village has exclusive control and jurisdiction of a street or bridge therein, it may change the grade thereof. If such change of grade shall injuriously affect any building or land adjacent thereto, or the use thereof, the change of grade to the extent of the damage resulting therefrom, shall be deemed the taking of such adjacent property for a public use. A person claiming damages from such change of grade must present to the board of trustees a verified claim therefor, within sixty days after such change of grade is effected. The board may agree with such owner upon the amount of damages to be allowed to him. If no agreement be made, within thirty days after the presentation of the claim, the person presenting it may apply to the Supreme Court for the appointment of three commissioners to determine the compensation to which he is entitled. Notice of the application must be served upon the board of trustees at least ten days before the hearing thereof. All proceedings subsequent to the appointment of the commissioners shall be taken in accordance with the provisions of the condemnation law, so far as applicable, except that the commissioners in fixing their award may make an allowance for benefits derived by the claimant from such improvement."

Although there were several interesting and important questions discussed by coun-

sel, still, with our view of the case, the only one we deem it necessary to consider is whether the order appointing commissioners to assess the damages claimed by the respondent was authorized, or whether it was void for want of jurisdiction. As we have already seen, this proceeding was wholly statutory. Both the right sought to be enforced and the remedy provided for its enforcement were created by the same section of the statute. By the provisions of that section certain facts and conditions must precede the right to recover any compensation, and must be established and determined before the remedy becomes available, so far as the appointment of commissioners was concerned. As the right claimed was for compensation for damages sustained by change of grade, until the fact that there had been a change of grade, resulting in damages to the respondent, was determined by the court, it possessed no authority or jurisdiction to appoint commissioners to assess them. In other words, before the court had any jurisdiction to grant an order appointing commissioners, the fact that there had been such change of grade, followed by damages to the respondent, and that there had been a presentation to the board of a verified claim therefor within 60 days after such change was effected, was necessary to be established and determined.

An examination of this section of the statute discloses that the establishment of several facts must precede the jurisdiction of a court to appoint commissioners: (1) The village must have exclusive control and jurisdiction of the streets; (2) it must have changed the grade thereof; (3) such change must have injuriously affected the respondent's building, or the land adjacent thereto, or the use thereof; and (4) the person claiming damages must have presented to the board a verified claim therefor within 60 days after such change was effected. In this case, while the petition of the respondent alleged facts which, if established and determined in his favor, would have entitled him to an order appointing commissioners, yet, an answer was interposed which admitted some of the facts necessary to be established and denied others. It denied that there was any material or substantial change of grade; denied that the respondent's premises, or the use thereof, were injuriously affected thereby; denied that his claim for damages was presented within 60 days after the change of grade was effected; and then alleged that the only work done by the village upon said streets consisted in causing the inequalities of said streets to conform to an already established and existing grade and laying sidewalks thereon. It further alleged that the work mentioned in the petition was done with the knowledge, consent, and approval of the petitioner, and that he both expressly and by implication waived any such claim as was set forth therein. It is obvious that

if the allegations of the answer, together with its denials, had been established and found in the appellant's favor, the respondent would not have been entitled to an order appointing such commissioners. But the court, upon the petition and notice of motion, with no proof or determination of the facts alleged therein and denied by the answer, granted an order appointing three commissioners to determine the compensation to which the petitioner claimed to be entitled by reason of the alleged change of grade, and to report their determination to the court. Thus the appellants were afforded no opportunity for the trial of the issues raised by the answer, either before the commission was appointed or afterwards, and the report of the commissioners was confirmed without affording them any opportunity to establish the facts alleged and put in issue by the denial and other allegations of the answer. The village sought diligently to obtain such an opportunity, but it was denied both by the court and the commissioners appointed. It is also apparent from the record that the court at the time it granted the order appointing commissioners thought that the matters set up in the answer might be tried before and considered by the commissioners. Afterwards, however, when an attempt was made to resettle the order by inserting a provision authorizing the commissioners to take proof upon the issues, the motion was denied, and the court expressed the opinion that it was for the commissioners to find, from the evidence and from a personal inspection, how much of a change of grade was made, and then assess six cents damages or more, thereby assuming that there had been a change of grade resulting in damage to the respondent, although those facts were denied by the answer, and the issues thus raised had not been tried or determined. Subsequently the commissioners appointed a time and place for a hearing, and a trial followed, which resulted in an award to the petitioner of \$550 damages, besides costs. Therefore it becomes evident that a substantial sum for damages has been awarded against the village without its having been afforded an opportunity to try the issues raised by the denial and defenses in the answer. We think it is clear that, until those issues were tried and determined, and the court found that there had been a change of grade which injuriously affected the property of the respondent, and that a verified claim was presented within 60 days, it had no power, authority, or jurisdiction to grant the order appointing commissioners. Such is the plain language and effect of the statute. It is only when those facts exist, and are established and found by the court, that it has any authority or jurisdiction to appoint a commission. The jurisdiction of the court was dependent upon the existence of those particular facts, and therefore they must ap-

pear and be determined, or the order was void, as it was only when they were found to exist that the court had any power or authority to make such appointment. The issues tendered by the defendant's answer were not merely technical, but went to the very substance of the respondent's right to recover. If the facts were that the only act performed by the appellant consisted of causing the inequalities of the street to conform to an already established and existing grade, there was no change of grade within the meaning of the statute. *Matter of Whitmore v. Vil. of Tarrytown*, 137 N. Y. 409, 33 N. E. 489; *Farrington v. City of Mount Vernon*, 166 N. Y. 233, 59 N. E. 828; *Fuller v. City of Mount Vernon*, 171 N. Y. 247, 253, 63 N. E. 964. The conclusion that the facts entitling the respondent to damages were jurisdictional, and must be established before the court was justified in granting the order appointing commissioners, is fully sustained in *Matter of Borup*, 89 App. Div. 183, 85 N. Y. Supp. 828, and plainly recognized in *Matter of Greer*, 39 App. Div. 22, 56 N. Y. Supp. 938.

Nor does the fact that the court before which this application was made was a court of general jurisdiction aid the respondent in sustaining this proceeding, as it is to be observed that it does not fall within the ordinary proceedings of a court of common law, and hence the jurisdiction of the court is special and limited, wholly dependent upon the statute, and no presumption can be indulged in favoring that particular jurisdiction. In cases of that character, where the rights and remedies are new, and conferred only by statute, the statute must be strictly pursued, whatever jurisdiction the court may possess. *Warren v. Union Bank of Rochester*, 157 N. Y. 259, 276, 51 N. E. 1036. Presumptions indulged in support of the judgments of superior courts of general jurisdiction are limited to jurisdiction over persons within their territorial limits, and over proceedings which are in accordance with the course of the common law. *Galpin v. Page*, 18 Wall. 350, 21 L. Ed. 959.

We are of the opinion that the court acquired no jurisdiction to appoint commissioners to determine the amount of damages due to the respondent, that the order was void, and hence that the judgment of the Appellate Division should be reversed, the order granted by the Special Term should be vacated, with all subsequent proceedings taken thereunder, and the proceeding remitted to the Special Term for further consideration, with costs to the appellants in all the courts.

CULLEN, C. J., and GRAY, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur.

Order reversed, etc.

(187 Mass. 81)

WENDALL v. FISHER.

(Supreme Judicial Court of Massachusetts.
Bristol. Nov. 23, 1904.)

DEEDS—CONSTRUCTION — RESERVATIONS—VEN-
DOR AND PURCHASER—UNRECORDED
AGREEMENTS—EFFECT.

1. Where the granting and habendum clause in a deed were effective to convey the fee, a subsequent clause in the covenant against incumbrances to the effect that the premises were free from incumbrances, "except a right to pass and repass in the road leading up from the barn," etc., must be regarded as inserted only to modify the grantor's liability upon the covenants, and not as constituting a reservation or exception from the grant, or as estopping the grantee from denying the existence of the right therein described, as against any person asserting it.

2. An unrecorded, sealed agreement, executed by a grantor to his grantee, purporting to establish the boundaries of a way mentioned in a previously executed deed, is binding upon subsequent holders under the grantee with notice.

Exceptions from Superior Court, Bristol County; Loranus E. Hitchcock, Judge.

Contract by Olaf Wendall against John M. Fisher. There was a verdict for plaintiff, and defendant excepted. Exceptions sustained.

The material portion of the deed referred to in the opinion is as follows:

"Know all men by these presents: that I, Peter Thacher of Attleborough, Bristol County, Commonwealth of Massachusetts, Gentleman, in consideration of two thousand dollars paid by Albert Goff, of Rehoboth, County of Bristol aforesaid, the receipt whereof is hereby acknowledged, do hereby give, grant, bargain, sell, and convey unto the said Albert Goff, his heirs and assigns forever, a certain tract of land or parcel of land situated in Attleborough aforesaid, containing by estimation 67 acres 67 rods be the same more or less, bounded as follows: Beginning at the corner of the old garden at the corner of the wall beside the road leading from J. C. Hidden's to Taunton; thence running north 75 degrees east 21 rods; thence south 10 degrees east 6 rods; thence north 75 degrees east 84 rods to a stone in the ground; thence southerly 8 rods to a stone perched in the ground; thence south 13½ degrees east, 84 rods and ¼ rods and 17 links to the corner of the swamp; thence southwesterly bounded by the swamp till it comes to the road; thence by the road northwesterly till it comes to the first mentioned corner.

"To have and to hold the above granted premises with all the appurtenances thereto belonging to the said Albert Goff, his heirs and assigns to his 'of' their use and behoof forever. And I the said Peter Thacher for myself and heirs, executors and administrators, do covenant with the said Albert Goff, his heirs and assigns, that I am lawfully seized in fee simple of the granted premises, that they are free from all incumbrances, except a right to pass and repass in the road

leading from the barn to the swamp where we get mud by our putting up the bars with teams and otherwise. That I have good right to sell and convey the same to the said Albert Goff his heirs and assigns forever as aforesaid, and that I will and my heirs, executors and administrators shall warrant and defend the same to the said Albert Goff, his heirs and assigns forever, against lawful claims and demands of all persons."

H. H. Robinson and R. P. Coughlin, for plaintiff. Wm. H. Fox, F. B. Fox, and F. L. Babcock, for defendant.

HAMMOND, J. By the granting and the habendum clause in the deed of Thacher to Goff, the land therein described was conveyed in fee. The clause, "except a right to pass and repass in the road leading from the barn to the swamp where we get mud by our putting up the bars with teams and otherwise," first appears in the covenant against incumbrances. This exception must be regarded, therefore, as inserted only for the purpose of modifying to that extent the liability upon the covenants. It did not estop the grantee from denying the existence of the right therein described, as against any person asserting it. *Weed Sewing Machine Co. v. Emerson*, 115 Mass. 554. Much less was it a reservation or exception from the grant; and the principle upon which cases like *White v. New York & New England R. R.*, 158 Mass. 181, 30 N. E. 612, and *Hamlin v. New York & New England R. R.*, 160 Mass. 461, 36 N. E. 200, rest, is not applicable. It follows that the second and third of the defendant's requests for instructions should have been given, and the instruction that the jury might consider that the deed from Thacher to Goff as establishing a right of way which is still existing across the plaintiff's land was erroneous.

No error is shown in the admission of the sealed agreement subsequently executed by Thacher to Goff, purporting to establish the boundaries of the way. Although unrecorded, it was binding upon subsequent holders under Goff with notice.

Exceptions sustained.

(187 Mass. 90)

COMMONWEALTH v. OAKES.

(Supreme Judicial Court of Massachusetts.
Essex. Nov. 23, 1904.)

CRIMINAL LAW—EVIDENCE—CREDIBILITY OF WITNESS.

1. Where, on a trial for crime, defendant sought to discredit the principal witness for the prosecution by evidence showing the hostility of the witness, evidence that defendant, who was chief of police, had stated that he wanted the witness to run a hotel in the town, and that he need not be afraid of being arrested for selling liquor, was admissible, as showing an attempt on the part of defendant to conciliate the witness.

Exceptions from Superior Court, Essex County.

MASS. DEC. 67-72 N. E.—55

Edward H. Oakes was convicted of forgery, and he brings exceptions. Exceptions overruled.

W. Scott Peters, Dist. Atty., for the Commonwealth. Jas. H. Sisk, Wm. E. Sisk, and Richard L. Sisk, for defendant.

LATHROP, J. This is an indictment charging the defendant with knowingly uttering a promissory note for \$900, the indorsement of a third person being forged. At the trial in the superior court a verdict of guilty was returned, and the case is before us on the defendant's exceptions to the admission of certain evidence.

The government had introduced evidence to show that the defendant had uttered the note as charged in the indictment, and there was evidence on the part of the defendant to the contrary. The principal witness for the government was one Roberts, who gave material evidence. The defendant sought to discredit Roberts in various ways, and introduced evidence tending to show hostility on the part of Roberts toward him. The government was then allowed to put in evidence a conversation between one Curry, an attorney at law, and the defendant, by which it appeared that Roberts was endeavoring to get possession of some real estate, on which was a hotel, which had belonged to his wife, of whose estate he was administrator, which had been leased to certain persons for whom the defendant was acting as manager. In this conversation it was testified that the defendant, who was chief of police in Revere, where the land was situated, said that he wanted Roberts to take possession of the property and run it, and "he need not be afraid of being arrested for illegal sales of intoxicating liquor." The jury were instructed that the evidence was admissible only to show an attempt on the part of the defendant to conciliate Roberts. We are of opinion that the evidence was admissible for the purpose for which it was offered, and to which it was limited by the court.

The remaining exception relates to a conversation between the defendant and one Cole. We do not deem it necessary to consider this question at length. Taken by itself, it amounted to but little; but, taken in connection with the other evidence in the case, we are of opinion that it was in the discretion of the presiding judge to admit it. Exceptions overruled.

(187 Mass. 23)

PERKINS v. RICE et al.

(Supreme Judicial Court of Massachusetts.
Worcester. Nov. 22, 1904.)

LEASED PREMISES—ELEVATORS—CONTROL—RETENTION BY LANDLORD—INJURIES—EVIDENCE—EXCLUSION—DISCRETION—PREJUDICE.

1. Where, in an action for injuries to plaintiff while seeking to use an elevator in an apartment building, defendants admitted own-

ership of the building, but denied that they were in control of the elevator at the time of the accident, evidence that, shortly before the accident, defendants had procured an indemnity insurance policy against loss or damage from accidents arising in operating the elevator, and that such insurance was in force when plaintiff was injured, was admissible to prove that, in renting the apartment, defendants still retained control of the elevator.

2. The fact that there was uncontradicted testimony, which, if believed, was amply sufficient to prove that defendants retained control of the elevator by which plaintiff was injured, did not cure the erroneous exclusion of other evidence admissible to prove such control.

3. A judge presiding at a jury trial has no discretionary power to reject evidence regularly offered because, in his opinion, sufficient proof, if believed, has already been introduced to establish the fact to be proved.

4. Where, in an action for injuries in the use of an elevator, defendants denied all the facts in issue, except their ownership of the building, which was leased to various tenants, and the case went to the jury on all the issues, and defendants obtained a general verdict, the erroneous exclusion of evidence that at the time of the accident defendants were in control of the elevator was not harmless, on the ground that the conceded facts necessarily established such fact.

Exceptions from Superior Court, Worcester County; Elisha B. Maynard, Judge.

Action by Chas. H. Perkins against George H. Rice and others. A judgment was rendered in favor of defendants, and plaintiff brings exceptions. Sustained.

Webster Thayer, Hollis W. Cobb, and Fred A. Walker, for plaintiff. C. C. Milton and G. A. Gaskill, for defendants.

BRALEY, J. This is an action of tort, brought to recover damages for personal injuries received by the plaintiff when seeking to use an elevator maintained in an apartment building rented to various tenants, but the ownership of which was admitted by the defendants. The trial in the superior court resulted in favor of the defendants, and the case is before us on exceptions taken by the plaintiff to the exclusion of certain evidence offered by him, and to portions of the instructions under which it was submitted to the jury.

The admission of ownership of the building was accompanied by a denial by the defendants that they were in control of the elevator at the time of the accident, and this must be taken to mean that they required the plaintiff to prove the essential fact that in renting the apartments they still retained control of it. If this was proved, then they might be held liable for its defective condition, if the plaintiff could establish his due care, and negligence on their part in the discharge of any duty they owed to him. See *Marwedel v. Cook*, 154 Mass. 235, 236, 28 N. E. 140; *Wilcox v. Zane*, 167 Mass. 302, 306, 45 N. E. 923; *Coupe v. Platt*, 172 Mass. 458, 52 N. E. 526, 70 Am. St. Rep. 293.

Although each of the defendants was a witness, neither appears to have been directly asked any questions relating to their retention of possession of the elevator; but, in the cross-examination of one of them, the plaintiff, for the sole purpose of proving such control, formally offered to show that shortly before the accident they had procured a policy of indemnity insurance against loss or damage from accidents arising in operating the elevator, and that such insurance was in force when he was injured. Upon objection being made by their counsel, who stated, in reply to a question asked by the presiding justice, that they still denied any control of the elevator, this offer was excluded. The reasons for such exclusion are not given, and it is to be determined whether the evidence was admissible in support of this issue. The exceptions are silent as to the form in which it was sought to introduce the proposed proof—whether by further cross-examination of the defendant or by the policy itself; but as the evidence was, in substance, admissible, either course could have been taken, for the proof offered was in the nature of an admission by the defendants. *Smith v. Palmer*, 6 Cush. 513, 520, 521. If they had taken such a policy, it was evidence of their interest in some form in the elevator, and, with the accompanying proof, might have been found sufficient to satisfy the jury that, notwithstanding their denial, they still retained the management of it. The probative force of this evidence was for the jury, and it could properly be argued that the defendants would not have deemed it prudent to secure indemnity insurance on an elevator not within their control, or for the careless management or defective condition of which they could not be held responsible. When repairs are made on premises by those whom it is sought to charge with liability for their defective condition, evidence of this fact has been deemed competent, whether they were made before or after the accident, as being inconsistent with a denial of ownership, although such evidence is not competent as an admission of liability for the accident itself. *Readman v. Conway*, 126 Mass. 374; *Poor v. Sears*, 154 Mass. 539, 549, 28 N. E. 1046, 26 Am. St. Rep. 272; *Skinner v. Props. of Locks & Canals*, 154 Mass. 168, 28 N. E. 10, 12 L. R. A. 554, 26 Am. St. Rep. 226; *Anderson v. Duckworth*, 162 Mass. 251, 254, 38 N. E. 510; *O'Malley v. Twenty-Five Associates*, 170 Mass. 471, 477, 49 N. E. 641. In principle, there is no difference whether evidence of this character is offered to prove possession and control of an elevator, or of the premises in which it may be located. Proof of any act of the defendants whom it was sought to hold tending to show the exercise by them of dominion over either was competent for this purpose, and the exclusion of the plaintiff's offer of proof was erroneous.

¶ 3. See *Trial*, vol. 46, Cent. Dig. § 131.

The fact that there was uncontradicted testimony, which, if believed, was amply sufficient to prove that the defendants had not relinquished, but retained, such control, does not cure the error, for the plaintiff was entitled to the full benefit of any and all relevant and material evidence properly offered by him upon this issue.

Nor can it be held that the large discretionary powers of the superior court include the right to reject evidence at a jury trial, when regularly offered, because, in the opinion of the presiding judge, sufficient proof, if believed, has already been introduced to establish the fact to be proved.

Neither are we able to say that no injustice would be done if the rule adopted in *Hinckley v. Somerset*, 145 Mass. 328, 338, 14 N. E. 168, that, if incompetent evidence is admitted "to prove a fact which the conceded facts necessarily establish," the exceptions will not be sustained, is extended to include a case like this. For, beyond the fact of their title, the defendants made no concessions, but went to the jury on all the issues; and, as they obtained a general verdict, there is substantial support for the position that it may have been rendered on the very issue on which the plaintiff desired to introduce the rejected evidence.

As the exceptions must be sustained by reason of this error, a discussion of the other questions raised is not required, for at another trial they may not become material in the form in which they are now presented.

Exceptions sustained.

(187 Mass. 51)

CUNNINGHAM v. ATLAS TACK CO.

(Supreme Judicial Court of Massachusetts.
Bristol. Nov. 22, 1904.)

**SERVANT'S INJURIES—NEGLIGENCE OF MASTER
—EVIDENCE—EMPLOYER'S LIABILITY
ACT—SUPERINTENDENTS.**

1. In was a question for the jury whether one in charge of the work of loading a machine onto a wagon was a superintendent, within the employer's liability act.

2. In an action for injuries to a servant from the revolving of a wheel, part of a machine that plaintiff and others were lifting, *held*, that the evidence was sufficient to warrant a finding that the master's superintendent was negligent in ordering the machine lifted without seeing that the wheel was fastened, and that such negligence was the proximate cause of the injury.

Exceptions from Superior Court, Bristol County; Wm. Cushing Wait, Judge.

Action by one Cunningham against the Atlas Tack Company. Judgment for defendant, and plaintiff brings exceptions. Exceptions overruled on the first count and sustained on the second.

F. S. Hall and C. O. Hagerty, for plaintiff. Romney Spring, for defendant.

LORING, J. This is an action for the loss of a finger under the following circumstan-

ces: The plaintiff, who was an employé of the defendant, was called away from his regular work to help in loading certain rivet machines onto a wagon in a hurry. The first machine was placed on the wagon without trouble. The second, after being rolled to the tailboard on rollers, fell while being lifted onto the wagon. The first count was a count at common law, and the second was under the employer's liability act. The presiding judge directed a verdict for the defendant on both counts.

The case was submitted on briefs. No adequate description of the machine is given in the bill of exceptions, and no explanation was made by counsel of the cut of the machine, which is also before the court. The machine weighed 1,000 pounds, and consisted of a pedestal four feet high, with a balance wheel at the top, which is a foot and a half higher. Across the top of the pedestal, and at right angles to it, is a cross-piece. Apparently (in some way not adequately described) this balance wheel, when the machine is in operation, brings two sharp edges together. If the balance wheel is not tied, it apparently revolves on the machine's being moved, and on its revolving the sharp edges are brought together. The evidence warranted a finding that when the moving of this machine was begun the balance wheel was tied, but that the wire with which it was tied was broken by the fall, and that after the machine fell one Lincoln, who was in charge of the work, without waiting to see whether the wheel was still tied or not (he testified that he did not know whether it was originally tied or not), ordered a board put under some part of the machine, and then told the six to eight men engaged in loading the machine to take hold and lift it into the wagon, directing as many as could to take hold of the board and "the rest get hold of the machine wherever you can," in the language of one of the witnesses. The machine was then bottom up. There were more men than there was "room to get hold of the machine readily." The plaintiff then undertook to help lift with his right hand on the board and his left hand on the end of the machine, where apparently the sharp edges come together when the balance wheel turns. As the men lifted the machine up to the wagon, the plaintiff was crowded, and lost his hold. He felt that his finger was caught, and with the next lift his "hand came clear and the finger was gone"—cut off by the two sharp edges put in motion by the revolving of the balance wheel. In the language of the superintendent on the stand, the plaintiff "had never had anything to do with the running of the machine upon which he was hurt, or anything like it." The jury were also warranted in finding that Lincoln was a superintendent, within the employer's liability act, and was acting as such.

We are of opinion that the jury were war-

ranted in finding that it was negligent for Lincoln to order the men to lift the machine without finding out that the balance wheel was tied, and that this negligence was the proximate cause of the defendant's injury. The jostling of the men, and consequent loosening of the hold of the plaintiff, under the circumstances was an incident to be expected in lifting so high, so heavy, yet so small a machine. We are of opinion that the defendant's contention is not well taken that this was something for which the defendant was not to blame, and was the sole cause of the accident. Neither is the contention that the situation was as clear to the plaintiff as to the superintendent. The superintendent knew the nature of the machine, while the plaintiff was altogether ignorant of it. The plaintiff has not argued that he can maintain his action at common law.

The entry must be: On the first count, exceptions overruled; on the second count, exceptions sustained.

(186 Mass. 594)

HARRINGTON v. CITY OF WORCESTER.

(Supreme Judicial Court of Massachusetts.
Worcester. Nov. 22, 1904.)

MUNICIPAL CORPORATIONS—DISCHARGE OF SEWAGE—FAILURE TO PURIFY—STATUTES.

1. St. 1867, c. 106, p. 541, authorized the city of Worcester to use the waters of a certain brook for the purpose of receiving sewage and discharging it into the river below; and St. 1886, p. 309, c. 331, provided that the city should within four years establish a plant for the purpose of purification of the sewage. *Held*, that the failure of the city, prior to the establishment of the plant, to purify its sewage before discharging it into the brook, was not negligence, in the absence of any showing that it could have done so by any reasonable and incidental construction and careful management, without the establishment of an independent plant for purification, involving the taking of land and the exercise of other powers not given by the act of 1867.

2. St. 1886, p. 309, c. 331, provided that the city of Worcester should within four years establish a plant for the purification of sewage, so that it should "not create a nuisance or injure the public health." There was a special provision for enforcing the statute by injunction, and it was provided that the commonwealth might distribute a part of the expense among all the cities and towns of the state. *Held*, that the statute was a measure for the benefit of the public health, and the city was not liable to a riparian owner on the stream into which the sewage was discharged for failure to erect an adequate plant.

Report from Superior Court, Worcester County; Francis A. Gaskill, Judge.

Action by William Harrington against the city of Worcester. Case reported to the Supreme Judicial Court. Judgment for defendant.

Frank Bulkeley Smith, T. H. Gage, Jr., and Frank F. Dresser, for plaintiff. Arthur P. Gugg and J. Fred Humes, for defendant.

KNOWLTON, C. J. This case is before us on a demurrer to the plaintiff's declaration, charging the defendant with carelessly and negligently constructing its sewers and drains, and carelessly and negligently and improperly failing to purify the waters discharging through the sewers and drains before discharging them on the plaintiff's premises, so that the water flowing through the plaintiff's mill pond has become corrupted, impure, and filthy, and sewage has been placed upon the plaintiff's premises and in his mill pond, and other damages have been caused to him and to his property. Under an order of the court upon the defendant's motion, specifications were filed setting forth particularly the matters relied on, and the defendant filed a second demurrer to the declaration and specifications. At the hearing upon the declaration, specifications, and demurrers, it was agreed by the plaintiff, as appears by the report of the presiding justice, that the declaration and specifications be modified by allegations as follows: "That when chapter 331 [page 309] Laws 1886, was enacted, it was necessary for the city of Worcester to adopt a system of sewage purification, independent of the construction of its sewers, and to take tracts of land therefor, in order to prevent the pollution of the Blackstone river, arising from the appropriation and use of Mill brook as a sewer, in the manner authorized by chapter 106 [page 541] Laws 1867; that there has been no negligence on the part of the city, unless negligence be inferable from the fact that prior to 1886 the city made no attempt to purify its sewage before discharging it into the Blackstone river through said Mill brook, and that since 1886 it has failed to adopt a system of purification adequate in size and proper in design to accomplish the purification of its sewage, although such system might have been adopted and constructed, but would have involved the expenditure of larger sums of money, and taking larger tracts of land. In 1886 and thereafter the city of Worcester, acting under chapter 331 [page 309] Laws 1886, established purification works, which necessitated its taking large tracts of land and making large expenditures of money, and expended for land and constructions over one million five hundred thousand dollars, and annually sums varying from fourteen thousand dollars to fifty-three thousand dollars for maintenance. Except as modified hereby, all allegations of the declaration and specifications stand." The judge overruled the demurrers, the defendant appealed, and the judge reported to this court the questions of law raised by the appeal, with a stipulation that, if the demurrer should be sustained, judgment should be entered for the defendant. This agreement does not appear of record, except in the report, and we infer that it was made orally at the hearing, and treated as a

modification of the plaintiff's pleadings. It would have been more regular to have put the agreement in writing, and to have filed it as an amendment of the declaration or specifications; but it has been embodied in the written report of the justice, which is a part of the record, and adopted in that form by the parties. We will therefore treat it as an amendment of the declaration.

The effect of the declaration and specifications, so modified, is, as we interpret them, to present an averment that the plaintiff suffered damage in his property from the pollution of the stream, and the discharge of sewage through it upon his land, but that prior to the action of the city under St. 1886, p. 309, c. 331, there has been no negligence on the part of the city, either in the construction or management of its sewers or otherwise, unless negligence is inferable from the fact that prior to 1886 the city made no attempt to purify its sewage before discharging it into the Blackstone river through Mill brook.

The first question is whether negligence is inferable from the fact that sewage in the water caused the plaintiff damage, coupled with the fact that the city made no attempt to purify its sewage before discharging it into the river. The law applicable to the use of Mill brook by the city of Worcester, under the statutes, has often been considered by this court. *Merrifield v. Worcester*, 110 Mass. 216, 14 Am. Rep. 592; *Butler v. Worcester*, 112 Mass. 541; *Washburn Manufacturing Company v. Worcester*, 116 Mass. 458; *Workman v. Worcester*, 118 Mass. 168; *Woodward v. Worcester*, 121 Mass. 245; *Morse v. Worcester*, 139 Mass. 389, 2 N. E. 694; *Washburn & Moen Manufacturing Company v. Worcester*, 153 Mass. 494, 27 N. E. 664. St. 1867, p. 541, c. 106, authorized the city of Worcester to take and use Mill brook for the purpose of receiving sewage and discharging it into the river below; and the case last cited holds that some contamination of the water in the river must have been contemplated by the Legislature as necessarily incidental to this use, and that damages for such contamination could be recovered by riparian proprietors under the statute. On the other hand, in *Morse v. Worcester*, 139 Mass. 389, 2 N. E. 694, it was decided that the city was bound to use due care in the construction and management of its sewers, so as not to cause any unnecessarily injurious consequences to others, and that "if it is practicable to use any methods of constructing the sewer, and, as a part of the construction, of purifying the sewage at its mouth, at an expense which is reasonable, * * * it is the duty of the city to adopt such methods." But the court went on to say that it was not the duty, nor within the power, of the city to establish an independent system of sewage purification which would require the taking of lands and the expenditure of large sums of money

for the construction and operation of such a system. Such a system was authorized and required by St. 1886, p. 309, c. 331, and it is agreed that, for the proper purification of the sewage, such a system was necessary. For the failure to establish such a system prior to the enactment of the statute, the city is not liable. Following the law as it is stated in the two cases last cited, the mere fact that the water at the plaintiff's pond was somewhat polluted is not proof of negligence on the part of the defendant, for the existence of some pollution there, as necessarily incident to the use of the brook in the manner authorized, was contemplated by the Legislature. For the damage caused by such necessary pollution the plaintiff was entitled to recover, and presumably did recover, damages under the original statute. If, as a part of its system of sewerage, the city could purify the sewage by any reasonable incidental construction and by careful management, without the establishment of an independent plant for purification, involving the taking of land and the exercise of other powers not given by the statute, it was its duty to do it. The precise question is whether it can be inferred from the facts before the court that there could be such purification which would have materially diminished the plaintiff's damages. We do not see how such an inference can be drawn from the facts averred, as limited by the agreement. It is possible that some effectual means of purification could have been provided in connection with, and as a part of, the construction and maintenance of the sewer; but we think it quite as probable that it could not have been done without the exercise of powers which the city did not then possess. There is nothing stronger than conjecture, if there is even that, in favor of the proposition to be proved. We are therefore of opinion that, under the agreement, there was no actionable negligence on the part of the city prior to the enactment of St. 1886, p. 309, c. 331.

It is averred that under this statute the city has failed to adopt a system of purification adequate in size and proper in design to accomplish the purification. The question on this part of the case is whether such negligence is actionable. This depends upon the construction of the statute. If this is an act putting upon the city of Worcester, as an agency of the government, the performance of a governmental duty for the benefit of the general public in the neighborhood of the Blackstone river, there is no liability in damages for the failure properly to perform the duty. This principle of law is established in this commonwealth by many decisions, and it is recognized quite generally elsewhere. *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332, and cases cited; *Bigelow v. Randolph*, 14 Gray, 541; *Benton v. Boston City Hospital*, 140 Mass. 13, 1 N. E. 836, 54 Am. Rep. 436; *Tindley v. Salem*, 137 Mass. 171,

50 Am. Rep. 289; *Pettingill v. Chelsea*, 161 Mass. 363, 37 N. E. 380, 24 L. R. A. 426; *Eastman v. Meredith*, 36 N. H. 284, 72 Am. Dec. 302; *Maxmillian v. Mayor*, 62 N. Y. 160, 20 Am. Rep. 468. If, on the other hand, this should be treated as merely an enabling act to authorize the city of Worcester to perform duties beyond those which it was authorized to perform under St. 1867, p. 541, c. 106, in order the better to protect individual owners upon the stream in the enjoyment of their original rights of property, which had not been taken away under the earlier statute, the city is liable for this negligence, as it was liable, under the chapter just mentioned, for negligence in the construction and management of the sewer in Mill brook. The considerations in favor of each of these different views of the law are of nearly equal weight, but, on the whole, we think it a better interpretation of the language of the Legislature to hold that this is a measure in the interest of the general public, looking particularly to the protection of the health of the people living near the Blackstone river, and that the duty to make this provision was imposed as other public duties which rest upon cities and towns are imposed, like the duty to provide for the education of children, or the duty to establish and maintain the ordinary institutions of the government. It does not purport to give the city privileges which it asks for its own benefit, but it is mandatory. It requires the removal of the sewage, not so completely as to make the water pure for all kinds of manufacturing purposes, but only to such a degree that it shall not "create a nuisance or injure the public health." It does not direct that this shall be done at once, but only that it shall be done within four years after the passage of the act. There is a special provision for the enforcement of the statute by injunction or other equitable process, and this does not seem to be for the benefit of riparian proprietors or other property owners, as such, but for the benefit of the general public. Action of this kind can be taken only on complaint of the selectmen of a town on the Blackstone river.

The last section specially recognizes in another way the fact that this is a public matter, in which the city of Worcester acts, in part at least, as an agency of the government, for there is a provision that the commonwealth may, if it deems it equitable so to do, distribute a part of the whole of the expenses of this service among all the cities and towns of the state. Primarily and chiefly, it seems to be a measure in the interest of the public health, and these provisions, enacted with a knowledge of the rule of law that for the nonperformance of public duties there is no liability in an action for negligence, indicate a purpose to leave the city without liability to individual property owners under this statute. It follows that this action cannot be maintained, and that the

public must look for the protection of their interests to proceedings in equity instituted on the complaint of a board of selectmen.

Judgment for the defendant.

(187 Mass. 5)

PRATT v. NEW YORK, N. H. & H. R. CO.
(Supreme Judicial Court of Massachusetts.
Bristol. Nov. 22, 1904.)

**RAILROADS—INJURIES TO LICENSEE—SIDINGS—
MOVING CARS—NEGLIGENCE—CONTRIBUTORY
TOBY NEGLIGENCE.**

1. Plaintiff, an employé of a shipper, desiring to load a freight car standing on a grade siding at a small country station, was furnished by defendant's agent with a bar to move one of the cars to the place where it was to be loaded, and while so engaged he was struck and injured by another car, which followed the car being moved down the grade without plaintiff's knowledge; there being at the time of the accident no other person in the neighborhood. *Held*, that plaintiff was not guilty of contributory negligence, as a matter of law, in going between the rails while pushing the car.

2. Where a railroad company left a car at the top of a grade siding without setting the brakes thereon, and, if the brakes had been set, the car could not have been moved even with a bar, but, by reason of defendant's failure to set the brakes, the car was caused to move down the grade by the blowing of a high wind, and struck the servant of a shipper while moving another car down the grade, defendant was negligent, though the first car in the string was held on the grade by brakes.

Exceptions from Superior Court, Bristol County; Loranus E. Hitchcock, Judge.

Action by William Pratt against the New York, New Haven & Hartford Railroad Company. From a judgment in favor of defendant, plaintiff brings exceptions. Sustained.

Perry, Jenney & Potter, for plaintiff. F. S. Hall, for defendant.

LORING, J. The material evidence in this case was, in substance, as follows: The plaintiff was employed by one Porter to assist in loading box boards into a freight car on a spur track of the defendant railroad at Tremont, in this commonwealth. This spur track was used for loading freight cars, and butted upon an open space belonging to the defendant railroad, devoted by it to the deposit of goods to be loaded in such cars. On being told that he wished to move the two cars which were to be loaded to the place where the box boards were, Porter was furnished by the defendant with a bar with which to move the two cars. While the plaintiff, together with Porter and two other employés of his, was moving the car south, to be placed where the boards were, another car came down upon the plaintiff without warning. It was first seen by one of the other employés, who called to the plaintiff; but the car struck the plaintiff before he could get out of its way, while he was walking between the rails, pushing against the bunter of the car which was be-

ing moved. The car which ran the plaintiff down was standing by itself, six to ten feet further north than the car was which the plaintiff was in the act of moving before the moving of the last car was begun. It was in evidence that it was the practice for shippers to move cars to such place on this spur track as was convenient for loading the goods to be shipped. It was also in evidence that there was a grade in this spur track running downhill toward the south; that it was a grade which no one would be likely to see, unless looking for it; and that, if the brakes were set on a freight car, it could not be moved, even by an iron bar, down this grade. At the time of the accident there was a high wind from the north and no engine, no employes of the defendant, nor any one else near the car which ran the plaintiff down after it was left on the spur track earlier on the same day. The presiding judge directed the jury to render a verdict for the defendant, and the case is here on an exception to that ruling.

The defendant seeks to support the ruling on two grounds: First, that there was no evidence of due care on the part of the plaintiff; and, second, that the cause of the accident was, on the evidence, a matter of conjecture, and no negligence on the defendant's part was shown. But we are of opinion that these contentions cannot be maintained.

1. The place in question was not a railroad yard, where cars were continually going back and forth. It was a single spur track, leading off the main line, devoted to loading freight cars, at what appears to be a small country station of the defendant railroad; and at the time of the accident there was neither any employe of the railroad, nor any other person, in the neighborhood. Under these circumstances, the plaintiff was not, as matter of law, lacking in due care in walking between the rails while pushing the car in question to the place where it was to be loaded at the invitation of the defendant. In the case at bar there was evidence that the plaintiff did not know that there was a grade in the track. For this reason the case does not come within such cases as *Jean v. Boston & Maine Railroad*, 181 Mass. 197, 63 N. E. 399; *Judge v. Elkins*, 183 Mass. 229, 66 N. E. 708; *Dyer v. Fitchburg Railroad*, 170 Mass. 148, 48 N. E. 1087; *Dolphin v. New York, New Haven & Hartford Railroad*, 182 Mass. 509, 65 N. E. 820—and also is to be distinguished from *Martyn v. New York & Boston Despatch Express Co.*, 176 Mass. 401, 57 N. E. 671.

2. We are of opinion that the jury were warranted in inferring that the car which ran down onto the plaintiff, and which was left without the brake being set, was put in motion down grade by the high wind which was then blowing. The case comes within such cases as *Cox v. Central Vermont Railroad*, 170 Mass. 129, 49 N. E. 97, and not within such cases as *Kendall v. Boston*, 118

Mass. 234, and *Wadsworth v. Boston Elevated Railway*, 182 Mass. 572, 66 N. E. 421. We are also of opinion that to leave a car, with the brakes not set, at the top of a down grade on a spur track, on which it is the practice for shippers to move cars by hand, is an act of negligence. The only doubt we have had is this: The plaintiff testified that the brakes were set on the first car which Porter and his employes moved south on this spur track, that there were no brakes set on the second car brought down by them, and that Porter and his men let off the brakes on the first car when they brought it down. But if it be assumed that the setting of the brakes on the first car next to the grade was a sufficient protection against all the cars behind it running down grade, the defendant knew that there was a grade at this point, and it also knew the practice then existing for the local agent to leave it to shippers to move the cars to the desired place; and, knowing this, it was negligent to leave this car at the top of the grade with the brakes not set, as against a shipper, or the employe of a shipper, who, from ignorance of the existence of the grade, might move the first car, and thus be exposed to the danger from which the plaintiff suffered.

Exceptions sustained.

(186 Mass. 600)

TURNER v. PAGE (two cases).

(Supreme Judicial Court of Massachusetts.
Worcester. Nov. 21, 1904.)

HIGHWAYS—RUNAWAY TEAMS—PERSONS ON STREET—INJURIES—HABITS OF HORSES—ACTS OF THIRD PERSONS—INSTRUCTIONS—APPEAL.

1. Where, in an action for injuries by negligence of the driver of defendant's team, defendant requested a ruling that, if the jury believed the evidence as to the previous habits of the team, plaintiff could not recover, defendant could not claim on appeal that such request required an instruction that the jury should consider the previous habits of the horses, in passing on the question of the driver's negligence.

2. In an action for injuries caused by the negligence of the driver of defendant's team, in permitting them to run away, an instruction that if the accident would not have happened, except for the acts of a third person in endeavoring to stop the horses, plaintiff could not recover, was properly refused.

Exceptions from Superior Court, Worcester County; Francis A. Gaskill, Judge.

Actions by Lucy A. Turner and by Henry A. Turner against Charles P. Page. Judgment was rendered in favor of plaintiffs, and defendant brings exceptions. Overruled.

Defendant's servant intrusted with his team, hitched to a tipcart containing wood, left the same unsecured near a railroad track for the purpose of picking up some wood that had dropped from the car; and, while so left, the horses ran away. As they passed one Clifford Buffum, who was working on a lawn, he attempted to stop them, and, in so doing, went to the center of the road,

a little ahead of the team, with a wooden rake, which he held up, and shouted at the team to stop; and when they passed him he struck the nigh horse over the head with the rake. The horses did not stop, but passed up the street and ran into plaintiffs' carriage, which had been left in front of a bank in charge of plaintiff wife, by which she was thrown out and injured.

At the close of the evidence, defendant requested the judge to rule "(4) that if the horses which ran into plaintiff would not have so collided, and the injuries would not have occurred, except for the intervening attempt of Buffum to stop the horses, together with the blow of the rake over the head of the nigh horse, then the plaintiff could not recover; and (5) if the horses which ran had always before the accident been safe, docile, and gentle, and they had never run away before, and the driver had no knowledge of any tendency on their part to run away, and they had many times before been left without being hitched, and they had been much about railroads, and were familiar with the sight and sounds about railroad trains, and the driver of the horses did what it was customary to do under similar circumstances, then plaintiff could not recover"—which requests the court refused, and to which defendant excepted.

Geo. R. Warfield, for plaintiffs. John R. Thayer, Arthur P. Rugg, Henry H. Thayer, and John T. Dervin, for defendant.

LORING, J. 1. The difficulty with the defendant's argument in support of his exception to the refusal to give the fifth ruling asked for, and to so much of the charge as is inconsistent with it, is that what is complained of in the argument is not what was asked for in the ruling. The complaint made by the defendant in his argument is that the judge did not tell the jury to consider the previous habits of the horses in passing on the question of the driver's negligence. What the defendant asked for in this ruling was that, if the jury believed the testimony as to their previous habits, the plaintiff could not recover.

2. The difficulty with his argument in support of his exception to the refusal to give the fourth ruling asked for lies in the assumption that the persons who attempt to stop runaway horses will in fact act as the typical prudent man would act. We are of opinion, on the contrary, that, among the natural and probable consequences of negligently letting a pair of horses run away, it is competent to find that they will swerve to one side or the other on account of the acts of persons who try to stop them in a way which would not have been adopted by a prudent man, including waving a rake and hitting one of the horses over the head with it. The case comes within *Lane v. Atlantic Works*, 111 Mass. 136; *Koplan v. Boston*

Gaslight Co., 177 Mass. 15, 58 N. E. 183; *Boston Woven Hose & Rubber Co. v. Kendall*, 178 Mass. 232, 59 N. E. 657, 86 Am. St. Rep. 478, 51 L. R. A. 781; *Murray v. Boston Ice Co.*, 180 Mass. 165, 61 N. E. 1001 (see, also, *Clifford v. Atlantic Cotton Mills*, 146 Mass. 47, 48, 15 N. E. 84, 4 Am. St. Rep. 279, where the earlier cases are collected), and does not come within *Stone v. Boston & Albany R. R.*, 171 Mass. 536, 51 N. E. 1, 41 L. R. A. 794; *Glynn v. Central R. R. of New Jersey*, 175 Mass. 510, 58 N. E. 698, 78 Am. St. Rep. 507; *Glassey v. Worcester, etc., Street Ry.*, 185 Mass. 315, 70 N. E. 199. See, also, *Clifford v. Atlantic Cotton Mills*, 146 Mass. 47, 49, 15 N. E. 84, 4 Am. St. Rep. 279.

Exceptions overruled.

(187 Mass. 13)

MURPHY v. NEW YORK, N. H. & H. R. CO.

(Supreme Judicial Court of Massachusetts.
Worcester. Nov. 22, 1904.)

MASTER AND SERVANT—INJURIES TO SERVANT—TRANSFERRING FREIGHT—NEGLIGENCE OF FOREMAN—STATUTORY LIABILITY—ASSUMED RISK—PRESUMPTIONS—QUESTION FOR JURY.

1. M., section foreman on defendant railroad, had charge of a gang of men, including plaintiff, whose duty it was, under M.'s instructions, to transfer freight from one car to another, it being M.'s duty to select the cars that were to be unloaded, and check the freight as it was transferred. Held sufficient to justify a finding that M. was intrusted by defendant with superintendence over the plaintiff, within a statute making a master liable for injuries to a servant by reason of the negligence of a superintendent.

2. Plaintiff was injured while transferring freight from one car to another by the misplacement of a "brow" used for that purpose. Defendant's foreman, on seeing one of plaintiff's fellow servants about to reverse the brow, ordered him to let it alone, though the reversal of the brow would have averted the accident. Held sufficient evidence of defendant's negligence to justify submission of the case to the jury.

3. Where plaintiff was not present at the time a brow used in transferring freight from one car to another was adjusted, and on being called by his foreman, by whose negligence the brow was caused to be improperly placed, went about the work of transferring the freight in the usual way, and was injured by the sliding of the brow as he was taking out his first truck load, plaintiff did not assume the risk of such injury as a matter of law.

4. Where the work of transferring freight from one car to another was being prosecuted under the immediate supervision of the foreman of defendant whose orders plaintiff was bound to obey, plaintiff, when ordered to enter the car with his truck and take a load to a connecting car, had a right to presume that the connecting platform between the two cars had been properly placed.

Exceptions from Superior Court, Worcester County; Francis A. Gaskill, Judge.

Action by John Murphy against the New York, New Haven & Hartford Railroad Company. From a judgment in favor of defendant, plaintiff brings exceptions. Sustained.

John H. S. Hunt, Edwd. H. O'Brien, and Thayer & Perry, for plaintiff. Arthur P. Rugg, for defendant.

BRALEY, J. The plaintiff finally relies on the third count of the declaration to sustain his cause of action, and the questions presented are whether there was any evidence of the defendant's negligence or of the plaintiff's due care which should have been submitted to the jury. It appeared that Mulvaney was the section foreman of the defendant, having charge of a gang of five men, including the plaintiff, whose duty it was under his instructions to unload or transfer freight from one car to another, while he selected the cars that were to be unloaded, and checked the freight as it was transferred. This was sufficient evidence for the consideration of the jury that he was intrusted by the defendant with superintendence over the plaintiff within the meaning of the statute, and for whose negligence it would be responsible. *Mahoney v. New York & New England Railroad Co.*, 160 Mass. 573, 36 N. E. 588.

In the performance of this work by the men a movable platform, called a "brow," was placed between and formed a bridge from one car to the other, over which the freight was wheeled in trucks. The brow in use at the time of the accident was provided with curved hooks at one end, with a cleat on the under edge. These hooks were intended to stick into the floor of the car, thus preventing the brow from slipping, while the opposite end ran to a beveled edge. There was evidence that the usual way of using it was to place the end with hooks on the car to which the freight was to be wheeled, otherwise the loaded truck striking against the raised end as it rested on the hooks might cause it to slide from the car. When the brow used by the plaintiff had been placed in position after the cars had been designated by Mulvaney, the raised end rested on the car to be unloaded, but before any work had been done, one of the men, discovering its situation, was about to reverse it, when Mulvaney said "the brow was all right, let it alone," and because of this order no change was made. The method of doing the work, as well as when it should be done, was to be determined by Mulvaney, and it became his duty, when he ordered the plaintiff, with the other men, to go to work unloading freight, to use reasonable care to prevent his being exposed to the danger that the brow might slip from the car when struck by the loaded truck as it rose from the level of the floor of the car to the top of the brow. It could have been found that reversing the brow would have placed it properly, and prevented it from slipping from this cause, as the beveled edge would have been substantially on a level with the floor of the car which was being unloaded, and thus the accident would have been averted. If this was not done because of the order, then its dangerous position was due to him, and furnished evidence of his negligence. *Dean v. Smith*, 163 Mass. 569, 48 N. E. 619; *O'Brien*

v. Look, 171 Mass. 36, 50 N. E. 458; *Knight v. Overman Wheel Co.*, 174 Mass. 455, 54 N. E. 890. If the accident was caused by the negligence of the superintendent, this was a risk not assumed by the plaintiff under his contract of service. *Davis v. New York, New Haven & Hartford R. R. Co.*, 159 Mass. 532, 538, 34 N. E. 1070; *Murphy v. City Coal Co.*, 172 Mass. 324, 327, 52 N. E. 503. Nor can it be said as matter of law that by using the brow his conduct was such as to show either that he assumed the risk or failed to exercise ordinary care. He was not present when it was adjusted, and on being called went about his work in the usual way, and the accident happened as he was taking out his first load. Moreover, the work was being prosecuted under the supervision of Mulvaney, whose orders he was to obey, and when directed by him to enter the car with his truck, and take a load to the connected car, he had a right to infer that this order would not have been given if the connecting platform was not properly placed. How far these conditions, when coupled with his previous experience, can be held to have affected his conduct, which otherwise might have been found to be careless, was a question of fact. *White v. Nonantum Worsted Co.*, 144 Mass. 276, 277, 11 N. E. 75; *Fitzgerald v. Connecticut River Paper Co.*, 155 Mass. 155, 158, 29 N. E. 464, 31 Am. St. Rep. 537; *Hennessy v. Boston*, 161 Mass. 502, 503, 37 N. E. 668; *Powers v. Fall River*, 168 Mass. 60, 65, 46 N. E. 408. Both issues, therefore, under proper instructions, should have been left to the determination of the jury.

Exceptions sustained.

(187 Mass. 21)

FOSTER v. NEW YORK, N. H. & H. R. CO.

(Supreme Judicial Court of Massachusetts.
Worcester. Nov. 23, 1904.)

MASTER AND SERVANT—INJURIES TO SERVANT—
DEFECTIVE APPLIANCES—ADOPTION FOR TEMPORARY USE—CONTRIBUTORY NEGLIGENCE—
QUESTIONS FOR JURY.

1. It is the duty of one employed by a railroad in the unloading of freight not to expose himself to unusual danger, but he may rely on the presumption that the railroad will not furnish defective appliances for him to use.

2. A railroad employé unloading freight, who had to pass through a car of another railroad, in which he had not been before, and which was between the car that he was unloading and the freight depot, and whose attention was directed to a rising board over which he had to pass, and which partially concealed a hole in the floor of the strange car, was not guilty of contributory negligence as a matter of law in failing to see the hole and injuring himself by contact therewith.

3. A freight car of another railroad, made use of by a railroad as a passway between a car of its own, which is being unloaded, and the freight depot, is, as between the railroad and an employé engaged in unloading the car, a part of the railroad's equipment, which it is required to use reasonable precautions to make safe, either at common law or under St. 1887.

p. 899, c. 270, § 1, cl. 1, as originally enacted, making employers liable for injuries to employes caused by reason of any defect in the condition of the ways, works, or machinery, etc., or as amended by St. 1893, p. 993, c. 359, which declares that a car in the use of a railroad shall be considered a part of its ways, works, or machinery, whether owned by it or by some other company.

4. Where instrumentalities employed by a master are originally defective, or become unsafe from want of repair, the master cannot defend an action for injuries to a servant on the ground of the transitory character of such instrumentalities.

5. Where the evidence on the questions of negligence and contributory negligence is open to more than one conclusion, its weight and the inferences to be drawn therefrom are for the jury.

Report from Supreme Judicial Court, Worcester County; Francis A. Gaskill, Judge.

Tort for personal injuries by Edward F. Foster against the New York, New Haven & Hartford Railroad Company. In the superior court the jury, by direction, returned a verdict for defendant, and the case was reported for the determination of the Supreme Judicial Court. If the ruling was right, judgment was to be entered on the verdict; otherwise judgment to be entered for plaintiff in the sum of \$1,500. Judgment for plaintiff.

J. E. McConnell and J. H. P. Dyer, for plaintiff. Arthur P. Rugg, for defendant.

BRALEY, J. It is the contention of the plaintiff that upon the evidence shown by the report whether he was in the exercise of due care or the defendant was negligent were issues of fact upon which the jury could have found in his favor, and therefore the direction of a verdict for the defendant was wrong. In the performance of his duty as delivery clerk the plaintiff was required to unload freight from the cars as called for, and deliver it to consignees, and he had a right to rely on the presumption that the defendant would not furnish defective appliances with which he was to perform the work. The car in which he was injured was not a part of the permanent instrumentalities provided for the reception, delivery, or storage of freight, and he had not been in it until the morning of the accident, and had not previously known of the defective condition of the floor. At that time the car had been opened, and all the usual arrangements made for the delivery of the freight, and the hole in the floor was partly covered by the rising board connecting the cars, and which obstructed a full view of it by the plaintiff. He testified that when he passed through pushing an empty truck before him on his way for the freight his attention was directed to the rising board over which he was to pass, rather than to any other portion of the way, and that he did not see the hole. While it was his duty, in the exercise of ordinary care, not to expose himself to unusual danger, his conduct, under the conditions

disclosed, cannot be said as matter of law to have been careless. *Gilman v. Eastern Railroad Corporation*, 10 Allen, 233, 87 Am. Dec. 635; *Huddleston v. Lowell Machine Shop*, 106 Mass. 282; *Myers v. Hudson Iron Co.*, 150 Mass. 125, 184, 22 N. E. 631, 15 Am. St. Rep. 176; *Gustafsen v. Washburn & Moen Mfg. Co.*, 153 Mass. 468, 474, 27 N. E. 179; *Anderson v. Clark*, 155 Mass. 368, 29 N. E. 589; *Bartolomeo v. McKnight*, 178 Mass. 242, 246, 59 N. E. 804. In the conduct of its business the defendant was required, as a carrier of freight, to deliver it to the consignees at the station where the plaintiff was employed, and, if his injuries had been caused by a defective platform provided for his use by the defendant, there would seem to be no sufficient reason why it could not be held liable for such defect. *Snow v. Housatonic Railroad Company*, 8 Allen, 441, 85 Am. Dec. 720. Instead of this, the method generally employed seems to have been that, when a freight car was to be unloaded on the second of the two tracks, the "usual, customary, and only way" was to run such car opposite a car on the first track, put a bridge between the two, and then connect the first car with the platform of the freight-house. The freight was then carried on trucks across the bridge through the intervening car, and over the second bridge to the freighthouse. If it had placed one of its own cars in position for this purpose, there would be no substantial difference between the use of the car or of a movable or stationary platform to accomplish the work, and either would be an appliance furnished by the defendant. It chose to use a freight car belonging to another railroad company, which had apparently been run over its tracks to this station. Although the report does not show whether the defendant was to be paid for this service, or was merely forwarding the car, or what arrangement, if any, existed between it and the company, it is enough that, whatever the character of the defendant's possession, it took and utilized this car, which at the time of the accident was being used solely for the purpose of unloading its own freight, and, between itself and the plaintiff, must be treated as a part of its works. *Spaulding v. Flynt Granite Co.*, 159 Mass. 587, 588, 34 N. E. 1134. See *Delory v. Blodgett*, 185 Mass. 126, 69 N. E. 1078, 64 L. R. A. 114.

But the plaintiff is not obliged to rely exclusively upon his count at common law, for under the statute it was temporarily a part of the defendant's rolling stock and of its works and machinery. It was being used "as one of the instruments of its business." St. 1887, p. 899, c. 270, § 1, cl. 1. And this would be so, under the circumstances of this case, under the employer's liability act as originally passed or as amended by St. 1893, p. 993, c. 359. *Bowers v. Connecticut River Railroad Co.*, 162 Mass. 312, 317, 38 N. E. 508. For this reason the rule which imposes

upon the defendant the duty of properly inspecting cars of other railroad companies delivered to it for transportation, and its consequent liability, whether at common law or under St. 1887, c. 270, § 1, cl. 2, for injury to its servants if this duty is neglected or improperly performed, becomes unimportant in the decision of this case. See *Mackin v. Boston & Albany R. R. Co.*, 135 Mass. 201, 46 Am. Rep. 456; *Coffee v. New York, New Haven & Hartford R. R. Co.*, 155 Mass. 21, 24, 28 N. E. 1128.

There is a class of risks not fully defined that may arise in the ordinary course of employment, and from their transitory character are said not to impair or permanently affect the ways, works, and machinery, and for which the master is not held liable to a servant who may be injured while working under such temporary conditions. *Whittaker v. Bent*, 167 Mass. 588, 46 N. E. 121; *Kanz v. Page*, 168 Mass. 217, 46 N. E. 620; *Thompson v. Norman Paper Co.*, 169 Mass. 416, 417, 48 N. E. 757. See *Northern Pacific Railroad Co. v. Dixon*, 194 U. S. 333, 346, 24 Sup. Ct. 683, 48 L. Ed. 1006. But where these instrumentalities are originally defective, or become unsafe from want of repair, such a defense is not open. *Meehan v. Speirs Mfg. Co.*, 172 Mass. 375, 377, 52 N. E. 518. If the defendant adapted and used the car as a way or platform over which freight was to be unloaded and transferred to its freight-house, or delivered to consignees, then, manifestly, at common law or under the statute, it was required to use every reasonable precaution to see that it was suitable for this purpose; and whether this duty had been discharged was to be determined upon the evidence. *Snow v. Housatonic Railroad Co.*, supra. See *Trimble v. Whittin Machine Works*, 172 Mass. 150, 153, 51 N. E. 463.

As the evidence was open to more than one conclusion on both of the questions presented, its weight and all just inferences to be drawn therefrom were for the jury, and the case should have been submitted to them. In accordance with the terms of the reservation contained in the report, the order must be:

Judgment for the plaintiff in the sum of \$1,500.

(186 Mass. 584)

COLE v. BATES.

(Supreme Judicial Court of Massachusetts.
Hampden. Nov. 21, 1904.)

**MONEY RECEIVED—TRACING FUNDS—FIDUCIARY
—BANK DEPOSIT—IMPROPER PAYMENT
—RECOVERY.**

1. An action for money had and received will lie where defendant has received money to which the plaintiff has an equitable right, plaintiff being able to trace the money in equity into defendant's hands, regardless of whether the money was received by defendant in the first instance.

2. The rule that the plaintiff is entitled to recover money to which she had an equitable

right, which she can trace in equity into the hands of defendant, in an action for money had and received, is confined to money received for the plaintiff by some one standing toward him in a fiduciary capacity.

3. Money was deposited in a bank in the name of a wife, an entry authorizing payment to the order of her husband. The husband died, bequeathing the residue of his estate to defendant, subject to a life estate in his wife, and after her death the husband's administrator received the money from the bank. *Held*, that the order in the bankbook for payment to the husband was an order for payment for the wife's benefit, personal to him, which did not authorize payment to his administrator.

4. Where a bank made an invalid payment of a deposit to an administrator, who paid the same to defendant, plaintiff, who was rightfully entitled to the deposit, could not recover the same from defendant in an action for money had and received, since the money in defendant's hands was not plaintiff's money, which he was entitled to follow in equity.

Report from Superior Court, Hampden County; Lemuel Le B. Holmes, Judge.

Action by one Cole, as administrator of the estate of Mrs. A. T. Hancock, against one Bates. A judgment was rendered in favor of defendant, and the case reported to the Supreme Judicial Court. Judgment for defendant.

John B. O'Donnell, for plaintiff. A. J. Fargo, for defendant.

LORING, J. This is an action of money had and received to recover the amount of a savings bank deposit. The case was tried by the court without a jury. The judge found that the money deposited was the money of the plaintiff's intestate. The plaintiff's intestate was the second wife of Austin T. Hancock, and the defendant was his daughter by a first wife. Austin died December 16, 1891, leaving, by his last will and testament, the residue of his property to the defendant, subject to a life interest in his wife. On January 6, 1892, the second wife died. On February 2, 1892, the defendant's husband was appointed administrator with the will annexed of the estate of the husband and father, and on February 6, 1892, he took possession of the bankbook, drew out the money, and deposited it in his own name as administrator of the estate of Austin, the husband and father. On February 9, 1892, the plaintiff was appointed administratrix of the estate of the second wife, and on the same day demanded the bankbook of the defendant and of her husband, to which demand the husband answered in the defendant's presence that he had been advised that the book was the property of the estate of the husband and father, and refused to pay the money to the plaintiff. This action was brought on October 20, 1894. It was originally brought against the husband as well as the wife. After the trial the action was discontinued against the husband on the motion of the plaintiff allowed by the court.

The judge found that the husband's account as administrator was at all times more

than \$317.69, and that the sum paid to the defendant as the residue of her father's estate by her husband as administrator with the will annexed of said estate amounted to \$1,019.99, and was paid over as follows: \$354.07 on or before January 17, 1893; \$665.92 on or before March 3, 1894. In addition he made this finding: The defendant "did not attend court, being ill, at the trial, and there is no positive evidence as to her knowledge of the facts about the book, but demand was made on both her and her husband, Clarence, for the book by the plaintiff, February 9, 1892, and there is no evidence that at the time of such demand any payments from the estate of Austin T. Hancock had been made to her." Also, "She never received the identical money which was paid by the bank when the deposit was withdrawn." It appeared that on the page or cover in the front of the deposit book were these words: "Mrs. A. T. Hancock. Northampton Institution for Savings, No. 3609," and on the fifth page the following: "No. 3609, Northampton Institution for Savings, in account with Mrs. A. T. Hancock. Order also Austin T. Hancock." Upon these facts the judge ruled as matter of law that the plaintiff could not recover, and reported the case to this court.

For the purposes of this case we assume that under the finding made by the judge the defendant is to be taken to have known that the amount paid to her as the residue of the estate was larger by the amount of \$317.69, because that sum had been collected by the administrator and put into her father's estate. It is settled in this commonwealth that money had and received will lie where the defendant has received money to which the plaintiff has an equitable right. *Knowles v. Sullivan*, 182 Mass. 318, 85 N. E. 389; *Henchey v. Henchey*, 167 Mass. 77, 44 N. E. 1075; *Derome v. Vose*, 140 Mass. 575, 5 N. E. 478; *Farrelly v. Ladd*, 10 Allen, 127; *Peabody v. Tarbell*, 2 Cush. 226. And we assume, for the purpose of this discussion (without making a decision to that effect), that where the plaintiff can trace his money in equity into the hands of the defendant he may recover it from him in an action of money had and received, as well as when the money was received in the first instance by the defendant. Further, in the case at bar the plaintiff has traced her money into the defendant's hands, if the money in the hands of the administrator was her money within the rule in equity as to tracing money. She has shown that it went into the bank account of the administrator, and that there was always more to the credit of that account than the sum in question. In such a case the sums drawn are held to have been rightly drawn and are applied against deposits made from the proper funds of the depositor. In *re Hallett*, 13 Ch. D. 696; *Hancock v. Smith*, 41 Ch. D. 456. See, also, *Knight v. Fisher* (C. C.) 58 Fed. 991, cited by the plaintiff. More-

over, in the case at bar it must be taken that the whole amount of the account was finally paid to the defendant.

But we are of opinion that the money received by the administrator with the will annexed of the estate of the husband and father was not the plaintiff's money in his hands, within the rule that allows her to follow her money in equity. That rule is confined to money received for the plaintiff by some one standing toward her in a fiduciary capacity. In *re Hallett*, 13 Ch. D. 696. In the case at bar the only ground on which the defendant's husband (as administrator with the will annexed of his wife's father) could claim the deposit was this: The money deposited was the money of the husband, although deposited in the name of the wife. It had been made payable to the husband in fulfillment of the obligation ensuing from these facts. This order for payment had been accepted by the savings bank by changing the terms of the deposit. This gave a right to the husband to collect the deposit, and this right survived to his administrator with the will annexed. On the other hand, if the administrator claimed to be paid on the ground that the money deposited was the money of the wife, the order for payment to the husband was an order for payment to him for her benefit, and was an order personal to the husband, which did not authorize payment to his administrator. In either event the payment by the bank was not a valid payment. The money received by the administrator was not received as the money of the wife, but under a claim adverse to her and to the administrator of her estate. The money in the defendant's hands was not the plaintiff's money, and she could not follow it in equity. It cannot be said that in collecting the \$317.69, and ultimately paying it over to her, the administrator was an agent and the defendant the principal, although she was the only person interested in the estate if it turned out to be solvent, and although she was present when the demand for the savings bankbook was made both upon her and her husband in her presence. An administrator acts for the benefit of whosoever turns out to be the person beneficially entitled, and the husband in the case at bar must be taken to have so acted here in claiming what he was advised was a part of the estate.

None of the cases particularly relied on by the plaintiff supports her contention. In *Bearce v. Fahrnow*, 109 Mich. 315, 67 N. W. 318, the defendant received the money from the agent of the plaintiff, with notice that it was his money. The decision in *Northrop v. Graves*, 19 Conn. 548, 50 Am. Dec. 264, went on the ground that the payment was, in legal contemplation, a payment to the husband. In *Barnes v. Johnson*, 84 Ill. 95, the money due to the plaintiff was collected by the defendant, and in *Tevis v. Brown's Adm'r*, 3 J. J. Marsh. 175, there was a subse-

quent agreement that the money tortiously taken should be treated as a loan. For cases somewhat like the case at bar, see *Moore v. Moore*, 127 Mass. 22, and *Rand v. Smallidge*, 130 Mass. 337.

The entry must be: Judgment for the defendant.

(187 Mass. 62)

GARRY v. GARRY.

(Supreme Judicial Court of Massachusetts.
Essex. Nov. 22, 1904.)

DECEIT — FALSE REPRESENTATIONS—MATERIALITY — PROMISSORY REPRESENTATIONS — DAMAGES—RELEASE OF DOWER RIGHT.

1. False representations to a married woman as to title to property which her husband had formerly owned, and as to the disposition of the proceeds of its sale, which induced her to believe that her husband was to receive one-half of such proceeds, when in fact he was to receive nothing, were material representations, and sufficient to constitute an inducement leading her to release her dower interest in the property, and, as such, afforded grounds for an action of deceit, although she did not expect to directly receive any money herself in consideration for such release.

2. Representations to a married woman that her husband was to receive one-half of the proceeds of the sale of property, made to induce her to release her dower, were not merely promissory representations, but constituted statements as to existing conditions and arrangements.

3. An inchoate right of dower is a valuable right in property, for which a married woman, who is induced to release the same by false and fraudulent representations, is entitled to damages.

Appeal from Superior Court, Essex County; Lemuel Le B. Holmes, Judge.

Tort for deceit by Garry against Garry. From an order sustaining defendant's demurrer to the declaration, and from a judgment for defendant, plaintiff appeals. Judgment reversed, and demurrer overruled.

J. P. Sweeney, H. R. Dow, and L. S. Cox, for plaintiff. W. J. Bradley and C. H. Rogers, for defendant.

KNOWLTON, C. J. This is an appeal from an order sustaining the defendant's demurrer to the plaintiff's declaration and from a judgment for the defendant. The declaration is in tort for deceit, the averment being that the defendant and his brother, the plaintiff's husband, were tenants in common of certain real estate, each owning an undivided half thereof, and that they conspired to defraud and deprive the plaintiff of her rights in the property by the making of a quitclaim deed from her husband to the defendant, transferring his share, and by then selling the property and concealing from the plaintiff the previous conveyance from her husband to the defendant, and falsely and fraudulently representing to her that he was still the owner of an undivided half of the property, and that upon the sale which had been made one-half of the purchase money was to go to him. She also avers

that, relying upon these false representations, she was induced to sign a deed releasing her right of dower and all her rights in the property, when in fact her husband was not then the legal owner of any interest in it, and no part of the purchase money was coming to him.

The demurrer is general, with only two grounds stated on which it rests. The first is that there is no averment of a representation that she was to receive any portion of the proceeds of the sale, and that, therefore, the alleged representations are collateral and immaterial, and do not constitute a sufficient inducement to influence the plaintiff's action, and that she suffered no damages. The second ground is that the representation in regard to the receipt of a part of the proceeds of the sale by the plaintiff's husband does not purport to state an existing fact, but is merely promissory.

The declaration is not made with the technical formality of an ordinary declaration for deceit, but we are of opinion that, with a proper interpretation of its meaning, it is, in substance, sufficient. It avers false representations as to the state of the title and as to the nature of the sale in its relation to the plaintiff's husband and to the disposal of the proceeds, which induced her to believe that he was to receive one-half of the price, when in fact he was to receive nothing. We do not consider such representations immaterial, or insufficient to constitute an inducement which might lead a wife to release a valuable interest in property for the benefit of her husband, and perhaps, through him, for her own benefit. It was such an inducement as is operative upon the mind of many a married woman almost every day. The fact that the money was not coming directly to her does not imply that she was indifferent as to whether money was to be received by her husband.

Nor can it properly be said that the statement in regard to his right to one-half of the proceeds was of a matter that was merely promissory. It was rather a statement of existing conditions and arrangements, in reference to which the deed of release was supposed to be made. The plaintiff, according to her averment, was falsely led to believe that a sale had been agreed to under which he was entitled to receive and would receive, if she signed a release, one-half of the proceeds of the property, whereas the sale and arrangement that had been made were of a different kind.

It cannot rightly be contended that she suffered no damages from the release. An inchoate right of dower is a valuable right in property. *Burns v. Lynde*, 6 Allen, 305; *Davis v. Wetherell*, 13 Allen, 60, 90 Am. Dec. 177. A similar right has been held to create an insurable interest in a building upon the real estate to which it pertains. *Doyle v. American Fire Ins. Co.*, 181 Mass. 139, 63 N. E. 304. If she was induced to

give up such a right by the defendant's false and fraudulent representations, she is entitled to damages.

We cannot anticipate the evidence and determine the nature and degree of the proof that the plaintiff will be able to furnish, but, giving the declaration the meaning which we think it was intended to have, it states a case which is proper for the consideration of a jury.

Judgment reversed. Demurrer overruled.

(187 Mass. 53)

BAKER v. CITY OF FALL RIVER.

(Supreme Judicial Court of Massachusetts.
Bristol. Nov. 22, 1904.)

MUNICIPAL CORPORATIONS—DEFECT IN STREET—AUTOMOBILE—INJURY TO CHAUFFEUR—INSTRUCTIONS—STATUTES—LAYING OUT STREETS—ACCEPTANCE OF LAY OUT.

1. St. 1854, p. 178, c. 257, § 14, provided that the mayor and aldermen of a city, with the concurrent vote of the common council, should have exclusive power to lay out, alter, or discontinue any street. The statutory phrase indicating the action to be taken by the inhabitants of a town or by the legislative department of a city on a report adjudicating that a way should be laid out in order to establish the way is "accepted and allowed." Rev. St. 1836, c. 24, § 69; Gen. St. 1860, c. 43, § 65; Pub. St. 1882, c. 49, § 71; Rev. Laws, c. 48, § 71. *Held*, that a record showing that a report of the mayor and aldermen laying out a street was accepted and approved by the board of aldermen, and accepted in the common council, and that thereafter the board of aldermen concurred with the council in accepting the report, a contention that the street was not a public way because the votes of the council and the board of aldermen were only to accept the "report," and not the "lay out," was of no merit.

2. Rev. Laws, c. 51, § 1, provides that highways shall be kept in a reasonably safe condition for travelers with horses, teams, and carriages. *Held*, that an automobile, being a vehicle in common use for transporting persons and merchandise, and its use being regulated by statute (St. 1902, p. 235, c. 315; St. 1903, p. 507, c. 473), a defect in a street which caused an injury to one operating an automobile, being one which was dangerous to ordinary vehicles, the fact that the conveyance was an automobile did not preclude recovery in an action under Rev. Laws, c. 51, § 18, giving an action for injuries resulting from defective streets.

3. Plaintiff, operating an automobile, attempted to pass on the right side of men engaged in opening a trench near the middle of the carriageway of a street, such opening being narrower than the opening to the left of the men, and he was injured by the automobile running into a rope stretched across the opening. *Held*, in an action against the city, under Rev. Laws, c. 51, § 18, for the injuries sustained by plaintiff, that Rev. Laws, c. 54, § 1, requiring that when persons shall meet each shall drive to the right of the middle of the traveled path might be considered by the jury on the question of plaintiff's care and the existence of a defect in obstructing the street.

4. In an action against a city under Rev. Laws, c. 51, § 18, for injuries sustained by one operating an automobile, owing to it colliding with an obstruction in the street, evidence *held* to warrant a finding that the obstruction was dangerous to travel, and that the danger might have been avoided by reasonable care on the part of defendant.

Exceptions from Superior Court, Bristol County; Wm. Schofield, Judge.

Action by John Baker against the city of Fall River. Judgment in favor of plaintiff, and defendant brings exceptions. Exceptions overruled.

Phillips & Fuller, for plaintiff. H. A. DuBuque, for defendant.

BARKER, J. This is an action brought under the provisions of Rev. Laws, c. 51, § 18, to recover compensation for personal injuries suffered in consequence of an alleged defect in Bedford street. This street had been used for public travel for more than 30 years, and was constructed with a macadam driveway for vehicles, and with sidewalks and curbs on either side. The plaintiff was riding on the right-hand side of the driveway in an automobile, which ran into a rope stretched above the driveway across a portion of it extending from the curb to a point near the center of the street, and fastened at one end to a pole in the sidewalk and at the other end to an iron bar driven into the macadam.

1. The first question raised is whether the street had been laid out in accordance with law. The records showed a layout of the street by the mayor and aldermen by a report accepted and approved by the board of aldermen on August 22, 1871; that the report was accepted in the common council on August 24, 1871, and that the board of aldermen on September 4, 1871, concurred with the council in accepting the report. The defendant's contention is that the street was not a public highway because the votes of the common council and of the board of aldermen were only to accept the report, and not the layout mentioned therein. The case of *Draper v. Mayor of Fall River*, 185 Mass. 142, 69 N. E. 1068, is relied upon by the defendant in support of this contention. There the question was whether a sewer system had been adopted by the city, and the report which had been accepted and referred to a committee was merely a report of an engineer employed by the city to devise a system of sewerage. The action of the city in accepting the report of a mere employé and in referring it to a committee with authority to print the report in pamphlet form was not a laying out of the sewers comprised in the system, nor an adjudication that they were required by common convenience and necessity. In the present case the mayor and aldermen who reported the laying out of Bedford street in 1871 were not acting as a committee, but as a branch of the city government, and were clothed with authority to take the first step in laying out public ways by the making and filing of a report adjudicating that the way should be laid out. St. 1854, p. 178, c. 257, § 14. The statutory phrase indicating the action to be taken by the inhabitants of a town or by the legislative departments of a city government up-

on such a report in order to establish the way is "accepted and allowed." See Rev. St. 1836, c. 24, § 69; Gen. St. 1800, c. 43, § 65; Pub. St. 1882, c. 49, § 71; Rev. Laws, c. 48, § 71. The acceptance by one branch of a government of the action of another branch, when the effect of concurrence of action by both branches is to establish a new public work, indicates that the branch which accepts intends to allow the public work to be established. Accordingly a vote of the inhabitants of a town upon the report of its selectmen laying out a way that the report be accepted has been held to establish the way. *Harrington v. Harrington*, 1 Metc. 404. We think the records concerning the laying out of Bedford street showed its establishment as a public way for the care of which the defendant was responsible. See *Masonic Building Ass'n v. Brownell*, 164 Mass. 306, 309, 41 N. E. 306.

2. The defendant requested an instruction that "the provisions of Rev. Laws, c. 51, § 1, do not apply to one driving an automobile, which is not a "carriage" within the meaning of that statute, but may be considered more like a "machine." Upon the subject of this request the presiding judge said to the jury that he did not feel at liberty to instruct them that an automobile cannot be considered as a carriage, and that, although the plaintiff was in one at the time, still he was in the highway as a traveler in a mode of conveyance which, if the other elements of liability were established, would entitle him to recover. Plainly, an automobile is a vehicle which can carry passengers or inanimate matter, and so is such a "carriage" as the decision in *Richardson v. Danvers*, 176 Mass. 418, 414, 57 N. E. 688, 50 L. R. A. 127, 79 Am. St. Rep. 320, said that the Legislature had in view in the use of that word in the statute. The section referred to in the request deals with the state of repair in which ways are to be kept. In the present case the alleged defect was one which would be dangerous to ordinary vehicles. Therefore we now have no occasion to consider whether roads must be kept in such a state of repair and smoothness that an automobile can go over them with assured safety. It now has been settled that a traveler is not precluded from recovery under the statute by the fact that when the accident occurred he was riding upon a bicycle, if the defect was one dangerous to ordinary travel. *Spring v. Williamstown*, (Mass.) 71 N. E. 949. The automobile is a vehicle in common use for transporting both persons and merchandise upon public ways, and its use is regulated by statute. St. 1902, p. 225, c. 315; St. 1903, p. 507, c. 473. We think that the plaintiff was not precluded

from a recovery because of the nature of the vehicle in which he was riding, and that the instruction to that effect was right, and that the defendant was not harmed by the omission to charge in accordance with the request stated.

3. At the plaintiff's request the jury were instructed that in considering the question of due care they might have in mind the provisions of Rev. Laws, c. 51, § 1, commonly known as the "Law of the Road." We are of opinion that there was no error in this instruction. Although, as there was no other vehicle in the immediate vicinity, and the plaintiff might have turned to the left without disobeying the statute, it was plain that other vehicles might approach, and that, if so, it would be the plaintiff's duty to keep to the right of the workmen, who were plainly to be seen engaged in opening a trench near the middle of the carriage way. The defendant contended that the plaintiff was negligent in choosing the narrower opening to the right, rather than the wider one to the left. Under these circumstances the statutory requirement that when persons meet each shall seasonably drive to the right of the middle of the traveled path properly could be taken into account upon the question of the plaintiff's due care in attempting to travel where he did, and upon the question whether there was a defect caused by negligence in obstructing the whole of one-half of the traveled path. The instruction given did not in any way imply that for the plaintiff to have kept to the left would have been to violate the provision of the statute cited. See *Norris v. Saxton*, 158 Mass. 46, 32 N. E. 954.

4. We are of opinion that the questions whether the way was defective and whether the plaintiff was in the exercise of due care were for the jury. There was evidence tending to show that the rope was of a color not easily distinguishable, and that no flag or other means of attracting attention to the presence of the rope was used. The obstructions to travel were caused by the operations of persons who were acting under a permit issued by the proper officials of the city, and this evidence, with that tending to show how long the obstructions had been in place, and their nature and location, and the general location and use of the street, justified a finding that they were dangerous to travel, and that the danger might have been avoided by reasonable care on the part of the defendant. While the evidence as to the speed of the plaintiff's vehicle was contradictory, there was evidence that he was proceeding slowly and carefully.

Exceptions overruled.

(187 Mass. 45)

PROVIDENCE, F. R. & N. STEAMBOAT CO. v. CITY OF FALL RIVER (two cases).
KEOGH v. SAME (two cases). BORDEN et al. v. SAME (two cases).

(Supreme Judicial Court of Massachusetts.
Bristol. Nov. 22, 1904.)

EMINENT DOMAIN — CONDEMNATION PROCEEDINGS—DIVESTMENT OF TITLE—TIME—DAMAGES—ELEMENTS — INTEREST — HIGHWAYS—PRESCRIPTIVE RIGHTS — ADVERSE USER — MORTGAGES—ESTABLISHMENT BY PAROL.

1. Under St. 1900, p. 471, c. 472, confirming the report of commissioners appointed to consider the abolition of grade crossings in a certain city, and providing that there should be filed in the registry of deeds a plan, signed by the mayor of the city and the engineer of the railroad, showing the lands and rights to be taken, and further providing that, in case of lands taken otherwise than by purchase, a statement that the lands were taken to abolish grade crossings should be recorded in said registry of deeds, and the recording of such statement should constitute the taking of the lands and rights specified therein, while the rights of the parties became fixed, so far as the final adoption of the scheme was concerned, as soon as the act has passed, and it was then the duty of the mayor and engineer to file the plan and statement of lands and rights taken within a reasonable time, the ownership of property, or of rights therein, was not changed by the enactment of the statute itself, but by the subsequent record of the required statement in the registry of deeds.

2. In an assessment of damages under St. 1900, p. 471, c. 472, confirming the report of commissioners appointed to consider the abolition of grade crossings in a certain city, and providing for the taking of lands and rights therein for making the specified improvements, interest runs, not from the date of the entry upon the land to make the changes, as in proceedings to lay out highways under Rev. Laws, c. 48, § 13, which provides for the payment of damages when the land has been entered upon and possession taken thereof, but from the date of the taking.

3. After the public has acquired a prescriptive right of way over land, which has, by virtue of such prescriptive right, become a public highway, no individual can acquire a private right of way over such land by adverse use in traveling along it.

4. Under St. 1900, p. 471, c. 472, confirming the report of certain grade crossing commissioners, and requiring the making of the alterations prescribed by them, which included the raising of the side walls of a street to a height of four feet above grade, the protection of travelers along the street, and not the cutting off of landowners from access to the street if they chose to construct passageways opening into it, was intended; and damages to such landowners should be assessed as if, upon their request, they were to have openings made where reasonable for access to their property.

5. Under St. 1900, p. 471, c. 472, confirming the report of certain grade crossing commissioners, and requiring the making of the alterations prescribed by them, which included the raising of the side walls of a street to a height of four feet above grade, such walls could be removed altogether, in case the abutting owners made provision for the safety of travel, and the land was so used as to make such an opening in the wall reasonable; otherwise they could not.

6. Proceedings to recover damages for changes made in the abolition of certain grade crossings, wherein the property damaged consisted of a single estate, with leasehold interests in certain parts thereof—the reversion of all being owned by a single corporation—were governed

by Rev. Laws, c. 48, § 20, providing for proceedings to recover damages for the laying out or alteration of a highway when there are several parties having several estates in the same property; and the rule for assessment of damages was, as stated in section 22 of said chapter, to ascertain the total amount of damages sustained by the owners, estimating the same as an entire estate, and as if it were the sole property of one owner in fee simple, and then apportioning the damages among the several parties entitled thereto, in proportion to their several interests and the damages sustained by them, respectively.

7. When a mortgagee waives its right to be heard on the assessment of damages in proceedings relative to the abolition of grade crossings, the mortgagor is entitled to recover the damages.

8. In a proceeding for the assessment of damages growing out of the abolition of grade crossings in a certain city, evidence held sufficient to warrant a finding that the city had notice of the existence of a certain lease before the taking was filed.

9. An assignment of a lease, shown by parol to have been made as security for a debt, is a mortgage.

Report from Supreme Judicial Court, Bristol County; Chas. W. Bell, Judge.

Separate petitions brought to recover damages arising from the changes required to abolish crossings in Fall River under the provisions of chapter 472, p. 471, of the Acts of 1900, and of the statutes referred to therein; two by the Providence, Fall River & Newport Steamboat Company, two by John Keogh, and two by Charles F. Borden and others, against the city of Fall River. The several cases were referred to an auditor, and it was agreed that his findings on questions of fact should be binding on all the parties. The auditor filed his report, and the various petitioners and the city filed their objections thereto. In the Superior Court the cases were heard on the auditor's report and exceptions, and were reported to the Supreme Judicial Court for its final determination on questions of law. Report modified in part, and judgment entered in accordance with the report as modified.

The facts necessary to an understanding of the questions of law involved are sufficiently stated in the opinion, except in the following particulars: The evidence which the court holds sufficient to warrant the finding that the city had notice of the existence of the lease to Borden & Remington is stated by the auditor to be as follows: "The respondent having objected to the admission of the lease, the lessees offered the following testimony upon the question whether on January 1, 1902, the date of the taking, the respondent city had actual knowledge of the lease: Arthur S. Phillips, Esq., as attorney for Borden & Remington, the lessees, appeared before the grade crossing commissioners February 26, 1898, and was heard. He there spoke of the lease held by his clients. The representatives of the city and railroad were present. The first petition of the lessees, Borden & Remington, against the city for damages was filed July 17, 1901. It did not appear that legal notice of this was given to

the city, but H. A. Dubuque, city solicitor, subsequently—but at what time was not shown—entered his appearance for the city. During the summer of 1901 correspondence took place between Mr. Phillips and Frederick S. Hall, Esq., attorney for the Old Colony Railroad Company, relative to the claim of Borden & Remington for damages. Mr. Hall was at that time acting for the railroad in the settlement of land damages growing out of the commissioners' report, and his settlements were accepted without objection by the city, which would ultimately be required to pay 10 per cent. of the entire cost of the abolition of the grade crossings, and deeds to the city and railroad resulting from such settlements were put on record by the railroad company. Mr. Phillips, who took the acknowledgment of the Borden & Remington lease in 1896, was city solicitor from March, 1899, to March, 1900, and before accepting the position had a conversation with the mayor of the city of Fall River, in which he explained his relation to Borden & Remington, and their relation as lessees having a claim for damages on account of the abolition of grade crossings. In 1901 Mr. Phillips told both Mr. Dubuque, the city solicitor, and Mr. Hall, of the filing of the Borden & Remington petition, and also talked with Mr. Dubuque relative to this case, specifying its nature. Mr. Dubuque referred him to Mr. Hall. Mr. Dubuque at this time was city solicitor. While city solicitor, Mr. Phillips had charge of the record work with Mr. Fuller and Mr. Thurston assisting, and made reports to the mayor, from which the owners as shown on the grade crossing plans were listed. It also appeared that it was stated in the Keogh lease, which was recorded, that the private way reserved over the Keogh parcel was to the parcel of land 'heretofore leased to Borden & Remington.' The facts relative to the assignment of the Keogh lease are that the lease was assigned with the written assent of the lessor by an assignment absolute on its face, but oral evidence was admitted that the assignment was in fact made as security for a loan, and that the loan had been paid.

Jennings, Morton & Brayton, for petitioner Providence, F. R. & N. Steamboat Co. J. W. Cummings and E. Higginson, for petitioner John Keogh. Phillips & Fuller, for petitioners Borden & Remington. L. E. Wood, for petitioner Philanthropic Burial Soc. H. A. Dubuque and F. S. Hall, for defendant.

KNOWLTON, C. J. One of the most important questions in these cases arises in construing St. 1900, p. 471, c. 472, which is an act providing for the abolition of grade crossings in Fall River. In Providence, Fall River & Newport Steamboat Company v. Fall River, 183 Mass. 535, 67 N. E. 647, it was held that this was special legislation, adopting

and establishing a particular scheme for a public improvement, which superseded the action of the court, and finally determined the details of the changes to be made in the interest of the general public. The question now before us is whether the statute worked a change of the title to the rights and lands which were appropriated to the public use, or whether it required an additional proceeding as a preliminary to such a change. Upon the theory of the petitioner, the statute not only settled the rights of the public and of property owners as to what was to be done, but it was, in law, the taking of the title to such land as was appropriated, and such private rights as were abridged or destroyed in the public interest, so that the time limiting the bringing of petitions for damages began to run, and the right to receive interest on the amount to be paid accrued, on the passage of the act. It is argued correctly that the rights of the parties were not made subject to the discretion of the mayor and the engineer of the railroad company, which they could exercise by filing or refusing to file the plan and the statement of taking in the registry of deeds. No doubt, the rights of all parties became fixed, so far as the final adoption of the scheme was concerned, as soon as the act was passed, and it then became the duty of the mayor and engineer to file within a reasonable time a plan and the statement of lands and rights taken. This duty they could have been compelled to perform. But the statute contemplated the possibility, if not the desirability, of acquiring a part of all of the lands by purchase, and provided for such purchases. This involved an implication that the title to land purchased would pass by the deed of conveyance, and not by a taking. It was intended, therefore, that there should be an opportunity to attempt an acquisition of title by purchase before there was a taking, and, upon a failure in the attempt, that there should be a taking by the mayor and the engineer, which would work a change of title, and fix the time from which the statute of limitations would begin to run, and the right to receive interest would accrue. While it might be possible to construe the statute in accordance with the petitioner's contention, we think it better to hold that the Legislature did not intend to change the ownership of property by the enactment of the statute, without the subsequent action called for, which was to be a matter of record in the registry of deeds. If this is a correct construction of the statute as to the taking of the lands, the same construction should be given to that part of it which relates to the acquisition of rights in land, the general title to which is left in private owners.

The respondent's contention that interest is to be reckoned from the date of the entry upon the land to make the changes, instead of from the date of the taking, is not well founded. The reason for the provision

of Rev. Laws, c. 48, § 13, relied on by the respondent, is not applicable to the assessment under this statute, which statute in itself shows a final determination that the work shall be done, and under which no land of the petitioners was taken, but only certain rights in land. See *Hay v. Commonwealth*, 183 Mass. 294, 67 N. E. 334.

In regard to the discontinuance of Water street, the claim of the first petitioner, as stated in the report, is "that, although its land did not abut on the discontinued portion of Water street, it had, by open, adverse, and uninterrupted use for more than twenty years, acquired a private right of way over the land of the railroad company from its land to the discontinued portion of Water street, and that therefore the discontinuance of that street was a special damage to it." The finding of the auditor that the public had acquired a right of way by prescription in the land between Central street and Water street was well warranted, and, after this land had become a public highway by the acquisition of such a right, the petitioner could not acquire a private right of way over it by adverse use in traveling along it. The ruling of the auditor in this particular was correct.

The requirement of the statute, following the report of the commissioners, was that the side walls of Central street from Davol street to Pond street be raised, with suitable masonry, to a height of four feet above the grade of the street. This requirement was for the protection of travelers along the street from the danger of falling upon the adjacent land below. It was not intended to cut off landowners from access to the street if they chose to construct passageways opening into it. *Warner v. Holyoke*, 112 Mass. 362. The ruling of the auditor was correct—that damages were to be assessed "as if, upon the request of the petitioners or its tenants, they were to have openings made, where reasonable, in the northerly wall of Central street, for access to their property." This sufficiently covered the contention of the respondent that they were "to have it removed altogether, in case provisions were made by the abutter to make travel safe wherever their land is lower than the grade of Central street." This could be done if the land was so used as to make so complete an opening reasonable; otherwise it could not. There was no ground for the respondent's contention that the walls were to stop short of Pond street. The report adopted by the statute is explicit in that particular, and is binding upon the parties.

The allowance of \$600 for shoaling the water in the petitioner's dock, which was made to the lessees, Borden & Remington, called for an increase of the entire damages to the owner and the lessees, which were being assessed in the trial of the several cases together. This allowance, having been made

to the lessees, was deducted from the aggregate sum, and thus it diminished by so much the allowance to which the owner was fairly entitled. This sum would have been added to the other allowance for the entire damages, except that the auditor understood the counsel of the owner to waive any claim to it. We are of opinion that a fair construction of the language of the counsel is that, as between the owners and the lessees, he did not care to claim it in the apportionment, and not that, if it was allowed to the lessees, he consented that it should be deducted from the damages to which his client was entitled. We are of opinion that this sum should be added to the \$24,000 allowed as the gross damages, thus relieving the owner from a deduction from the \$24,000 on account of the loss of the lessees from shoaling the dock, and thereby increasing by \$600 the amount allowed to the owner in the apportionment. See *Manson v. Boston*, 163 Mass. 479, 40 N. E. 850.

The ruling that these proceedings are governed by Rev. Laws, c. 48, § 20, was correct. Here was one estate, with leasehold interests in certain parts of it, and the reversion in all of them owned by a single corporation. The rule for the assessment of damages in such cases is to ascertain the total amount of damages sustained by the owners, "estimating the same as an entire estate, and as if it were the sole property of one owner in fee simple," and then to apportion the damages among the several parties "entitled thereto, in proportion to their several interests, and to the damages sustained by them respectively," as stated in Rev. Laws, c. 48, § 22, in reference to proceedings under section 20. *Edmonds v. Boston*, 108 Mass. 535; *Boston v. Robbins*, 121 Mass. 453; *Burt v. Merchants' Insurance Company*, 115 Mass. 1.

The Union Trust Company, holding a title as mortgagee under a trust deed, having waived its right to be heard, the petitioner, as mortgagor, was plainly entitled to recover the damages.

There was sufficient evidence to warrant an inference that the city had notice of the lease to Borden & Remington before the taking was filed. If there had been no lease, the damage to the whole property as it was at the time of the taking, including the buildings, would have been assessable.

The assignment of the lease from Keogh to Brown was rightly held to be a mortgage, and upon the disclaimer of the mortgagee the damage was rightly awarded to Keogh.

The exceptions of the respondent which relate only to the apportionment of damages between the different petitioners are immaterial. Other exceptions that have not been argued either orally or upon the respondent's brief, we do not consider.

Under the report of the justice of the superior court, the auditor's report is to be confirmed, the judgment entered in accordance therewith, except that the total

damages are to be increased by the sum of \$600, and that sum is to be added to the amount allowed in the apportionment to the owner of the fee. So ordered.

(187 Mass. 67)

HOOE v. BOSTON & N. ST. RY. CO. et al.
WELCH v. SAME. LANE v. SAME.
DONAHUE v. SAME.

(Supreme Judicial Court of Massachusetts.
Essex. Nov. 22, 1904.)

INJURY TO EMPLOYÉ—DANGEROUS PLACE—FELLOW SERVANTS.

1. One who, under a contract, provides all labor and materials to complete the grading and ballasting of a railroad bed and has the management and control of the men employed in the work "subject to the direction and acceptance of the engineer," is not a fellow servant of the men employed under him.

2. An employé engaged in charging holes in rock with dynamite and exploding the same is a fellow servant of the employés engaged in drilling the holes for the charges.

3. An employé, while engaged in assisting the foreman or superintendent in making an inspection after a blast of dynamite for the purpose of ascertaining whether any part of the charge had failed to explode, is performing a part of the master's duty, and is not a fellow servant of those engaged in drilling holes for the charge and removing the rock after the blast.

Exceptions from Superior Court, Essex County; Frederick Lawton, Judge.

Separate actions by William D. Hooe, Garrett E. Welch, Ernest Lane, and John D. Donahue against the Boston & Northern Street Railway Company and others. To the judgments rendered defendants bring exceptions. Exceptions in the first three cases sustained. Exceptions in the fourth case overruled.

R. H. Sherman and W. C. Ford, for plaintiffs Garrett E. Welch and Wm. D. Hooe, W. J. Bradley and C. H. Rogers, for plaintiff Ernest Lane. Knox & Coulson, for defendant Farnum. J. P. Sweeney, H. R. Dow, and L. S. Cox, for defendant Middleton & Danvers St. Ry.

KNOWLTON, C. J. The first three cases were brought to recover damages caused by an explosion of dynamite on February 14, 1902, and the fourth was brought against the same defendants to recover for a similar explosion which occurred on February 15, 1902. The first three cases were tried together in the superior court, and the four were argued together in this court. We will consider first the exceptions of the defendant Farnum in the first three cases. The plaintiffs were admitted to have been in the exercise of due care. The explosion occurred in the morning, while the men were at work with pick and shovel, under the direction of the superintendent of the defendant Farnum, on the mass of earth and rocks where a blast had been exploded about half past 3 o'clock in

the afternoon of the day before. There was evidence which well warranted the jury in finding that the accident was caused by an unexploded piece of dynamite which was left in one of the holes after the blast of the day before, and that no such inspection was made by the defendant or his superintendent as should have been made to guard against such an accident. See *Hopkins v. O'Leary*, 176 Mass. 258, 57 N. E. 342.

The judge rightly declined to instruct the jury that the superintendent and workmen engaged in the work were servants of the Middleton & Danvers Street Railway Company, and not of the defendant Farnum. Upon the undisputed facts, under the agreement in writing between Farnum and the railway company, the management, control, and direction of the men employed upon the work were in the defendant Farnum, and not in the railway company. It was a contract which gave Farnum the legal right to provide all the necessary labor and materials to complete the subgrading and ballasting of the proposed line of railroad. By the terms of the writing he was to have "the general direction of the work," and he could be displaced only in case the progress made on the work was "not satisfactory to the railroad company" in reference to the time when he agreed to have it completed. The expression, "subject to the direction and acceptance of the engineer," is similar to the common provision in building contracts which gives the architect a right to represent the owner in determining whether the work is in accordance with the requirements of the contract. In this case the work to be done is described in the agreement very generally. Probably something as to the details of construction was understood to be left to the determination of the engineer or agent. But this did not give to the engineer any right of control or direction as to the execution of the work after he had indicated to the contractor what was to be done and what materials were to be furnished. His further right was to determine whether the work done by the contractor was acceptable. The employés, being subject to the defendant's direction and control while engaged in working, were his servants, in reference to the rule which makes a master liable to third persons for the negligence of his servants. *Delory v. Blodgett*, 185 Mass. 126, 69 N. E. 1078, 64 L. R. A. 114, and cases cited.

The third and fourth instructions requested were rightly refused. There might be a liability on the part of the defendant, even though neither he nor his superintendent knew or had reason to believe that there was an unexploded charge of dynamite there. It was enough to create a liability if they knew, or ought to have known, of such a possibility or probability that some of the dynamite remained unexploded as to make an inspection necessary for the safety of the workmen.

¶ 2. See *Master and Servant*, vol. 34, Cent. Dig. §§ 386, 393, 396.

In one particular there was error in the instructions. Sheridan, who was called the "powderman," was not a superintendent. He was a workman who charged the holes with dynamite and exploded the charges. He also sometimes assisted the foreman or superintendent, Duggan, in making an inspection after a blast, for the purpose of ascertaining whether any part of the dynamite had failed to explode. In this work of inspection for the purpose of securing to workmen a safe place in which to work he represented the defendant, for he was performing a part of the master's duty, for the proper performance of which the master was responsible to his servants, whether he performed it in person or delegated it to a servant. *Moynihan v. Hills Company*, 146 Mass. 586, 16 N. E. 574, 4 Am. St. Rep. 348. But in charging the holes and exploding the blasts he was doing the ordinary work of a servant, like the other workmen who drilled the holes. While it was a more important part of the work than drilling, it was work which would ordinarily be done by a servant, and not by the master. Negligence in doing it would not subject the master to liability to a fellow servant injured by the neglect. The defendant requested the judge to instruct the jury that, if the "accident was caused by the negligence of Sheridan, who had charge of the firing of the blasts of dynamite, the plaintiffs cannot recover, because said Sheridan was a fellow servant of the plaintiffs." The judge declined to give the instruction, but told the jury that, "if there was any negligence in setting off the blast of dynamite on the day preceding the accident, either on the part of the foreman, Duggan, or the powderman, Sheridan," they might find for the plaintiffs. If there was negligence on the part of the superintendent in falling properly to supervise this part of the work, if supervision by the master or his superintendent was necessary, the defendant would be liable; but for the negligence of the workman himself he would not be liable to other servants. While this request went too far, inasmuch as there might have been negligence of Sheridan in inspection, in which he undertook to perform the master's duty, and for which the master would therefore be liable, the request directed attention to his firing the blasts, and the instruction was given in reference to that. Another part of the instructions was given in reference to his possible negligence in inspection. We are of opinion that by the exception to the refusal to give the instruction requested and to the instructions given the defendant saved his rights in this particular, and that a new trial should be granted.

In the trial of the fourth case, brought by Donahue, it appeared that the superintendent, Collins, fired the blasts, and no such request for instructions was made, and no such exception was taken. For the reasons given in the other cases, the exceptions of

the defendant in this case should be overruled.

In each of the first three cases the entry will be: Defendant's exceptions sustained; and in the last case: Defendant's exceptions overruled.

So ordered.

(187 Mass. 32)

BERTHOLET v. J. W. BISHOP CO.

(Supreme Judicial Court of Massachusetts.
Bristol. Nov. 22, 1904.)

MASTER AND SERVANT—INJURIES TO SERVANT— NEGLECT OF SUPERINTENDENT— EVIDENCE.

1. Plaintiff was injured, while assisting in rolling a timber on a barrel, by his fellow servants dropping the timber. Plaintiff charged that the superintendent was negligent in not ordering the men to lower the timber before it fell. A less number of men was provided than on previous days, and the men complained that there were not enough men, but this was not communicated to the superintendent. *Held*, that such facts did not warrant a finding of negligence on the part of the superintendent on the ground that he should have known that the slightly longer strain to which the men were exposed was beyond their strength.

Exceptions from Superior Court, Bristol County; Lorumus E. Hitchcock, Judge.

Action by Auguste Bertholet against the J. W. Bishop Company for injuries under the employers' liability act (St. 1887, p. 899, c. 270). A verdict was directed by the court in favor of defendant, and plaintiff brings exceptions. Overruled.

A. Auger, for plaintiff. Orapo, Clifford & Prescott, for defendant.

LORING, J. The plaintiff was a carpenter in the employ of the defendant corporation, and at the time of the injury here complained of was engaged with others in moving a hard pine timber which was 42 feet long and 10 by 13 inches thick. The method employed for moving the stick was for a gang of men to lift the forward end and place a kerosene barrel under it some 12 to 14 feet back from that end. The men then divided, some to hold the forward end and the others the rear, while the stick was rolled forward until the barrel was 12 to 14 feet from the rear end of it. "Then," in the words of the bill of exceptions, "the men would be ordered to lift the rear end of the timber, while one of the men, and sometimes the foreman, would roll the barrel towards the forward end to within 12 or 14 feet of the end, and the men would then be ordered to lower the timber and push it on the barrel, and the same operation would be repeated until the timber had reached its destination." Four or five timbers had been moved in this way before the day of the accident to the plaintiff. The accident to the plaintiff happened about 9 o'clock in the morning, after the plaintiff and other employees had been moving the timber for about

an hour, and after the timber "had been lifted eight or ten times so as to move the barrel along." At the time in question the men were ordered to raise the stick by a foreman who was in charge of the work, and who, on the evidence, could be found to be a superintendent within the employers' liability act. The barrel was then moved forward to "about ten feet" of the forward end, in place of twelve or fourteen feet as usual, "one or two feet further than usual." In the words of the plaintiff's testimony: "We held it a little longer, and put the barrel a little further." "It took generally from a minute to a minute and one-half to lift the timber and push the barrel along. At the time of the accident it took 'a little longer than at the other times'; about a minute and a half or more." "The weight of the timber was too heavy for the men that were holding it." While the men were thus holding up the rear end of the timber the plaintiff heard a cry, the timber fell, "and as it came down it caught his left hand and foot, injuring the same, and also his right knee." On cross-examination the plaintiff testified that he did not know, before he was hurt, that the men were getting too tired to move the timber, but that some of them had complained that "we had to use more strength." "Every man said it to one another," but not to Mr. Wing, the superintendent. They said among themselves that there were not enough men. No evidence was offered by the plaintiff beyond his own testimony. On the plaintiff resting, the presiding judge directed the jury to find a verdict for the defendant, and the case is here on an exception to that ruling.

The declaration contains two counts, but the second count was waived by the plaintiff, and he went to trial on the first count only, which was based on the negligence of the superintendent under the employers' liability act. St. 1887, p. 899, c. 270. At the argument before us counsel for the plaintiff also expressly disclaimed any complaint as to the number of men employed on the work, and stated that what he did claim was that he had a right to go to the jury on the ground that the superintendent was negligent in not ordering the men to lower the timber before it fell. On the evidence the stick must be taken to have fallen because the men were too tired to hold it longer, and the cry given must be taken to have been a cry of warning that the timber was falling, and not an order to lower it. The evidence did not warrant a finding that the superintendent was negligent on the ground set up by the plaintiff. In the first place, the men did not say among themselves that they were too tired to hold the stick while the barrel was being moved forward. What was said by them was that they had to exert more strength, and that there were not enough men. But this was said among themselves, and not to the superintendent. Beyond the fact that

fewer men were used to move the timber on the day in question than had been used to move the two of the five previously moved, which were similar to the one in question, there is nothing from which it could be inferred that the strain of holding up the end to which the superintendent subjected the men or allowed them to be subjected was beyond their strength. It is true that the testimony showed that the barrel was in fact rolled one or two feet further than usual, or "to about ten feet" of the forward end," in place of 12 to 14, and that the timber was held a little longer than usual "about a minute and a half or more," in place of "from a minute to a minute and a half." We assume that the jury could have found that the barrel was moved further forward than usual by order of the superintendent, although this is by no means plain. The fact that fewer men were used in moving the timber on the day in question than had been used on the previous day or days in moving two similar timbers, without any evidence as to why the number of men used was reduced, is not enough to warrant a finding that the superintendent ought to have known that the slightly longer strain to which the men were exposed was beyond their strength, especially in view of the defendant's express disclaimer of any complaint that too few men were employed. There was nothing else in the testimony from which that inference could be drawn.

Exceptions overruled.

(187 Mass. 33)

THOMPSON v. AMERICAN WRITING PAPER CO.

(Supreme Judicial Court of Massachusetts.
Hampden. Nov. 23, 1904.)

MASTER AND SERVANT—INJURIES TO SERVANT— NEGLECT—CONTRIBUTORY NEGLIGENCE—ASSUMPTION OF RISK.

1. In an action for injuries to a servant engaged in repairing a pulley, whether plaintiff was in charge of the work was—the evidence being conflicting—a question for the jury.

2. In an action for injuries to a servant engaged in repairing a pulley, whether the accident was attributable to any negligence in the manner of doing the work *held*, under the evidence, a question of fact for the jury.

3. A servant engaged in repairing heavy machinery may assume that his master has exercised due care to see that a cleat supporting the floor is properly fastened, and does not assume the risk of the master's failure to exercise care in that regard, although he knows the method of construction of the floor.

4. A master owes his servant the duty of using due care to see that a floor on which heavy weights are moved, and cleats which support such floor, are kept in proper repair.

Exceptions from Superior Court, Hampden County; Elisha B. Maynard, Judge.

Action by Gideon Thompson against the American Writing Paper Company. A ver-

¶ 1. See *Master and Servant*, vol. 24, Cent. Dig. §§ 179, 205, 252.

dict was directed for defendant, and plaintiff excepted. Exceptions sustained.

The action was in tort for personal injuries to plaintiff, Gideon Thompson, who was by occupation a millwright, and who at the time of the injuries, and for five years prior thereto, was employed by defendant, the American Writing Paper Company. The accident causing the injuries occurred on a Sunday, while plaintiff was doing repair work with some fellow servants under the supervision of David Griswold, plaintiff's boss. On the morning of that day, plaintiff had taken out what was known as a cone or speed pulley which belonged on a paper machine. Mr. Griswold was there at the time, but later went home because of illness, and was not present in the evening, when plaintiff and his fellow servants put the pulley back into its place, in the course of doing which the accident occurred by reason of the giving way of the floor on which plaintiff was working. The cone, which weighed from 1 to 1½ tons, was precipitated into the cellar, and a truck passed over plaintiff's foot and cut off his toes. There was evidence that the floor at the place where it gave way was supported only by a cleat of 2x4 plank, spiked to the side of the floor timber, so as to form a flange upon which the ends of the plank rested, and to which they were spiked. Plaintiff offered to show that this was not the usual construction, and was the only place in the mill known by the witness where the floor was supported on a piece nailed upon the timber; that the proper construction was to mortise into the timber. The evidence was excluded, and plaintiff excepted. Any other facts necessary to an understanding of the case sufficiently appear in the opinion.

Green & Bennett, for plaintiff. Brooks & Hamilton, for defendant.

HAMMOND, J. The work of removing the pulley in the morning was performed under the personal supervision of Griswold, the master mechanic of the mill, and was attended with no accident. The pulley safely passed over the very floor which gave way under its weight in the evening. It was about 14 feet long, and weighed from 1½ to 2 tons. In the ceiling of the room were four eyebolts—one having been put in by Griswold that morning—and hooked to three of them, including this one, were chain falls suitable for the purpose of relieving the floor of all or a part of the weight of the pulley.

One of the grounds of the defense is that at the time of the accident the plaintiff was directing the work, and was negligent in failing to make proper use of the chain falls; and the brief of the defendant contains a detailed description of a way in which, by a certain use of the eyebolts and falls, the strain upon the floor could have been re-

lieved, as the defendant says, so that the pulley would have passed safely over it. The evidence, however, as to whether the work was under the direction of the plaintiff, was conflicting; and a careful examination of the evidence as to the manner in which the pulley was moved and the falls used shows that a jury would be warranted in finding that it was moved in the evening in the same manner as in the morning, except that in the evening the small end of the pulley was kept pointed towards the posts, whereas in the morning it had been kept pointing towards the arch, or, in other words, both in the morning and in the evening the pulley was moved small end foremost. Upon the whole evidence, we are of opinion that the questions whether the plaintiff was in charge of the undertaking, and whether the accident was attributable to a negligent failure to make proper use of the eyebolts and chain falls, or to any other negligent act in the work, are questions of fact for the jury.

It is also urged by the defendant that the danger of the work was known to the plaintiff, and that he assumed the risk. The plaintiff was a carpenter and millwright of large experience. He had been employed as such in this mill for five years, and had worked under Griswold, making repairs upon floors, and doing "anything round the mill [he was] ordered to do." The evidence tended to show that the floor of the room in question was constructed in the following manner: The floor timbers all ran one way. The floor proper consisted of 3-inch pine planks running transversely to the floor timbers. Over these planks was laid a top flooring of 1½-inch hard pine, running parallel with the timbers, and being flush with them, so that the top of the timbers was visible. At the particular point where the floor gave way, the ends of the floor planking were supported by a cleat of two by four plank spiked to the side of the floor timber so as to form a flange, upon which the ends of the plank rested, and to which they were spiked. The ends of the flooring plank were not mortised into the timber, but were supported solely by this cleat. The plaintiff testified that he knew nothing about this floor, and it did not appear that such was the usual construction of floors in the mill, or that the plaintiff ever had seen or known of any such construction in the mill. There was evidence tending to show that the fastening of the cleat had become defective; one witness, who saw the state of things immediately after the accident, testifying that "the nails had been eaten away so it [the cleat] didn't hold; something had eaten the nails away"; and another, that "some of these nails pulled off, and some broke." The evidence tended further to show that in the room directly underneath this flooring there were several "size tanks," in which "sizing" was boiled, and that this operation "makes

steam"; and it was contended by the plaintiff that, by reason of this steam, the spikes were subjected to a peculiar and unusual liability to rust and became weakened.

Upon this evidence a jury might find that, even if there was no defect in the original construction of the floor, and even if the plaintiff had knowledge of the method of construction, still he had the right to assume that due care would be taken by his employer to see to it that the fastening of the cleat should be held to its original strength, and that by reason of the failure to exercise such care the accident happened. Such a risk was not assumed by the plaintiff. *Huddleston v. Lowell Mach. Shop*, 106 Mass. 232. In considering the strain to which the floor would be subjected by the movement of the pulley over it, he had the right to assume that due care had been used to see that the fastening of the cleat was in proper condition.

It cannot be said, as matter of law, that the evidence would not warrant a finding that the defendant was negligent. It must be assumed that the defendant knew of the method in which the floor was constructed, that heavy articles were liable to be moved over it, that the cleat was substantially the only support, and that consequently its fastening should be kept in such a condition as to bear the strain caused by the weight of such heavy articles. Moreover, the defendant must be assumed to have known of the relative position of the "size tanks" and the cleat. While, therefore, it was under no obligation to the plaintiff to change the method of its floor construction, still it owed to him the duty to use due care to see that the floor, including the fastening of the cleat, was kept in proper repair. Whether the accident was in any way attributable to a failure to use such care is, upon the evidence, a question for the jury.

Exceptions sustained.

(187 Mass. 104)

CALLENDER, McAUSLAN & TROUP CO. v. FLINT.

(Supreme Judicial Court of Massachusetts.
Worcester. Nov. 29, 1904.)

CONTRACTS — CONSTRUCTION — EVIDENCE OF INTENT — GUARANTY — LAW OF FOREIGN JURISDICTION — PRESUMPTION.

1. A contract of guaranty, not becoming effectual until accepted, will be construed according to the law of the place of acceptance.

2. The common law of another state will be presumed to be the same as that of this state.

3. Extrinsic evidence of intent is admissible to aid in the interpretation of an ambiguous written contract.

4. Plaintiff wrote defendant, stating that a third person wished to buy some goods from plaintiff, and asking defendant to guaranty payment for "any goods he might purchase." Defendant refused, and plaintiff in reply stated that the intending purchaser had told it that defendant would guaranty payment, and to hold

the goods until it received the guaranty. Later defendant wrote, stating that he had decided to help the purchaser, and would guaranty the payment of goods he might buy, not exceeding \$300. *Held* not a continuing guaranty.

Appeal from Superior Court, Worcester County; F. A. Gaskill, Judge.

Action by the Callender, McAuslan & Troup Company against John Flint. From a judgment for defendant, plaintiff appeals. *Affirmed*.

Chas. H. Goodell, for plaintiff. Chas. Haggerty, for defendant.

BRALEY, J. As the contract of guaranty did not become effectual until accepted by the plaintiff, whose place of business was in another jurisdiction, its argument that the construction of the agreement depends on the law of the place of acceptance may be conceded. *Nashua Savings Bank v. Sayles*, 184 Mass. 520, 522, 69 N. E. 309. But judicial notice cannot be taken of the laws of another state, which must be proved and determined like other facts, and no evidence of their provisions can be received for the first time at the argument of a case in this court. And, as the agreed statement of facts contains no reference to the common law of Rhode Island, the presumption follows that in the case presented it is the same as our own. *Hazen v. Mathews*, 184 Mass. 388, 391, 68 N. E. 838.

The question to be decided is whether the contract was a continuing guaranty. If there is no ambiguity in the agreement itself, the answer must be found from the terms of the instrument alone; but, as the language used is open to more than one construction, resort may be had to extrinsic evidence to determine the intent of the parties. *Bent v. Hartshorn*, 1 Metc. 25; *Sullivan v. Arcand*, 165 Mass. 386, 43 N. E. 198. It appears that Joseph Sherin, the debtor, desiring to buy goods on credit from the plaintiff, and it not being willing to open an account with him, at his suggestion the plaintiff wrote a letter to the defendant, asking him if he would become responsible for the amount of the sale. There is no evidence that before this time the defendant had been requested by Sherin to become a guarantor, and the letter must be considered as the first intimation or request made to him that he should so act. The language of the letter thus becomes important as expressing the nature of the pending transaction with Sherin in which the defendant was asked to guaranty. It shows that the purchase intended is limited to goods bought on the day of its date, and, though the phrase, "you would guaranty any purchase he might make from us," is used, it is a part of the sentence which states the proposed sale, and refers to it. And when the defendant had answered, declining to become responsible, the reply of the plaintiff in explanation of its request, and referring to the contract of the

¶ 1. See Guaranty, vol. 25, Cent. Dig. § 29.

debtor, contained this significant language, "He distinctly telling us to hold the goods which he might select until we received the guaranty." If it was the purpose of the plaintiff to give Sherin a general credit for the sale of goods in the future, for the payment of which the defendant should be bound, its letter contained no such statement, though it was written at a time when the proposed course of business between it and the debtor had been considered, and credit had been asked for by him. Obviously, when the guaranty was given, the defendant might well have understood that the debtor had contracted for specific goods on credit, and the plaintiff was unwilling to complete the sale by delivery until security for their payment had been given; and with this understanding he agreed to be liable for this transaction, but did not intend to become bound for succeeding purchases. While it might be said that the plaintiff and Sherin really intended that the defendant should become responsible for a course of continuous dealing, and the language of the defendant's engagement might be found open to such a construction, yet, looking at the conditions under which it was given, it is more consistent with a construction that all the defendant intended was to aid him in a single purchase of goods from the plaintiff, and, as this was followed by payment, the guaranty was fully satisfied. See *Boston & Sandwich Glass Co. v. Moore*, 119 Mass. 435; *Cutler v. Ballou*, 136 Mass. 337, 49 Am. Rep. 35; *Sherman v. Mulloy*, 174 Mass. 41, 43, 54 N. E. 345, 75 Am. St. Rep. 286. This was the finding of the superior court, and, as no error of law appears, the judgment must be affirmed.

So ordered.

(187 Mass. 73)

SCAPLEN v. BLANCHARD.

(Supreme Judicial Court of Massachusetts.
Essex. Nov. 22, 1904.)

CONFIRMATORY DEED—CONSTRUCTION—EVIDENCE—BILL OF EXCEPTIONS.

1. Where a bill of exceptions was prepared in good faith, and the disallowance of it resulted from a misunderstanding, the questions presented by a bill agreed to by both parties and presented by a commissioner appointed to consider a petition to approve exceptions will be considered.

2. In construing a deed stating that it was given to replace a certain lost deed of the same tenor, proof of the situation and previous dealings of the parties is admissible, and not objectionable as varying the terms of the deed.

3. A deed stating that it is given to replace a certain lost deed of the same tenor is merely confirmatory, and does not pass a title to a part of the land which one of the grantors had acquired after the execution of the lost deed and before the execution of the confirmatory one.

Appeal from Superior Court, Essex County; Pierce, Judge.

Action by William A. Scaplen against Walter E. Blanchard. There was judgment for defendant, and plaintiff excepts. Petition to prove exceptions. Exceptions overruled.

J. C. Batchelder, for plaintiff. Wm. H. Niles and E. M. Stevens, for defendant.

KNOWLTON, C. J. The commissioner appointed to consider the petition to approve exceptions has made a report presenting a bill of exceptions agreed to by both parties, which is the original bill with slight amendments, and which he finds to be in all respects conformable to the truth. It also appears that the original bill was drawn in good faith, in the belief that it fairly set forth the rulings and the evidence, and the commissioner finds that the disallowance of it resulted from a misunderstanding between the parties. We will therefore consider the questions presented by the exceptions.

In 1871 the tenant in this action and one Hurley were the owners of a tract of land which included the demanded premises. By a quitclaim deed dated April 2, 1873, they conveyed it to Edward Mahon. By a warranty deed dated April 23, 1873, Mahon conveyed a part of it, including the demanded premises, to the present tenant. In 1877 Hurley and the tenant executed to Mahon another deed, bearing date February 28, 1877, describing the same premises that were described in their deed to him dated April 2, 1873, and containing in the in testimonium clause these words: "This deed is given to take the place of a deed given April 23, 1873, and is lost, said lost deed being of the same tenor as this one." It is to be noticed that at this time the tenant, through Mahon's deed of April 23, 1873, had acquired a title to a part of the property described in these deeds to Mahon, which was later than his original title that he and Hurley conveyed to Mahon. The question at the trial was whether Mahon, by this confirmatory deed from Hurley and the tenant, if we may call it so, acquired, in addition to the original title which he had previously held, the new title of the tenant, which he himself conveyed to the tenant by the deed of April 23, 1873. In 1881 Mahon executed to one McCormick of Brooklyn, N. Y., a deed, whose description included, with other land, the demanded premises, and the demandant claims under this last conveyance. Although the tenant raises the question whether the demandant has the title which McCormick took under this deed, we will assume in favor of the demandant that he has. We therefore come back to the deed of February 28, 1877, to determine its legal effect, in view of its peculiar language, relative to the lost deed. The recital purported to show that the grantee had previously acquired a perfect title to the property, and that his only embarrassment in regard to it resulted from a loss of the deed. If the deed had not been recorded, he was left without a visible paper title. To obtain the muniments of title by compulsory process, he would be obliged to bring a suit in equity. If the deed was recorded, he not only had a good title, but he

could easily establish it by proof. Presumably he did not know, or did not remember, that the deed had been recorded, and he accordingly obtained the second deed. In considering it the judge might well receive proof of the situation and previous dealings of the parties in reference to the subject referred to in it, for the purpose of applying the language of the deed, and especially of the recital in it, to the conditions to which it related. *Whittier Machine Co. v. Graffam*, 156 Mass. 415, 31 N. E. 485. Accordingly, evidence was received that the deed of April 2, 1873, which, except in date and the language of the in testimonium clause, was identical with the later deed, was given at the same time as the deed from Mahon to the tenant, which bore date April 23, 1873. The tenant was also allowed to testify that he never gave Mahon any other deed than the two which are before us.

If there had been no evidence before the court other than the language of the deed itself to show its meaning, the recital would show, as between the parties and those claiming under them, that it was not given to create a new title, but only to perfect the evidence of a title created long before. It was "given to take the place of a deed given" previously, which had been lost. It was "of the same tenor" as the lost deed. Taking all its language together, it did not purport to convey anything. So far as it was a deed at all, it was strictly a confirmatory deed. See *Branham v. Mayor and Common Council of San Jose*, 24 Cal. 585-606; *Ing v. Brown*, 3 Md. Ch. 521; *Fryer v. Rockefeller*, 63 N. Y. 268; *Flauntleroy's Heirs v. Dunn*, 3 B. Mon. 594-617. Of a confirmatory deed it has been said by an elementary writer that: "The confirmation is the approbation or consent to the estate already created, which, as far as it is in the confirming power, makes it good and valid. So that the confirmation does not regularly create the estate, yet such words may be mingled in the confirmation as may create or enlarge an estate; but that is by force of such words that are foreign to the business of confirmation, and by their own force and power tend to create the estate." *Gilbert on Tenures*, 69. As against the grantors the grantee had a perfect title by his former deed. It was as if the deed in question had declared that the grantee became the owner of the property in April, 1873, and lost the usual evidence of his ownership, and that the new deed was given as additional evidence of the fact. Such a writing creates no title, and conveys nothing which has come into the grantor's ownership since the making of the original deed. It takes the place of the original deed, and is evidence of the making of the former conveyance as of the time when it was made. If, under our system of registration or otherwise, it is necessary to give it effect as in itself a conveyance, it is only confirmatory evidence of the

title which passed by the original deed. The oral testimony introduced makes it very plain that the deed referred to in the recital is the deed bearing date April 2, 1873, and that the statement that it was given April 23d means that it was delivered then, at the same time as the deed from Mahon to the tenant, which was dated April 23d. Probably its date was not remembered when the new deed was made.

The oral testimony objected to had no tendency to contradict or enlarge the meaning of the deed. If no such testimony had been introduced, the deed on its face would be construed as furnishing evidence of a title which had been created previously, and not as creating a new title. But full information in regard to the subject to which it relates simply confirms its obvious meaning.

It is questionable whether the deed from Mahon bearing date March 24, 1877, conveying the easterly half of Eastern avenue, adjoining the land described in the deed of April 23, 1873, from Mahon to the tenant, was strictly competent. It was made a short time after the deed in question, and it is an act which tends somewhat to show the understanding of the parties to it at the time. The deed from Mahon, under which the demandant claimed, was made several years afterwards, when this deed had been recorded in the registry. Whether it was competent or not, the admission of it did the demandant no harm. Upon the undisputed facts the judge could not find for the demandant, and the finding for the tenant was correct.

Exceptions overruled.

(187 Mass. 25)

NORCROSS v. WYMAN.

(Supreme Judicial Court of Massachusetts.
Worcester. Nov. 22, 1904.)

BUILDING CONTRACTS—CONSTRUCTION—POWER OF ARCHITECTS—CONTRACTS—REVOCATION.

1. Under a building contract providing that the decision of the architects as to the specifications shall be final and binding, no notice was necessary before making a decision as to the meaning of the specifications, but the architects were at liberty to decide on such legal principles as they deemed applicable, and on such evidence as they chose to receive.

2. Authority given by a building contract to the architects to decide as to the meaning of the specifications cannot be revoked by the owner after a decision has been made and communicated.

3. One cannot revoke an authority conferred by one part of an instrument which he is not entitled to rescind as a whole.

4. The interpretation of the specifications of a building contract may properly be left to the architects.

Report from Superior Court, Worcester County.

Action by O. W. Norcross against H. Wyman. Judgment entered in accordance with an arbitrator's report in favor of plaintiff. Case reported. Judgment for plaintiff.

Frank B. Smith, T. H. Gage, Jr., and Frank F. Dresser, for plaintiff. Chas. M. Thayer and Chas. A. Hamilton, for defendant.

BRADLEY, J. Under the contract, which included the specifications and plans, the plaintiff was required to provide a suitable foundation for the building to be erected, but the nature of the soil to be excavated was such that more work was ultimately required for this purpose than he originally anticipated. It is his contention that this work is not covered by the contract, and that he is entitled to extra compensation for its performance. By the specifications it was provided that: "The architects shall have the sole interpretation of their drawings and these specifications, except as otherwise provided or specified. Their decision upon all questions relative to drawings, specifications, or contract for the said building shall be final, and binding upon the owner and contractor." While putting in the foundation the plaintiff discovered a quicksand, and asked the architects subject to whose supervision the work was being done for instructions. Upon the evidence before him, the arbitrator finds as a fact that the architects decided that the clause in the specifications relating to the excavation required was not inserted with the intent that the expense of the work made necessary by the quicksand should be borne by the plaintiff, as this circumstance was unforeseen by him or them, and that the extra work so caused was not included within the terms of the contract. If the architects were clothed with authority to make this decision, it is conclusive between the parties. The clause which defined their powers and duties was contained in a contract under seal, voluntarily entered into by the parties, and provided a simple and convenient method for the settlement of any questions that, as the work proceeded, might arise over the interpretation of the contract or of the drawings and specifications. Or, in other words, whenever it became necessary, whether for the information of the plaintiff, who had stipulated to work under their direction, or for the benefit of the defendant in securing a strict compliance with the terms of the contract, it was left to the architects to finally determine what their drawings and specifications covered as to the quantity and quality of the work that was required to be done by the plaintiff. In the practical working of this plan of supervision and adjustment of differences the cumbersome formalities of a notice to or a hearing of the parties before making decision were evidently not contemplated, as such a requirement is not found in any provision of the contract. Neither was it required by the character of the undertaking. For the purposes of their decision they were free to adopt such legal principles as they honestly believed applicable, and to act on such evidence as they chose to receive. *Boston Water Power Co.*

v. Gray, 6 Metc. 131, 169; *Flint v. Gibson*, 106 Mass. 391, 395. Although the defendant, when notified, declined to be bound by their award, this action was taken after it had been communicated to the plaintiff, and, if it is treated as an attempt to formally revoke the power previously given, it came too late. *Wallis v. Carpenter*, 13 Allen, 19, 24. Besides, his attempted rescission would not work a revocation of the authority of the architects, for this was conferred by one part of an agreement, which as a whole he was not entitled to rescind. *Haley v. Bellamy*, 137 Mass. 357, 359. It does not become important to decide how far an agreement for the arbitration of the construction of a written contract, or of the quantity and value of work to be performed under it, could be effectually pleaded in bar to a suit on the contract itself, or enforced by a bill in equity for specific performance. *Miles v. Schmidt*, 168 Mass. 339, 340, 47 N. E. 115. Not only had the decision been made, but the question decided, if not treated as technically submitted to them as arbitrators, was one which the parties could leave to the determination of the architects. *Palmer v. Clark*, 106 Mass. 373; *Robbins v. Clark*, 129 Mass. 145; *McMahon v. New York & Erie Railroad Company*, 20 N. Y. 463, 465; *Omaha v. Hammond*, 94 U. S. 98, 24 L. Ed. 70. See *White v. Middlesex Railroad*, 135 Mass. 216, 220, and cases cited. Compare *Smith v. Boston, Concord & Montreal Railroad*, 36 N. H. 458, 489, 490. The arbitrator, therefore, correctly ruled that the architects were authorized to act on the question submitted to them, and their decision thereon was binding on the defendant. As the award can well rest on this ground, it becomes of no consequence to consider whether the contract, fairly construed, required the plaintiff to excavate through the quicksand, although on this question the arbitrator ruled in his favor. See *Stuart v. Cambridge*, 125 Mass. 102.

Award of the arbitrator accepted for the full amount, and judgment ordered thereon for the plaintiff.

(187 Mass. 84)

BRUSSEAU v. NEW YORK, N. H. & H. R. CO.

(Supreme Judicial Court of Massachusetts.
Bristol. Nov. 23, 1904.)

RAILROADS—CROSSING ACCIDENT—QUESTION FOR JURY—EVIDENCE.

1. In an action against a railroad for the death of one killed in a crossing accident, *held*, that the evidence was sufficient to warrant a finding that the absence of the signals required by the statute contributed to the injury.

2. In an action against a railroad company for the death of one killed in a crossing accident, the burden was on defendant to show that plaintiff was grossly negligent.

3. In an action against a railroad for the death of one killed in a crossing accident, *held*,

¶ 2. See *Railroads*, vol. 41, Cent. Dig. § 1117.

that the question whether plaintiff's intestate was guilty of gross negligence was one for the jury.

Exceptions from Superior Court, Bristol County; Lemuel Le B. Holmes, Judge.

Action by Mary Brusseau, as administratrix of James Brusseau, against the New York, New Haven & Hartford Railroad Company. Verdict for plaintiff, and defendant brings exceptions. Judgment on the verdict.

John W. Cummings and Edward Higginson, for plaintiff. F. S. Hall and C. C. Hagerty, for defendant.

HAMMOND, J. The evidence as to whether the signals required by the statute were given was conflicting, but it cannot be said, as matter of law, that it did not justify the jury in finding for the plaintiff on that issue. See *Dalton v. N. Y., N. H. & H. R. R.*, 184 Mass. 344, 68 N. E. 830, and cases cited. If the signals were not sounded, the jury, under the circumstances, might infer that the absence of them contributed to the injury. *Doyle v. Boston & Albany R. R.*, 145 Mass. 336, 14 N. E. 461.

The burden was upon the defendant to prove that the plaintiff's intestate was grossly negligent, and it is vigorously contended that, as matter of law, the evidence shows that he was. Although there are cases in which it has been adjudicated, as matter of law, that, under the circumstances, gross negligence was proved (*Debbins v. Old Colony R. R.*, 154 Mass. 402, 28 N. E. 274; *Emery v. Boston & Maine R. R.*, 173 Mass. 136, 53 N. E. 278), still, speaking generally, the question whether a particular fact is proved by oral testimony depends largely upon the view taken by the jury as to the credibility of the witnesses; and hence it is comparatively seldom that, in the absence of binding admissions or agreements as to facts, a ruling that, as matter of law, a material fact has been proved, can be given. The evidence in this case tended to show that the plaintiff's intestate was sober, and was driving a quiet and gentle horse at a moderate speed; that in his wagon there were bottles, which rattled; that when near the crossing he shouted "Whoa" to his horse; that the wagon cover extended over the whole side of the wagon; that there was no bell or whistle to warn him; that for some few minutes before reaching the crossing he had been traveling on a street parallel with and near to the railroad location; that, as he turned into Sawyer street and approached the crossing, his view of the track upon which the train was coming was obstructed by freight cars standing near Sawyer street; that the gates seemingly intended to warn passengers of approaching trains were up; and that the night was somewhat foggy. The evidence tended further to show that he was awake and guiding his horse. It was not shown that he observed the absence of the gateman, or that he knew that none was usually kept

there at night, or that he was not listening for the train. It was near midnight, and, from the absence of the signals, and the fact that the gates were not lowered, he had some reason to believe that no train was approaching, and that it was safe to cross. His ability to hear may have been affected by the rattling of the bottles and by the noise of the team. It is true that the evidence was conflicting as to many of the circumstances above named—especially with reference to the giving of the signals required by statute—and a verdict for the defendant might reasonably have been expected; but, without rehearsing it further in detail, it is plain that the question whether the plaintiff's intestate was guilty of gross negligence was not a question of law for the court, but of fact for the jury, and that the case was rightly submitted to them.

Judgment on the verdict.

(137 Mass. 87)

KIRK v. STURDY et al.

(Supreme Judicial Court of Massachusetts.
Bristol. Nov. 23, 1904.)

MASTER AND SERVANT—DUTIES OF MASTER—USE OF DUE CARE—DELEGATION OF DUTY—INSPECTION.

1. A master is bound to use due care, varying in degree with the circumstances of the case, to see that there is no danger to a careful servant, either in the tools and materials which he is required to use, or in the place where he is required to work.

2. Where the tools and materials and the place where the servant is required to work are under the exclusive control of the master, he cannot free himself from the responsibility of properly discharging his duty to use due care as to their safe condition by delegating the duty to another.

3. The duty of the master to use due care as to the safety of the tools and the place to work does not always include the duty of inspection, even where he has exclusive control of the place and tools.

4. A master who did not own the building in which his servants were employed, but merely hired rooms in it as tenant at will—the lessor furnishing everything in the rooms except the chairs and tools with which the servants worked—had a right to assume, in the absence of any indications to the contrary, that a pail attached to an overhead pipe by a plumber employed by the lessor was properly and safely fastened; and no duty rested on him of inspecting the same, although it had been hanging there for three or four weeks.

Exceptions from Superior Court, Bristol County; Loranus E. Hitchcock, Judge.

Action by Mary T. Kirk against Frank M. Sturdy and others. A verdict was directed for defendants, and plaintiff excepted. Exceptions overruled.

The plaintiff was a young lady 23 years of age, who had worked for several years in a jewelry factory at Attleboro, soldering chains. She worked for the defendant company a year or more prior to the accident. Three or

[1. See *Master and Servant*, vol. 34, Cent. Dig. § 172.

four weeks before the accident the defendants moved into a new building, owned by the trustees of the estate of John H. Fallon. The plaintiff was assigned a place at the bench to do her work by an agent of the defendant placing a card bearing her name in a drawer at the point where her chair was. Her work required her to be seated, and to occupy a position with her head bowed at the bench, and her eyes directed downward. The first day she went to work in the new shop she noticed a drip from a steam pipe that was leaking over her head. The pipes were at the top of the room, and some six or seven feet above her head. She called the attention of an employé of the defendant, whose duty it was to bring the work into the room where the plaintiff was employed, and carry it out when completed. She did this twice, but the leak was not stopped on that day. She testified she did not, from that time on, ever notice any leak. The evidence was undisputed that the defendants did not own the building where the plaintiff was injured, but simply hired certain rooms in the building as tenants at will from the Fallon estate, and they had no control of the steam pipes, which, with the heating apparatus, were under the exclusive control of the owners, and that everything in the room was furnished by the owners of the building, except the chairs and tools with which the plaintiff and other girls did their work. There was evidence that the defendant partners were in and out of the plaintiff's room in the new building three or four times a week, moving and watching the work, immediately preceding the accident. The evidence showed that the janitor of the building, employed by the owners of the building, after his attention had been called to the leak over the plaintiff's head, the following day, or the second day afterward, put an iron bucket up, and attached it to the steam pipe, to catch the drip. About three weeks later, without any warning, the pail fell upon the head of the plaintiff while she was working, and caused the injuries for which suit is brought.

F. S. Hall, for plaintiff. W. H. Fox and F. B. Byram, for defendants.

HAMMOND, J. The law as to the duty owed by the master to the servant with respect to the tools and materials of which the latter is to make use, and the place in which he is to work, is well settled by numerous decisions; and, speaking generally, it is that the master is to use due care to see that in neither is there danger to the careful servant. Where these things are under the exclusive control of the master, he is answerable for such care, whether the duty be performed by him in person, or be delegated to another. He cannot free himself from responsibility for the proper discharge of a duty resting upon him in person by delegating its performance to another. But even where the tools

and materials are exclusively under the control of the master, the degree of care required, as in other branches of law and in every line of human conduct, varies, of course, with circumstances. In *Garragan v. Fall River Ironworks*, 158 Mass. 596, 33 N. E. 652, which was an action by a servant against his master for injuries received by reason of the rotten condition of the bagging of a bale of cotton, it was held that a purchaser of cotton in bales is not bound to have the bagging inspected, with a view to ascertaining whether it is strong enough to hold iron hooks inserted in it for the purpose of moving the cotton. In *Shea v. Wellington*, 163 Mass. 364, 40 N. E. 173, it was held that the owner of a quarry did not owe to his workmen the duty of inspecting an exploder well and favorably known in the market. In the first case it was said: "The performance of such a duty [of inspection] would be impracticable, and no case is cited which holds that such a duty exists." In the second case it was said that, in view of all the circumstances, it would be unreasonable to hold "that quarrymen using these exploders owed their employes a duty to have them inspected by a competent person, as to the mode and workmanship of their construction." In *Mooney v. Beattie*, 180 Mass. 451, 62 N. E. 725, which was an action by a mason against his master, a building contractor, for injuries caused by the explosion of a stone from dynamite left in it after it had been blasted from the quarry, where it appeared that the defendant purchased the stone in the usual course of business, without inspecting it, the same principle was applied; the court saying that "such a course of inspection, while possible, is manifestly impracticable, and it is never done." In all of the above cases the appliances were under the exclusive control of the master, and allusion to them is made here to illustrate the doctrine that even where the master has such control the duty resting upon him does not always include that of inspection. See, also, *Reynolds v. Merchants' Woolen Co.*, 168 Mass. 501, 47 N. E. 406.

In the present case the evidence was undisputed that the defendants did not own the building where the plaintiff was injured, but hired certain rooms in it as tenants at will; that they had no control of the steam pipes, which, with the heating apparatus, were under the exclusive control of the owners of the building; and that the latter furnished everything in the room, except the chairs and tools with which the plaintiff and her fellow servants did their work. And the question is how far the defendants are answerable to the plaintiff for the improper fastening of the pail which was attached to the pipe to catch the drip. The pail was attached by the "head piper or plumber" of the owners of the building after "mending the leak" in the pipe. The pail was plainly in sight, but the manner in which it was attached to the pipe

does not appear to have been visible from the floor. There was nothing in the appearance of the pail, as it hung there, to excite suspicion or to suggest that the plumber had not properly done his duty; and, in the absence of any such appearance, the defendants had the right to assume that due care had been used, and no duty of inspection rested upon them. In principle the case cannot be distinguished from *Moynihan v. King's Windsor Cement Dry Mortar Co.*, 168 Mass. 450, 47 N. E. 425. In that case the plaintiff was set to work by the defendants upon a temporary or swinging stage, of which one end was supported by a permanent stage owned by the defendant and attached to its warehouse, and the other by ropes attached to a vessel discharging its cargo. The defendant had nothing to do with the ropes supporting this end, the method of attaching it to the vessel being entirely under the control of the captain of the vessel. The plaintiff, who did not know by whom the ropes were put together, furnished, and managed, while at work upon the stage, was injured by the falling of the stage, the result of the insufficiency of the ropes. It was held that inasmuch as "the support, control, and management of the outer end of the stage belonged to the captain, * * * the duty and responsibility primarily rested upon him, and the defendant cannot be held responsible, unless upon proof of neglect of a duty of inspecting and warning. In the absence of anything to excite suspicion or apprehension, the defendant might assume that due care would be used by those in charge of the vessel." As in that case, so in this, the defendant had the right, under the circumstances, to assume that due care would be used by those who had exclusive control of the pipes. It is argued by the plaintiff that the length of time during which the pail had been hanging might show ground for inspection, but that consideration does not seem to us of weight enough to turn the scale in her favor. Her right of action, if any she has, is apparently against the owners of the building.

Exceptions overruled.

(187 Mass. 58)

TETRAULT et al. v. FOURNIER et al.

(Supreme Judicial Court of Massachusetts.
Bristol. Nov. 22, 1904.)

EQUITY—DENIAL OF RELIEF—LACHES—EXCUSES.

1. More than 10 years' delay by a mortgagor and her heirs in instituting suit to set aside a foreclosure for fraud and mismanagement by the mortgagee, and for an accounting of rents and profits, is such laches as to bar relief, in the absence of facts showing an excuse for the delay.

2. Allegations of a bill to set aside mortgage foreclosures for fraud and for an accounting, stating that plaintiffs have been delayed in instituting suit by the negligence and misconduct of attorneys employed by them, are too general to constitute a sufficient excuse for 10 years' delay in the bringing of the suit.

3. Allegations of a bill to set aside mortgage

foreclosures for fraud and for an accounting, stating that plaintiffs were delayed in the bringing of the suit from 1895 to December, 1901, by reason of documentary evidence being beyond their control, and in the hands of an attorney, who refused to deliver the same, and put them off with assurances that he would try their cause, were insufficient to excuse 10 years' delay in bringing the suit, not only because of their general character, but also because they did not cover, in their explanation, the period from December, 1901, to May, 1903, when suit was filed, nor the period from the accrual of the cause of action and up to 1895.

Appeal from Supreme Judicial Court, Bristol County.

Bill in equity by Joseph Tetrault and others against Delphine Fournier and others. From a decree dismissing the bill after a hearing on demurrer, plaintiffs appeal. Affirmed.

The fifteenth paragraph of the amended bill, referred to by the court, is as follows:

"(15) The plaintiffs have from 1895 to December, 1901, been delayed in bringing this action by reason of certain documentary evidence therein being beyond their control; said evidence being in the hands of one of said attorneys, who refused, without cause, to surrender the same, but put the plaintiffs off from time to time with the assurance that he would try their said cause."

The original bill was filed and entered on May 18, 1903.

A. G. Weeks, for plaintiffs. L. E. Wood, H. A. Dubuque, and Jackson, Slade & Borden, for defendants.

LORING, J. The case made by the bill as originally filed (assuming that the allegations were sufficiently precise to state a case) is that both foreclosures are voidable because of fraud and mismanagement by the mortgagee while in possession, and of a refusal to account on demand. It is not pretended that the mortgagor or her heirs, the present plaintiffs, were ignorant of the fact that the mortgage had been foreclosed. It appears that more than 10 years have elapsed since the date of the later foreclosure. That convicts the plaintiffs and their ancestor of laches. *Learned v. Foster*, 117 Mass. 365; *Fennyery v. Ransom*, 170 Mass. 303, 49 N. E. 620. See, also, *Bancroft v. Sawin*, 143 Mass. 144, 9 N. E. 539. Where laches appears on the face of the bill, the defense can be set up by demurrer. *Snow v. Boston Blankbook Mfg. Co.*, 153 Mass. 456, 457, 26 N. E. 1116. This defect has not been cured by the amendment. To escape from the imputation of laches, it was incumbent on the plaintiffs to allege such facts as showed an excuse. The allegation here does not go far enough. It is: "The plaintiffs have been delayed in the bringing of this action by the negligence and misconduct of certain attorneys whom they have employed to protect their interests therein, but who have either done nothing, or have so unskillfully managed the said action that the plaintiffs

have wholly failed to secure the relief to which they are and were entitled; said attorneys being at no time able to respond in damages for their said negligence and misconduct." Such an allegation is too general a one to put the defendants to the burden of a trial. The plaintiffs may have been delayed without being excused from bringing this suit. The allegation here is like a general allegation of fraud, which it is well settled is not enough to put on a defendant the burden of going to a trial. As to this, see *Nye v. Storer*, 168 Mass. 53, 46 N. E. 402, where the demurrer was a general demurrer; *Wallingford v. Mutual Society*, 5 App. Cas. 685. See, also, *Nichols v. Rogers*, 139 Mass. 146, 29 N. E. 377; *Garst v. Hall & Lyon Co.*, 179 Mass. 588, 61 N. E. 219, 55 L. R. A. 631; *Fogg v. Blair*, 139 U. S. 118, 11 Sup. Ct. 476, 35 L. Ed. 104; *Van Weel v. Winston*, 115 U. S. 228, 6 Sup. Ct. 22, 29 L. Ed. 384; *United States v. Atherton*, 102 U. S. 374, 26 L. Ed. 213.

The allegations in the fifteenth paragraph, also, are open not only to this objection, but to the further objection that they do not cover 3 years and 4 months of the 10 years or of the 12 years, as one or the other method of foreclosure is taken to be under attack.

It is not necessary in this case to consider the cases relied on by the plaintiffs (*Denton v. Noyes*, 6 Johns. [N. Y.] 296, 5 Am. Dec. 237; *Dinwiddie v. Self*, 145 Ill. 290, 33 N. E. 802; *Whitridge v. Whitridge*, 76 Md. 54, 24 Atl. 645; *Boling v. Raleigh & Gaston Railroad*, 88 N. C. 62), or those relied on by the defendants (*Ayres v. Morehead's Adm'r*, 77 Va. 586; *Callaway v. Alexander*, 8 Leigh [Va.] 114, 31 Am. Dec. 640; *Ives v. Sargent*, 119 U. S. 652, 7 Sup. Ct. 436, 30 L. Ed. 544).

Decree affirmed.

(187 Mass. 35)

CLARK et al. v. KNOWLES.

(Supreme Judicial Court of Massachusetts.
Bristol. Nov. 22, 1904.)

FOREIGN CORPORATIONS — ENFORCING STOCK-
HOLDERS' LIABILITY — PARTIES — CON-
STRUCTION OF FOREIGN STATUTES.

1. A suit in equity by creditors of a Colorado corporation, on behalf of themselves and other creditors who may choose to come in, against a Massachusetts stockholder, to enforce his double liability, under *Sess. Laws Colo. 1885*, p. 204, § 1, cannot be maintained; the statute contemplating only a pro rata contribution by all the stockholders, sufficient to satisfy creditors. Hence only a suit in equity, to which the corporation is a party, brought for the benefit of all the creditors against all the stockholders, can be maintained.

2. The decisions of the courts in another state construing a statute of that state will be followed only as to the meaning of the substantive provisions of the statute, but the mode of procedure and practice in giving the remedies provided by the statute depends on the law of the place where the remedy is sought.

Appeal from Superior Court, Bristol County.

Creditors' bill by David T. Clark and others against Henry M. Knowles, individually and as executor of the estate of John P. Knowles, deceased. From a decree dismissing the bill on demurrer, plaintiffs appeal. Affirmed.

Homer W. Hervey, for appellants. E. D. Stetson, for appellee.

KNOWLTON, C. J. The plaintiffs, 425 in number, averring that they are the only known creditors of the Colorado State Bank of Grand Junction, a corporation, bring this bill, in behalf of themselves and all other creditors, against the defendant, as a stockholder in the bank. It is alleged that the corporation is insolvent, that proceedings to wind up its affairs have been taken, that a receiver has been appointed under the laws of Colorado, and that certain dividends have been paid. It is said that a large amount of indebtedness is still unpaid, while there is but little property of the corporation that can be used to pay it.

The statute of Colorado, found on page 264 of the Session Laws of 1885, is as follows: "Section 1. Shareholders in banks, savings banks, trust deposit and security associations, shall be held individually responsible for debts and engagements of said associations, in double the amount of the par value of the stock owned by them, respectively." It is averred that the construction, interpretation, and meaning of this statute, as determined by the court of last resort in Colorado, are in substance as follows: "Each shareholder of record at the date of the bank's failure is individually and severally liable for the debts and obligations of the bank, in an amount equal to twice the par value of the stock so held by him; and this liability is in addition to, and independent of, any liability on account of his original subscription for the stock. This liability in double the par value of his stock is in the nature of additional security to the creditors in dealing with the bank, and constitutes a fund for the benefit and protection of all creditors. It should properly be recovered in an action brought by one or more of the creditors for the common benefit of all creditors. Neither the bank nor the assignee is interested in this fund, nor can either enforce the liability, nor is either a proper or necessary party to any action brought to enforce such recovery. The aforesaid fund is exclusively for the benefit of the creditors, and forms no part of the assets of the corporation. While in the first instance the assets of the bank or corporation may constitute the primary or regular fund for the payment of corporate liabilities, when by reason of dissolution or insolvency an action against the corporation would be unavailing, or when the remaining assets, if any, consist of worthless or doubtful claims, or claims in litigation, the creditors are not required to await the collection of such. The

shareholders must pay promptly, and take upon themselves the onus and risk as to all such claims, looking to the assignee for whatever may be realized on remaining assets." This statute, so interpreted, apart from the statement that neither the bank nor the assignee is a necessary or proper party to an action brought for recovery under it, of which we will speak more particularly later, shows that on the establishment of such a corporation a fund is created, in addition to the assets of the corporation, as a guaranty to creditors that the corporation's debt will be paid. It is to be collected for the protection of all creditors, each one of whom has an interest in it. While each stockholder is individually and severally liable for the payment of his share, his liability is like that of all other stockholders, and ultimately each should pay only his proper proportion, according to his ownership of stock. But this liability outside of and in addition to the liability of the corporation itself, is only collateral to it; the corporation being under the primary obligation to pay. It follows that if the stockholders, or any of them, should pay corporate debts more than the excess of the indebtedness above the amount which the assets of the corporation are sufficient to pay, they could recover back the excess of their payment from the corporation, or, if any one of the stockholders should pay more than his proper proportion, he would have a right to a contribution from other stockholders to reduce his loss to its proper proportion. In all essential particulars, therefore, in reference to the proper mode of giving a remedy and of adjusting the rights of the parties in interest, this statute calls for procedure similar to that referred to in many cases, namely, by a suit in equity, to which the corporation is a party, brought for the benefit of all the creditors against all the stockholders. *Hadley v. Russell*, 40 N. H. 109; *Erickson v. Nesmith*, 4 Allen, 233; *Post v. Toledo, etc., Railroad Co.*, 144 Mass. 342, 11 N. E. 540, 59 Am. Rep. 86; *New Haven Horse Nail Co. v. Linden Spring Co.*, 142 Mass. 349, 7 N. E. 773; *Hale v. Allinson*, 188 U. S. 56, 23 Sup. Ct. 244, 47 L. Ed. 380; *Finney v. Guy*, 189 U. S. 335, 23 Sup. Ct. 558, 47 L. Ed. 839; *Terry v. Little*, 101 U. S. 216, 25 L. Ed. 864; *Elkhart National Bank v. Northwestern Guaranty Loan Co.*, 87 Fed. 252, 30 C. C. A. 632; *Marshall v. Sherman*, 148 N. Y. 9, 42 N. E. 419, 34 L. R. A. 757, 51 Am. St. Rep. 654. Ordinarily such a bill cannot be maintained elsewhere than in the state where the corporation is organized. There must be jurisdiction of the corporation as well as of the stockholders. The general principles which lie at the foundation of the decisions in the cases above cited are controlling in the present case. Accordingly it was held in *Fates v. Day*, 198 Pa. 513, 48 Atl. 407, 82 Am. St. Rep. 811 (a decision under the statute now before us made since the decision in *Zang*

v. Wyant, 25 Colo. 551, 56 Pac. 565, 71 Am. St. Rep. 145, interpreting the statute), that the personal liability of a stockholder in Pennsylvania could not be enforced by a bill in equity, because the corporation and the other stockholders were not made parties defendant. A like decision was made by the Supreme Court of Rhode Island in *Miller v. Smith*, 58 Atl. 634, which was also since the decision in *Zang v. Wyant*; the language of the court being in part as follows: "The statute contemplates a proceeding in equity in Colorado against all the shareholders to establish a pro rata liability, and, until such has been had, this court cannot enforce the liability against a single shareholder." In reference to the statement in the bill that, under the decision of the Supreme Court in Colorado, neither the corporation nor the assignee is a proper party to the bill, we do not understand that the court has so decided. We understand the decision referred to in the bill is that in *Zang v. Wyant*, *ubi supra*, and we understand that decision to have gone on the ground that the defendants had waived their right to set up a want of proper parties by answering over after the demurrer. But if we take the statement of the bill to be correct, as perhaps we are bound to do on this demurrer—it being a statement of the law of another state—the result is the same. Except in the last part of a single sentence which we have quoted, in reference to the necessity or propriety of making the corporation a party, there is nothing in the bill which indicates that the true construction of the statute is different from our statement of it already made. In all other particulars there is no question about the meaning of the act, according to the interpretation referred to in the bill. It is a familiar rule of pleading in equity that all persons interested in the subject-matter of the suit shall be either plaintiffs or defendants, that the rights of all may be settled, complete justice be done, and future litigation prevented. This rule makes it necessary in this case to have all the stockholders joined as defendants. It makes it equally necessary to join the corporation or its representative, the assignee. To say nothing of the importance of bringing in to defend against the claims of creditors the party which alone has knowledge of them, a court of equity will not compel the stockholders to go to trial and submit to a decree establishing claims against them, and leave the corporation at liberty to show that the claims are groundless when the stockholders afterward seek to hold the corporation upon its primary liability to the extent of the assets which may still be applicable to the payment of its debts. The corporation should be brought in, so that the decree establishing the indebtedness may be binding in favor of the stockholders against the corporation, as well as against the stockholders in favor of the creditors. If the court of Colorado has

decided otherwise, its decision is not binding upon this court. *Scott v. Neely*, 140 U. S. 106, 116, 11 Sup. Ct. 712, 35 L. Ed. 358; *Elkhart National Bank v. Northwestern Guaranty Loan Co.*, 87 Fed. 252, 30 C. C. A. 632; *Finney v. Guy*, 189 U. S. 335, 23 Sup. Ct. 558, 47 L. Ed. 839. Its decision as to the meaning of the substantive provisions of the statute must be followed, and we do not attempt to question it. But when the substantive provisions are made plain, the mode of procedure and practice in giving the remedies provided by the statute depend upon the law of the place where the remedy is sought. We cannot give effect to the provisions of this statute in Massachusetts if it calls for remedies which, according to our rules of practice, cannot be given for want of jurisdiction of the necessary parties. Whether in proceedings instituted in Colorado, to which the corporation is a party, creditors may have a remedy under this statute against nonresident stockholders upon whom no service is made, so far as to bind them upon the principles stated in *Howarth v. Lombard*, 175 Mass. 570-577, 56 N. E. 888, 49 L. R. A. 301, by a decree establishing everything that need be established in the name of the corporation, and thus have a foundation upon which to stand in a subsequent proceeding where service can be made upon these stockholders, is a question which we need not now decide. See *Hancock Bank v. Ellis*, 172 Mass. 39-45, 51 N. E. 207, 42 L. R. A. 396, 70 Am. St. Rep. 232. Even if the remedy provided should prove to be entirely ineffectual against nonresident stockholders, it would not be a sufficient reason for our disregarding established principles and rules of practice.

The proceedings in the courts of Colorado set out in the bill have not determined enough to subject the defendant to a decree in favor of the plaintiffs here. It appears that he was not made a party to the suit against stockholders there. Neither the corporation nor the assignee was a party. For these reasons, nothing that was determined in that suit can affect the defendant. The proceedings in insolvency do not include that which establishes liability in this case.

The recent decisions in this court and elsewhere by which the liability of stockholders in foreign corporations has been enforced after a judgment obtained against the corporation stand upon different grounds, and need not be considered. *Hancock National Bank v. Ellis*, 166 Mass. 414, 44 N. E. 349, 55 Am. St. Rep. 414, s. c. 172 Mass. 39, 51 N. E. 207, 42 L. R. A. 396, 70 Am. St. Rep. 232; *Howarth v. Lombard*, 175 Mass. 570, 56 N. E. 888, 49 L. R. A. 301; *Broadway National Bank v. Baker*, 176 Mass. 294, 57 N. E. 603; *Whitman v. Oxford National Bank*, 176 U. S. 559, 20 Sup. Ct. 477, 44 L. Ed. 587; *Hancock National Bank v. Farnum*, 176 U. S. 640, 20 Sup. Ct. 506, 44 L. Ed. 619.

Decree affirmed.

(187 Mass. 97)

MILLERICK et al. v. PLUNKETT et al.
(Supreme Judicial Court of Massachusetts.
Bristol. Nov. 29, 1904.)

CONSTRUCTION OF WILL—PROPERTY DEVISED.

1. Testator devised to his wife a "house and the land appurtenant thereto, being the house I now live in"; describing the land by metes and bounds, which stopped at the west boundary of the lot originally bought by him, but did not include land under an addition to the house, and a barn back of it, which he built on land subsequently purchased. Several years before his death, testator conveyed land west of this lot, and up to a line 23 feet from the west line described in the will. The land next west of the addition was always used as a passage to the yard and for a path to the barn, and the barn was used with the house; being connected by a plank walk. *Held*, that the strip of land west of the house should go with the lot devised.

Report from Court of Registration, Bristol County; Davis, Judge.

Petition for registration of title to an estate. A decree was ordered for registration of the title, and respondent excepted; the case being reported to the Supreme Judicial Court. Decree for petitioners.

J. W. Cummings, for petitioners. Jennings, Morton & Brayton and C. B. Snow, for respondents.

KNOWLTON, C. J. This case presents but a single question, namely, what is the proper interpretation of the will of Joseph Plunkett in reference to the devise to his wife of the house in which he lived, with the land appurtenant thereto? The difficulty arises from the use of terms of description in that devise and in other parts of the will which are inconsistent with one another. The mistake probably arose from the testator's failure to remember the true location of the boundary line between lots acquired by him at different times. The will was made in 1895, and he had owned the greater part of the land since 1867. The other part his wife acquired in 1869, and conveyed to him, through a third person, in 1872. The cottage house in which the testator lived, as originally constructed, had its westerly wall within about 2½ feet of the westerly line of the lot which he first purchased. In 1882 he built an L on the west side of the house, extending it 10½/10 feet, so that it stood over between 7 and 8 feet upon the land conveyed to him by his wife. This L contained two bedrooms, and was supported by a stone foundation. The next year a very small barn was moved upon the rear portion of the lot, so that a part of it was directly back of the L, and a part of it extended further westward. According to the plan, the front part of the barn was not more than 6 or 8 feet from the rear of the L. The cellar of the house had but one door, and this was put in by the testator. It was connected directly with the barn by a path. The rear door of the original house was also connected with the barn by a plank walk. This barn

was afterwards used in connection with the house—in summers for cooking and washing clothes until after the year 1895, and afterwards mostly for keeping wood. The household washing was done in the cellar, and the clothing was then carried out through the cellar door, and along the path around the westerly side of the L to the clothesyard, easterly of the house. The lot which originally went with the house before the construction of the L was a little less than 60 feet long upon the street, and nearly 54 feet deep from front to rear.

The language of the first clause of the will is as follows: "First, I devise to my wife Ann Plunkett the cottage house and the land appurtenant thereto, being the house I now live in, and situated on William street in Fall River. The land begins," etc. Then follows a description by metes and bounds, which stops at the westerly line of the lot originally bought by him, and which does not include the land under the greater part of the L. The lot formerly owned by his wife extended westerly along the street 125 feet from the line of the lot first bought to Mulberry street. The third clause of the will is as follows: "Third, I devise to my sons William Plunkett, Joseph Plunkett, Edward Plunkett and John Francis Plunkett, the lot of land at the corner of William and Mulberry streets, which is land formerly owned by the Blackstone Manufacturing Company, and contains twenty-four and sixty-seven one-hundredths rods of land more or less." The quantity of land mentioned in this devise is such as to include the land under the L up to the line of the testator's original purchase. In 1897 the testator sold and conveyed this lot at the corner of William and Mulberry streets to Richard and Catherine I. Golden, except that he made the length of the lot running from Mulberry street along William street only 102 feet, leaving 23 feet between the line thus established and the westerly line of his first purchase, upon which unconveyed portion stood the greater part of the L and all of the barn. The question is, where is the westerly line of the house lot devised to the testator's wife?

It is plain that the description of the appurtenant land by metes and bounds is incorrect, for there can be no doubt that the house and land appurtenant included at least all the land under the house—the L as well as the older part of the house. It follows with equal certainty that the description of the land mentioned in the third clause, by a reference to its quantity and the source from which he obtained it, is also inaccurate. The intention of the testator that his wife should have the house and the land under it, and the land which properly belonged with it, is too plain to admit of question, and other language in the will must yield to this provision. Inasmuch as the other language that would fix the boundary line,

if it stood alone, is erroneous both in the description of the devise to the widow and in that contained in the third clause, we are left to determine, as well as we can, where to establish the line which will include the land which is appurtenant to the house, as the testator understood it. As the land next westerly of the L was always used with the L as a passageway to the clothesyard and for a path to the barn, and as the barn was always used with the house—being connected with different parts of it by a path and by a plank walk—it would be too narrow a construction to hold that there was no land appurtenant to the house on the west, outside of the walls of the L. The land which was retained by the testator when he sold the lot at the corner of William and Mulberry streets extends only to a line between 15 and 16 feet westerly of the line of the L, and apparently not more than 3 or 4 feet westerly of the corner of the barn. The previous use of the property by the testator and his family, together with a sale of the corner lot mentioned in the third clause after the will was made, with a boundary leaving 23 feet of the lot to be used as it had been used, and the occupation of the testator afterwards until his death, with no change in his will, are indications that he intended to include in the devise to his wife not merely the land under the L, but also a reasonable quantity westerly of it, which would include the barn, and leave the boundary a straight line from front to rear, as shown in the deed to Richard and Catherine I. Golden.

We are of opinion that the land in controversy was included in the devise to the testator's wife. The ruling requested in favor of the petitioners should have been given, and a decree is to be entered in their favor accordingly. So ordered.

(187 Mass. 77)

EVENSEN v. LEXINGTON & B. ST. RY CO.

(Supreme Judicial Court of Massachusetts.
Worcester. Nov. 23, 1904.)

STREET RAILROADS—COLLISIONS WITH TEAMS—
NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—
VICARIOUS NEGLIGENCE—QUESTION FOR
JURY.

1. The right of one who has intrusted himself to the care of another, with whom he is driving, to recover for injuries caused by the negligence of a street car company, is dependent on the exercise of due care by his companion.

2. In an action for injuries to a person in a wagon, caused by collision with a street car, whether the driver of the team was in the exercise of due care *held*, under the evidence, a question for the jury.

3. In an action for injuries to a person in a wagon, caused by collision with a street car, whether the motorman of the car was guilty of gross negligence, within the meaning of Rev. Laws, c. 171, § 2, authorizing a recovery for the death of a person caused by gross negligence, *held*, under the evidence, a question for the jury.

¶ 1. See Negligence, vol. 37, Cent. Dig. § 147.

Exceptions from Superior Court, Worcester County.

Action by Eline A. Evensen, administratrix of the estate of Martin Evensen, against the Lexington & Boston Street Railway Company. There was a verdict for defendant, and plaintiff excepted. Exceptions sustained.

This was an action of tort brought by the plaintiff, in her capacity as administratrix of the estate of Martin Evensen, against the defendant, for the use and benefit of herself and seven minor children, on account of the death of her intestate. The declaration is in two counts. The evidence material to the issues raised was as follows: At about quarter before 6 on the evening of January 29, 1902, the plaintiff's intestate was riding at a speed of about four miles an hour, in a farm wagon owned and driven by one Martin Helchier, down Academy lane, toward Sudbury Road, which is one of the principal highways in the thickly settled part of Concord, Mass. They were on their way to Helchier's home, where Evensen was visiting. The wagon containing Helchier and Evensen came into collision with an electric car of the defendant company proceeding in a northerly direction along Sudbury Road from Thoreau street, so called, toward Main street. Evensen was thrown from the wagon to the ground, and received injuries from which he died without conscious suffering. Academy lane is a public highway running from Middle street easterly to Sudbury Road, about 12 feet wide, with sidewalks on both sides, and along the edge of the sidewalk on the south side thereof, between said road and said street, are quite large elm trees, about 2 or 3 feet through, with branches overhanging said lane. Sudbury Road is about 50 feet wide, and macadamized, and on the edge of the sidewalk, on the Selmes side, and southerly from Academy lane, are large elm trees, about 2 or 3 feet through, with branches overhanging the street. The trees are shown by black circles on the plaintiff's plan, and distances between trees are shown by red figures thereon. Defendant's location runs in a straight course down a slight incline from Thoreau street past Academy lane to Main street, which is a short distance beyond the place of accident. Distance from Thoreau street to corner of Sudbury Road and Academy lane is about 723 feet.

Geo. R. Warfield, for plaintiff. John R. Thayer, Arthur P. Rugg, and Henry H. Thayer, for defendant.

HAMMOND, J. The team was owned and driven by Helchier, who was sitting upon the right-hand side, while Evensen, the plaintiff's intestate, was sitting on the left-hand side. The evidence tended to show that the latter "was not feeling well," and had the collar of his overcoat turned up, and that

he had intrusted himself to the care of the driver. The question, therefore, upon this branch of the case, is whether Helchier was in the exercise of due care. It would serve no useful purpose to recite the evidence in detail. If the plaintiff's testimony is to be believed, Helchier, at several points on Academy lane, as he was approaching Sudbury Road, looked for the car. He was listening all the time, and he heard no gong or whistle, or anything else indicating the approach of a car. While at some points he could see two or three hundred feet up the track on Sudbury street, his view was wholly obstructed at others; and, as he came near the corner of the two streets and near the track, the view was much obscured by overhanging trees, both upon the lane and upon the road. Upon this, in connection with the other evidence—especially that with reference to the speed of the car and the darkness—we cannot say, as matter of law, that Helchier was not in the exercise of due care. It was a question for the jury. *Kelley v. Wakefield & Stoneham Street Railway*, 179 Mass. 542, 61 N. E. 139.

It is strongly urged by the defendant that there was no evidence of gross negligence on the part of the servants of the defendant, that there is nothing to show that the rate of speed was any greater than usual, and that the failure to sound the gong is not of itself gross negligence. There is, perhaps, no term of which it is more difficult to give a practically useful definition, or even to form a practical conception, than this term "gross negligence," as used in the statute under which this action is brought (Rev. Laws, c. 171, § 2), especially when the dividing line between that and what is called ordinary negligence is to be drawn. In some respects it is perhaps unfortunate that a right of action may be made to depend upon this dividing line. Of course, the greater includes the less, and where there is gross negligence there is always negligence. The line between due care and negligence may be stated clearly enough for the practical administration of the law, but, when one leaves the shore of due care and plunges into the sea of negligence, how far out can he go before he crosses the dividing line between what is called ordinary negligence and gross negligence? The most that can be said, perhaps, is that gross negligence is further from due care than ordinary negligence, but that is not entirely satisfactory. Still the dividing line is left undisclosed, for how far out does ordinary negligence extend? We are sensible of the danger of drawing the line too near to due care, and of finding gross negligence where only ordinary negligence exists. Each case, however, must be decided according to its peculiar features.

In this case it appeared that Academy lane and Sudbury Road were both public highways in the thickly settled residential part of the town. The evidence tended to

show that a person traveling upon the lane could have only a very imperfect view up Sudbury Road; the view being entirely cut off at some points by houses, and greatly obscured at others by the overhanging trees located upon the south side of the lane and the west side of the road. The same obstructions, of course, would have a similar effect upon the view which a motorman on the road would have of a traveler on the lane. The night was dark, and there was evidence that no gong was sounded, and that the car was going from 10 to 12 miles an hour down the slight incline of the road; that Evensen's body was found on the track about 70 feet from the place of the collision, where it evidently had been thrown or carried by the car; and that the car stopped about 35 or 40 feet further on. In view of the situation of the two ways in a thickly settled part of the town, the amount of travel reasonably to be expected thereon, the objects which obstructed or impaired alike the view which the traveler upon the lane could get of the car and that which the motorman could get of the traveler, the darkness of the night, the speed of the car, the incline of the rails, their nearness to the west side of the road and to the trees on that side, rendering it impossible for a team coming out of the lane to avoid a collision by turning to the west of the track, and especially the very serious consequences likely to arise in case of collision with a car moving so rapidly, we cannot say, as matter of law, that the motorman was not guilty of negligence, or that the negligence was not of so high a degree as to amount to gross negligence. The question was for the jury.

Exceptions sustained.

(187 Mass. 15)

COMMONWEALTH v. BECK.

SAME v. MURPHY.

(Supreme Judicial Court of Massachusetts.
Worcester. Nov. 22, 1904.)

INTOXICATING LIQUORS—OFFENSES—TRANSPORTATION—STATUTES—CONSTRUCTION.

1. Rev. Laws, c. 100, § 49, requiring intoxicating liquor which is to be transported for delivery in a city or town in which licenses of the first five classes are not granted to be delivered by the seller to a railroad corporation, or to a person or corporation regularly and lawfully conducting a general express business, in vessels marked with the name and address of the seller and of the purchaser, does not make it an offense for the seller to deliver liquor for carriage to a person other than a carrier or one engaged in a general express business, nor for such a person to transport the liquor; and a complaint charging that defendant, "not then and there regularly and lawfully conducting a general express business," brought and delivered intoxicating liquor into one of the designated cities, is bad.

2. Laws in derogation of the liberty of the citizen are to be strictly construed, and what, before their passage, was a legal employment does not become generally illegal when, in the exercise of the police power, a statute is passed

prohibiting the prosecution of such employment unless conducted in a certain manner by those whom it designates, but containing no language which, in the ordinary meaning of words, makes it applicable to other persons.

Exceptions from Superior Court, Worcester County; Chas. W. Bell, Judge.

August Beck and one Murphy were separately convicted of transporting liquor, and except. Exceptions sustained.

The complaints under which the prosecutions were brought read as follows: "Commonwealth of Massachusetts. To the police court of Fitchburg, in the county of Worcester and commonwealth of Massachusetts, H. L. Flint, of Fitchburg, in said county, in behalf of said commonwealth, on oath complains that August Beck, of Fitchburg, in said county, heretofore, to wit, on the 6th day of July in the year nineteen hundred and four, at Fitchburg, in said county, unlawfully did transport for hire and reward, for delivery in said Fitchburg, intoxicating liquor, said Fitchburg then being a city where licenses of first five classes to sell intoxicating liquors are not granted, and said August Beck not then and there regularly and lawfully conducting a general express business. The said complainant believes said defendant will not appear upon a summons. He therefore prays said defendant may be apprehended and held to answer to this complaint, and further dealt with relative to the same, according to law, and that the complainant and * * * may be summoned to testify what they know relative to the subject-matter thereof before said court."

Rockwood Hoar, Dist. Atty., and Geo. S. Taft, Asst. Dist. Atty., for the Commonwealth. David I. Walsh, Thos. L. Walsh, John E. Sullivan, and David F. O'Connell, for defendants.

BRALEY, J. No offense known to the common law is described in these complaints, and, if they can be sustained, it must be on the ground that they charge a misdemeanor under Rev. Laws, c. 100, § 49. This section, in substance, was originally St. 1897, p. 249, c. 271, § 1, which was before this court for construction in *Com. v. Intoxicating Liquors*, 172 Mass. 311, 52 N. E. 389, when it was said: "The act was manifestly intended to meet some difficulties which had been encountered by the government in the prosecution of common carriers for illegally keeping of intoxicating liquors, and to make it more difficult for the guilty to escape detection, when setting up the fraudulent defense that the liquors found in the possession of the carrier were for delivery by him as such to some person." The general rule of criminal pleading that it is sufficient to charge a statutory offense in the language of the statute cannot be applied, for there is no allegation that each defendant as a common carrier, or as a person lawfully conducting a general express business, had violated the

provisions of this section. *Com. v. Ashton*, 125 Mass. 384, 385. The offense described is that each defendant "not then and there regularly and lawfully conducting a general express business" brought and delivered intoxicating liquor for hire or reward in a city where licenses of the first five classes to sell such liquors had not been granted, and by its very terms excludes therefrom those whom the statute was designed to reach and punish. Nor are the cases covered by the exception to the rule that, where the language of the statute is so general as to include cases which come within its terms, though not within its spirit, the offense is to be gathered from the whole act, according to the intention of the Legislature, for the attempt is made in these complaints to enlarge, not to restrict, the use of language, and to make the alleged offense penal by implication. *Com. v. Barrett*, 108 Mass. 302, 303. When the duly licensed seller delivers to the railroad corporation, or to others regularly and lawfully conducting a general express business, intoxicating liquor for transportation into a city or town where licenses of the first five classes have not been granted, he is required to plainly and legibly mark the vessels or packages containing the liquor with his name and address and of the purchaser or consignee, but there is no express language declaring that delivery by him of such liquor for transportation to persons other than those described shall be unlawful, or subject him to prosecution and punishment. If the seller is free to deliver such liquors for carriage to persons other than to those named in the statute, no good reason is shown why those to whom the delivery is made are not equally free to transport them without the act of transportation being considered a crime. To bring the defendants within the allegations of the complaints, resort must be had to the argument that the crime described is to be gathered from the general purpose of the law as shown by Rev. Laws, c. 100, §§ 49, 50, even if there is no direct language used creating such an offense. Laws in derogation of the liberty or general rights of the citizen, however, are to be strictly construed, and what before their passage was a legal and legitimate employment or calling, does not become generally illegal and criminal when, in the exercise of the police power, a statute is passed prohibiting the prosecution of such employment or calling unless conducted in a certain manner by those whom it designates, but contains no language which, in the ordinary meaning of words, makes it applicable to other persons. *Com. v. Martin*, 17 Mass. 359, 362; *Com. v. Sylvester*, 13 Allen, 247; *Com. v. Worcester & Nashua R. R.*, 124 Mass. 561, 563. It is to be presumed that, if it had been intended to impose restrictions upon the transportation of intoxicating liquors in addition to those which now appear in our laws, such intention would have been

shown in clear and explicit language. This has not been done, and the inference follows that it was not intended to make the act with which the defendants are charged a crime. The motion to dismiss should have been granted in each case.

Exceptions sustained.

(187 Mass. 8)

FERGUSON v. UNION MUT. LIFE INS. CO.

(Supreme Judicial Court of Massachusetts.
Hampden. Nov. 22, 1904.)

INSURANCE — LIFE POLICIES — CONSTRUCTION —
NONFORFEITURE PROVISIONS — STIPULATIONS
FOR FORFEITURE — PREMIUMS — PAYMENT — EVIDENCE — SUFFICIENCY.

1. Clauses in a life insurance policy should be so construed, if possible, as to give force and effect to each clause.

2. Where an insurance policy provided for a forfeiture if any annual premium, with the interest due thereon, should not be paid, or if any note, check, or draft given in payment of any annual premium, should not be paid according to its provisions, and further provided that the company should have the right to set off any demand against either the assured or insured, arising in connection with the insurance, against any claim for which the company should be liable, it was implied that annual premiums might be paid in whole or in part by the note of either the assured or insured.

3. Where, after a first note for insurance premiums had been given, subsequent notes not only included the amount of the former note, which was surrendered, but were increased by the part of the yearly premium then due, it could not be contended, against a finding that the premiums had been paid, that the last premium note given was only the last renewal of the first and succeeding notes.

4. In an action on an insurance policy, evidence held sufficient to support a finding that six annual premiums had been paid on the policy, which itself provided no exclusive mode of payment.

5. Where, by the express language of an insurance policy, the beneficiary agreed to pay the premiums, she, as well as the insured, was bound by clauses relating to their payment, and providing for a forfeiture in case of failure to make payments.

6. A policy in a foreign insurance corporation is not affected by the provisions of the statutes authorizing a recovery of the cash surrender value of forfeited policies.

7. Where an insurance policy provided that, after the payment of two or more annual premiums, it should become a "paid-up, nonforfeiture policy" for an amount equal to one-tenth of the sum insured for each premium paid, a further provision of the policy that if any annual premium, or note, check, or draft given in payment or part payment of an annual premium, should not be fully paid on the day and in the manner provided for, the policy should be null and void and wholly forfeited, was limited in its scope, after the payment of the second annual premium, to the contract as a general policy of life insurance; and the failure to pay a third or subsequent premium, or premium note given therefor, did not destroy the effect of the payment of previous premiums, which entitled the assured to a "paid-up, nonforfeiture policy."

8. A forfeiture in an insurance policy is for the benefit of the insurer, and should not be construed as broader than the terms which create it; and, if the stipulations creating it are susceptible of more than one meaning, that which is most favorable to the insured should be adopted.

9. An insurance policy provided that, after two or more annual premiums had been fully paid, the policy should become a "paid-up, nonforfeiture policy" for a stated amount. Subsequent stipulations provided for a forfeiture for nonpayment of annual premiums, or notes, checks, or drafts given in payment of annual premiums, according to their terms. A premium note given by insured provided that its acceptance should not affect the condition in the policy relative to nonpayment of annual premiums or interest. *Held*, that the failure to comply with the stipulations of the premium note as to the time and manner of payment provided for therein did not destroy the contract of paid-up insurance, but merely discontinued the general policy of insurance.

Exceptions from Superior Court, Hampden County; Lloyd E. White, Judge.

Action by Lydia J. Ferguson against the Union Mutual Life Insurance Company. There was a finding for plaintiff, and defendant excepted. Exceptions overruled.

Elva H. Young, for plaintiff. E. H. Lathrop, for defendant.

BRALEY, J. The policy of insurance upon which suit is brought contains provisions not generally found combined in such contracts, in the form presented. In the first paragraph it purports, in full-faced capital letters, to be a "nonforfeiture whole life" policy, issued upon application of the wife of the insured for her separate use and benefit, and after reciting the amount of the annual premium, and receipt of its first payment, and the amount of insurance secured, expressly provides "that after two or more of said annual premiums have been fully paid, this policy becomes a 'paid-up, nonforfeiture policy,' for an amount equal to the sum of one-tenth of that hereby insured, for each and every premium which shall have been so paid, requiring no further payments of premiums, subject to no assessments, and entitled to its apportionment of the surplus accumulation in the ratio of its contribution thereto." This is immediately followed by the company's promise to pay "the said sum insured" upon notice and proof of death during "the continuance and before the termination of the policy," and also "the just claim of the assured * * * under this policy." It also contained these subsequent provisions: "Provided especially, and this policy is made, and it is accepted by the assured and the said insured upon the express condition that if the amount of any annual premium herein provided for is not fully paid, with the interest due thereon, on the day and in the manner so provided for, then this policy shall be null and void, and wholly forfeited. * * * It is a further condition of this policy, accepted by the assured and the said insured, that if at any time any note, check, or draft shall be given in payment, or part payment of any annual premium then due, or to become due, for or on account of this policy, and such note, check or draft shall not be paid according

to the provisions thereof, then said policy shall become immediately void, and the company be released from all obligation under it."

These clauses should not be construed as repugnant, unless irreconcilable with any reasonable interpretation which incorporates them as forming a harmonious plan for insuring the life of the plaintiff's husband; and a construction is to be adopted which, if possible, will give force and effect to each of them. *Campbell v. New England Mutual Life Insurance Co.*, 98 Mass. 381, 394; *Morrill & Whiton Construction Co. v. Boston*, 186 Mass. 217, 71 N. E. 550; *Thissell v. Schilling*, 186 Mass. 180, 184, 71 N. E. 300.

The clause of nonforfeiture was devised to work automatically, and, in order to become entitled to paid-up insurance, no affirmative action on the part of the assured or the insured became necessary, for as soon as two premiums, at least, had been paid, if the policy lapsed by reason of a failure to pay any annual premium thereafter due, she had a "paid up, nonforfeiture policy," for two-tenths of the whole amount; and, so long as the annual premium continued to be paid, each year added one-tenth more to the amount of insurance already secured.

As the only condition required to give life to this part of the contract was the payment of premiums, we proceed to inquire whether there was any evidence to support the finding made in favor of the plaintiff that six annual premiums had been paid in the lifetime of the insured. It is implied not only from the last two provisions already quoted, but from the further stipulation in the policy that "said company shall have the right to set off any demand it shall have against either said assured or insured, their assigns or representatives, arising incidentally to, or in connection with, this insurance, against any claim for which the company shall be liable thereon," that the annual premium might be paid in whole or in part by the promissory note of either the assured or insured. Beginning with the first payment, the annual premium was adjusted partly by a payment of money, and partly by the acceptance of the nonnegotiable promissory note of the insured, and after the first premium a statement of subsequent premiums was sent to him yearly by the secretary of the defendant. Each statement, after stating the amount of the annual premium, designated in detail the part to be paid in money, the amount of interest due on the "regular premium note" given the year before in part payment of the premium then due, and the amount of the "former note herewith returned"; and the balance showed the "total amount of the new note," and then directed that payment in this manner could be made to its "authorized agent," and when so made the policy would be continued "in force for one year." The agent, each year, on receiving the note and payment of the money, de-

livered the premium receipt, with the statement, "I have received the above payment in cash and notes;" and this course of dealing between the parties was uniform, and continued through several years. The last settlement was made February 17, 1875, when the insured paid the whole premium by two notes; one called a "cash note," and representing the percentage of the premium which should have been paid in money, and the other the "premium note," representing the part payable by such a note. This last note also included the amount of all notes previously given, for the insured, while paying the interest annually due thereon, had not paid any part of the principal of the six preceding notes. When the cash note became due, and remained unpaid, the secretary of the company wrote three indorsements on it, each extending the time of payment, and providing that, if then paid, "the payment of the within note * * * will hold the company liable under this policy," and thus by implication recognized the premium note as being part payment of premiums within the terms of the policy.

It is to be observed that, after the first note had been given, each new note not only included the amount of the former note which was returned and surrendered, but was increased by the note part of the yearly premium then due; and a possible argument that the last premium note given was only the last renewal of the first and succeeding notes, and hence the premiums had not been paid, is disposed of by the finding. *Eames v. Oushman*, 135 Mass. 573.

Under the terms of the policy, which provided no exclusive mode of payment, and thus left the parties free to adopt any method they pleased, and from the uniform course of dealing between them, the form and nature of the several transactions at the settlement of each annual payment, and the action taken by those lawfully representing the company, abundant evidence was furnished to support the conclusion of fact that six annual premiums had been paid on the policy. *White v. Connecticut Fire Insurance Company*, 120 Mass. 330, 332; *Pierce v. Charter Oak Insurance Company*, 138 Mass. 151, 160; *Agawam National Bank v. Downing*, 169 Mass. 297, 47 N. E. 1016; *Kendall v. Equitable Life Assurance Society*, 171 Mass. 568, 573, 51 N. E. 464; *Mowry v. Home Life Insurance Co.*, 9 R. I. 346, 355; *Union Cent. Life Insurance Co. v. Taggart*, 53 Minn. 95, 96, 56 N. W. 579, 43 Am. St. Rep. 474.

The defendant, however, further contends that, as the policy calls for a forfeiture if any note given in whole or part payment of premiums is not paid at maturity, "the contract lies both in the policy and in the notes given for premiums," and, as neither the last premium note nor the "cash note" were paid, there can be no recovery. *Pitt v. Berkshire Life Insurance Co.*, 100 Mass. 500. By the express language of the policy, the benefici-

ary agreed to pay the premiums; and she, as well as the insured, was bound by the clause relating to their payment, so that, if a failure to pay these notes forfeited all rights under it, she cannot recover at common law. See *Pingrey v. National Life Insurance Co.*, 144 Mass. 374, 382, 11 N. E. 562; *Boyden v. Massachusetts Life Insurance Co.*, 153 Mass. 544, 546, 27 N. E. 669. And as the defendant is a foreign corporation, the policy had no cash surrender value which she can recover under our statutes. *Haskell v. Equitable Life Assurance Society*, 181 Mass. 341, 342, 63 N. E. 899. Under this argument the plaintiff has no better standing than if she sought to recover upon a paid-up policy which contained the express condition that if a promissory note given in settlement of a premium due under the original policy, and outstanding when the paid-up policy was issued, remained unpaid, the policy would be forfeited. *Pitt v. Berkshire Life Insurance Co.*, ubi supra; *Holman v. Continental Life Insurance Co.*, 54 Conn. 195, 212, 6 Atl. 405, 1 Am. St. Rep. 97. Nor would it affect its force, if applicable, that all the premiums except the last had been paid in money, as a failure to pay the notes was in effect a failure to pay the last premium, and she would have forfeited not only all claim to future insurance, but also to the paid-up portion. If this policy had contained the provision that, after a certain number of premiums had been paid, upon a failure to pay future premiums the company would issue a paid-up policy for a certain sum, less any indebtedness due the company, such an argument ought not to prevail, for the right under such a contract to a paid-up policy would depend not upon a failure to pay an annual premium, but would rest on the number of such premiums already paid. By the contract in suit this result is obtained on the payment of the necessary number of premiums, but no further action, such as issuing a new policy for the amount of paid-up insurance, or indorsing the amount on the old policy on demand, was required. If the clause for nonforfeitable, paid-up insurance is to have any place in the plan of life insurance presented by this contract, it must be held to mean what it says, and to accomplish in this way a result similar to that reached under a form of contract to which we have already referred; and, if so, then a failure to pay a subsequent premium would not destroy the effect of the payment of two or more previous premiums, as being payments within the meaning of this part of the policy. If the second annual premium had not been paid, all benefits under the policy, of whatever kind, would have been forfeited. After that was paid, the right to paid-up insurance became vested, and the continuation of the general insurance would depend on the payment of the annual premium, while the clause declaring the failure to pay any note given in payment or part payment of it, if treated as equivalent to a failure to pay the pre-

mium itself, is limited in its scope, after the second annual premium had been paid, to the contract as a general policy of life insurance. *Cowles v. Continental Life Insurance Co.*, 63 N. H. 300, 301; *Bruce v. Life Insurance Co.*, 58 Vt. 253, 2 Atl. 710; *Symonds v. Northwestern Mutual Life Insurance Co.*, 23 Minn. 491.

If resort is now had to the last premium note, and which had not matured when the policy lapsed, the condition there contained is that the acceptance of the note "shall in no way affect the condition in said policy that the nonpayment of any portion of said annual premium, or the nonpayment of the annual interest hereon when due, shall in either case cause an immediate forfeiture of said policy." The portion of the premium to which reference is made was covered by the cash note, and, as the premium note had been accepted, the benefit secured by a payment of the cash note would have been a renewal of the general insurance for another year, and the addition of one-tenth of the face of the policy to the amount of paid-up insurance already accrued. But there is nothing in the conditions of the policy or of either note that directly refer to a forfeiture of the paid-up insurance if they are not paid, and it should not be read into them by implication, for a forfeiture is for the benefit of the insurer, and, where it is found to exist, is not construed as broader than the terms which create it; and, if such stipulations are susceptible of more than one meaning, that which is most favorable to the insured should be adopted. *McAllister v. New England Mutual Life Insurance Co.*, 101 Mass. 558, 561, 3 Am. Rep. 404; *Bartlett v. Union Mutual Fire Insurance Co.*, 46 Me. 500; *Hoffman v. Aetna Insurance Co.*, 32 N. Y. 406, 414, 88 Am. Dec. 337; *Reynolds v. Commerce Fire Insurance Co.*, 47 N. Y. 600, 604; *Allen v. St. Louis Fire Insurance Co.*, 85 N. Y. 473; *The Western Insurance Co. v. Cropper*, 32 Pa. 351, 356, 75 Am. Dec. 561; *Fowkes v. Manchester & London Assurance & Loan Association*, 3 Best & S. 917, 923.

A failure to comply with these executory stipulations should be held, therefore, to relate to their effect as conditions precedent to continuing the general policy in force, and not as designed to destroy the contract of paid-up insurance.

By this construction the different clauses of the policy are found not to be in conflict, but to present, combined in one contract, a form of life insurance that, after she had complied with certain clearly specified requirements, silently secured to the assured, from year to year, the full benefit ordinarily attaching to a paid-up policy, and at the same time conferred the protection of continued general insurance for the full amount of the policy so long as the annual premiums were paid in the manner adopted, while the defendant was amply protected by the express stipulation that upon the death of the insured, if

the settlement made was for either form of insurance, any indebtedness then due to it should be deducted from the amount to be paid to the plaintiff. *Cowles v. Continental Life Insurance Co.*, *Bruce v. Life Insurance Co.*, and *Symonds v. Northwestern Mutual Life Insurance Co.*, *ubi supra*.

Exceptions overruled.

(187 Mass. 109)

TRIPP v. MACOMBER.

(Supreme Judicial Court of Massachusetts.
Bristol. Nov. 29, 1904.)

REFERENCE—AUDITOR'S REPORT—FINALITY OF FINDINGS—REFUSAL TO RECOMMIT—TRIAL COURT'S DISCRETION—PRESUMPTIONS—CONTRACTS—CLAIM AGAINST DECEDENT'S ESTATE—EVIDENCE—COMPETENCE.

1. Where an auditor is appointed under the usual rule, and his report is merely evidence, and not final, the question of recommitment is in the discretion of the trial court.

2. Where a cause is referred to an auditor, whose findings of fact are to be final, and the report states the questions of evidence decided, and they were of a nature to have had an effect on the findings, and on appeal it appears that no reason was given for refusing to recommit which shows that the refusal was as a matter of discretion, the Supreme Court is justified in assuming that the refusal was equivalent to a ruling that there was no error in the auditor's rulings on the questions of evidence.

3. A son of defendant's testator sued to recover wages, which it was claimed the father had deposited in bank, and promised to hold subject to plaintiff's order. The executor claimed that plaintiff had worked on his father's farm for his board, lodging, clothes, and tobacco. *Held*, that it was proper to admit testimony as to items of property left by the testator, and their value, particularly as to his bank accounts.

4. It was proper to admit evidence to the effect that after the funeral witness read the will to plaintiff, and that he did not at that time make any claim, and that thereafter plaintiff executed a number of papers relative to the estate, but said nothing about the claim, and never presented it until some time thereafter, and then through an attorney.

5. Rev. Laws, c. 175, § 67, provides that, if a cause of action brought against an executor is supported by oral testimony of a promise by the testator, evidence of statements, written or oral, made by him, and evidence of his habits of dealing, tending to disprove or show the improbability of making such a promise, is admissible. *Held*, in an action to recover for services rendered defendant's testator, that declarations of the testator made in his lifetime either to defendant or to testator's sister, or contained in his will, were admissible in evidence as tending to contradict plaintiff's claim.

Exceptions from Superior Court, Bristol County.

Action by Charles H. Tripp against Edward L. Macomber, as executor of the will of Robert P. Tripp. Judgment for defendant, and plaintiff brings exceptions. Exceptions overruled.

F. Wasserman, for plaintiff. H. B. Worth, for defendant.

BARKER, J. The cause was referred to an auditor, whose findings of facts were to be final. If, under these circumstances, he

made an error in the exclusion or admission of evidence, the parties might have no means of correcting the error except by motion to recommit because of it, and if, upon the hearing of such a motion, there should be a ruling that there was no error, by exception to such ruling. We construe the motion made by the plaintiff after the filing of the auditor's report to have been, in effect, a motion to recommit because of his alleged errors as to evidence at the auditor's hearing, and as properly bringing here for review the question whether the court was right in refusing to recommit. At the same time we do not intimate that it necessarily is an error in law for a court to refuse to recommit to an auditor a report which shows that he has erred in the admission or exclusion of evidence, even when the cause is sent to the auditor under such circumstances as are stated in the present bill of exceptions. When the auditor is appointed under the usual rule, and his report is evidence merely, the question of recommitment is one of discretion, and the decision of the court upon it is not open to exception. *Kendall v. Weaver*, 1 Allen, 277; *Packard v. Reynolds*, 100 Mass. 153; *Butterworth v. Western Assurance Co.*, 132 Mass. 489, 492; *Carew v. Stubbs*, 161 Mass. 294, 37 N. E. 171; *Craig v. French*, 181 Mass. 282, 284, 63 N. E. 893. But when the auditor's finding is to be final on questions of fact it has a different function, and is to receive other treatment than a report made under the usual rule. See *Daley v. Legate*, 169 Mass. 257, 259, 47 N. E. 1013. Unless it appears from the report itself, or from some other evidence, that the error was immaterial, it would be unjust to affirm the report, or to use it as the final means of fixing the facts upon which the rights of the parties are to be adjusted. When such a report comes in, stating the questions of evidence decided by the auditor, and it appears from the report itself that the questions of evidence were of a nature to have had an effect upon his findings, and it further appears from the record before us that no reason is given for refusing to recommit which shows that the refusal was made as a matter of discretion, we are justified in assuming that the refusal was equivalent to a ruling that there was no error in the auditor's dealings with the questions of evidence, and in deciding upon the correctness of that ruling. This course we think consistent with our decisions upon the general subject. See *Kendall v. May*, 10 Allen, 59; *Fair v. Manhattan Ins. Co.*, 112 Mass. 320; *Briggs v. Gilman*, 127 Mass. 530; *Eagan v. Luby*, 133 Mass. 543; *Collins v. Wickwire*, 162 Mass. 143, 38 N. E. 365. We now make no decision as to the course to be pursued if, in case of an auditor's report, where his findings of fact are to be final, it appears from the record that the refusal to recommit was made as an act of discretion.

The plaintiff, a son of the defendant's testator, sues to recover the sum of \$3,400, which he alleges that his father, when he died, owed him for wages at the rate of \$25 per month for 11 years and 4 months, which the plaintiff alleges his father promised to pay him, and to hold subject to his order and call. In addition to a general denial, the answer alleged that, if any services were rendered, they were not intended by either the plaintiff or his father to create a pecuniary debt. The answer also alleged payment, and set up the statute of limitations. At the auditor's hearing the plaintiff testified, among other things, that his father told him from time to time that he had deposited the plaintiff's wages in the bank, and was holding such deposits subject to the plaintiff's order, and that just before his father's death his father told him that he had his wages to the amount of \$3,400 deposited in the bank. The father died on February 7, 1903, testate, leaving a widow, the plaintiff's mother, and the plaintiff, his only son and heir at law. The plaintiff is unmarried, and at the time of the hearing was 38 years of age. The auditor finds that in the year 1891 the plaintiff was working on the farm of an uncle, and was discharged for intemperate habits, and then went to his father's farm, and remained there until his father's death, doing general work with other laborers; that his father received him with the understanding, to which he assented, that he was to work for his board, lodging, clothes, and tobacco; that he had a little money of his own, and that from time to time his mother let him have small sums. The report states that the father, believing it to be unwise to let him have money, expressly declined to pay him any wages, and told him that, if he was not satisfied with the arrangement, he could go elsewhere. Also that the evidence showed that the father paid some of the bills which the plaintiff contracted, and that there was some testimony that the father said at different times that he had money saved up for the plaintiff. The evidence admitted by the auditor against the plaintiff's objection was the testator's will, by which the income of his property went to his widow for life, and upon her death to the plaintiff for life, with remainder to his issue, or, in default of such issue, to the testator's sister. Also the defendant's testimony as to the items of property left by the testator, and their value, particularly as to his bank deposits. Also the defendant's testimony that in the fall of 1903 he was employed by the testator to draw up the will, and that the testator then talked over his affairs with the defendant, and said that he wanted to fix matters so that his property would not be squandered by his wife and son; that he said nothing about owing his son wages, or having money belonging to his son deposited for his son's benefit, or subject to his order; that there-

upon the defendant drew the will which subsequently was probated; that after the funeral the defendant read the will to the plaintiff and his mother; that, although the mother said that she was dissatisfied because the plaintiff was not given something substantial, neither the plaintiff nor his mother referred to any claim which the plaintiff had against the testator's estate, and that subsequently the defendant saw the plaintiff a number of times, and got him to sign probate papers, and that at these times the plaintiff said nothing about any claim, and never presented one until some time afterwards, and then through an attorney. Also testimony of the testator's sister as to declarations made by him to her as to the amount of his bank deposits from time to time.

The evidence objected to is of three classes: (1) Facts relating to the property and circumstances of the testator, all of which were competent upon the question whether the contract between him and the plaintiff was that for which the latter contended or that set up by the defendant. (2) Conduct on the part of the plaintiff himself, which was competent to enable the auditor to weigh the plaintiff's own testimony. (3) Declarations of the testator, made in his lifetime either to the defendant or to the testator's sister, or contained in his will. All these declarations clearly were competent under the provisions of Rev. Laws, c. 175, § 67. *Brooks v. Holden*, 175 Mass. 137, 55 N. E. 802. See, also, *Dixon v. New England Railroad*, 179 Mass. 242, 246, 60 N. E. 581; *Huebener v. Childs*, 180 Mass. 484, 62 N. E. 729; *Hayes v. Pitts-Kimball Co.*, 183 Mass. 262, 264, 67 N. E. 249. *Hyde v. Gannett*, 175 Mass. 177, 55 N. E. 991, holds merely that St. 1896, p. 440, c. 445 (Mass. Rev. Laws, c. 175, § 67), does not make private conversations between husband and wife admissible.

Exceptions overruled.

(212 Ill. 182)

ROBERTS v. AETNA LIFE INS. CO.*

(Supreme Court of Illinois. Oct. 24, 1904.)

INSURANCE—ACCIDENT POLICY—CONSTRUCTION—TERM—PREMIUM NOTES—NONPAYMENT—FORFEITURE—WAIVER—RETENTION OF NOTES—DENIAL OF LIABILITY—ERRORS—RIGHTS OF BENEFICIARY IN CASE OF DEATH.

1. The application for an accident policy stated that the insurance applied for was to be for four consecutive periods of two, two, three, and five calendar months respectively, from noon on March 14, 1899, each period being covered by a distinct equal-premium note. The policy provided that it insured the applicant "for the period of two calendar months, beginning at twelve o'clock noon" of the day on which the policy was dated, "and in consideration of the further cash payment, on or before the expiration of two calendar months from the date hereof, of a certain note for six and ²⁵/₁₀₀ dollars, the insurance hereunder shall be in force for four calendar months from the date of this

policy." The second note provided that the policy "should become null and void at the expiration of two calendar months from its date, if default was made" in the payment of that note. *Held*, that the insurance was not for a period of twelve months divided into different periods for which the notes were given, but was for two months only, and that payment of the second note at or before maturity was a condition precedent to the existence of any insurance for the second period of two months.

2. Where an accident policy provided for insurance for four consecutive periods, each of which was represented by a premium note given when the policy was issued, and the policy provided for a payment of \$5,000 in case of death, the fact that it also declared that the amount due the insured under such circumstances should be applied to the payment of the premium notes did not operate as a continuance of the policy, which had been forfeited for nonpayment of the note for the second period of insurance, the effect of such provision being merely to limit the highest amount of insurance which the insurer could be liable for under the policy to the amount specified, less the aggregate amount of the notes.

3. Where an accident policy provided that the possession of premium notes by the insurer should be conclusive evidence that they were unpaid and that the insurance had ceased at the expiration of the term for which the premium had been paid, a retention of such notes after maturity and forfeiture of the policy for nonpayment did not constitute a waiver of such forfeiture.

4. Where a letter written by the agent of the insurer recited that inasmuch as the insurance under the policy expired on May 14, 1899, by reason of the nonpayment of the second note given for premium in connection with the policy, there could be no claim under it, it was immaterial that the date specified in such letter on which the policy expired was a mistake, because, being Sunday, the note did not mature until the succeeding day, the defense specified in the letter being the nonpayment of the note at maturity.

5. Where an accident policy provided for payment, in case of death, to insured's wife within 90 days from an injury consequent on an accident occurring "during the time the insurance under the policy was in force," the right of insured's wife to recover in the event of his death did not exist unless he could have recovered on account of the accident, had his death not resulted therefrom.

Error to Appellate Court, First District.

Action by Jane Roberts against the Aetna Life Insurance Company. From a judgment in favor of defendant, affirmed by the Appellate Court (101 Ill. App. 313), plaintiff appeals. Affirmed.

Jule F. Brower and Samuel B. King, for plaintiff in error. Daniel F. Flannery, for defendant in error.

SCOTT, J. Plaintiff in error brought her suit against defendant in error in the superior court of Cook county upon a policy of insurance issued upon the application of David Roberts, who in his lifetime was her husband. At the close of the evidence on the part of the plaintiff the court directed the jury to return a verdict for the defendant, and, such verdict being rendered, judgment was entered thereon, which has been affirmed by the Appellate Court for the First District, and the record is brought here for review by writ of error.

*Rehearing denied December 7, 1904.

The application for this policy was made on March 14, 1899, by David Roberts. The policy was one providing for payments to the insured in the event of his sustaining an injury from accident, and, in the event of his death occurring as the result of an accident and within 90 days after the accident, providing for the payment of \$5,000 to plaintiff in error. The policy provided, however, that, if the injury was the result of an accident occurring while the insured was riding as a passenger upon any public passenger conveyance using steam, cable, or electricity as a motive power, the amount to be paid should be double the amount specified in the clause under which claim should be made, subject to all the conditions of the policy.

The application contained the following provision: "(9) Said policy to be written for four consecutive periods of two, two, three and five calendar months, respectively, from noon of the 14th day of March, 1899, each period being covered by a distinct premium, and I hereby agree, for myself, my estate and the beneficiary named herein, that no claim will be made on account of injuries received during any period for which its respective premium has not been paid in full in cash, except as provided by said policy in case of accident happening before first note becomes due."

The policy issued on the same day the application was made, and provides that in consideration of the warranties made in the application for the policy, and of the payment in cash, on or before the expiration of one calendar month from March 14, 1899, of a certain note for \$6.25, the insurer—"Does hereby insure, as hereinafter provided, David Roberts, of the town of Chicago, county of Cook, state of Illinois, under classification preferred, being a salesman by occupation, for the period of two calendar months, beginning at twelve o'clock noon, standard time, of the day this policy is dated, viz., the 14th day of March, 1899; and in consideration of the further cash payment on or before the expiration of two calendar months from date hereof, of a certain note for six 25/100 dollars, the insurance hereunder shall be in force for four calendar months from date of this policy; and in consideration of the further cash payment, on or before the expiration of three calendar months from date hereof, of a certain note for six 25/100 dollars, the insurance hereunder shall be in force for seven calendar months from date of this policy; and in consideration of the further cash payment, on or before the expiration of four calendar months from date hereof, of a certain note for six 25/100 dollars, the insurance hereunder shall be in force for twelve calendar months from date hereof.

"In event of valid claim arising under this policy prior to any or all of the notes above referred to becoming due (the insurance be-

ing at the time of the accident in full force and effect by reason of cash payments already made, except in case of accident happening before the first note becomes due,) the amount due the insured shall be applied to the payment of said notes, so far as it will apply to the payment of one or more of them in full, and the balance, if any, shall be paid to the insured."

The policy also provides that possession by the company or its agent of any or all of the notes given in connection with the issuance of the policy should be conclusive evidence that the same had not been paid, "and that the insurance under this policy will cease to be in force at the expiration of the term provided for herein, and also as provided by the said note or notes."

On the same day, and as a part of the same transaction, Roberts gave to the insurance company his four promissory notes, each for \$6.25. The first, due one month after date, contained this provision: "It is understood and agreed that in case this note shall not be paid in full at maturity, said policy shall become null and void. In event of claim arising before this note falls due, I hereby agree for myself, my estate, and the beneficiary named in said policy, that any or all notes given for said policy shall first be deducted in the settlement of said claim." The second note was payable two months after date, the third was payable three months after date, and the fourth was payable four months after date. The second note contained this provision: "It is understood and agreed that in case this note shall not be paid in full at maturity, said policy shall become null and void at the expiration of two calendar months from its date, and any partial payment made hereon shall not operate to extend the insurance under said policy beyond said term of two calendar months." The third note contained the same provision, except that it provided for the policy becoming null and void at the end of four months from its date in the event of nonpayment of this note, instead of at the end of two months; and the fourth contained the same provision, except the date at which the policy should become null and void was fixed at the end of seven months from its date in the event of the nonpayment of the note, instead of at the end of two months, as in the case of the second note.

The first premium note fell due on April 14, 1899. It was not paid when due, but payment was thereafter made and accepted on April 17, 1899. The second note fell due on May 14, 1899, and the third note fell due on June 14, 1899. Neither of the two latter was paid.

On July 10, 1899, David Roberts, while riding as a passenger in a street car which was operated in the city of Chicago by electricity, sustained injuries from an accident, and as a result thereof died on the 20th day of that

month. On July 13 or 14, 1899, an attorney at law, who was the sister of Roberts, called at the office of the insurance company and tendered to the company the full amount of the three unpaid notes in satisfaction thereof. The company refused the tender, but did not offer to surrender or cancel the notes, and still held possession of the notes uncanceled at the time of the trial. On August 19, 1899, defendant in error, by its secretary, wrote to Jule F. Brower, attorney for plaintiff in error, acknowledging the receipt of the proofs of the death of David Roberts and stating: "However, inasmuch as the insurance under the policy mentioned (601,604) expired the 14th of May, by reason of the non-payment of the second note given in connection with the issue of said policy, there can be no claim made under it." The date last mentioned, May 14, 1899, fell on Sunday. Mr. Brower, the attorney for plaintiff in error, testified on her behalf, in the trial of this cause, in substance that, on a date subsequent to the beginning of this suit, one Eyler, an adjuster for defendant in error, called at his office, and in a conversation with the witness stated, "We sent around to Mr. Roberts a number of times for the money that was due, and told him that these payments were due and must be paid."

The above is the substance of the facts proven by the plaintiff in the superior court, and both that court and the Appellate Court deemed them insufficient to warrant a recovery by the plaintiff, on account of the fact that the proof showed that the second note had not been paid. It will be observed that the payment of the first note, which fell due April 14th, by the terms of the policy was to carry the insurance to May 14th at 12 m.; the payment of the second note, which fell due May 14th, would carry the insurance to July 14th at 12 m.; and the payment of the third note, which fell due June 14th, would carry the insurance to October 14th at 12 m.

The position of plaintiff in error is that the policy, instead of being a policy providing for four separate periods aggregating 12 months, is in fact a policy for one period of 12 months, and that its terms merely provide for the forfeiture of the rights of the insured and the beneficiary in the event of a nonpayment of the notes; that the retention of the notes past due and uncanceled by the insurer, the acceptance of the amount of the first note at a date later than its maturity, and the attempt to collect some of the notes after maturity, establish a waiver, or tend to establish a waiver, of the forfeiture. We are disposed to the view that the construction contended for by plaintiff in error does violence to the language of the application, the notes, and the policy, each of which is competent as evidence against the beneficiary. The application states that the policy applied for is to be for four consecutive periods of two, two, three, and five calendar months, respectively, from noon of the 14th day of

March, 1899, each period being covered by a distinct premium. The policy provides that it does insure David Roberts "for the period of two calendar months, beginning at twelve o'clock noon" of the day on which the policy is dated, "and in consideration of the further cash payment on or before the expiration of two calendar months from date hereof, of a certain note for six ²⁵/₁₀₀ dollars, the insurance hereunder shall be in force for four calendar months from date of this policy"; and the second note provides that the policy "shall become null and void at the expiration of two calendar months from its date" if default be made in the payment of that note. It is apparent that the contract as written is one of insurance for two months only, and that, unless the second note was paid at or before maturity, there would be no insurance during the second period of two months. The payment of the second note was a condition precedent to the existence of any insurance for the second period of two months, within which the accident occurred.

It is urged that this view is incorrect, because each of the four payments was to be for the same amount. Each of the first two was to pay for a period of two months, the third for a period of three months, and the fourth for a period of five months. The amount that should be paid for any particular period was, so far as the rights of the parties to this suit are concerned, exclusively a matter of contract between the insured and the insurer.

It is then suggested that the policy provides, in the event of injury from accident, that "the amount due the insured shall be applied to the payment of said notes," and it is urged that if the insurance was for separate periods, and the death of the insured resulted from an accident occurring in one of the earlier periods, the contract would not provide for the payment of a note given for the premium for a period beginning at a date later than the day of the accident. We think the correct view of this provision is that the greatest amount for which the company was to be liable was the highest amount specified by the terms of the policy, less the sum of \$25, the aggregate amount of the notes; that is, if death occurred as the result of an accident, of the class which did occasion Roberts' death, while the policy was in force, the insurer would pay \$9,975 in excess of the amount which it had received. At any rate, all the documents executed in reference to this contract of insurance show that it is to be for four separate periods; and as Roberts, who was of full age and competent to contract, saw fit to enter into such a contract, we cannot relieve his beneficiary from the operation thereof.

In support of their theory that this policy is a policy for one entire period of 12 months, counsel for plaintiff in error refer us to *Mutual Benefit Life Ins. Co. v. Robertson*, 59 Ill. 123, 14 Am. Rep. 8, and *Northwestern*

Mutual Life Ins. Co. v. Amerman, 119 Ill. 329, 10 N. E. 225. In the first of these cases a life policy had been issued. The insured failed to pay the premium which fell due on March 19, 1869. Thereafter, in November of that year, upon the payment of that premium, a renewal receipt was issued to him which was dated March 19, 1869, and recited that the policy was thereby continued in force for one year from date of the receipt; and it was held that the receipt did not make a new contract, but merely evidenced a continuance of the old, and that certain acts of the company had waived the right of forfeiture resulting from the failure to pay the premium when due. In the second case it was held that the office of a like receipt was to acknowledge the payment of the premium, as required by the terms of the policy, and avoid the effect of the condition forfeiting the insurance for the nonpayment of the premium. Neither of these cases in any wise sustains plaintiff in error. On the other hand, in *McMahon v. Travelers' Ins. Co.*, 77 Iowa, 229, 42 N. W. 179, a policy was involved which, like this, covered successive periods of two, two, three, and five months, the premium being \$5 for each period, and the policy providing, "All claims for injuries effected during any period for which its respective premium has not been actually paid shall be forfeited to the company." There the insured had given the insurer an order on his employer for money to pay the premium covering the second period. This order was payable out of the money earned in a certain month, and in that month the insured earned nothing, and it was held that there could be no recovery for death resulting from an accident in the second period for which the premium had not been paid, unless the defendant had failed to discharge some duty incumbent upon it or had waived its defense, and that the defendant did not waive its defense by its failure to cancel the policy or by its failure to return the order; that neither of these things was required of the defendant in order to preserve its right to insist that it was not liable in the action, as the policy provided that it might be enforced during some of the insurance periods and not during others; and that, had the third payment been made, the policy would have been in force during the third period, without regard to its condition during the second; from which it appears that the court regarded the policy as providing for four separate and distinct periods of insurance, and not for one continuous period of 12 months.

In the case at bar, as the payment of the second note was a condition precedent to the existence of any insurance for the second period, and inasmuch as that note was not paid, it is manifest that the only thing that would continue the policy in force would be an extension of time of payment of the note, or some other act on the part of the company

that would demonstrate with equal clearness the purpose of the company to postpone the time of payment or waive payment entirely. There is no evidence of any such act. The failure to return the note is entirely without significance, as the policy provided that the possession of the notes by the company should be conclusive evidence that they were unpaid, and that the insurance had ceased to be in force at the expiration of the term for which the premium had been paid. To argue that possession of the notes was evidence of a waiver of its rights by the insurance company is to give to such possession exactly the opposite effect to that which the insured contracted such possession should have. This we cannot do without disregarding the contract voluntarily entered into by insured and insurer. It is true, the notes might have been canceled and retained, but that would have put it in the power of the insured to claim that the company had entirely dispensed with payment as a condition precedent. The case in this respect stands on a footing different from one in which failure to pay the premium merely gives the insurer the option to forfeit the policy and terminate the insurance. Here the insurance would not come into existence unless the payment was made, and to bring it into existence required some act on the part of the insured equivalent to the satisfaction of the note or an extension of the time of payment.

It is then urged that the second note, by its terms, fell due on May 14, 1899, which was Sunday, and that it therefore did not actually become due and payable until the succeeding day, and consequently there could be no default until the 15th of May; wherefore, in any view, the first period of insurance did not expire until the 15th day of May. In the letter written by the secretary of the company to Mr. Brower, it was stated that the insurance had expired on the 14th day of May by reason of the nonpayment of the second note, and it is urged that the defendant cannot rely upon any other default than the one assigned in its letter, in which it gave this reason for declining to pay, and that, as the insurance had not expired on the 14th, the defense stated by the letter does not exist, and no other can now be interposed. This contention is without merit, for the reason that it is entirely apparent from a perusal of the entire letter that the defense to which the company was calling the attention of counsel for plaintiff in error was the one here insisted upon, viz., the nonpayment of the second note at maturity.

It is urged, however, that the policy contains an unconditional promise to pay the wife if death results, and that, even though it be true that an action on the policy, if the insured lived, might be defeated by his failure to comply with the conditions of the contract, still that these conditions in no wise affected the right of plaintiff in error to re-

cover where the death of the insured ensued from the accident. An inspection of the policy, considering all its terms together, shows that money is payable to the wife only if death results within 90 days from an injury consequent upon an accident occurring "during the term the insurance under this policy is in force." Her right to recover, therefore, in the event of his death resulting from an accident, does not exist where he would be without right to recover on account of the accident had his death not resulted therefrom.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

(212 Ill. 320)

NATIONAL COUNCIL OF KNIGHTS AND LADIES OF SECURITY v. DILLON.*

(Supreme Court of Illinois. Oct. 24, 1904.)

FRATERNAL BENEFIT INSURANCE—CHANGE OF CONTRACT—INCREASE OF ASSESSMENTS—RIGHTS OF MEMBER—NONPAYMENT OF ASSESSMENTS—ESTOPPEL.

1. A member of a fraternal benefit order, at the time she became a member, was required by the certificate to pay a certain sum per annum—a portion to the local council, and a portion to the expense fund of the national council. The laws of the order were afterwards changed, whereby she paid the same total amount per annum, but the local council received less per year, and the expense fund of the national council more. The assessments for the beneficiary fund were never changed, but the time for the payment of the assessments was extended to the last day of the month, and the assessments for the expense and reserve fund were payable monthly, instead of quarterly. After the change the member never disputed the right to make such change, and no objection was made until suit was brought on the certificate. The certificate provided that one who had not paid the beneficiary assessment stood suspended. The member died March 16th, not having paid the February assessment. *Held*, that the member was not excused from payment of the assessment because of the change made.

2. In an action on a fraternal benefit certificate, where it appeared that the member had failed to pay assessments required by the contract to keep it in force, but that after her death a sum sufficient to pay all arrearages was paid by some one to the local financial secretary, who received the same with knowledge of the member's death, the mere fact that the defendant tendered the plaintiff, after the commencement of her action, the amount so paid, is insufficient to show an admission by the defendant that the money had been received by it, or was not still in the hands of the local financial secretary; and hence a contention that the defendant was estopped from claiming that the assessments were not paid in time, because the money was forwarded to and retained by defendant with knowledge of the member's death, is without merit.

Appeal from Appellate Court, First District.

Action by Mary Dillon against the National Council of the Knights and Ladies of Security. From a judgment of the Appellate Court (108 Ill. App. 183) affirming a judgment for plaintiff, defendant appeals. Reversed.

A. W. Fulton, for appellant. Edmund S. Cummings, for appellee.

CARTWRIGHT, J. In October, 1897, Hanora McCaffrey, mother of Mary Dillon, the appellee, was admitted to membership in Illinois Council No. 420 of the National Council of the Knights and Ladies of Security, a fraternal beneficiary society, the appellant, and a certificate was issued to her for \$1,000, to be paid at her death to appellee. The certificate contained the following: "This certificate is issued upon the express condition that the said member shall in every particular, while a member of the order, comply with all the laws, rules, and requirements thereof, and shall, at her death, be a member in good standing of said order;" and in her application for membership she agreed to faithfully abide by all the laws, rules, and regulations of the society. On the back of the certificate was the number; the name of the member; her age, 52 years; the rate of assessment, \$1.40; and a synopsis of rates in force, which gave \$1.40 as the mortuary assessment at that age. This beneficiary assessment was due on the 1st of each month and payable on or before the 28th day of the month, without notice, and the laws contained the following provision: "The certificate of each member who has not paid such assessment on or before the twenty-eighth day of each month, shall, by the fact of such non-payment, stand suspended, and no action on the part of the council, or any officer thereof, shall be required as essential to such suspension." There were other dues and assessments which she was required to pay. She died on March 16, 1900, not having paid the February assessment against her. The next day some one paid to the financial secretary of the local council \$3.80 for the February assessment and the assessment for the month of March, and the secretary knew that Hanora McCaffrey was then dead. Appellant refused to pay the amount of the certificate; and this suit was brought by appellee in the superior court of Cook county to recover the same. There was no dispute as to Hanora McCaffrey being in default under existing laws, but plaintiff claimed that the laws of the society had been amended and the assessments changed after the certificate was issued, in violation of the contract, and that she was not bound to pay the assessment for February. There was a stipulation that all defenses might be made under the general issue, and upon the trial the court directed the jury to return a verdict for the plaintiff and assess her damages at \$1,043.24. A verdict was returned accordingly, and judgment was entered upon it, which was affirmed by the Appellate Court for the First District.

The position of plaintiff was that the certificate and the by-laws in force at the time Hanora McCaffrey became a member of the society constituted a contract between the

*Rehearing denied December 7, 1904.

parties, that her payments to the society could not be increased in amount or the times or conditions of payments changed without her consent, and that such changes had been made which relieved her from the obligation to pay the assessment. When she became a member she was required to pay an assessment of \$1.40 for the beneficiary fund, which became due on the 1st of each month, and a failure to pay any assessment by the 28th of the month operated as a suspension without notice or any action of the council or any officer of the society, and a member thereby forfeited all rights under a certificate. The laws were amended in 1898, but the amount of said monthly assessments was never changed. When she became a member there were provisions of the society for maintaining a reserve fund and paying the expenses of the national council and the local council to which she belonged. The certificate provided that for the purpose of maintaining a reserve fund the national council should retain \$50 out of each \$1,000 of the certificate, less \$1 for each year the certificate should remain in force. She was also required to pay 25 cents each quarter for the reserve fund and 40 cents each quarter for the expense fund of the national council for conducting the business of the order and assessments by the local council for the expenses of that council. There was no provision for suspension of a member, without notice, for a failure to pay these assessments for the reserve fund and the expenses of the national and local council. The local council was required to collect the 40 cents quarterly for the expense fund of the national council, which was called a "per capita tax," to be remitted to the head office by the subordinate council. Including that quarterly assessment, the local council collected \$5 per annum in quarterly payments of \$1.25 in advance, and the balance above the per capita tax was used by the council to pay its running expenses. Under the contract, as claimed by the plaintiff, she was required to pay for all the assessments for the beneficiary fund, reserve fund, and expenses of the local council, \$22.80 per year. In 1898 the national council changed the plan of collecting the assessments for the reserve fund and expense fund of the national council from the quarterly to a monthly plan, and increased the expense fund assessment from 40 cents quarterly to \$2 per year, payable 16 $\frac{2}{3}$ cents per month. The reserve fund was left the same as before, but was made payable monthly, at 8 $\frac{1}{2}$ cents per month. Under the amended laws she paid the same total amount per annum, but the local council received 40 cents per year less, and the expense fund of the national council was 40 cents more per annum. As before stated, the assessment for the beneficiary fund was never changed, but the time for the payment of all the assessments was extended to the last day of the month. This extension of time was beneficial to the mem-

bers, but the assessments for the expense and reserve fund were payable monthly, instead of quarterly, which was unfavorable to the members. From the time of the adoption of the new laws on July 1, 1898, until February, 1900, Hanora McCaffrey made payments at the rates and in accordance with the new plan without any objection, and after her death some one gave to the financial secretary of the local council the amount due under the rates fixed by the amended laws. After the change was made she acquiesced in it, apparently taking the benefit of the extension of time of payment, and never disputed the right of the national council to make the changes as in violation of her contract. No objection was made to the change or manner of payment until this suit was commenced.

There is no similarity of this case to that of *Covenant Mutual Life Ass'n v. Kentner*, 188 Ill. 431, 58 N. E. 968, where Mr. Kentner refused to pay the first assessment under the new rule, which was assessment No. 149. He had paid some increased assessments for the accumulation of a reserve fund held in common for the benefit of all the members, but had never paid or consented to pay any assessment on the new basis for insurance on which No. 149 was levied. Neither is this case at all like that of *Peterson v. Gibson*, 191 Ill. 365, 61 N. E. 127, 54 L. R. A. 836, 85 Am. St. Rep. 263, where there was no question of consent or acquiescence in the change made in the by-laws, or any claim that the contract had been interpreted by the parties or acted upon them as admitting of any change. The question of the effect of acquiescence, however, is not here decided, for the reason that the evidence showed that Hanora McCaffrey did not comply with her contract under any interpretation of it.

If the society could not increase the assessments for the expenses of the national council, or make those assessments and the assessments for the reserve fund payable monthly, she was still bound to pay according to her contract. The case of *Grand Lodge A. O. U. W. v. Bagley*, 164 Ill. 340, 45 N. E. 538, is not authority for the proposition that she was not bound to pay anything if she was not required to pay the increased assessment for the expense fund, and does not decide that, if a contract cannot be changed to the detriment of one party without his consent, he need not comply with it at all. In that case the laws provided that the subordinate lodge should make the assessment, and none was in fact made. In this case the assessment of \$1.40 for the beneficiary fund was fixed by the certificate and by-laws when the certificate was issued, and was payable at fixed times, and without notice. According to the contract as contended for by plaintiff, if the assessment of \$1.40 was not paid before the 28th of February, the member would be suspend-

ed without notice or any action of the council or any officer of the society; and it was not paid. In the aggregate the member was not required to pay any more per annum under the amended laws than under the old ones. But, even if she was not bound by acquiescence or her voluntary payment of the increased assessments for the expense fund, and could ask for a credit for such payments, they did not amount to the assessment for February.

It is contended that the condition of the certificate was waived by the defendant by receiving and retaining the \$3.80. When this payment was made to the financial secretary of the local council he knew that Hanora McCaffrey was dead; but it is conceded that the rights of the parties could not be affected by the payment to him. It is admitted that he had no right to set aside the rules of the order, and if, from ignorance or any other reason, he received the money, it would not operate to reinstate the member, or waive the conditions of the certificate. Under the laws a suspended member could only be reinstated if living, and upon conditions therein specified, and upon a majority vote of the local council. There was not even any action of the local council in the matter.

But it is said that the financial secretary forwarded the money to the national council, which had notice of the death, and retained the money, and the defendant is therefore estopped from claiming that the assessment was not paid in time. The secretary testified that he did not know whether he sent the money to the national council or not, and the only basis in the record for saying that it was sent to the council is that after the suit was commenced defendant offered to repay to appellee the amount paid after the death, and tendered the same to her. Who made the payment, to whom it could be returned, is not shown by the record, and we do not regard the offer to give the money to the plaintiff as an admission that it had been received by the national council, or that it was not still in the hands of the financial secretary of the local council.

The court erred in directing a verdict for the plaintiff. The judgments of the Appellate Court and the superior court of Cook county are reversed, and the cause is remanded to the superior court.

Reversed and remanded.

(212 Ill. 282)

STRONG v. PETERS et al.*

(Supreme Court of Illinois. Oct. 24, 1904.)

HOMESTEADS—EXECUTION SALE—ADMINISTRATORS—CAPACITY TO SUE—BILL TO REMOVE CLOUD FROM TITLE.

1. An execution sale of property occupied by the judgment debtor as a homestead conveys

the property to the purchaser, subject to the homestead right, so that he takes title in fee on the death of the judgment debtor and his wife.

2. An administrator cannot maintain a bill to remove a cloud from the title to land owned in fee by his decedent, and hence is not an interested party entitled to appeal from a decree in such a case.

Error to Circuit Court, Cook County; E. F. Dunne, Judge.

Action by Joseph H. Strong, as administrator of the estate of Frederick Koss, deceased, against Wilhelm Peters and others. There was a judgment for defendants, and plaintiff brings error. Writ dismissed.

A motion has been made to dismiss the writ of error heretofore sued out herein by Joseph H. Strong, administrator of the estate of Frederick Koss, deceased, which motion has been reserved to the hearing.

It appears from the record that on the 30th day of April, 1894, Frederick Koss, the intestate of the plaintiff in error, filed his bill in chancery in the circuit court of Cook county against Minna Koepecke and Charles Meister, wherein it was averred that said Frederick Koss, at the March term, 1881, of the said circuit court, recovered a judgment against one Louis Koss in an action at law for the sum of \$6,000; that on November 2, 1882, an execution was issued thereon, directed to the sheriff of Cook county, which execution was levied upon lot 10 of the subdivision of the west half of block 28, in Canal Trustees' Subdivision of section 5, township 39, range 14 east of the third principal meridian, Cook county, Ill., which premises, on February 12, 1883, were sold, by virtue of said execution, to said Frederick Koss, and said Frederick Koss received a sheriff's deed therefor on May 19, 1884, which deed was recorded; that, at the time said action at law was commenced and at the time of said execution sale, said premises were occupied by said Louis Koss and family as a homestead, and were worth not to exceed the sum of \$1,000; that prior to the recovery of said judgment, and on June 1, 1876, said Louis Koss and wife conveyed said premises to their son, Frederick C. L. Koss, by warranty deed, which said deed was recorded, in which deed the said grantors did not waive or release their homestead; that on April 5, 1878, said Frederick C. L. Koss and wife conveyed said premises to Henry Rabe, which deed was recorded, and that on or about said 5th day of April, 1878, said Henry Rabe conveyed said premises to Christina Koss, the wife of Louis Koss, which deed was recorded; that said Louis Koss and wife continued to reside upon said premises until the death of the survivor of them; that Louis Koss and Frederick C. L. Koss both died prior to the year 1892; that May 25, 1892, Christina Koss died; that by her will said Christina Koss devised said premises to her sister, Minna Koepecke, in fee, and nominated Charles

*Rehearing denied December 7, 1904.

¶ 1. See *Homestead*, vol. 25, Cent. Dig. §§ 294, 366.

Meister her executor; that said will was admitted to probate, and Meister qualified as executor. It was further averred that said conveyances were made without consideration, and for the purpose of hindering and delaying the said Frederick Koss in the collection of his lawful demands against said Louis Koss; and the bill prayed that said conveyances and the probate of said will be set aside and canceled, as clouds upon the title of Frederick Koss, and that he be decreed to be the owner of said premises by virtue of said execution sale and sheriff's deed.

It was subsequently discovered that said Minna Koepcke was dead at the time said bill was filed, and the bill was amended, and the heirs of Minna Koepcke were brought in as parties defendant to said bill. Answers and replications were subsequently filed by said heirs and Frederick Koss. During the pendency of the said suit the heirs of Minna Koepcke, deceased, filed a bill for partition of said premises in the said circuit court and made said Frederick Koss a party defendant, and sought to set aside and cancel said sheriff's deed held by him upon said premises as a cloud upon their title. Said Frederick Koss filed an answer, to which a replication was filed, and Frederick Koss filed a cross-bill, in which he set up the same facts set forth in his original bill, and prayed the same relief. A cross-bill was also filed by the heirs of Minna Koepcke, deceased, in the suit commenced by Frederick Koss, praying the same relief sought by them in their original bill. The issues in both of said causes being made up, the court entered an order consolidating the cases, and referred the same to a master to take the proofs and report his conclusions. On the coming in of the master's report a decree was entered dismissing the original and cross bills of Frederick Koss, and granting the prayer of the original bill of the heirs of Minna Koepcke for the partition of said premises between said heirs. On the 28th day of September, 1902, and after the entry of said decree, Frederick Koss died, and on March 5, 1904, said Joseph H. Strong, as administrator, was substituted as a party in said consolidated case in his stead.

Dickinson & Haremski, for plaintiff in error. William Vocke and William Mannhardt, for defendants in error.

HAND, J. (after stating the facts). The objects of the original and cross bills, filed by Frederick Koss in the original suit commenced by Frederick Koss and the suit commenced by the heirs of Minna Koepcke, deceased, were to remove the conveyances made by Louis Koss and his grantees, and the probate of the will of Christina Koss, deceased, as clouds upon the title to said premises, held by him by virtue of said execution sale and sheriff's deed. In the decree rendered in the consolidated case the

circuit court held that the premises in question, at the time of the rendition of said judgment and at the time of said execution sale, were occupied by Louis Koss and wife as a homestead; that, at the time of the execution sale, they were not worth to exceed \$1,000; that the judgment of Frederick Koss, by reason of that fact, was not a lien thereon; that the same were not subject to sale on execution; that said execution sale and sheriff's deed were void; that, the judgment of Frederick Koss not being a lien upon said premises, Louis Koss had the right to place the title to said premises in his wife if he saw fit; and that the title to said premises having passed to her and being in her at the time of her death, it passed by virtue of her will to the heirs of Minna Koepcke, deceased, the said Minna Koepcke being the sole devisee of said Christina Koss, deceased. If said judgment became a lien on said premises (which question we do not determine), the execution sale divested such judgment lien, and, upon the execution of a sheriff's deed to Frederick Koss, the title to said premises vested in him subject to the homestead right of said Louis Koss and his wife, and upon the extinguishment of said homestead right by their death, or otherwise, the fee title to said premises became vested absolutely in Frederick Koss, and upon the death of said Frederick Koss such title descended to and became vested in his heirs and not in his administrator; and the appellant, as administrator of Frederick Koss, deceased, by virtue of his appointment, took no title to said premises, and had no interest in the subject-matter involved in said suits as consolidated. A party, only, who has a legal interest in the subject-matter of a suit can sue out a writ of error to reverse a decree entered therein. The cases, after consolidation, differed in no particular from any other bill in chancery filed for partition and to remove a cloud. A writ of error, therefore, will not lie on behalf of said administrator to review said decree: such right to review being in the heirs of Frederick Koss, deceased. The writ of error must therefore be dismissed.

Writ dismissed.

(212 Ill. 444)

CONKEY v. REX.*

(Supreme Court of Illinois. Oct. 24, 1904.)

MORTGAGES—TRANSFER BY THIRD PERSON— AGREEMENT OF GRANTEE TO CONVEY.

1. Land was deeded to defendant, who gave his note, secured by mortgage, for a part of the price; the remainder of the consideration being the conveyance by plaintiff to the grantor of land which had formerly been mortgaged for its full value to defendant, defendant at the time releasing the mortgage. It was agreed that, if plaintiff should pay defendant \$1,000 on the price of the land conveyed to him, he should convey to plaintiff, taking the latter's notes and mortgage for the balance of the price. Held

*Rehearing denied December 7, 1904.

that, as plaintiff had at the time of the transaction no interest in the land, the original deed to defendant was not a mortgage, from which plaintiff was entitled to redeem.

Error to Appellate Court, Second District.

Action by Lewis B. Rex against Oscar D. F. Conkey. A decree for plaintiff was affirmed by the Appellate Court (111 Ill. App. 121), and defendant brings error. Reversed.

On February 13, 1902, Lewis B. Rex, defendant in error, filed his bill of complaint in the circuit court of La Salle county against Oscar D. F. Conkey, the plaintiff in error, and Lizzie S. Conkey, his wife, to redeem from a deed executed by one Albert H. Carr and wife, which purported to convey 80 acres of land in La Salle county to Oscar D. F. Conkey in fee simple, but which defendant in error claims was intended only as a security for certain moneys then owing by him to Conkey, and certain liabilities then incurred by Conkey in Rex's behalf. The bill also asked for an accounting between the parties. An answer was filed by Conkey, and a replication by complainant. The cause was referred to the master, who took the evidence and reported it to the court without conclusions. The court on November 11, 1902, rendered a decree finding the allegations of the bill true, and that the deed from Carr and wife to Conkey, although absolute in form, was in equity a mortgage, and intended as a security merely to Conkey for moneys due him from Rex, and for moneys assumed to be paid by him in Rex's behalf, and adjudging that Rex be allowed to redeem the land from said deed. The decree refers the cause to the master to take an account between the parties, and orders Rex to pay to Conkey the amount found by the master to be due within six months after the master's report shall be confirmed by the court, and orders Conkey and wife, upon such payment being made by Rex, to convey the land to Rex by good and sufficient deed, and in default thereof that the master execute a deed of the land to Rex. Conkey appealed from said decree to the Appellate Court for the Second District, where the decree was affirmed. He now brings the cause to this court by writ of error.

On June 1, 1889, one Albert H. Carr was the owner in fee simple of said 80-acre tract, subject to a mortgage thereon securing a note for \$1,400. On the same date Rex was the owner in fee simple of 160 acres of land in South Dakota, subject to a mortgage thereon securing a note to Conkey for \$803, with interest from January 27, 1886, at the rate of 8 per cent. per annum, payable annually. On said 1st day of June, 1889, Carr, Rex, and Conkey met at Mendota, in La Salle county, by previous arrangement, and the following transfers and transactions took place: Carr conveyed to Conkey, by deed, the 80 acres of land in La Salle county at an agreed valuation of \$4,400, subject to the mortgage for

\$1,400 thereon, which was deducted from the \$4,400, and the payment of which mortgage, by the terms of the deed, Conkey assumed; Carr to retain possession of the land until March 1, 1890. In consideration of this conveyance, Rex deeded to Carr the 160 acres of land in South Dakota at an agreed valuation of \$1,000, and Conkey released his mortgage thereon, which then amounted to more than \$1,000. Conkey also executed two notes, for \$1,000 each, payable to Carr, one due October 1, 1889, and the other due October 1, 1890, and, to secure the same, gave Carr a mortgage on the La Salle county land. Conkey did not surrender the note for \$803, which, with interest, had been secured by the mortgage on the South Dakota land. This last-mentioned mortgage provided that, if default was made in the payment of any of the interest on the \$803 note when such interest fell due, the entire note, both principal and interest, should become at once due and payable. Rex first proposed a trade to Carr, and his theory of the transaction is that the deed was made to Conkey as security for the payment of the note for \$803, with interest, which was still held by Conkey, and as security for the payment by Rex of the mortgage for \$1,400 assumed by Conkey, and the two notes, for \$1,000 each, signed by the latter and delivered to Carr, and as security for the repayment to Conkey of any money expended by the latter in the payment of said last-mentioned mortgage or notes.

The instruments for the several transfers of June 1, 1889, were prepared by one Austin Smith, a justice of the peace and notary public at Mendota. It appears from the testimony of a majority of the persons then present that, as a part of the transaction, a written agreement was entered into between Rex and Conkey whereby it was agreed that Rex should go into possession of the La Salle county land, and pay interest on the \$4,400 to Conkey until such time, within five years, as he could pay Conkey \$1,000 in addition to the interest, when the latter should deed the land to Rex, and take back notes secured by a mortgage on the land to secure the balance of the money expended or liability incurred by Conkey in making the trade with Carr. This contract was not produced on the trial; witnesses for complainant testifying that it was left with Smith, and Smith testifying that it was afterwards obtained by Conkey, who had either destroyed it or had it in his possession. Conkey denied obtaining the contract from Smith, and also denied the making of any such contract. Its terms, above stated, were proved by oral testimony. Rex stated on his examination that he agreed to pay according to such terms. Afterwards, during the fall of 1889, Conkey leased the La Salle county land to one Loren Carr for a term of one year from March 1, 1900. Rex had done some plowing on the land during that autumn, and, hearing of this lease, on

February 26, 1900, moved into the house on the land without the knowledge of Conkey, and has ever since been in possession of the premises, paying to Conkey a share of the crops worth about \$100 the first year, and paying \$336 each year thereafter; the latter amount being paid in accordance with the provisions of three successive leases, the first dated November 25, 1890, and being for a term of one year from March 1, 1901, and providing for an extension to March 1, 1896; the second dated March 24, 1896, and being for a term of five years from March 1, 1896; and the third dated October 8, 1900, and being for a term of one year from March 1, 1901. The first lease contained a clause providing that Conkey would convey the land to Rex upon the payment of \$1,000 within the life of the lease, and take a mortgage back to secure the remaining \$3,400. Rex claims that this clause was inserted in the lease to evidence the former agreement between him and Conkey, which had been left with Smith, and, as he had been informed, was taken from Smith's possession by Conkey. This clause was not inserted in the second or third lease, nor was any similar provision contained therein. Rex testified that he did not read the second lease before signing, and that Conkey assured him that the clause in question was written therein. Conkey denies this. Rex also testified that he knew that the clause was not in the third lease at the time he signed it, but that Conkey told him that, although it was not in the lease, he (Conkey) would deed the land to him upon the payment of \$1,000 any time during the term of the lease. Conkey also denies this. During the term of the third lease, Rex offered to pay Conkey \$1,000, and to execute notes and a mortgage for the balance of the money paid out by Conkey on account of the property, and requested a deed for the land. Conkey refused. At this time the land was worth about \$100 per acre. During the terms of the leases above referred to, Rex made various improvements on the property, the cost of making most of which was either paid for by Conkey, or allowed as credits to Rex in making payments of the \$336 per year provided for in the leases. Rex testified that the cost of such improvements as should be paid for by Conkey was to be added to the amount to be paid by the former in the settlement and transfer of the property to Rex. He also testified that Conkey told him that the interest on the money owing him by Rex, and on the liability assumed by him, together with the taxes on the land, would amount to \$336 per year, and that such amount was therefore fixed in each of the leases as rent. Plaintiff in error contends that the proof does not warrant a finding that the deed from Carr to Conkey was a mortgage, from which Rex was entitled to redeem.

M. T. Moloney and J. H. Widmer, for plaintiff in error. Brewer & Strawn, for defendant in error.

SCOTT, J. (after stating the facts). This was a bill to redeem. It is shown by the preponderance of the evidence that on June 1, 1889, when Conkey received the deed from Carr, he entered into a written agreement with Rex, by which Rex was to go into possession of the farm on March 1, 1890, and to continue in possession, paying interest on the purchase money at the rate of 7 per cent. per annum, and, whenever Rex should pay \$1,000 on the purchase price of \$4,400, Conkey was to convey the land to Rex by warranty deed, and Rex was to execute notes for the balance, due in five years, secured by a mortgage on the land to Conkey. It is uncertain what length of time Rex was to have in which to pay the \$1,000. The evidence tends to show, however, that the period was five years, and Rex testifies that he agreed to take the land at \$4,400 and pay for the same on the terms above mentioned. On November 25, 1890, Conkey executed to Rex and wife the first lease, which was signed by all three of them, by which the lands were demised to Rex and wife for a term of one year from March 1, 1891, at an annual rental of \$336, to continue, upon payment of rent, to March 1, 1896, and which contained this provision: "If the parties of the second part shall pay to the party of the first part \$1,000 within the life of this lease, then he shall make a deed to the parties of the second part and take a mortgage on said land for \$3,400 and interest." The purpose of including this in the lease, no doubt, was to evidence the fact that the lease did not abrogate the earlier contract, although its effect was to extend the time within which, by the terms of the contract of June 1, 1889, Conkey was obligated to make a deed upon the payment of \$1,000. Under these circumstances, was the deed from Carr to Conkey a mortgage, with a right of redemption in Rex, or was Conkey the absolute owner of the property by virtue of that conveyance and the contract between him and Rex merely one for the sale of the land?

It will be observed that prior to the execution of the deed from Carr to Conkey, and the execution of the agreement between Conkey and Rex, the latter had no interest, either legal or equitable, in the land. It is true that he had negotiated with Carr for the conveyance, but it was to be a conveyance to Conkey. It is true, also, that \$1,000 of the purchase price was paid by the conveyance of the land in South Dakota from Rex to Carr; but Conkey held a mortgage on the South Dakota land to secure a note given by Rex, on which there was more than \$1,000 unpaid. The evidence shows that Rex homesteaded this land, but left it and moved back to Illinois in the spring of 1888, and the land after that time was vacant, unoccupied, and unproductive. He wanted to dispose of it, and both he and Conkey desired that the indebtedness secured thereon

be adjusted. Conkey released his mortgage, that the land might be conveyed to Carr, and thereupon Rex became entitled to a credit for the sum of \$1,000 upon his note. It is insisted by plaintiff in error, under these circumstances, that Rex never had any interest in the land in La Salle county that he could mortgage, and that consequently the deed from Carr to Conkey cannot be regarded as a mortgage from Rex to Conkey. In *Heaton v. Gaines*, 198 Ill. 479, 64 N. E. 1081, it was contended that a deed executed by Ford to Gaines, the appellee, was a mortgage from Heaton, and that the latter had a right of redemption. This court said (page 486, 198 Ill., page 1083, 64 N. E.): "The deed from Ford to appellee could not be a mortgage to secure an indebtedness from Edward Smith Heaton, unless it appeared in some way that Edward Smith Heaton had an interest as owner in the lands thereby conveyed. Without an ownership in lands, there can be no mortgage of them. *Payne's Adm'r v. Patterson's Adm'rs*, 77 Pa. 134; *Carpenter v. Plagge*, 192 Ill. 82, 61 N. E. 530; *Burgett v. Osborne*, 172 Ill. 227, 50 N. E. 206. Edward Smith Heaton cannot be said to have owned any equity of redemption which was kept alive by any agreement between Ford and the appellee." In *Carpenter v. Plagge*, 192 Ill. 82, 61 N. E. 530, the heirs of the owner of the equity of redemption in a piece of real estate which had been sold under foreclosure, upon the expiration of the 12-months period of redemption, induced Plagge to advance the money necessary to purchase the certificate of sale; and the latter entered into an agreement giving them the right to pay the purchase money to him, with 10 per cent. interest thereon, at any time within 15 months after the purchase, and agreeing, upon such payment being made, to assign such certificate for the benefit of the heirs. Afterward the heirs filed a bill for redemption, claiming the transaction to be a mortgage. The court below denied the relief sought, and the heirs appealed. This court said: "Inasmuch, therefore, as appellants had no interest in the property by reason of the expiration of the twelve months, there was no title in them which they could mortgage." In *Caprez v. Trover*, 96 Ill. 456, it appeared that Caprez was in possession of a certain lot as the lessee of Townner. The lot was offered for sale. Caprez applied to Trover & Miller to purchase the same for him. Thereupon they purchased the lot, and took title from Townner to themselves, and agreed that Caprez was to have a deed to the property when the entire cost thereof should be paid by him, within a certain period, to Trover & Miller. After his death his heirs filed a bill to redeem, claiming the deed to Trover & Miller was a mortgage. This court held otherwise, saying (page 465): "The deed was not from Caprez, but from Town-

ner, whose duty it was to make an absolute conveyance of the lot. He was entitled to take no mortgage, and his deed was executed as it was intended by all the parties it should be. Indeed, Caprez never had an interest in the lot which was susceptible of being mortgaged. He never had the legal title, and his only claim of an equitable title is a parol contract (condemned by the statute of frauds) that the lot would be conveyed to him upon his reimbursing Trover & Miller their outlays in purchasing and improving it."

Defendant in error calls our attention to the fact that a court of equity disregards form, and seeks the substance of the transaction, and argues that it is therefore immaterial that the title to the land in controversy was never in Rex. We are referred to a number of authorities in support of this proposition, and find that in each of those cases, where the court has given the matter any consideration, the party in whom the right of redemption was held to exist had some interest in the real estate, legal or equitable, prior to the execution of the deed from the third party to the person held to be a mortgagee, as in *Carr v. Carr*, 52 N. Y. 251, where it is said: "It is not material that the conveyance should be made by the debtor, or by him in whom the equity of redemption will exist. It is sufficient if the debtor, and he who claims to occupy the position of mortgagor, with the right of redemption, has an interest, legal or equitable, in the premises, and the grantee of the legal title has and acquired such title by the act and assent of the debtor, and as a security for his debt. *Stoddard v. Whiting*, 46 N. Y. 627. In the case cited the plaintiff sought to redeem the premises from the defendant, who had taken the title, upon paying a balance due upon a contract of purchase held by the assignor of the plaintiff, who had entered under the contract and paid a part of the purchase money before the arrangement with the defendant, who took the conveyance directly from the original vendor." In the case at bar, at the time of the execution of the deed from Carr to Conkey, Rex had no interest, legal or equitable, which he could assert, in the real estate; and, as he had nothing which could be mortgaged, the deed in question cannot be regarded as a mortgage from him to Conkey. If Rex's rights under the contract with Conkey still continue, they cannot be asserted by a bill to redeem. His remedy, if any he has, as to which we express no opinion, is by bill for specific performance.

The judgment of the Appellate Court and the decree of the circuit court will be reversed, and the cause remanded to the latter court, for such further proceedings as to justice and equity may appertain.

Reversed and remanded.

(212 Ill. 227)

PEOPLE ex rel. PARKER v. BURNS et al.*

(Supreme Court of Illinois. Oct. 24, 1904.)

QUO WARRANTO—DRAINAGE DISTRICT—ORGANIZATION—PETITION—SIGNATURES—SUFFICIENCY—ESTOPPEL.

1. In quo warranto against drainage commissioners, an allegation in a plea that there was presented to the town clerk a petition addressed to the drainage commissioners, signed by certain landowners, representing that they desired the organization of a drainage district; that the lands lying within the boundaries of the district required a system of drainage; and that said petition was signed by a majority in number of the adult owners of lands lying in said proposed district, and that they are the owners in the aggregate of more than one-third of the lands lying in the proposed district, and by the owners of a major part of the lands and who constitute one-third or more than one-third of the owners of the lands in the proposed district, etc.—sufficiently alleges that the petition was signed by a majority in number of the adult owners of lands lying in the proposed district, and that they owned in the aggregate more than one-third of the lands lying therein, as required by Hurd's Rev. St. 1903, p. 740, c. 42, § 11.

2. In quo warranto against drainage commissioners on the ground that the drainage district was not lawfully organized, the fact that relator was present at some of the meetings held by the drainage commissioners and acquiesced in their proceedings does not prevent the maintenance of the quo warranto proceeding in the name of the people, the doctrine of estoppel not applying to a matter in the nature of a public right.

Error to Circuit Court, Lee County; R. S. Farrand, Judge.

Quo warranto by the people, on relation of W. D. Parker, against Owen Burns and others. From a judgment quashing the writ, relator appeals. Affirmed.

This is a writ of error to the circuit court of Lee county to reverse the judgment of that court in a quo warranto proceeding by plaintiff in error, against defendants in error, to oust the latter from the office of drainage commissioners. The information alleges that the defendants usurped, and were wrongfully and without lawful authority exercising, the rights of the offices, powers, and franchise of drainage commissioners of District No. 2 of the town of Harmon, in said Lee county. The grounds of the petition are that the drainage district was not legally organized because the original petition filed with the town clerk was not signed by a majority of the adult persons owning land in said proposed district who were the owners of more than one-third of the land in the proposed district, or by the owners of a major part of the land and who constitute one-third or more of the owners of the land in said proposed district, wherefore the district was not legally organized, and the defendants hold and execute, without warrant of law, the office of drainage commissioners. A demurrer was filed to the information by the respondents,

and overruled, whereupon they filed seven pleas, to each of which the relator demurred, and the respondents moved to carry the demurrer back to the information, but that motion was overruled, and the demurrer to the pleas, and each of them, sustained. Five additional pleas were then filed, and the sixth and seventh original pleas amended. The relator moved to strike the additional pleas from the files, which was denied. He also demurred to the sixth and seventh amended pleas, which demurrer being overruled, he elected to abide by the demurrer. The respondents then moved the court for judgment on said pleas, and that the writ of quo warranto be quashed, and that relator pay the costs of the suit, which latter motion was sustained, and judgment entered accordingly. To that judgment relator excepted, and sued out this writ of error.

C. H. Wooster, State's Atty., J. E. Lewis, and H. A. Brooks, for plaintiff in error. F. E. Andrews, for defendants in error.

WILKIN, J. (after stating the facts). The drainage district in question was organized, or attempted to be organized, under section 11 of chapter 42 of our Statutes (Hurd's Rev. St. 1903, p. 740). It is a well-settled rule of practice, applicable to this action, that defendants must either disclaim the office which they are charged with usurping, or they must justify, and that if they justify they must show on the face of their plea that they have title to the office. The seventh amended plea, to which relator's demurrer was overruled, is a plea of justification, and, if the ruling of the court upon the demurrer thereto was proper, its judgment must be affirmed. It is true that no disposition seems to have been made of the five additional pleas, but no question is here made as to that fact, and, as above stated, the judgment was upon the demurrer to the sixth and seventh pleas.

Counsel for plaintiff in error say: "The real question presented by the record is, are the pleas of the defendants in error good on demurrer?" etc. In the view we take of that question, it will be unnecessary to consider or decide the many other points raised in the argument of counsel for the defendants in error, our conclusion being that the demurrer to the seventh plea was properly overruled. Counsel for the relator assume that that plea did not allege that the petition to the commissioners for the formation of the drainage district was signed by a majority in number of the adult owners of lands lying in the proposed district, and that they owned in the aggregate more than one-third of the lands lying therein, or by the owners of the major part of the lands and who constitute one-third or more of the owners of lands therein. Their construction of that plea is that those facts are only alleged to have been found by the commis-

*Rehearing denied December 7, 1904.

sioners, and do not appear by direct allegation, and they say the plea simply recites "the finding of the commissioners that the petition contained the signatures of a majority of the adult persons owning lands in the proposed district," etc. We do not agree with this construction of the plea. As appears from the abstract filed by plaintiff in error himself (there being an additional abstract by the defendants in error), "amended plea No. 7 alleges that upon October 11, 1898, there was presented to and filed with the town clerk of the town of Harmon, in said county, a petition addressed to the drainage commissioners of said town, signed by John Gorman and other landowners in said proposed district, representing, among other things, that they desired that a drainage district might be organized, embracing the lands therein described, for the purpose of constructing, repairing, and maintaining drains, embankments, and grades within said district for agricultural and sanitary purposes, by special assessment upon the property benefited thereby; that the lands lying within the boundaries of said proposed district required a combined system of drainage and protection from wash and overflow; and that said petition was signed by a majority in number of the adult owners of lands lying in said proposed district, and that they are the owners in the aggregate of more than one-third of the lands lying in the proposed district, and by the owners of a major part of the lands, and who constitute one-third, or more than one-third, of the owners of the lands in the proposed district; and praying that the said drainage commissioners would proceed and cause said drainage district to be organized." The abstract also shows that the plea set out the various steps taken by the landowners and the commissioners, as provided by the statute, in the organization of the district. It will thus be seen that the plea does allege that it was signed by the requisite number of landowners, as required by section 11 of the statute. It further alleges that on October 11, 1898, the town clerk notified the commissioners of the filing of said petition, posted notices, etc., as required by section 12, and that a meeting of the commissioners would be held at his office, on the 20th day of October following, for the purpose of organizing the district. It then recites that on the latter date (October 20th), in pursuance of said notice, the commissioners met at the town clerk's office for the purpose of considering the petition and for a hearing of the matters involved therein; "that the town clerk laid before the commissioners the petition, which was alleged to be signed by the required number of landowners, as provided by law"; and then follows the allegation: "And the said commissioners did examine and consider the papers laid before them, and did hear the evidence of the witnesses produced before them, and the affidavit of two of the

petitioners who were credible persons, and became satisfied in the premises that all the statements in said petition were true, did so find, and did find in favor of said petition, and did reduce their finding to writing, and did sign and seal the same, and file their said finding with the said town clerk, with the other papers in the case." In other words, the plea, on its face, alleges that the petition was signed by the required number of landowners in the proposed district, and that upon the hearing, as provided in section 13 of the act, the commissioners found that allegation to be true.

We are unable to perceive upon what theory the objection to the seventh plea can be sustained and it held insufficient as a plea of justification. It may be conceded that, if the plea showed nothing but the finding of the commissioners as to the number of landowners who signed the petition, it would be bad on demurrer as a plea of justification, because it would then be simply a finding unsupported by allegation, in which case the authorities cited by counsel in their argument would be in point; but, as before stated, this plea is not subject to that objection, and we think the court below properly overruled the demurrer thereto.

The sixth plea sets out the various steps in the organization of the district, as in the seventh, and then alleges that the relator, W. D. Parker, was present at some of the meetings held by the drainage commissioners, and acquiesced in their proceedings to such an extent that he is estopped from maintaining this action questioning the legality of the organization of the district, the theory of the plea being that this proceeding is not for the benefit of the public, but for that of the relator individually. The information is in the name of the "People of the State of Illinois," filed by the State's Attorney, on the relation, etc. The public at large is therefore, upon the face of the information, interested in the drainage district, it being a public corporation. *Payson v. People*, 175 Ill. 267, 51 N. E. 588. The Attorney General or State's Attorney may file an information on behalf of the people where the interests of the public are involved, and lapse of time constitutes no bar to such a proceeding. The doctrine of estoppel does not apply to a matter in the nature of a public right, and the state is not embraced within the statute of limitations unless specially named, and, by analogy, does not fall within the doctrine of estoppel. *People v. Gary*, 196 Ill. 310, 63 N. E. 749. In the organization of the district in question the public was interested, and could not be estopped from filing an information to question the legality of its organization merely because of the individual conduct of the relator, and, as we have seen, there is nothing in the record to show that the information as filed was for the private and exclusive benefit of the relator.

We are of the opinion, therefore, that the

demurrer to the sixth amended plea should have been sustained. The seventh plea, however, as a plea of justification, being sufficient, the overruling of the demurrer to the sixth worked no injury to the relator. The judgment of the circuit court must therefore be affirmed.

Judgment affirmed.

(212 Ill. 369.)

CHICAGO & E. I. R. CO. et al. v. COGGINS.

(Supreme Court of Illinois, Oct. 24, 1904. On Rehearing, Dec. 7, 1904.)

RAILROADS—INJURIES AT CROSSINGS—INSTRUCTIONS—APPEAL QUESTIONS NOT RAISED IN APPELLATE COURT—RIGHT TO REVIEW.

1. A point not made in the Appellate Court cannot be considered on appeal in the Supreme Court.

2. Where a railway company in an action for personal injuries sustained by being struck by a train requested an instruction that plaintiff could not recover unless he was using reasonable care for his safety "at the time of the accident," it cannot complain of the court's use of the words "immediately before and at the time of the accident" on the ground that the words used by the court restricted the jury to a consideration of plaintiff's conduct only after he had placed himself in a dangerous position.

3. An instruction, in an action against a railway company for personal injuries sustained by being struck by a train at a street crossing, that plaintiff could not recover if he failed to use reasonable care "to ascertain whether any train was approaching" before he entered on the track, was properly refused because it was apt to mislead the jury by emphasizing the duty of plaintiff with regard to the exercise of due care, thereby drawing the jury's attention to particular facts.

Appeal from Appellate Court, First District.

Action by Dominick Coggins against the Chicago & Eastern Illinois Railroad Company and another. From a judgment of the Appellate Court affirming a judgment for plaintiff, defendants appeal. Affirmed.

This was an action on the case, brought in the superior court of Cook county on October 20, 1899, by Dominick Coggins, appellee, against the Chicago & Eastern Illinois Railroad Company and the Chicago & Western Indiana Railroad Company, the appellants, to recover for personal injuries received by Coggins from being struck by a locomotive attached to a train of cars and belonging to and operated by the first above named railroad company. The track on which the engine and cars were being run at the time of the injury belonged to the last above named railroad company, and it was made a defendant on the theory that it was liable for the injury because it was the lessor of the company whose engine and cars inflicted that injury.

The accident occurred at the intersection of Root street, an east and west street in Chicago, with the railroad track above referred to. There are also a number of other parallel railroad tracks at this place, running north and south. The three eastern tracks are known as

the "Pennsylvania tracks." Immediately west of them are the tracks of the Chicago & Western Indiana Railroad Company, referred to as the "Indiana tracks." These are four in number. The one farthest east is used for north-bound passenger trains, the one next west for south-bound passenger trains, and the other two for freight trains. West of these Indiana tracks are the Wabash tracks, there being four or five of them. An ordinary railroad gate is located immediately west of the Indiana tracks, being between those tracks and the Wabash tracks. The same kind of gate is also located immediately east of the Pennsylvania tracks. The entire surface of Root street at this intersection is covered with planks. There are also sidewalks on the north and south sides of the street crossing the tracks. There is no depot or ticket office there, and no tickets are sold from that point. About 600 feet north of Root street there is a surface crossing with the tracks of another railroad. This again occurs at a point 937 feet north of Root street. The evidence tends to show that all north-bound passenger trains running on the Indiana tracks stop at Root street and take on and discharge passengers, but that south-bound trains do not stop there. The testimony of appellants was to the effect that the north-bound trains stopped at this point on account of the two crossings with the tracks north, which are above referred to, and not for the purpose of receiving or discharging passengers; that no signals were there given by any member of the train crew to the engineer to start the train; and that when persons did get on there fares were collected from the last preceding station to the destination of the passenger.

The evidence tends to show that on the morning of September 9, 1899, appellee left Flanley's Empire House, where he was working, to go to the Polk Street Depot to meet his sister-in-law, who was expected to arrive on a train about 7:30 o'clock that morning. He rode on a street car going east until he reached the railroad tracks above mentioned. He then saw a north-bound passenger train, belonging to the Chicago & Eastern Illinois Railroad Company, standing across Root street, the engine being north and the last coach south of that street. He left the street car, and walked across the Wabash tracks in a southeasterly direction until he came to the south sidewalk, and then proceeded east on that sidewalk across the two freight tracks of the Indiana Railroad Company. While crossing the third track from the west, a south-bound passenger train belonging to the Chicago & Eastern Illinois Railroad Company struck him, inflicting the injuries complained of in this suit. He testified that when he left Flanley's Empire House he intended to go to the Root street railroad crossing and take a train to the Polk Street Depot; that when he left the street car he started across the tracks to board the north-bound train, which was standing there, and which belonged to the last-mentioned railroad company. The evidence tends to show that this north-bound train stopped several minutes on this occasion while persons were getting off and on the cars, and that, had appellee not been struck by the south-bound train, he would have had ample time to board the north-bound train, as he testified it was his intention to do. The evidence also tends to show that the gates west of the Indiana tracks were open at the time appellee went upon those tracks and also at the time he was struck, and further tends to show that the bell was not ringing, and that the whistle was not blown until just as the engine struck appellee. Coggins testified that before going upon the tracks he looked both north and south for

¶ 1. See Appeal and Error, vol. 2, Cent. Dig. § 1133.

approaching trains, and saw none, but that he did not look north again after he had passed within the west gate; that although his senses of sight and hearing were exceptionally good, he received no warning of the approach of the train.

At the close of the evidence for the plaintiff the defendants moved the court to give an instruction, in writing, directing the jury to return a verdict for the defendants. The motion was denied, and the instruction refused. At the close of all the evidence a similar motion was made and instruction offered, with the same result. The jury returned a verdict for \$12,500 in favor of the plaintiff, on which judgment was subsequently rendered, motions for a new trial and in arrest of judgment having been, respectively, overruled. The cause was taken to the Appellate Court for the First District, where the judgment of the superior court was affirmed, and appellants now appeal to this court.

The cause was tried upon counts of the declaration numbered 5, 6, and 7. The fifth charges a violation of the statutory duty to ring the bell or sound the whistle as the south-bound train approached Root street. The sixth charges that the Chicago & Eastern Illinois Railroad Company habitually stopped its north-bound passenger trains at the Root street crossing and habitually received and discharged passengers there, and that in violation of its duty to intending passengers it carelessly and negligently ran the south-bound train over the crossing upon a track next to and parallel with the track upon which the north-bound passenger train was standing. The seventh count charges that the negligence consisted in failing to keep the tracks next to the standing train free from moving locomotives, and in negligently running the south-bound train past the standing train at a high rate of speed.

Calhoun, Lyford & Sheean, for appellants.
James W. Duncan, C. Le Roy Brown, and Charles J. Gould, for appellee.

SCOTT, J. (after stating the facts). Appellants first contend that under their twelfth instruction which was given to the jury the court conditioned the right of plaintiff to recover herein upon the existence of the relation of carrier and passenger between the parties, thus limiting the issues to be decided by the jury; that there is no evidence in the record tending to show such relation, and for that reason the judgment should be reversed. Appellee, having obtained leave, filed in this court a certified copy of appellants' brief and argument in the Appellate Court. It appears therefrom that this point was not made in that court; consequently it cannot be considered here.

Appellants also question the action of the circuit court in modifying, and in giving as modified, their eleventh instruction, and in refusing their fourteenth and fifteenth instructions. The eleventh instruction, as requested, read as follows:

"The plaintiff cannot recover in this case unless it is proved by a preponderance of the evidence not only that the defendants were guilty of the negligence charged

against them in the plaintiff's declaration, or some count thereof, but that Coggins was using reasonable care for his safety at the time of the accident; and if the jury shall find from the evidence that Coggins did not use reasonable care to ascertain whether any train was approaching from the north and carelessly placed himself on or alongside of the track on which the south-bound train was running so near to it as to expose himself to the danger of being struck by the said train, or carelessly stepped in front of said train as it had almost reached him, then the plaintiff cannot recover, and their verdict should be for the defendants."

The court modified the instruction by striking out the portion italicized and inserting in lieu thereof the following: "Or ordinary care for his own safety immediately before and at the time of the accident complained of, then the plaintiff cannot recover, and their verdict should be for the defendants," and gave the instruction so modified to the jury. It is not urged that there was error in giving the instruction as modified, except it is said that the use of the term "immediately before and at the time of the accident" restricted the jury to a consideration of the conduct of the plaintiff only after he had placed himself in a dangerous position, and would lead them to disregard his conduct prior thereto, even though the evidence showed that he was guilty of negligence in having placed himself in a position of danger. As appellants used the expression "at the time of the accident," in drawing the first part of the instruction, to specify the period during which Coggins was required to use reasonable care, they are not in a position to urge this objection. But the point is without merit in any event. *Lake Shore & Michigan Southern Railway Co. v. Johnson*, 135 Ill. 641, 26 N. E. 510; *Cleveland, Cincinnati, Chicago & St. Louis Railway Co. v. Keenan*, 190 Ill. 217, 60 N. E. 107. Appellants contend, however, that, as given, this instruction is a mere abstract proposition of law, and that there was error in modifying it, because they were entitled to have the principle therein stated applied to the facts of the case, and to have the jury's attention directed to the plaintiff's failure "to take any means to ascertain whether any trains were approaching before appellee entered upon the track"; and it is urged that appellants had the right to have the jury pass upon the question whether appellee used reasonable care to ascertain whether any train was approaching from the north, and that they were entitled to an instruction calling the attention of the jury to the fact that it was the duty of appellee, not merely to use reasonable care "to avoid injury by the train after discovering its approach, but also to exercise reasonable and ordinary care to ascertain whether any such train was approaching." We are inclined to the view that this instruction, as requested, violates

the rule that "an instruction should not draw the attention of the jury to particular facts." *Chapman v. Cawrey*, 50 Ill. 512; *Drainage Com'rs v. Illinois Central Railroad Co.*, 158 Ill. 353, 41 N. E. 1073. It was apt to mislead the jury by emphasizing the duty of plaintiff with regard to the exercise of due care to avoid danger from the particular train approaching from the north as he crossed the tracks toward the north-bound train. It was his duty to exercise reasonable care for his personal safety. His mind would naturally be intent upon reaching the north-bound train and entering it in safety before it began moving. Trains might pass either north or south upon the tracks. Teams and vehicles of various kinds might come upon the crossing. It was his duty to use reasonable care to avoid danger from trains passing in either direction and from every other agency from which injury might be received, and it would have been proper to have so instructed the jury; but to call their attention particularly to his duty to exercise such care to ascertain whether any train was approaching from the north was to call their attention to the fact that, if he had stopped as soon as he came upon the Chicago & Western Indiana tracks, and turned and looked to the north, he could have seen the approaching train, and avoided injury, and might have led the jury to conclude that a failure to take that course would necessarily bar a recovery.

In *Chicago, Burlington & Quincy Railroad Co. v. Gunderson*, 74 Ill. App. 356, it was held that an instruction was erroneous which advised the jury that a person going upon a railroad track "must look both ways, listen for trains, and avoid being injured by them, if he can do so by the exercise of reasonable care and caution." The case came to this court, where the judgment of the Appellate Court was affirmed in *Chicago, Burlington & Quincy Railroad Co. v. Gunderson*, 174 Ill. 495, 51 N. E. 708. We regard the instruction under consideration there and the one now before us as alike in principle.

No error was committed in refusing the fourteenth and fifteenth instructions asked by appellants, as each was objectionable in the same respect as was the eleventh in its original form.

The judgment of the Appellate Court will be affirmed. Judgment affirmed.

On Rehearing.

SCOTT, J. Appellants now insist that their eleventh instruction, as requested, is in substance identical with appellant's twelfth instruction in *C. C. Ry. Co. v. O'Donnell*, 208 Ill. 267, 70 N. E. 294, 477, the refusal of which was in that case held to be error. We are entirely satisfied with the views there expressed relative to that instruction, but the one now before us is materially different. The instruction in the *O'Donnell* Case submitted to the jury the question whether ordinary care required the party injured to ascertain before going upon the track whether a car was ap-

proaching, and the question whether, before going upon the track, he could, by the exercise of ordinary care, have ascertained whether a car was approaching. The instruction now before us omits both of these propositions. In the case in 208 Ill., 70 N. E., the instruction submitted to the jury for their consideration every question necessary to be decided in determining whether the party injured had exercised due care. The instruction here does not submit every such question, and is objectionable because it directs the attention of the jury particularly to those facts upon which the questions which it does submit arise. The petition for rehearing will be denied.

Rehearing denied.

(213 Ill. 314.)

GLOS v. KELLY.*

(Supreme Court of Illinois. Oct. 24, 1904.)

BURNT RECORDS ACT—PETITION IN SUIT UNDER STATUTE ISSUES—TAX DEED—VALIDITY—BURDEN OF PROOF—SETTING ASIDE DEED—RECOVERY OF PAYMENTS.

1. A petition setting forth the description of certain land, and the character and extent of the estate claimed therein by petitioner, and from whom, when, and by what mode he derived his title thereto, and that the records pertaining to the title had been destroyed by fire on October 8 and 9, 1871, and alleging that G. claimed to have some interest in the premises, that petitioner knew of no other person having or claiming any interest, making G. a defendant, together with "all whom it may concern," and praying that he be enjoined and restrained from clouding petitioner's title, was on its face a petition under the burnt records act (Hurd's Rev. St. 1903, p. 1484, c. 115).

2. Where the deeds in a chain of title are destroyed by fire, an action may be maintained under the burnt records act, though questions as to title, involving tax deeds subsequent to the destruction of the records, are involved.

3. In proceedings under the burnt records act (Hurd's Rev. St. 1903, p. 1484, c. 115), the holder of a tax title who is made a defendant has the burden of showing the validity of his title, if he asserts its validity.

4. In a suit under the burnt records act (Hurd's Rev. St. 1903, p. 1484, c. 115), the validity of a tax title held by defendant was not shown by the mere introduction of the deed.

5. Hurd's Rev. St. 1903, c. 120, § 224, provides that the holder of a tax deed, even though his title be invalid, if his deed be set aside as a cloud, is entitled, as a condition precedent to such action, to "receive all taxes and legal costs together with all penalties as provided by law which it shall appear he has properly paid in procuring the deed." In a suit under the burnt records act (Hurd's Rev. St. 1903, p. 1484, c. 115), defendant claimed under a tax deed, and he stated that he purchased the premises in question at a tax sale, and that he paid a certain sum at that sale. It appeared that other property was sold at the same sale and on the same day, and that he was a holder of a certificate of sale of such other property at the time of the execution of the tax deed. Held, that such evidence was insufficient to show the amount properly paid.

6. In a suit under the burnt records act (Hurd's Rev. St. 1903, p. 1484, c. 115), where petitioner seeks to have a tax deed running to a defendant set aside, and the holder of the tax deed does not attempt to show that his title is valid, but merely offers in evidence his tax deed, if he desires to be reimbursed for money prop-

*Rehearing denied December 2, 1904.

‡ See Records, vol. 42, Cent. Dig. §§ 24, 25.

erly paid out in procuring the deed under Hurd's Rev. St. 1903, c. 120, § 224 (providing that the holder of a tax deed, if it is set aside, is entitled to receive all taxes, etc., which he has properly paid in procuring the deed), he must prove the amount.

Appeal from Circuit Court, Cook County; J. W. Mack, Judge.

Suit by Dennis Kelly against Jacob Glos. From a decree in favor of complainant, defendant appeals. Affirmed.

Dennis Kelly, the appellee, filed his petition on November 19, 1901, in the circuit court of Cook county, to establish and confirm title in him to certain lots in the city of Chicago under the act of the Legislature commonly referred to as the "Burnt Records Act" (Hurd's Rev. St. 1903, p. 1484, c. 115). The petition, after setting forth the description of the lots, the character and extent of the estate claimed by the petitioner, and from whom, when, and by what mode he derived his title thereto, and that the records pertaining to the title had been destroyed by fire on October 8 and 9, 1871, alleges that Jacob Glos claims to have some interest in said premises, and that petitioner knows of no other persons having or claiming any interest therein by reason of the destruction of the records. The petition makes Jacob Glos a party defendant, together with "all whom it may concern," and prays that Glos be enjoined and restrained from clouding or attempting to cloud the title of petitioner to the lots aforesaid, and that such injunction be by decree made perpetual; that a decree be entered removing any such cloud or clouds, and establishing petitioner's rights and interests, and determining the title to said lots to be in petitioner in fee simple, and that petitioner's title be established and confirmed as against the defendants and all others. Jacob Glos demurred to the petition. The demurrer was overruled, and he answered, setting up a sale of the lots to him on October 1, 1897, for delinquent taxes of 1896, and a deed to him to said lots from the county clerk on September 19, 1900. The petitioner replied to the answer. The cause was referred to the master, who took evidence and reported to the court that Glos had offered no testimony to establish the validity of his tax deed, or to prove that the provisions of the statute had been complied with in obtaining the same; that the evidence will not justify a finding that Glos paid \$82.56 for the lots in question at the tax sale, but that he paid subsequent taxes, which, with interest, amount to \$34.38, and also paid \$17.65 for issuing his tax deed, but that the deed includes other premises. A decree was thereupon entered by the court finding the material allegations of the petition proved, that Glos is not entitled to be reimbursed on account of the \$17.65 paid for issuing the tax deed, and that there is no evidence that he paid \$82.56, or any other sum, for the premises at the tax sale. It

adjudges petitioner to be seised of the premises in fee simple, and orders that his title be confirmed and established. It also adjudges the tax deed to be null and void as to the lots in question, and orders it canceled as to that property. The clerk is ordered to pay \$36.85, being \$34.38 taxes paid, with interest, which has been deposited with him by the petitioner, to Glos on demand, and Glos is decreed to have no further interest in the lots by virtue of the payment of taxes by him.

The only evidence in the record concerning the amount paid at the sale for taxes is the testimony of Jacob Glos, who, after stating that he purchased the lots in question at a tax sale held on October 1, 1897, said, "I paid at that sale \$82.56."

This appeal is prosecuted from the circuit court by Glos, who contends, first, that the petition herein is, in effect, a bill to remove a cloud from the title, and that therefore the court erred in holding that the burden of proof was on him to show the validity of his tax deed; and, second, that the decree is erroneous in not ordering appellee to reimburse appellant by the payment of \$82.56, with legal interest, for the money paid by the latter for the lots at the tax sale on October 1, 1897.

Jacob Glos (John R. O'Connor, of counsel), pro se. Rogers & Mahoney and Chilton P. Wilson, for appellee.

SCOTT, J. (after stating the facts). The petition herein indicates on its face that it is filed under the burnt records act (Hurd's Rev. St. 1903, p. 1484, c. 115). Appellant contends that this is a mere pretense, and that it is in fact a bill to set aside his tax title as a cloud upon the title of petitioner, and refers us to the case of Gage v. McLaughlin, 101 Ill. 155. In that case the only persons named as defendants were Gage, the owner of the tax title, and the widow and heirs of Andrew Cook. The latter had conveyed the property, after the destruction of the records, by mortgage, which had been foreclosed and passed to a deed through which petitioner took title. No person was defendant as to whom any relief could be had in reference to links in the chain of title, the records of which had been destroyed. This case is materially different. The petitioner avers that he is the owner of the title in fee simple, holding through Thomas A. Hill, who was the owner of the property at the time of the destruction of the records on October 9, 1871; that said Hill held title through sundry mesne conveyances, a part of which are particularly described, from the government of the United States, the record of all which conveyances were destroyed by fire on the date last mentioned. Petitioner seeks to have his title established and confirmed, and makes defendants "all whom it may concern" and

Jacob Glos. It is apparent that petitioner did not have a perfect title of record on account of the destruction of the records, and it was therefore proper for him, upon requisite proof, which he made, to have his title established and confirmed in this proceeding under the act in question. We think the suit is rightfully to be regarded as one under that act, within the authority of *Gage v. Caraher*, 125 Ill. 447, 17 N. E. 777, and *Gage v. Thompson*, 161 Ill. 408, 48 N. E. 1062.

In proceedings under this act, the holder of a tax title who is made defendant is required to show the validity of his title, if he asserts its validity. The burden of proof is upon him. The appellant offered no evidence of such title except the tax deed, which is not sufficient. *Gage v. Thompson*, supra. The holder of such a deed, however, even though the title be invalid, if his deed be set aside as a cloud upon the title of petitioner, is entitled, as a condition precedent to such action, to receive "all taxes and legal costs, together with all penalties, as provided by law," which it shall appear he has properly paid in procuring the deed. *Hurd's Rev. St. 1903, c. 120, § 224*.

In this case the tax deed offered by appellant conveys or purports to convey to him the real estate in question and certain other real estate, and recites that at a public sale of real estate for nonpayment of taxes, made in Cook county on October 1, 1897, the real estate in question and certain other real estate, all of which is described in the deed, was sold. Glos testified: "I purchased the premises in question [describing them] at a tax sale held on the 1st day of October, A. D. 1897. I paid at that sale \$82.56." The court below held that this testimony was not sufficient to show what amount Glos had properly paid for the purposes enumerated by the language above quoted from section 224, supra, and the decree, for that reason, does not provide for the repayment to said Glos of the sum of \$82.56, with interest, or any part thereof. We think the evidence was insufficient. It appears that other property was sold at the same sale and on the same day, and that Glos was the holder of the certificate of sale of such other property at the time of the execution of the tax deed. He says he paid a certain amount "at that sale." This may mean that he paid that amount for the property in question, or that he paid that amount for the property in question and other property. It does not show, at any rate, that it is an amount which he "properly paid" in securing a deed for the premises in controversy.

It is then urged that as appellee sought, in equity, to have appellant's tax deed set aside, he could only have equity by doing equity, and to do equity he must repay to appellant the money properly disbursed by him in procuring the tax deed; and that, as he was required to make this payment, the burden of proof was upon him to show

the amount to be paid; and that, if the proof offered by appellant did not establish the amount paid, it was error for the court to set aside the tax deed without ascertaining the amount paid and decreeing its repayment to appellant, with interest. In *Gage v. Du Puy*, 134 Ill. 132, 24 N. E. 866, the petitioner made the holder of a tax title a party, and offered, if it was found that such defendant claimed under tax titles and the tax deeds were declared void, to pay what was equitably due therefor. The title was established and confirmed in the petitioner. The holder of the tax title brought the case to this court, and assigned as error the failure of the decree to require the petitioner to repay the money expended in acquiring the tax titles. This court refused to reverse the decree, saying: "There is nothing in the record before us showing, or tending to show, that at the hearing plaintiff in error offered any evidence of title claimed by him, or that he had expended any sum of money in respect of any such title. There was, so far as shown by this record, nothing before the court from which it could have rendered a decree finding anything equitably due to plaintiff in error." And in *Gage v. Gentzel*, 144 Ill. 450, 33 N. E. 536, it was contended that the decree of the court below was erroneous, in that it did not require appellee to repay to appellant the amount of money advanced by him on account of a tax sale. This court affirmed the decree, holding that the relief in question could not have been granted, for the reason that the holder of the tax deed had furnished no evidence of the amount expended by him upon which a decree for repayment could be rendered. Both of these cases were under the burnt records act, and it is apparent from them that in a proceeding under that act, where the holder of the tax deed does not attempt to show that his title is valid, but merely offers in evidence his tax deed, if he desires to be reimbursed for money properly paid out in procuring that deed, it is necessary for him to make proof of the amount. The decree of the circuit court will be affirmed.

Decree affirmed.

(212 Ill. 222)

BENNETT v. ROYS.*

(Supreme Court of Illinois. Oct. 24, 1904.)

BURNT RECORDS ACT—PROCEEDINGS—TITLE—ESTABLISHMENT—PLEADINGS—VERIFICATION—OBJECTION—WAIVER—JUDGMENTS—COLLATERAL ATTACK—APPEAL—PRESUMPTIONS.

1. Where defendant demurred to the petition, but failed to question its sufficiency, because verified before a notary in another state, who failed to certify in his jurat that under the statutes of that state he was authorized to administer oaths, defendant waived such objection, and could not raise the same for the first time after final decree.

*Rehearing denied December 8, 1904.

¶ 1. See Pleading, vol. 39, Cent. Dig. §§ 1415-1417.

2. Where, after a decree for possession of certain premises in a proceeding under the burnt records act, defendant was removed from possession under a writ of assistance, defendant's subsequent motion for a writ of restitution and to quash such writ of assistance was a collateral attack on such decree.

3. Where the record in a proceeding to establish title under the burnt records act showed that a former proceeding under such act had been instituted by plaintiff's grantor, and that a decree had been entered establishing title to the premises in him, it would be presumed on appeal, as against a collateral attack on a judgment in favor of plaintiff, that the court had found that for some reason the former decree was void, and was not therefore a bar to plaintiff's proceeding.

Appeal from Circuit Court, Cook County; E. F. Dunne, Judge.

Application by Ellis Bennett, impleaded, etc., against Cyrus D. Roys for writ of restitution and to quash a writ of assistance. From an order denying the writ of restitution and overruling the motion to quash, said Bennett appeals. Affirmed.

The appellant, on March 19, 1904, made a motion that a writ of restitution issue to restore him to the possession of certain premises located in Cook county; also to quash a writ of assistance, by virtue of which the appellant had been removed from the possession of the said premises. The court overruled the motion and refused to order said writ of restitution to issue or to quash said writ of assistance, and appellant has brought the record to this court for review by appeal. It appears from the record that a petition under the burnt records act was filed on May 12, 1898, by the appellee; that appellant was made a party defendant thereto; that he was duly served with summons; that he appeared by counsel, and on July 11, 1898, filed a special demurrer to said petition; that on June 26, 1899, an order was entered overruling said demurrer and ruling appellant to answer said petition within ten days; that, no answer having been filed within that time, the appellant was defaulted on July 8, 1899; that the petition was taken pro confesso as to him, and a decree was entered finding that the court had jurisdiction of the subject-matter and all the parties to said proceeding, that the title to the premises was in appellee, and that appellant had no valid interest therein, and it was ordered that he vacate and surrender possession of the premises to appellee on the production of a certified copy of said decree, and in default that a writ of assistance issue; that on February 19, 1904, appellant was served with a certified copy of said decree, and a demand was made upon him for possession, which he refused to surrender, whereupon he was ruled to show cause in five days why a writ of assistance should not issue; that on March 5, 1904, the court ordered the writ of assistance to issue; that on March 7, 1904, the appellant moved to quash said writ, which motion was overruled, and the writ was thereupon executed,

whereupon the motion now under consideration was made and overruled.

Consider H. Willett (Mills, Gorham & Mills, of counsel), for appellant. Oliver & Mecartney, for appellee.

HAND, J. (after stating the facts). The petition of appellee, filed under the burnt records act, was sworn to by appellee before a notary public in the state of Indiana, who failed to certify in his jurat that under the statutes of said state he was authorized to administer oaths; and it is urged the court for that reason failed to acquire jurisdiction to hear and determine the cause made by the petition, and that the decree entered in said proceeding against the appellant by reason of that fact is void. We do not agree with such contention. The appellant, when served with process, appeared and demurred to said petition, but failed to raise the question of the sufficiency of the verification thereof. By failing to challenge the sufficiency of the petition for want of a sufficient verification, the appellant waived the objection, and cannot, upon a motion made after final decree, be heard to say the petition was not properly verified.

In *King v. Haines*, 23 Ill. 340, there was a defective verification to a plea in abatement required by the statute to be verified. The plaintiff, instead of objecting thereto by motion or demurrer, filed a replication. The court, on page 341, say: "Pleas of this character, by the statute, must be positively verified by the affidavit required to be attached. The statute requires an affidavit of the truth, and not of the mere probable truth, of the plea. Under the statute of Anne, the courts have been so rigid as to require the affidavit to state that the plea is true in substance and fact, and that a statement that it is a true plea is insufficient. 1 Chitty's Pl. 463. But, however defective the affidavit, this plea was treated as sufficient by filing a replication. Whatever defects in form may have existed to the plea or the affidavit, they were waived by filing a replication. To have rendered the defect in the affidavit availing, the plaintiff below should have moved the court to strike it from the files before filing a replication, or, if the plea was defective, he should have demurred. It is too late, after forming an issue in fact, to urge these objections." In *Re Miller*, 32 Neb. 480, 49 N. W. 427, the verification attached to the petition for the appointment of an administrator was not signed by the affiant, and it was urged that this defect was jurisdictional. The court said (page 483, 32 Neb., page 428, 49 N. W.): "While such a petition should be verified, yet the failure to do so is not more than an irregularity, and does not oust the court of jurisdiction to act. It could have been supplied, and doubtless would have been, had the attention of the court been challenged

thereto. It is a defect that can be waived, and was waived in this case." In *Sutherland v. Hankins*, 56 Ind. 343, there was a defective verification to the bill of complaint in a special statutory proceeding to set aside a will. The court held that specific objection thereto should have been made in the trial court, and by failing to object in time the appellant waived the point.

The appellant had the right, when he appeared, to insist upon a proper verification of the petition. If this had been done, and the court below had then refused to require the appellee to furnish proof that the notary public before whom the same was sworn to had authority to administer oaths, a different question from that presented here would be presented for our consideration. He, however, saw fit, as he had a right to do, to waive the verification thereto; and, having voluntarily adopted that course, it must be considered now that he waived any objection he might have taken to the petition for the want of a proper verification.

It appears from the affidavits filed in support of the motion that Charles E. Rees, the grantor of appellee, on August 15, 1876, filed a petition in the circuit court of Cook county against the appellant, under the burnt records act, which involved the title to the premises in question, and that on February 18, 1878, a decree was entered therein establishing the title to said premises in Charles E. Rees, and it is contended that said decree is void for the further reason that said proceeding exhausted the jurisdiction of the circuit court, under said burnt records act, over said premises, and that said circuit court was powerless to enter said decree upon the petition of appellee. The motion made by the appellant in effect was a collateral attack on the original decree rendered upon the petition of appellee. It has been held by this court that the proceeding under the burnt records act is a suit in equity, and that the rules governing courts of chancery apply to proceedings instituted under said act so far as they are applicable. *Gage v. Du Puy*, 127 Ill. 216, 19 N. E. 878; *Harms v. Jacobs*, 155 Ill. 221, 40 N. E. 488. The circuit court, in the proceeding commenced by appellee, found it had jurisdiction over the subject-matter and the parties to the suit, and its decree, based upon such finding, unless contradicted by other portions of the record, imports verity, and all presumptions will be indulged which are necessary to support it. *Figge v. Rowlen*, 185 Ill. 234, 57 N. E. 195. It must therefore be presumed, for the purposes of this motion, although said former decree appeared in the chain of appellee's title introduced in evidence in the proceeding under his petition, that the circuit court held, for want of jurisdiction or other cause, that said former decree was void, and therefore not a bar to the proceeding instituted by appellee under said act, which ruling could only be reviewed by

appeal or writ of error. We think it clear, however, if the appellant desired to contest the right of the appellee to file his petition upon the ground that a former petition involving the title to said premises had been filed by the grantor of appellee, and which proceeding had ripened into a decree, he should have raised said question by a plea or answer, and that, he having failed to set up said former adjudication by plea or answer, it cannot now be interposed for the purpose of overthrowing the decree entered upon appellee's petition.

It is also urged by appellant that his demurrer to the petition of appellee was disposed of by the circuit court without proper notice to him. If the appellant was dissatisfied with the action of the trial court in disposing of his demurrer, he should have moved the court to vacate the decree and to set aside the order overruling his demurrer and ordering that the bill be taken pro confesso as to him. Having failed to take such action, he cannot now be heard to say the demurrer was improperly overruled.

Finding no reversible error in this record, the decree of the circuit court overruling the motion of the appellant will be affirmed.

Decree affirmed.

(212 Ill. 238)

SOKEL v. PEOPLE.*

(Supreme Court of Illinois. Oct. 24, 1904.)

BIGAMY—EVIDENCE OF MARRIAGE—COMPETENCY OF WITNESS—VALIDITY OF MARRIAGE—BURDEN OF PROOF.

1. In a prosecution for bigamy, the question as to the prior marriage being one of fact from the evidence, it is error to allow witness to state merely that defendant and the alleged first wife were married.

2. Where the preliminary examination of a child nine years of age showed that she had attended school, and knew the difference between truth and falsehood; that she knew her oath obliged her to tell the truth, and that she would be punished if she failed to do so—it is not error to allow her to testify.

3. The admission of record proof of marriage in a prosecution for bigamy does not violate the constitutional guaranty to persons accused of crime of meeting witnesses face to face.

4. Where the evidence in a prosecution for bigamy shows that defendant at the time of his first marriage was only 14 years of age, the marriage having taken place in a foreign country, it is presumed to have been valid, and the burden of proof is on defendant, rather than on the prosecution.

5. Evidence in a prosecution for bigamy considered, and held sufficient to sustain a conviction.

Error to Criminal Court, Cook County: E. F. Dunne, Judge.

Joseph Sokel was convicted of bigamy, and brings error. Affirmed.

John A. Silha and Charles A. Churan, for plaintiff in error. H. J. Hamlin, Atty. Gen.,

*Rehearing denied December 8, 1904.

¶ 2. See Criminal Law, vol. 14, Cent. Dig. § 1540.

Charles S. Deneen, State's Atty., and Ferdinand L. Barnett, Asst. State's Atty., for the People.

CARTWRIGHT, J. Plaintiff in error was convicted in the criminal court of Cook county of the crime of bigamy upon an indictment charging that in the year 1885, in Safed, in Palestine, in the empire of Turkey, he lawfully married one Esther Schocherts, and afterward, on March 9, 1901, in the city of New York, while the said Esther was still living, unlawfully married Rachel Schur.

By the assignment of errors the correctness of various rulings during the trial is questioned, as well as the sufficiency of the evidence to warrant a conviction. The points upon which plaintiff in error relies are very fully presented by his counsel in their brief and argument, to which there is a merely perfunctory reply on the part of the people, having neither the form nor the substance of a brief, and not containing any citation of authority, or any allusion to the most important questions in the case. It is apparent that several errors were committed in the course of the trial, but our examination of the record has led us to the conclusion that none of them call for a reversal of the judgment, and that the evidence adduced upon the trial warranted the conviction.

The first witness examined was Israel Levy, who testified that he knew the defendant and Esther Schocherts in Safed, Palestine, in the empire of Turkey, and saw them together in that place in June or July, 1885. He was then asked what the occasion was that brought them together, and answered that the rabbi married them. On objection the court refused to strike out the answer, and this was error. The question whether the defendant married Esther Schocherts was the principal fact in issue which the jury were impaneled to try, and the answer substituted the conclusion of the witness for the finding of the jury on that question. The question whether the parties were married was to be determined by the jury from the evidence as to what was done in the way of entering into a marriage contract, and the ruling permitted the witness to usurp the province of the jury. *Chicago & Alton Railroad Co. v. Springfield & Northwestern Railroad Co.*, 67 Ill. 142. The witness, however, afterward detailed what occurred at the time, which, in our opinion, was *prima facie* evidence of a legal and valid marriage, and the testimony was wholly uncontradicted. He testified that he knew the parties in Safed; that he was between 13 and 14 years old; that he went to the wedding with his brother, who boarded with Esther Schocherts' father; that there was a ceremony performed by a rabbi in the presence of a large crowd in Safed, in the yard of the synagogue; that they brought a can-

opy, and placed under it the groom and bride; that the rabbi called upon two persons and made them witnesses, that they should see and bear witness that the defendant was married to Esther, and must see the way he put the ring on her finger; that the two witnesses bore witness to the marriage contract, and signed a paper produced at the trial; that he saw the paper under the canopy, and the rabbi read it; that he knew the witnesses, and saw them sign it; that after the wedding they went to the house, and there was a festive occasion—eating, drinking, and playing; that after the marriage the defendant lived with Esther at her father's house; and that he was in the house several times where they were living as husband and wife. Inasmuch as everything that was done was subsequently detailed by the witness, and was sufficient to prove a marriage contract, and was not contradicted, the error was not prejudicial. There was also testimony of a witness that the defendant said he was married in Palestine, 18 or 19 years ago, to Esther Schocherts. He also said to that witness that he had been divorced by a rabbi, but, as it does not appear that a rabbi had jurisdiction to grant divorces, the alleged divorce, if his statements were any evidence of it, would be void. A divorce granted without jurisdiction is absolutely void. *Tucker v. People*, 122 Ill. 583, 13 N. E. 809.

The second witness was Tillie Sokel, a child nine years old, who testified that she was the daughter of the defendant and his wife, Esther, born in Jerusalem; that when she met her father in New York he recognized her, and kissed her, and that afterwards he took a child of his second marriage in his lap, and asked the witness how she liked her sister. The girl was objected to as a witness on the ground that she was not of proper age and did not comprehend the nature and effect of an oath. The competency of a child to testify depends upon his or her intelligence, understanding, and moral sense. *Draper v. Draper*, 68 Ill. 17. If the preliminary examination shows that the child understands the nature and meaning of an oath, and is of sufficient intelligence and understanding, it is not error to admit the testimony, and the weight to be given to it is a matter for the jury. *Featherstone v. People*, 194 Ill. 325, 62 N. E. 684. The preliminary examination of the witness in this case showed that she had attended school, and knew the difference between truth and falsehood; that she knew her oath obliged her to tell the truth, and that she would be punished if she failed to do so. It was not error to permit her to testify. Another witness testified that she went to defendant's house with the daughter, Tillie, and defendant asked how his wife, Esther, was, and asked Tillie how she liked her sister, referring to a child of the second marriage.

The court admitted, over objection, a paper

purporting to be a transcript from the records of marriages reported to the department of health in the city of New York, showing the marriage of Joseph Sokel to Rachel Schur. The ruling was erroneous for want of identification and evidence that the record was one required by law to be kept. Afterward the state's attorney, by leave of the court, withdrew the paper, and the defendant excepted to the ruling. An instruction was also given to the jury that they should not consider the transcript as any evidence in the case. It is contended that the withdrawal of the certificate did not cure the error of its admission, and it is doubtless true that the withdrawal of evidence of such a nature would not remedy the error in admitting it. The paper was of a nature to prejudice the defendant, and was not competent evidence. But here again the marriage was proved by other and competent evidence, which was not controverted. It was proved by a witness present at the marriage that the defendant and Rachel Schur were married in New York City in March, 1901, by a rabbi, in a public assembly; that there was a ceremonial marriage, in which the defendant put a ring on Rachel Schur's finger; that a wedding present was given to them at that time; and that they lived together afterwards as husband and wife and had two children. It was also proved that they lived together as husband and wife in Chicago, and there was no contradictory evidence. The marriage to Rachel Schur having been otherwise proved, so that the jury could not have found differently, the judgment should not be reversed on account of the admission of the transcript.

It is next complained that the court permitted the people to prove that Rachel Schur, the second wife, could not be found by an officer, and was evading service of a subpoena. There was nothing tending to show that defendant kept her away from the trial, and it is insisted that the evidence was only offered to prejudice him. The court overruled defendant's objection to the evidence, but, as we understand the abstract, afterward struck it out, and it will not be considered.

The next point is that the defendant was denied the right to meet the witnesses against him face to face, which is guaranteed by the Constitution, by the admission in evidence of the instrument, in the Hebrew language, prepared and signed by the two witnesses as a part of the marriage ceremony in Safed. The same objection was made in *Tucker v. People*, supra, to the introduction of a certified copy from the records of the county clerk of the certificate of the person who performed the marriage ceremony indorsed on the back of the license. It was there held that the constitutional guaranty assures to the accused the right to meet witnesses face to face, and prevents the taking of their depositions in a criminal prosecution, but that

it has no reference to record evidence which may become necessary to establish some material fact. The evidence tended to show that the making of the paper was a part of a ceremonial marriage under the law where the marriage took place. Its execution as a part of the ceremony was duly proved. It was not signed by the contracting parties, but only by the witnesses, and as translated it recited the proposal of the youth Isaac Joseph, the son of Hebron, to the maiden Esther, daughter of the rabbi Moses, asking her to be his wife. It purported to recite the making of a marriage contract between the parties on the fourth day from Saturday, in the month of seven, in the year 5645, according to the laws of Moses and Israel. We think it was admissible, in connection with the testimony, as a part of the ceremonial marriage.

It was necessary for the people to prove a valid first marriage, and it is contended that, in order to do so it was necessary to allege and prove the laws of the empire of Turkey authorizing the defendant to enter into a marriage contract. The evidence was that at the time of the marriage defendant was 14 years old, and it is urged that the marriage was presumptively illegal and void because our statute only allows males over the age of 17 to contract marriage. There is no presumption that the empire of Turkey has adopted the statute laws of this state, and so far as there is any presumption concerning the laws of foreign countries it is limited to the common law. If there were any presumption, the age at which a boy might contract marriage at common law was 14, and according to the evidence that was the age of the defendant at the time of the marriage. But at common law the marriage of an infant over 7 years of age and under 14 was merely voidable, and subject to disaffirmance or ratification. If a boy within those ages were married, he might, when he came to the age of consent, declare the marriage void without any divorce; but if, at the age of consent, the parties agreed to continue together as husband and wife, it was not necessary to be married again. The evidence showed that the defendant was 14 years old at the time of marriage, and that the parties continued to live together as husband and wife for some years afterward. The validity of the marriage is to be determined by the laws of the empire of Turkey, and there was evidence tending in some degree to show that marriages at the age of defendant were lawful in that country. The evidence was that people were frequently married at that age in that empire, and the fact of the celebration of the marriage, followed by cohabitation, raises the presumption that it was lawful. Where the evidence establishes a contract of marriage, one contending that the contract falls within restrictions imposed by the state where the marriage took place has the burden of proof on that point. Laurence

v. Laurence, 164 Ill. 367, 45 N. E. 1071. If there was any restriction on the right of defendant to contract marriage at the age of 14 years, the burden is upon him to prove it. In Canale v. People, 177 Ill. 219, 52 N. E. 810, we recognized the rule that, if the evidence establishes a marriage in fact, followed by cohabitation, it is sufficient proof of the validity of the marriage, without evidence as to the law of the place where the marriage was celebrated. The evidence proved a public ceremonial marriage by one in holy orders, followed by cohabitation as husband and wife, and the presumption is that the defendant was capable of contracting the marriage under the laws of the empire of Turkey. Nothing was shown to the contrary.

It is next insisted that the evidence was not sufficient to warrant a conviction on account of the failure of the people to prove that the defendant's wife had not been continuously absent from him for a period of five years together, he not knowing that she was living in that time, and also that at the time of the second marriage he had not been divorced by lawful authority or the marriage declared void. The criminal statute excepts such cases from its operation by a proviso to the section creating the offense. It is the rule that, where an act is made criminal, with exceptions embraced in the enacting clause creating the offense so as to be descriptive of it, the people must allege and prove that the defendant is not within the exceptions, so as to show that the precise crime has been committed. Where the exception is descriptive of the offense, it must be negated in order to charge the defendant with the offense, but, if the exception or proviso is in a subsequent clause, or in the same one, but not incorporated within the enacting clause by any words of reference, it need not be negated, but is a mere matter of defense. Lequat v. People, 11 Ill. 330; Metzker v. People, 14 Ill. 101; Chicago, Burlington & Quincy Railroad Co. v. Carter, 20 Ill. 391; Beasley v. People, 89 Ill. 571. If an act is prohibited except under certain conditions, the indictment must allege the circumstances for the purpose of showing that the prohibited act constituting the crime has been done. But the division of the statute into sections is of no practical importance. All that need be negated is such exception as is descriptive of the offense. 10 Ency. of Pl. & Pr. 497. In our statute the crime of bigamy is first defined as follows: "Whoever, having a former husband or wife living, marries another person or continues to cohabit with such second husband or wife in this state shall be deemed guilty of bigamy and be imprisoned in the penitentiary not less than one nor more than five years and fined not exceeding \$1,000." Those circumstances complete the offense, and the proviso following, with its exceptions, is not in any manner descriptive of the crime. It must be averred that the former husband or wife

was living at the time of the second marriage (Prichard v. People, 149 Ill. 50, 38 N. E. 103); and that was done in this case, and the wife was present at the trial. It was not necessary to prove the exceptions contained in the proviso.

Finally, it is contended that the court erred in giving instructions to the jury concerning circumstantial evidence and authorizing a conviction upon such evidence. The evidence of the two marriages was direct, and not circumstantial, and the instructions were not called for by the evidence, but we do not think they could have done any harm.

We find no error in the record prejudicially affecting the plaintiff in error. The judgment is affirmed.

Judgment affirmed.

(213 Ill. 247.)

MULLANNY v. NANGLE et al.*

(Supreme Court of Illinois. Oct. 24, 1904.)

WILLS—CONSTRUCTION — EXECUTORS — TRUSTEES—RESIGNATION—APPOINTMENT—JURISDICTION.

1. Where powers and duties are conferred on an executor which did not pertain to that office but pertained to that of a trustee, the executor by virtue of his appointment became a trustee by implication of law only, and on the revocation of his appointment as executor by the testator his powers as trustee terminated, unless otherwise provided by the will.

2. Where testator appointed two executors by his will, and devised and bequeathed to them or to the survivor of them the remainder of his estate in trust for specific purposes named in the will, on the refusal of one of the executors to qualify the remaining executor became sole trustee, and the court had no jurisdiction to appoint another to act with him in the place of the executor resigned.

Wilkin and Cartwright, JJ., dissenting.

Appeal from Appellate Court, First District.

Bill by Maria Mullanny against John Nangle and others. A judgment in favor of complainant was reversed in part by the Appellate Court, and complainant appeals. Affirmed.

This was a bill in chancery filed by the appellant in the superior court of Cook county to obtain a construction of the will of Dominick Mullanny, deceased, and the three codicils attached thereto, and for the appointment of a trustee. The will bore date March 6, 1896. The testator died September 20, 1901, and the will and codicils were admitted to probate by the probate court of Cook county October 30, 1901. After the payment of debts and funeral expenses and specific bequests to the amount of \$1,000, by the tenth paragraph of the will the testator nominated Thomas Brennan and James Healy as executors, and by the sixth paragraph he gave, devised, and bequeathed to his said executors, or the survivor of them, all the rest and residue of his estate, which consisted of personal and real estate, in trust, and

*Rehearing denied December 2, 1904.

provided that his said trustees should manage and control the same, but should not have the power to sell or incumber his real estate, except No. 1466 Indiana avenue, which they were given power to sell and convey. The will also provided the appellant, who was the widow of his deceased son, John J. Mullanny, should have the right to occupy a flat in one of his buildings free of rent, and be paid by his said trustees, out of his estate, \$40 per month, which amount by one of the codicils was increased to \$60 per month, during her life; also, after the payment of all charges and expenses connected with the management and control of the estate, including taxes, insurance, repairs, expenses of the trust, and trustees' fees, that the net income arising from said estate, or so much thereof as said trustees should deem proper, should be expended for the care, education, support, and maintenance of Margaret Mary Mullanny and Dominick Daniel Mullanny, who were the children of the appellant by the testator's deceased son, John J. Mullanny, and sole heirs at law of the testator, until the younger of said children should arrive at the age of 23 years, when, if living, the entire estate should vest in said grandchildren; that said Dominick Mullanny, on the 9th day of September, 1898, published the second codicil to his said will, which, in part, is as follows: "I hereby nominate and appoint my nephew, John Nangle, with Thomas Brennan, nominated and appointed in my said will, as and to be the executors of my said last will and testament and all codicils thereto, the appointment of James Healy, mentioned in my said last will and testament as executor thereof, being hereby revoked and set aside;" that the said Thomas Brennan declined to qualify or act as executor, and also disclaimed said trusteeship and refused to act as trustee; that said James Healy also disclaimed said trusteeship and refused to act as trustee; that John Nangle duly qualified as executor, and letters testamentary were issued to him; that, subsequently, said probate court appointed Edward F. Dunne administrator with the will annexed, under the provisions of section 38 of chapter 3 of Hurd's Revised Statutes of 1903, to act with said John Nangle.

The bill was amended and an answer was filed, and it was sought to have determined (1) whether James Healy was removed as trustee as well as executor by said codicil; (2) whether John Nangle was appointed trustee as well as executor by said codicil; (3) and in case it was determined that said James Healy was not removed as trustee by said codicil, to have Edward F. Dunne appointed as trustee in the place of Thomas Brennan to act with James Healy; or (4) in case it was determined that James Healy was removed as trustee, and John Nangle substituted in his place as trustee, to have Edward F. Dunne appointed as trustee in

place of Thomas Brennan to act with John Nangle.

The case was heard upon the amended bill and answer, and the court decreed (1) that John Nangle, by said codicil, was substituted in the place of James Healy, both as executor and trustee, and that the estate vested in trust in John Nangle; (2) that it was the intention of the testator that there should be at all times two acting trustees of the estate, and Edward F. Dunne was appointed trustee in the place of Thomas Brennan to act with John Nangle; that thereafter Edward F. Dunne declined to act as trustee, and the court substituted in his place as trustee the appellant. To reverse this decree John Nangle sued out a writ of error from the appellate court for the First District, where errors and cross-errors were assigned by the respective parties. The appellate court affirmed the decree of the superior court in so far as it decreed that John Nangle was appointed executor and trustee in place of James Healy, and reversed the decree in so far as it decreed that it was the intention of the testator that there should be at all times two acting trustees, and held that John Nangle was the sole trustee of said estate, and that as there was no vacancy in the trusteeship, the superior court was powerless to appoint appellant a trustee to act with said John Nangle, and all costs were adjudged against the appellant, Maria Mullanny, and she has prosecuted an appeal to this court to review the judgment of the appellate court.

P. H. O'Donnell and William Dillon, for appellant. James Smith, for appellees.

HAND, J. (after stating the facts). The first question which presents itself for our consideration in this case is what effect, if any, did the revocation of the appointment of James Healy, and the appointment of John Nangle as executor in his stead, have upon the powers of James Healy as trustee? The will named James Healy as an executor, but did not expressly name him as a trustee. He therefore became trustee by virtue of the fact that certain powers and duties were conferred upon him as executor which did not pertain to the powers and duties of an executor, but belonged to those of a trustee. The powers and duties of an executor and those of a trustee are separate and distinct, and, while they are usually performed by different persons, the same persons are occasionally named in wills as both executors and trustees. If a person be expressly named as executor, also as trustee, the revocation of his appointment as executor will not necessarily revoke his appointment as trustee; but, where powers and duties are conferred upon a person appointed as executor which do not pertain to the powers and duties of an executor but pertain to those of a trustee, the executor, by

virtue of his appointment, becomes a trustee by implication of law, in which event the revocation of his appointment as executor revokes his power to act as trustee, and the duties and powers conferred upon him as an incident to his appointment as executor will terminate upon a revocation of his appointment as executor, unless otherwise provided by the will. In other words, if James Healy had been specifically named as executor, also as trustee, and his appointment as executor alone had been revoked, his powers and duties as trustee would not necessarily have terminated; but as he was named as executor only, and as executor certain powers and duties were conferred upon him which pertained to those of a trustee, upon the revocation of his appointment as executor, his right to perform the powers and duties conferred upon him as executor which pertained to the powers and duties of a trustee was terminated. The testator after revoking the appointment of James Healy as executor, which revoked his appointment as trustee, appointed John Nangle as executor in the place of said James Healy. The powers and duties of Thomas Brennan remained as they were before the appointment of John Nangle, who by the terms of the codicil was appointed executor to act with Thomas Brennan. If John Nangle was to act with Thomas Brennan, then, obviously, the powers and duties conferred upon him were intended by the testator, to be the same as the powers and duties conferred upon Thomas Brennan, which were the powers and duties not only of an executor, but also of trustee. After naming John Nangle as executor, the codicil contains the expression "said trustees." These words clearly refer to Thomas Brennan and John Nangle. We think it clear, therefore, that the testator intended to revoke the appointment of James Healy as executor and trustee, and to substitute in his place as executor and trustee John Nangle, and that the superior and appellate courts ruled correctly in holding that, by virtue of the appointment of John Nangle as executor, he was given the powers and duties of trustee that were originally conferred upon James Healy by the will.

The next question presented for our determination is, upon Thomas Brennan declining to qualify as executor and disclaiming as trustee, did the superior court have the right to appoint a successor to Thomas Brennan as trustee to act with John Nangle? The testator appointed two executors by his will, and gave, devised, and bequeathed to said executors, or to the survivor of them, so much of his estate as should remain after the payment of his debts, funeral expenses, and certain charges and bequests, in trust for the specific purposes named in his will. At the time of the testator's death his duly nominated and appointed executors were Thomas Brennan and John Nangle, who by implication of law were also the trustees of the residuum of his estate. Thomas Brennan

refused to qualify as executor and trustee, whereupon John Nangle qualified as executor, and thereupon became sole executor and trustee of said will and codicils and said estate. The testator, by devising the residue of his estate to his executors or to the survivor of them, showed that he did not intend that there should always be two acting trustees of his estate, otherwise, in case of the death of one of the executors appointed by him, he would not have provided that the survivor should hold in trust the remainder of his estate, but would have provided for the appointment of a successor to said trustee. Where a testator names two trustees, and makes no provision for the appointment of a successor in case one of the trustees dies, resigns, or refuses to act, the entire trust devolves upon the trustee who qualifies. *Golder v. Bressler*, 105 Ill. 419. This being true, it is apparent so long as such trustee acts there is no vacancy in the trusteeship. While a court of equity will not allow a trust to fail for want of a trustee, such court cannot rightfully appoint a trustee to administer a trust until there is a vacancy in the trusteeship; and, in case a trust is created and more than one trustee is named, the author of the trust has the right to determine whether the failure of one trustee to qualify shall create a vacancy, and, in case of a vacancy, to determine in what manner it shall be filled. *French v. Northern Trust Co.*, 197 Ill. 30, 64 N. E. 105. Here the author of the trust appointed two trustees. One, only, qualified. No provision was made for the appointment of a successor, and it is apparent the testator did not intend that the failure of one trustee to qualify should create a vacancy. In such state of case the trust devolved upon the trustee who qualified, and there was no vacancy in the trusteeship, and the superior court was without power to appoint a trustee to act for the one who failed to qualify with the one who had qualified.

We have looked into the record and are of the opinion the appellate court did not err in adjudging the cost in that court and in the trial court against the appellant. The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

WILKIN and CARTWRIGHT, JJ., dissent.

(113 Ill. 420.)

INDIANA, I. & I. R. CO. v. OTSTOT.*

(Supreme Court of Illinois. Oct. 24, 1904.)

MASTER—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—NEGLIGENCE—ASSUMPTION OF RISK—FELLOW SERVANT—JURY QUESTIONS—INSTRUCTIONS—REMARKS OF COUNSEL—APPEAL.

1. In an action by a railroad section hand for injuries resulting from being struck by an engine while at work between the rails, evidence

*Rehearing denied December 8, 1904.

examined, and whether plaintiff was in the exercise of due care at the time of the accident, held to be a question for the jury.

2. Whether defendant was guilty of negligence, held to be a question for the jury.

3. Whether plaintiff had assumed the risk, held to be a question for the jury.

4. Whether the employé of the defendant in charge of the engine by which plaintiff was injured, and the plaintiff, a section hand, were employés whose duties brought them into such habitual association as would afford them power and opportunity of exercising an influence, each upon the other, promotive of their mutual safety, and therefore fellow servants, was a question for the jury.

5. To create the relation of fellow servants, the employés must be directly co-operating with each other in a particular work at the time of the injury, or their usual duties must be such as to bring them into such habitual association as will afford them the power and opportunity of exercising an influence, each upon the other, promotive of their mutual safety.

6. Where a party offers several instructions embodying the same proposition in varying language, some only of which are given, he will not be heard to complain because the court refuses the one the party considers most important.

7. In an employé's personal injury suit, a charge that the jury should not arrive at their verdict by chance, and, in the event of a finding for plaintiff, should not determine the amount by adding the amount individual jurors think ought to be awarded and dividing the sum by the number of jurors voting, was properly refused, where it was coupled with incorrect and misleading statements of the law of negligence, and in reference to the duty of a juror to refrain from consenting to a verdict which does not meet with the approval of his judgment.

8. Instructions to the effect that affirmative testimony of witnesses that they heard a bell ring is of more force as evidence than opposing statements of witnesses of equal credibility that they did not hear the bell ring are properly refused when not based on the hypothesis of equal opportunity.

9. Counsel has no right to advise the jury that he does not intend to ask any instructions.

10. At the close of the evidence the court, in the presence of the jury, addressing counsel, directed them to pass up their instructions. Counsel for plaintiff replied, "We haven't any instructions to pass up, your honor." Objection was made by defendant, and sustained. *Held* that, as the statement was elicited by the court's direction and was directly responsive thereto, and as defendant obtained the only relief that it asked, which was that its objection be sustained, the remarks of counsel were not cause for reversal of a judgment for plaintiff.

Appeal from Appellate Court, Second District.

Action by Henry Otstot against the Indiana, Illinois & Iowa Railroad Company. From a judgment of the Appellate Court (113 Ill. App. 37) affirming a judgment for plaintiff, defendant appeals. Affirmed.

Glennon, Cary & Walker and Reeves & Boys, for appellant. Arthur H. Shay, Browne & Wiley, and Brewer & Strawn, for appellee.

SCOTT, J. This is an appeal from a judgment of the Appellate Court for the Second District, affirming a judgment of the circuit court of La Salle county for the sum of \$8,-

000, recovered by appellee against appellant for personal injuries.

One terminus of appellant's railroad is at Streator, Ill., where it has extensive switch-yards. Lundy street, in that city, is a street running east and west. North from that street, in the following order and parallel thereto, are Livingston, Wilson, Bridge, and Main streets. Between Lundy street and Main street the main track of appellant runs north and south. This track approaches Lundy street from the south, and, together with all the other tracks of appellant, terminates at or near Main street. The depot is located on Bridge street, about one block south of the terminus of appellant's tracks. About 100 feet south of Lundy street a switch leaves the main track on the east side, and runs first in a northeasterly direction. As it approaches Main street, however, it gradually turns in a northwesterly direction, and again intersects the main track. This switch is known as the "lead track." Between this lead track and the main track are five switch tracks, which are parallel with the main track and connect at both ends with the lead track. Where the lead track leaves the main track south of Lundy street, is switch stand No. 1. Following the lead track northeast, switch stand No. 2 is located at the intersection of the first switch track with the lead track, switch stand No. 3 at the intersection of the second track, and switch stand No. 4, where the accident hereinafter mentioned occurred, at the intersection of switch track No. 8.

Appellee was a section hand, and on the morning of February 7, 1900, at 7:15 o'clock, the section gang, composed of Harry Sawyer, the foreman, and of Mull, Lantzer, and appellee, section hands, was proceeding south on a hand car on the main track, for the purpose of going to the roundhouse, which was situated in the yards south of Lundy street, for the purpose of cleaning out the ash pit. When they got to Lundy street they found the main track south of them blocked, and the foreman directed them to take the hand car off the track and clean out the switch points along the lead track. They first commenced work at switch stand No. 2, then moved to No. 3, and then to No. 4. While engaged in throwing out the water that had collected between the rails at switch stand No. 4, Mull and appellee were standing between the rails, facing south. At that time Mumaw, a hostler in the employ of the appellant, backed locomotive engine No. 9 south on switch track No. 4, which is next east of switch track No. 3, and intersects the lead track at switch stand No. 5. The engine followed the switch to the lead track, and then came along the lead track until the tender struck appellee, knocking him down. The two rear wheels ran over his left leg, necessitating its amputation, and he was otherwise injured. Mull, one of the other sectionmen, who was working alongside of appellee and

facing the same way, was struck and slightly injured at the same time.

Appellee brought suit, and filed a declaration consisting of five counts. The first charges negligence in driving the engine along the track; the second charges negligence in that the hostler failed to ring a bell or sound a whistle to warn appellee of the approach of the engine; the third count charges willful and wanton negligence on the part of the hostler in charge of the engine; the fourth count charges that the defendant failed to furnish a sufficient number of servants to properly operate the engine, and carelessly and negligently placed the same in the care of but one of its servants; the fifth charges that the defendant carelessly and negligently placed the engine in charge of an unskillful and reckless person. The plea was "not guilty." At the close of the plaintiff's evidence, and again at the close of all the evidence, appellant moved the court to direct a verdict for the defendant. The motion was denied in each instance, and this action of the court is assigned as error, and the question is thereby presented whether there is any evidence in the record which, with the legitimate inferences to be drawn therefrom, is sufficient to warrant a verdict in favor of the plaintiff.

It is first insisted that there is no evidence that appellee was in the exercise of due care for his own personal safety at the time of the accident, and this is based on the fact that he did not keep such a lookout to the north and back of him, at the place where he was working, as would enable him to ascertain that the engine was approaching from that direction. He had been in the employ of the appellant as a section hand for two years. His duties, ordinarily, were confined to the switchyards at Streator, which extended from Main street, where all the tracks terminated, south and east along the main track a distance of $2\frac{1}{2}$ to 3 miles. In some emergencies, however, he was sent out to work at places beyond the yards, as the exigencies of the business of appellant required. On the morning in question, engine No. 9 came in with a freight train about 6:45 a. m. It stopped at the roundhouse, which is about a mile from Main street, for the hostler, and then proceeded north to the depot, which was near Main street. There it was uncoupled, and the hostler took it over on the switch to a place just south of Livingston street, where it was standing prior to the time it was moved south at the time the accident occurred, and it stood there for about a half hour. That place is about 180 feet north of switch stand No. 4. When appellee was at work just prior to the accident, there was an engine in the yards south of Lundy street switching freight cars, and using the switch tracks and the lead track upon which the appellee was at work. Appellee was facing south, and this engine which was engaged in switching freight cars was south of

him. He testified that he did not know that there was any engine in the yards north of him, and that as he worked he looked around every one or two or three minutes to see whether any engine was approaching from the north, but did not see engine No. 9, or know that it was north of him, until it struck him. It is not contended that he was in an improper place or position to do the work which he had been directed to do by his foreman. His attention would naturally be engrossed by his occupation. He knew of the engine working south of him, and would be on the alert to avoid any danger from that direction. He did not know of the one north of him. Under these circumstances, we regard the question whether he was in the exercise of due care as one for the jury.

When Mumaw took charge of the engine, he backed it down from Main street on track No. 4 until he crossed Livingston street. There he stopped the engine and waited until the tracks south of him were cleared by the switch engine so that he could reach the roundhouse. There is evidence that at the time of starting the engine south, after the tracks were cleared, just before the accident, Mumaw knew that these section hands were working on the track at switch stand No. 4, and that he started the engine and ran it over the distance intervening the point at which it had been stopped, just south of Livingston street and the point where it struck the appellee, without ringing the bell, or sounding the whistle, or giving other warning of its approach. From this evidence the jury might well infer negligence on the part of the appellant.

Counsel suggest that the injury to appellee resulted from a risk which he had assumed. The evidence tends to show that the proximate cause of the accident was the negligence of the defendant in failing to give appellee warning of the approach of the engine, and it appeared from the testimony of appellee that he had frequently seen Mumaw in charge of a moving engine when the whistle was not sounding and the bell was not ringing, and it is said that by reason of this fact, and of the further fact that he had not made any complaint of Mumaw's conduct in this regard, he had assumed the risk of any injury that he might receive as a result of Mumaw operating an engine without ringing the bell or sounding the whistle. If it be conceded that counsel's view is correct in this respect so far as it might concern appellee if he had come upon the track on which the engine was moving after it was in motion, we are still of opinion that whether or not appellee had assumed the risk resulting from the failure of Mumaw to give notice of the fact that he was about to start an engine standing at a point less than 200 feet from the place where he knew appellee was working on the track which the engine would follow when in motion, and from the failure to give warning

that the engine was approaching after it was in motion, was one for the jury. While appellee knew that Mumaw moved the engine through the yards with bell and whistle both silent, we do not think it can be said as a matter of law that he thereby assumed the risk that Mumaw would deliberately start an engine and run it upon men who he knew were working on the track at a point not more than 200 feet from the starting place of the engine, without giving them any warning whatever.

It is next insisted that the evidence in this case is such that all reasonable minds must reach the conclusion that Mumaw, whose negligence caused the injury, and appellee were fellow servants. To create that relation between servants, they must be directly co-operating with each other in a particular work at the time of the injury, or their usual duties must be such as to bring them into such habitual association as will afford them the power and opportunity of exercising an influence, each upon the other, promotive of their mutual safety. *Chicago & Northwestern Railroad Co. v. Moranda*, 93 Ill. 302, 34 Am. Rep. 168; *Pagels v. Meyer*, 193 Ill. 172, 61 N. E. 1111; *Duffy v. Kivillin*, 195 Ill. 630, 63 N. E. 503. It is not claimed that appellee and Mumaw were fellow servants within the first division of the rule, but it is claimed that their usual duties brought them into such habitual association as afforded them the power and opportunity of exercising an influence over each other promotive of mutual safety. It appears from the evidence of appellee that it was his duty and the duty of the sectionmen with whom he worked to keep the railroad tracks in repair, and that their usual duties included work on all the tracks in the yards at Streator. Mumaw's duties were to take engines from the depot to the roundhouse when they came in off the road, and to fetch them from the roundhouse to the depot when they were needed to go out on the road. Both appellee and Mumaw worked during daytime. It appears that on several occasions appellee had ridden on an engine with Mumaw on Sunday when appellee went to the roundhouse to clean out the cinder pit, but that his duties did not require him to ride there, and that he was not directed to ride there by appellant, and that he did it to save walking the distance to the roundhouse. It also appears that appellee saw Mumaw practically every day; that is, Mumaw would be going back and forth on an engine through the yards while appellee was at work there. Whether they saw each other, however, or came in contact with each other, or whether any of the sectionmen saw Mumaw or came in contact with him, was purely a matter of chance. The duties of the sectionmen never necessarily brought any of them into association with Mumaw, and his duties did not at any time necessarily bring him into association with any of them. They were

employed in different departments, and the work of the sectionmen had no connection whatever with that of the hostler. He might never be brought into association with any of them. Such association as there was between Mumaw and the section men was purely accidental, resulting from the fact that they happened to be working in the part of the yards through which he passed in the performance of his duties in taking engines to and from the roundhouse at a time when he had occasion to move an engine through that portion of the yards. Under these circumstances we cannot say that the evidence is such that all reasonable minds must conclude that Mumaw and appellee were fellow servants.

Appellant requested the court to give to the jury 34 instructions, which cover 17 printed pages of the abstract. These instructions seem more voluminous and numerous than there was occasion for, in view of the few and simple issues involved in this cause. The first 22 of these were given. The last 12 were refused. The refusal of each of the 12 is assigned as error. No. 23 announced the doctrine of assumed risk. Nos. 17 and 20 "given" correctly laid down the law on this subject, the only difference being that No. 23 points out the duty of an employé who discovers an extraordinary hazard in the service which did not exist, or of which he did not have knowledge, when he entered the service. While this instruction stated the law correctly, we do not regard its refusal as error, in view of the fact that 17 and 20 were given. Had the seventeenth and twentieth not been offered and given, the twenty-third should have been given. Where a party thus offers two or more instructions embodying the same proposition in varying language, he will not be heard to complain because the court refuses the one the party considers most important, where the others are given. He can avoid this difficulty by requesting the giving only of the instruction which is most satisfactory to himself on that subject.

No. 24 is to the effect that if it was the duty of each of the section hands to look out for himself and the other members of the section gang, and to give each other warning of approaching trains or engines, and that if the man Lantzer, who was working with appellee, neglected this duty, then appellee cannot recover. There is no evidence that Lantzer owed any such duty to appellee. The instruction was properly refused.

No. 25 advised the jury not to arrive at a verdict by chance, and, in the event of finding a verdict for the plaintiff, not to determine the amount by adding the amount individual jurors think ought to be awarded, and dividing the sum so obtained by the number of jurors voting; but these propositions were coupled with an incorrect statement of the law of negligence, and with a

misleading statement of the law in reference to the duty of a juror to refrain from consenting to a verdict which does not meet with the approval of his judgment.

The 26th, 28th, and 30th deal with the doctrine of assumed risk, and we regard that subject as having been sufficiently covered by the 17th and 20th instructions.

The thirty-second and thirty-third were in substance that the affirmative testimony of witnesses that they heard a bell ring was of more force as evidence than opposing statements of witnesses of equal credibility that they did not hear the bell ring. In the case at bar, appellant contended that Mumaw started the bell ringing before he moved the engine from the place where he had stopped it, south of Livingston street, and kept it ringing continually until after the accident occurred. A man by the name of Ferriter testified that he was on the engine before it started, with Mumaw, and continued there with him until after the accident occurred, and that he heard no bell rung or whistle sounded on that engine prior to the accident. Another witness, by the name of Pryor, testified that he was on the switch engine which stood on track No. 1, about 30 feet from the point where the accident occurred, which would be about 200 feet from the place where engine No. 9 stood after being stopped on the south side of Livingston street, and that he heard the bell on engine No. 9 ringing just as that engine started south, immediately before the accident. It is apparent that the rule announced by these last-mentioned instructions could not properly be applied to these two witnesses. Where the trial court refused a similar instruction asked by defendant, and there was a judgment for the plaintiff, this court declined to reverse the judgment in *Atchison, Topeka & Santa Fé Railroad Co. v. Feehan*, 149 Ill. 202, 36 N. E. 1036, and said: "The force and weight to be given to the testimony of the respective witnesses is a matter to be determined by the jury, and with which the court should not ordinarily interfere." In any event, an instruction which attempts to advise the jury that, in determining whether a bell did ring, the testimony of a witness who testifies affirmatively that a bell was rung is of greater weight than that of a witness who testifies that he did not hear it ring, should be based on the hypothesis of equal opportunity. The instructions before us are defective in this respect.

We have been favored with no statement showing that there was error in the refusal of the 27th, 29th, 31st, and 34th instructions, and it is therefore unnecessary to discuss them.

At the close of all the evidence, the court, in the presence of the jury, after being advised that the proof was all in, addressing counsel on both sides, said, "Well, pass up your instructions and proceed with your ar-

guments." Thereupon counsel for appellee replied, "We haven't any instructions to pass up, your honor." Counsel for appellant objected to this statement, made in the presence of the jury. Thereupon counsel for appellee responded, "We have a right to tell the jury that we are not going to ask any instructions." Objection was made to this statement, and the court, after expressing regret that the statement had been made, sustained the objection. Counsel for appellee was mistaken in saying that he had a right to advise the jury that he did not intend to ask any instructions. So far as the jury is concerned, the instructions are the instructions of the court, given as the court's view of the law, and the jury should not be informed at whose request they are given. This court long since condemned the practice which once prevailed of writing the words "plaintiffs" and "defendants" on the instructions requested by the respective parties. *Aneals v. People*, 134 Ill. 401, 25 N. E. 1022. The statement made by counsel for appellee in this case conveyed to the jury precisely the information which this court intended to prevent when it disapproved the practice of so marking instructions. Where the jury are advised that certain instructions are given at the request of one of the parties, there is danger that they will look upon such instructions as in the nature of an argument in favor of the party requesting them, instead of an impartial statement of the law. Appellant, however, obtained the only relief it asked, which was that its objection to the statement be sustained. The action of the court in sustaining an objection made to improper remarks or conduct of an attorney in the cause will not always be regarded as purging the record of error. *West Chicago Street Railroad Co. v. Sullivan*, 165 Ill. 302, 46 N. E. 234. In this instance the statement to which the original objection was made was elicited by the court's request or direction to pass up the instructions, and was directly responsive thereto. We do not consider the objectionable conduct of counsel under the circumstances here disclosed such as to warrant a reversal.

The judgment of the Appellate Court will be affirmed. Judgment affirmed.

(212 Ill. 377.)

HURSEN v. HURSEN.*

(Supreme Court of Illinois. Oct. 24, 1904.)

CANCELLATION OF DEED FROM HUSBAND TO WIFE—EVIDENCE.

1. Where the transfer of property by a husband to a wife is procured through the fraud of the wife, equity has power to set aside the conveyance.
2. Where a wife procures her husband to convey certain property to her, under threats not to live with him unless he does so, and on ob-

*Rehearing denied December 2, 1904.

taining the conveyance lives with him three days, and then, without any apparent cause, severs their marital relations, the conveyance will be set aside at the suit of the husband.

Wilkin, J., dissenting.

Appeal from Circuit Court, Cook County; Chas. G. Neeley, Judge.

Action by Patrick Hursen against Margaret Hursen for cancellation of a deed. From a decree for defendant, complainant appeals. Reversed.

See 70 N. E. 904.

This was a bill in chancery filed by the appellant against the appellee to set aside a deed made by appellant to appellee on April 19, 1901, and recorded in the office of the recorder of deeds in Cook county, to a house and lot located in the city of Chicago, and known as No. 18 Colorado avenue. An answer and replication were filed, and upon a hearing in open court the bill was dismissed for want of equity, and the appellant has brought the record to this court for review by appeal.

It appears from the pleadings and proofs that the appellant was a widower 55 years of age; that he had resided in the city of Chicago for upwards of 30 years; that he had accumulated property of the value of about \$18,500, which was invested in productive real estate located in said city; that he had been twice married; that he had five children by the first marriage and three by the second; that the children by his second marriage were all girls, and ranged in ages from 5 to 10 years; that the appellee was a widow 42 years of age; that she resided in the same section of the city of Chicago in which the appellant resided, and they had known each other, in a casual way, for a number of years; that in December, 1900, appellant commenced keeping company with appellee and in the following month of January proposed marriage to her; that appellee said to him she would marry him if he would buy her a seal skin coat, a diamond ring, and deed her a portion of his property; that appellant bought the coat and ring and made her a present of \$50 in cash, and in the month of March took her to the state of Indiana to view a farm that he was about to trade one of his houses and lots in Chicago for, and which he proposed to occupy, after their marriage, as a summer home, with a view for her to determine if she would be satisfied to live upon the farm; that shortly thereafter, and on the 17th day of April, 1901, the parties were married in the state of Indiana; that the appellant had consummated the exchange for the Indiana farm, which was worth \$5,000, and just before the marriage ceremony was performed took from his pocket a deed for a half interest in the farm to appellee and offered it to her. She examined the deed, but objected to accepting the same, and demanded that appellant convey to her the premises in question, which were worth \$8,000, and for a time declined to

marry appellant unless he would convey to her said premises; that after talking with the priest who was to perform the marriage ceremony, and after deliberating upon the subject, the appellee took into her possession the deed to the half interest in the Indiana farm, and the marriage ceremony was performed; that within one hour after the marriage the appellee took the train for Chicago, telling the appellant when he conveyed to her the Colorado avenue property she would return to him the deed for the half interest in the farm and be to him a wife. The appellant remained in Indiana two days, when he followed her to Chicago, and there said to her he had married her against the advice of his friends, and, in order to have peace and save talk, if she would return to the farm with him, and live with him and be a faithful wife, he would convey to her the Colorado avenue property; and upon her promise so to do he executed and delivered to her a deed for said property, and she returned to him the deed for the half interest in the Indiana farm, and they returned to the Indiana farm on the day the deed to the Colorado avenue property was executed and delivered, and she occupied his bed for three nights, when she left it and took another room, and from that time refused to cohabit with him. She remained on the farm a part of the time up till the month of September, in the year of their marriage, when she returned to Chicago. While she was upon the farm the appellant, at her request, expended thereon \$2,500 in improvements, furnished a servant to do the work in the house, and provided the appellee a horse and buggy in which to drive about the country.

F. S. Baird, for appellant. Benedict J. Short, for appellee.

HAND, J. (after stating the facts). It is undoubtedly the law that a husband, except as to his creditors, if he sees fit, may convey to his wife the whole or any part of his property, and that, if the transaction is free from fraud or duress, she may hold the same as against the husband or his heirs. If, however, the transfer is procured through the fraud of the wife, equity has the power to set aside the conveyance and to restore the property to the husband.

In *Stone v. Wood*, 85 Ill. 603, Wood and his wife lived in Galesburg. He went to Bloomington to obtain work. His wife wrote him, representing to him if he would convey his homestead to her she would sell it for \$1,800, pay his debts, go where he was and turn over to him the balance remaining from the sale of the property. Wood conveyed the title to her through a third party, whereupon she conveyed the property to Stone, who held it for her benefit. The court, upon bill filed by Wood, decreed that the property be restored to the husband. On page 609 the court said: "There can be no doubt that a

man may have relief from such frauds as this, in equity, against his wife. So may the wife against the husband. There is nothing in the marriage relation that can prohibit it. If it were not so, there would be a wrong without a remedy. That courts are seldom called on in such cases does not militate against the rule. It is a fraud that is not sanctified by that relation. When either party becomes untrue to his or her vows and marital duties, and by fraud obtains an unjust advantage of the other, equity will as readily afford relief as it will between other persons not occupying that relation."

In *Bayse v. Bayse*, 152 Ind. 172, 52 N. E. 797, it was held that a voluntary conveyance by a husband to his wife, fraudulently procured by the wife through shamming affection for him and promising to be a dutiful wife, with the intent of abandoning him after obtaining such conveyance, would be set aside in equity. To the same effect is *Brisson v. Brisson*, 75 Cal. 252, 17 Pac. 689, 7 Am. St. Rep. 189; *Meldrum v. Meldrum*, 15 Colo. 478, 24 Pac. 1083, 11 L. R. A. 65, and *Turner v. Turner*, 44 Mo. 539. In *Turner v. Turner*, supra, the court said: "A wife in whom her husband reposed the strictest confidence might well be calculated to exert an influence on his mind and obtain the title to property in her own name. If it was done with an honest intent to secure a home for herself and her offspring, the transaction would not only be legal, but praiseworthy; but if the influence was exerted with the design of despoiling the husband and then abandoning him, the law would condemn and stigmatize the transaction."

The controlling question in this case is, did the appellee obtain the deed to the Colorado avenue property in good faith, or did she do so by means of false promises and representations made to the appellant, with the design of obtaining title to said property and then abandoning him? The appellant appears to have been greatly infatuated with the appellee, and ready to make any sacrifice to induce her to marry him and after their marriage to live with him in peace. She, on the contrary, appears to have been actuated only by a desire to possess herself of his property. Before the marriage she obtained from him \$50 in cash, a seal skin coat which cost \$300, and a diamond ring which cost \$100. When the marriage ceremony was about to be performed she expressed dissatisfaction with his offer to convey to her unincumbered real estate worth \$2,500, and threatened to abandon the marriage unless he would convey to her property worth \$8,000—nearly one-half his estate. After conferring with the priest and deliberating upon the matter she took into her possession the deed conveying to her a one-half interest in the farm, and the marriage ceremony was performed. She then abandoned appellant's home, returned to Chicago and refused to cohabit with him until he conveyed to her

the Colorado avenue property. Relying upon her promises to return to Indiana with him and be a faithful wife, the appellant conveyed to her said property. After obtaining title to the Colorado avenue property the appellee lived with appellant three days as his wife, and then, without any apparent cause, severed their marital relations, but remained upon the farm a part of the time until the following fall, when she returned to the city. The conduct of the appellant towards the appellee appears to have been honorable, while that of the appellee towards the appellant was most reprehensible, and should receive the most severe condemnation, and must be held, in law, to amount to a fraud upon the rights of the appellant in obtaining title to the Colorado avenue property. In *Brisson v. Brisson*, supra, it was said: "The plaintiff was induced to make the deed by the confidence which he had in his wife, and the belief thereby engendered that she would perform her promise. But for that he would not have made it. The betrayal of such confidence is strictly fraudulent and gives rise to a constructive trust. This is independent of any element of actual fraud." As was well said by the Supreme Court of Indiana in *Bayse v. Bayse*, supra: "Married women have been emancipated by the statutes of this state. They must respond for frauds practiced upon their husbands, as well as for those upon others." To permit the appellee to hold the title to said property, as against the appellant, under the circumstances of this case as disclosed by this record, would be to shock the sense of justice of a court of conscience.

The decree of the circuit court will be reversed, and the cause remanded to that court, with directions to enter a decree setting aside and annulling the deed from appellant to appellee for the Colorado avenue property.

Reversed and remanded, with directions.

WILKIN, J., dissenting.

(212 Ill. 274)

GUNNING SYSTEM v. LAPOINTE.*

(Supreme Court of Illinois. Oct. 24, 1904.)

MASTER AND SERVANT—ASSUMPTION OF RISK.

1. A servant who, after complaining of dangerous defects in the scaffold on which he was working, and a promise by the master to repair it, which promise could have been fulfilled in two or three hours, continued his work thereon for three days, assumed the risk incident to the work.

Appeal from Appellate Court, First District.

Action by Charles Lapointe against the Gunning System. A judgment for plaintiff was affirmed by the Appellate Court, and defendant appeals. Reversed.

*Rehearing denied December 9, 1904.

F. J. Canty and J. C. M. Clow, for appellant. Gemmill & Foell, for appellee.

RICKS, C. J. This action is brought to recover damages for injuries sustained by appellee through appellant's alleged negligence. On the trial in the circuit court of Cook county the jury returned a verdict in favor of the plaintiff (appellee here) for the sum of \$13,250. The trial court, on motion for a new trial, directed a remittitur of \$3,250, and judgment was entered for \$10,000, which was affirmed by the Appellate Court for the First District, and a further appeal is prosecuted to this court.

The facts as shown by the record are, briefly, as follows: On February 23, 1901, Charles Lapointe (appellee) was working for the Gunning System (appellant) in Milwaukee, Wis., his business being that of a sign painter. The company had recently erected a bulletin board in Milwaukee, and appellee had been sent there from Chicago to assist a man by the name of Fromm in painting this board. Fromm had for 10 years been a foreman for the Gunning System and its predecessor. Appellee had worked for the company between 2 and 3 years, and had worked as sign painter for about 10 months. A few days before the appellee was injured he was directed by Mr. Reich, who was general foreman for the Gunning System, to go to Milwaukee and report there to Fromm, and was told that he would receive all his instructions from Fromm, who was to be his immediate foreman. Appellee and Fromm arrived in Milwaukee on Sunday, the 17th day of February, and on the following day they called at the office of one Fitzgerald, who was superintendent and manager for appellant in Milwaukee, and were by him directed to the place and informed as to the manner in which they should do their work. They went to the bulletin board on that day, and did some work, and discovered that the bulletin board was incomplete. On Tuesday they did some additional work, and on Tuesday evening went to Fitzgerald and made complaint about the weakness of the board. It appears from the evidence that the bulletin board was built with tongue and grooved planks one inch thick, set perpendicular, the upright boards being nailed onto two crosspieces about 1 inch thick and 3 inches wide, the upper crosspiece being about 2½ feet from the top, and the lower one about the same distance from the bottom of the boards. Braces extended from the crosspieces back of the boards to the ground. There was no crosspiece over the front of the billboard, nor was there a strip or board running across the top of the bulletin board, as is generally used in the construction of such boards. Fitzgerald directed them to return the following morning, which they did, and then Fromm, in the presence of appellee, told Fitzgerald that the bulletin board needed fixing;

that it was shaky and weak, and that he did not think it was safe. He also stated it was not properly braced, and there was no board along on top of the signboard to protect the hook. Fitzgerald then said, "You are always kicking, anyway, every time you come up here, and you better go back and work." Fromm replied, "I will not till you fix that sign." Fitzgerald then said, "If that is all you want, go back to work and I will have that band put on for you." Then Fromm said to Lapointe, "We will go back to work." The two did return to work, and worked Wednesday and Thursday. Friday being a holiday, they did not work, and on Saturday Fromm returned to Chicago. Appellee remained at work, and in the afternoon, while he was upon the scaffold, one of the large hooks which were thrown over the top of the boards to hold up the scaffold upon which he stood pulled through the top of the bulletin board, owing to the top band not having been put in place, allowing one end of the scaffold to fall, throwing Lapointe from the scaffold to the ground and severely injuring him.

Upon this state of facts plaintiff contends that the assumption of risk which would ordinarily bar his right of action was suspended during the running of the promise to repair, and for a reasonable time after the period when it could have been fulfilled. The defendant meets this argument with the assertion that such a promise, if made, would not suspend the risk assumed by the employé, because it was a promise that could have been fulfilled in an hour and a half's time, as shown by the evidence, and he, having continued in the work for three days after the promise to remedy the defect, thereby assumed the risk.

At the close of the plaintiff's evidence, and at the close of all the evidence, the defendant (appellant) asked the court to give a peremptory instruction to find the issues for the defendant, which the court refused to do, and it is assigned as error that the court refused to give said instruction. It is claimed by appellee that the giving of other instructions afterwards, submitting to the jury the question as one of fact whether appellee continued to work on the board longer than a reasonable time for the appellant to repair the defect, waives the right to have the question again passed upon as one of law. But in this contention we cannot agree with the appellee, as we have construed the rule of law to be that the giving of the peremptory instruction is in the nature of a demurrer to the evidence, and saves the question as to whether or not the evidence fairly tends to support plaintiff's cause of action. *Boyce v. Tallerman*, 183 Ill. 115, 55 N. E. 703; *Chicago & Northwestern Railway Co. v. Dunleavy*, 129 Ill. 132, 22 N. E. 15. And if, as a matter of law, the evidence does tend to fairly support the cause of action, the per-

empty instruction was properly refused, and, if it does not, then it should have been given.

The narrow and concrete question presented by these conflicting claims is whether such a promise as here made at once absolves the employé from the risk which he had theretofore voluntarily assumed, or whether the risk is continued until the time when the master's promise to repair is fulfilled, and what would constitute a reasonable time for the fulfillment of the promise to repair. We find that the authorities in this state all practically agree. While, as a broad, general proposition, the master is required to furnish the servant a reasonably safe place in which to work, it is also true that if the defect is so open and obvious that the servant does see and know of the existence of the defect, and the danger arising therefrom is apparent and known to him, or within the observation of a reasonably prudent man in his situation, and the servant enters upon and continues the work, he is held to assume the risks and hazards of the employment due to such conditions. The servant may, however, in some cases, suspend the operation or force of the rule of assumed risk as to such defects and dangers by complaining to or informing the master thereof and obtaining from him the promise to repair the defects and obviate the danger. It is not in all cases that the servant may relieve himself from the assumption of the risk incident to defects and dangers of which he has full knowledge by exacting from the master a promise to repair. The cases where the rule of assumed risk is suspended, and the servant exempted from its application under a promise from the master to repair or cure the defect complained of, are those in which particular skill and experience are necessary to know and appreciate the defect and the danger incident thereto, or where machinery and materials are used of which the servant can have little knowledge, and not those cases where the servant is engaged in ordinary labor, or the tools used are only those of simple construction, with which the servant is as familiar and as fully understands as the master. *Webster Manf. Co. v. Nisbett*, 205 Ill. 273, 68 N. E. 936; *Illinois Steel Co. v. Mann*, 170 Ill. 200, 48 N. E. 417, 40 L. R. A. 781, 62 Am. St. Rep. 370; *Meador v. Lake Shore & Michigan Southern Railway Co.*, 138 Ind. 290, 37 N. E. 721, 46 Am. St. Rep. 384; *Marsh v. Chickering*, 101 N. Y. 396, 5 N. E. 56; *Power Co. v. Murphy*, 115 Ind. 570, 18 N. E. 30; *St. Louis, Arkansas & Texas Railway Co. v. Kelton (Ark.)* 18 S. W. 933; *Bailey on Master and Servant*, § 3103; *Barrows on Negligence*, pp. 121, 122. If it be held that the case at bar is one that falls within the exception, and, pending the time for promised repairs, exempts the servant from the assumption of the risk, then it is proper to consider and determine the meaning and terms of the rule itself.

From a careful review of the authorities,

we are disposed to the view that where the servant finds that the machinery with which he is to work is out of repair and dangerous to work with, or that the place in which he is to work is dangerous, he may complain to the master and exact from him a promise to repair, and, if the defect is not such that it so endangers the person of the servant that a reasonably prudent man would not continue to work with the machinery or in the place assigned, the servant may continue the work, under the promise to repair, without being held, as a matter of law, to have assumed the risk. If the promise is to repair by a fixed time, then, after the expiration of the time fixed, the servant assumes the risk from the defects complained of. If the promise to repair is without fixing the time within which the repairs shall be made, the servant may continue the work for a reasonable time, taking the character of the defects into consideration, within which the repairs could or ought to be made, and at and after the expiration of such reasonable time within which to make the repairs, if they are not made, and if the defects are open and known to the servant, and no new promise to repair is made, and the servant continues the work, he assumes the risks incident to the defects of which he complained. In *Illinois Steel Co. v. Mann*, 170 Ill. 200, 48 N. E. 417, 40 L. R. A. 781, 62 Am. St. Rep. 370, we said (page 210, 170 Ill., page 420, 48 N. E., 40 L. R. A. 781, 62 Am. St. Rep. 370): "While it is true some cases hold the rule to be that the servant, after having informed the master of any defects in machinery, tools, appliances, or surroundings of his work, and the master having promised to repair and make safe such defects, has the right to rely upon such promise and continue in the employ of the master, expecting such promise to be fulfilled, yet the rule in this state, and also in most other states, holds that such expectation on the part of the servant may continue only for a time reasonable for such repairs to be made or defects remedied, and, if not so made within a reasonable time, the servant, having full knowledge of such defects, will be considered to have waived the same, and subject himself to all the dangers incident thereto"—citing, also, *Swift v. Madden*, 165 Ill. 41, 45 N. E. 979; *Counsell v. Hall*, 145 Mass. 468, 14 N. E. 530; *Missouri Furnace Co. v. Abend*, 107 Ill. 44, 47 Am. Rep. 425; *Stephenson v. Duncan*, 73 Wis. 404, 41 N. W. 337, 9 Am. St. Rep. 806; *Gowan v. Hardy*, 56 Fed. 974; *Corcoran v. Milwaukee Gaslight Co.*, 81 Wis. 191, 51 N. W. 328.

After the servant has discovered the defect and shown his appreciation of the danger by exacting from the master the promise to repair, and continues in the employment after the expiration of the reasonable time for making the repairs without the same having been made, and without exacting or receiving a further promise to repair, it is neither unjust nor a hardship to

the servant to hold that he assumes the risk, and the question of negligence is no longer in the case. In the case at bar the evidence discloses that there was no time fixed by the master in which to make the repairs complained of, and it is conceded, and the undisputed evidence shows, that to have made the repairs would not require to exceed two or three hours' time. Appellee not only continued to work a few hours, but continued to work for two days, took a holiday the third day, and resumed work the fourth day, and worked until after 4 o'clock of that day, when his injury was incurred—all after he had complained to the master, and the master had promised to repair the defect which caused the injury. The offering of the peremptory instruction, therefore, raises the question whether or not, as a matter of law, appellee assumed the risk by continuing at the work for a longer period than was necessary for the master to have made the repair. Upon that question, and under the undisputed evidence appearing in this record, and under the view of the law as hereinabove expressed, we feel constrained to hold that the appellee, by continuing the work after the reasonable time within which the repairs could and ought to have been made, with full knowledge of the defect and thorough appreciation of the danger, must be held to have assumed the risk of the defect and danger which caused his injury, and that the peremptory instruction to find for appellant should have been given.

Other questions are made and discussed, but we deem it unnecessary to pass upon them, as the views already expressed dispose of the case.

The Appellate Court erred in not reversing the judgment of the circuit court. The judgments of the Appellate Court and of the circuit court are therefore reversed, and the cause remanded to the circuit court.

Reversed and remanded.

(212 Ill. 498)

CITY OF CHICAGO v. SHERMAN et al.*
(Supreme Court of Illinois. Oct. 24, 1904.)

MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—SPECIAL ASSESSMENTS—INVALID ORDINANCE—SUPPLEMENTAL ASSESSMENT—RES ADJUDICATA—DEPARTURE FROM TERMS OF ORDINANCE.

1. A paving ordinance was held invalid on appeal from an order confirming a special assessment, and on remand there was a retrial which resulted in a dismissal of the petition for confirmation, which judgment was affirmed on appeal. Hurd's Rev. St. 1901, p. 389, c. 24, §§ 57, 58, provide that no special assessment shall be void because levied for work already done under a prior ordinance if the work has been done in good faith, and authorize a supplemental petition in such a case. *Held*, that the liability of property specially assessed under the invalid ordinance was not rendered *res judicata* by the judgment holding the ordinance invalid, but the court had jurisdiction of a proceeding

under a supplemental ordinance to confirm the assessment.

2. Under Hurd's Rev. St. 1901, p. 389, c. 24, §§ 57, 58, authorizing the passage of ordinances for supplemental assessments to pay for street improvement work done in good faith under an invalid ordinance, an ordinance authorizing such a supplemental assessment need not remedy defects of description in the ordinance under which the work was done.

3. The use of a curb and gutter five inches thick instead of six inches, as required by a paving ordinance, and the use of crushed stone, some pieces of which were a little too large to pass through a ring three inches in diameter, as required by the ordinance, were not such departures from the ordinance as to render a supplemental ordinance invalid on the ground that the work was not the same as that provided for in the ordinance, it being shown that for all practical purposes the work as done was as valuable as if it had conformed strictly to the requirements of the ordinance.

Appeal from Cook County Court; F. W. Shonkwilder, Judge.

Petition by the city of Chicago against F. L. Sherman and others for a supplemental assessment to pay for a street improvement. From a judgment for defendants, plaintiff appeals. Reversed.

January 6, 1896, the city council of the city of Chicago passed an ordinance for the improvement, by special assessment, of Hamlin avenue from West Chicago avenue to West North avenue, in said city. The ordinance, as to the property of appellees, in *Lingle v. City of Chicago*, 178 Ill. 628, 53 N. E. 366, was held invalid on the ground the ordinance failed to state the height of the curb required to be constructed on each side of the street, and the cause was reversed and remanded. Upon the reinstatement of the case in the county court the city sought, upon a second trial, to obviate said objection by proving that the descriptive terms used in the ordinance with reference to the curb had a precise, well known, and established meaning in the paving and curbing of streets in said city, and that the height of the curb was included in the description of the curb contained in the ordinance. The court held the evidence produced was insufficient to cure the defect appearing upon the face of the ordinance, and the objection that the ordinance failed to state the height of the curb was sustained, and the petition dismissed as to the appellees, and the city prosecuted an appeal to this court, where the judgment of the county court was affirmed. *City of Chicago v. Sherman*, 192 Ill. 576, 61 N. E. 850. The improvement having been completed, improvement bonds issued, and there being a deficiency in consequence of the non-payment of a portion of the assessment by reason of the ordinance having been set aside and annulled by the decision of this court, the city, on March 24, 1902, filed a supplemental petition for a new assessment to pay the unpaid balance of the cost of the construction of said improvement, pursuant to sections 57 and 58 of the local improvement act of 1897 (Laws 1897, p. 121),

*Rehearing denied December 9, 1904.

as amended in 1901 (Hurd's Rev. St. 1901, p. 289, c. 24). The appellees entered a special appearance, and made a motion to dismiss the petition on the ground that the county court had no jurisdiction of the subject-matter involved, as the matters involved in said petition had been fully and finally determined by the decision of the county court and this court, and were *res judicata*. The court overruled the motion, whereupon voluminous objections were filed by the appellees to the confirmation of said new assessment. A large amount of evidence was heard by the court on behalf of the respective parties, and in passing upon the questions involved the court made the following finding of facts:

"First. That the court has, by publication and mailing of notices in accordance with the statute, and by the appearance of the objectors, obtained jurisdiction of the parties to this proceeding, and that it has jurisdiction of the subject-matter herein involved.

"Second. That as to said objectors the original judgment of confirmation of the special assessment formerly made herein has been annulled by the Supreme Court of Illinois, for the reason that the original improvement ordinance was held to be insufficient for the purpose of such an assessment; that the same cause was retried upon remandment by the Supreme Court, and the objections of the appellees were sustained, and the petition dismissed, and said judgment was thereafter affirmed by the Supreme Court of the State of Illinois.

"Third. That a new or special ordinance has been passed, providing for the making of a new assessment, a certified copy of which said last-mentioned ordinance is attached to the supplemental petition filed herein.

"Fourth. That the improvement described in said prior ordinance and in said new or special ordinance for said new assessment has, notwithstanding the defects in said ordinance, been actually constructed and done in good faith on the contract duly let and executed pursuant to said original ordinance, which said original ordinance provided that such improvement be paid for by special assessment, and that the said improvement was accepted by the proper officials of the municipality, the city of Chicago.

"Fifth. The court finds that the new or supplemental ordinance is valid, notwithstanding the fact that the said ordinance failed to correct the errors of the original ordinance in describing the nature, character, locality, and description of the improvement.

"Sixth. That the original ordinance provided that the combined curb and gutter should be six inches in thickness throughout, and that the combined curb and gutter as actually constructed on said street was only five inches in thickness.

"Seventh. That the original ordinance in this case provided that upon the roadway

described in the ordinance 'shall be spread a layer of the best quality of broken limestone, said limestone to be crushed to a size so as to pass through a ring of three inches internal diameter,' and that the said improvement as actually constructed contained a number of stones which would not pass through a ring of three inches internal diameter."

The court entered judgment in favor of the appellees, and dismissed the petition on the ground the said improvement was not constructed in accordance with the terms and provisions of the original ordinance, in this: that the original ordinance provided for a combined curb and gutter six inches in thickness throughout, and upon the roadway there should be spread a layer of the best quality of broken limestone to be crushed to a size so as to pass through a ring of three inches internal diameter, while as actually constructed the combined curb and gutter were only five inches in thickness, and the layer of limestone contained stones which were not crushed to a size which would pass through a ring of three inches internal diameter, and the city has brought the record to this court for review by appeal, and errors and cross-errors have been assigned.

William M. Pindell (Edgar Bronson Tolman, Corp. Counsel, and Robert Redfield, of counsel), for appellant. George W. Wilbur, for appellees.

HAND, J. (after stating the facts). The first cross-error assigned is that the county court erred in overruling the motion to dismiss the petition. We do not agree with such contention. The record in *Gorton v. City of Chicago*, 201 Ill. 534, 66 N. E. 541, is the same as the record in this case, so far as it applies to the original assessment, with the exception that, when the confirmation judgment was reversed and remanded, and the cause reinstated in the county court, no attempt was made to review in this court the action of the county court in dismissing the petition. The judgment of this court in the *Sherman Case* added no force to the judgment of the county court, it being simply an affirmance of the judgment of that court. If a supplemental petition could be properly filed in the *Gorton Case*, we can see no reason why this petition was not properly filed. To the same effect is the case of *City of Chicago v. Hulbert*, 205 Ill. 346, 68 N. E. 786. We regard the question settled by those cases, and it need not here be further considered.

It is also assigned as cross-error that the county court erred in holding the supplemental ordinance valid, notwithstanding said ordinance failed to correct the errors of the original ordinance in describing the nature, character, locality and description of the improvement. The evidence shows, and the

county court found, that the ordinance provided the improvement should be paid for by special assessment; that the improvement had been constructed in good faith under a contract let by the city, and that said improvement had been accepted by the city before the new ordinance was passed. In the Hulbert Case it was held the fact that the ordinance for a new assessment for completed work does not cure defects as to matters of description of the improvement contained in the original ordinance will not defeat the new assessment when the city has accepted the work as satisfactory; that in such case the new ordinance need not describe the work in detail. To the same effect is *Markley v. City of Chicago*, 190 Ill. 276, 60 N. E. 512.

It is further assigned as cross-error that the court erred in finding that the improvement was actually constructed in good faith, for the reason that the evidence shows said improvement was poorly and improperly constructed. In view of the holding of this court in *People v. Whidden*, 191 Ill. 374, 61 N. E. 133, 56 L. R. A. 905, and other cases, it cannot be successfully contended that a special assessment can be defeated on the ground that the improvement was poorly or improperly constructed, unless the evidence shows there was such a departure as to make the improvement constructed a different improvement from that provided for by the original ordinance. The evidence in this record shows that at the time of the trial the improvement had been in use six years, and that it was then in a fair condition, and we are forced to the conclusion, from what the witnesses stated upon that subject, that it was a good improvement of its kind when completed, and that the new assessment should be confirmed unless the use of a combined curb and gutter five inches thick instead of six inches thick, or a small per cent. of foundation filling composed of crushed limestone four instead of three inches in size, will now defeat the assessment on the ground they were such changes as to make the improvement a new or different improvement from that described in the original ordinance—which brings us to a consideration of the assignment of error of appellant that the county court erred in sustaining the objection that the improvement as actually constructed was not the improvement provided for in the original ordinance. The evidence fairly tends to show that for all practical purposes a five-inch curb and gutter are as valuable as a six-inch one, and that the difference in size of the small proportion of the limestone used which was four instead of three inches in size, if properly placed in the foundation, would not affect the value of the improvement. The property owners who are objecting made no objection to the manner of construction when the improvement was in the course of construction, and the city, under whose inspection

the improvement was constructed, accepted it upon completion and issued improvement bonds therefor. In the Hulbert Case it was held that the fact that a five-ton instead of a ten-ton roller was used upon the improvement would not defeat a new assessment; and in *Ricketts v. Village of Hyde Park*, 85 Ill. 110, one of the objections urged was that the hydrants used were not such as were required by the ordinance. The ordinance called for Holly hydrants, but Cregier hydrants were used. The evidence showed that the Cregier hydrants cost slightly more than the Holly hydrants, but were greatly superior in point of utility. The court, on page 113, say: "The objection, if tenable, should have been brought forward by bill for injunction before the work was completed. It is not admissible now, when the work has been completed in that way without objection on the part of appellant." In *Haley v. City of Alton*, 152 Ill. 113, 38 N. E. 750, it was said (page 118, 152 Ill., page 752, 38 N. E.): "It is also contended that the county court erred because it would not permit objectors to prove that the improvement had not been made as required by the ordinance. The law provides how the contracts shall be let, the manner of payment, and who shall be the judge as to whether the contract is complied with. In this case the work had been accepted by the city council. Who shall be the judge of whether the contract is complied with? Certainly not each individual property owner, because to so hold would not only be a violent construction of the statute, but render the making of all local improvements impracticable. The law has invested the city authorities with that power, and, unless there is a fraudulent abuse of it, their action is conclusive upon the property owners. and, if their action is to be reviewed for fraud, it must be done by bill in equity." And in *Craft v. Kochersperger*, 173 Ill. 617, 50 N. E. 1061, the court, on page 619, 173 Ill., page 1061, 50 N. E., said: "The bill does not show any equitable ground for relief against the judgments, or any equitable reason why they should not be enforced. The alleged facts that the ordinance required the use of Trinidad asphaltum, obtained from Pitch Lake, in the Island of Trinidad; that the improvement was not made of that kind of asphalt, and was soft and uneven, and poorly and unskillfully executed, and that the work was not yet completed, leaving two blocks between Sixteenth street and Douglas Park Boulevard unimproved, are not grounds of equitable interference with the collection of the assessment." In *People ex rel. v. Church*, 192 Ill. 302, 61 N. E. 496, it was held, in the construction of local improvements, every variation from a literal compliance with the terms of the ordinance will not avoid the assessment. In the Hulbert Case, on page 357, 205 Ill., page 790, 68 N. E., it was held to authorize an ordinance for a new assessment under the statute now

in force, it must appear "(a) that the work was done in good faith by contract duly let and executed pursuant to an ordinance providing that such improvement should be paid for by special assessment; (b) that the prior ordinance shall be held insufficient for the purpose of such assessment, or otherwise defective, so that the collection of the assessment therein provided for becomes impossible; (c) that the original assessment be set aside by some court; (d) that a new or special ordinance be passed, providing for such new assessment; (e) that a new assessment be made and returned and like notice given and proceedings had as are required in relation to the first ordinance and assessment, except that the same need not be originated or presented by the board of local improvements." The record shows this supplemental assessment proceeding fulfills all of these conditions, and we are of the opinion it should have been confirmed.

The judgment of the county court will be reversed, and the cause remanded to that court for further proceedings in accordance with the views herein expressed.

Reversed and remanded.

(113 Ill. 412.)

L'HOTE et al. v. VILLAGE OF MILFORD.*
(Supreme Court of Illinois. Oct. 24, 1904.)

MUNICIPAL CORPORATIONS—CLASSIFICATION—
BASIS—VALIDITY—LOCAL IMPROVE-
MENT—PETITION—NECESSITY.

1. Under Laws 1897, p. 103, § 4, as amended by Laws 1899, p. 95 (Starr & C. Ann. St. Supp. 1902, p. 149, c. 24), a petition signed by the owners of one-half of the property abutting on a street proposed to be improved, and by a majority of the resident owners of the property affected by the improvement, is necessary to the adoption of an ordinance, by the trustees of a village containing less than 10,000 inhabitants, providing for the improvement.

2. The incorporation act providing for the incorporation of cities and villages is the charter of the municipalities organized under it, and legal enactments empowering them to construct local improvements by special assessments are a part of their charters, and acts amending the enactments are amendments of the charters within Const. 1870, art. 4, § 22, prohibiting the passage of local or special laws amending the charter of municipalities.

3. Act May 11, 1903 (Laws 1903, p. 101), and Act May 15, 1903 (Laws 1903, p. 101), relating to the construction of local improvements in cities, towns, and villages, declaring that, in municipalities having a population of less than 50,000 and more than 20,000, no ordinance for an improvement to be paid for by special assessment shall be adopted unless the owners of half of the property abutting on the improvement shall petition therefor, and providing that, in municipalities having a population of less than 23,000 and more than 20,000, no such ordinance shall be adopted unless the owners of half of the property shall petition therefor, and containing provisions for local improvements in municipalities containing a population between 23,000 and 50,000, amend the charters of municipalities organized under the incorporation act, within Const. 1870, art. 4, § 22, prohibiting the passage of local or special laws amending the charter of any municipality.

4. Municipalities may be classified, for purposes of legislation, on the basis of population, having a reasonable relation to the purposes of the legislation; but a class of municipalities cannot be arbitrarily made for the sole purpose of enabling certain municipalities to enjoy special powers, or for the purpose of conferring special privileges on their electors and property owners, unless such municipalities may be reasonably regarded as comprising a separate and distinct class.

5. A classification of municipalities into two classes, one having a population of 50,000 or less, and the second having a population of over 50,000, and giving the latter power to adopt ordinances providing for local improvements by special assessments without a petition of the property owners affected, and denying that power to the first class, as is done by Laws 1897, p. 103, § 4, as amended by Laws 1899, p. 95 (4 Starr & C. Ann. St. Supp. 1902, p. 149, c. 24) is a valid classification.

6. Act May 11, 1903 (Laws 1903, p. 101), and Act May 15, 1903 (Laws 1903, p. 101), amending Laws 1897, p. 103, § 4, as amended by Laws 1899, p. 95 (Starr & C. Ann. St. Supp. 1902, p. 149, c. 24), relating to local improvements in municipalities, are in conflict with Const. 1870, art. 4, § 22, prohibiting the passage of local or special laws amending the charters of municipalities, because the classification of cities adopted by the acts is arbitrary, the first act creating two classes, one embracing a population of more than 20,000 and less than 50,000, and the second class embracing all other cities, and the second act placing all cities having a population of less than 23,000 and more than 20,000 in one class, and all other cities in the other class.

Appeal from Iroquois County Court; Frank Harry, Judge.

Proceedings by the village of Milford for the confirmation of a special tax for a local improvement. Eugene L'Hote and others appeared and moved for the dismissal of the proceedings. From a judgment of confirmation, they appeal. Reversed.

Robert Doyle, for appellants. Morris & Hooper, McClellan Kay and J. H. Dyer, for appellee.

BOGGS, J. This is an appeal from the judgment entered in the county court of Iroquois county confirming a special tax levied under the authority of an ordinance adopted by the board of trustees of the village of Milford, providing that Grant avenue, in the village, from the north line of Jones street to the south line of Frederick street, a distance of two blocks, should be improved by paving the roadway of the same with brick and curbing it with sandstone curbing. A motion to dismiss the proceeding, based on the fact that no petition of the owners of the property on the line of the proposed improvement and to be affected thereby had been presented asking that the avenue be so improved, was entered and overruled. The denial of the motion is assigned as for error.

Section 4 of the act entitled "An act concerning local improvements," approved June 14, 1897 (Laws 1897, p. 103), as amended by the act approved April 19, 1899 (Laws 1899, p. 95; Starr & C. Ann. St. Supp. 1902, p. 149, c. 24), requires that, in cities, towns, and villages of the population of 50,000 or less by

*Rehearing denied December 3, 1904.

the last preceding census of the United States, no ordinance for making any improvements to be paid for by special assessment or special taxation of contiguous property should be adopted unless the owners of one-half of the property abutting on the line of the improvement should petition therefor, and in such municipalities having a population of 10,000 and less, not unless a majority of resident property owners affected by such proposed improvement should also petition for the same. The appellee village has a population of 1,077, and under said section 4 of the act of 1897, as amended by the act of 1899, a petition was essential to the power of the village board to adopt the ordinance. At the session of the General Assembly of 1903 two acts amendatory of said section 4 were adopted. The first of said amendatory acts of 1903 was adopted May 11th, and reads as follows:

"Sec. 4. When any such city, town or village shall, by ordinance provide for the making of any local improvement, it shall, by the same ordinance, prescribe whether the same shall be made by special assessment, or by special taxation of contiguous property, or general taxation, or both. But in cities, towns or villages, having a population of less than 50,000 and more than 20,000, ascertained as aforesaid [i. e., the last preceding census of the United States], no ordinance for making any local improvement to be paid by special assessment or by special taxation of contiguous property, shall be adopted, unless the owners of one-half of the property abutting on the line of the proposed improvement, shall petition for the same." Laws 1903, p. 101.

The second of said amendatory acts of 1903 was adopted May 15th, and reads as follows:

"Sec. 4. When any such city, town or village shall, by ordinance, provide for the making of any local improvement, it shall, by the same ordinance, prescribe whether the same shall be made by special assessment, or by special taxation of contiguous property, or general taxation, or both. But in cities, towns and villages having a population of less than twenty-eight thousand (28,000) and more than 20,000, ascertained as aforesaid [i. e., the last preceding census of the United States], no ordinance for making any local improvement to be paid by special assessment or by special taxation of contiguous property, shall be adopted, unless the owners of one-half of the property abutting along the line of the proposed improvement shall petition for the same: provided, however, that on a petition signed by one hundred property owners in cities, towns and villages containing a population, ascertained as aforesaid, of between twenty-eight thousand (28,000) and fifty thousand (50,000), the question may be submitted to a vote of the people at any general or special election, whether or not said improvements can be

made, unless the same is petitioned for by at least one-half of the property owners abutting on the line of said improvement, and if a majority of all the votes cast at such election shall be in favor of said proposition, then a petition, as hereinbefore provided, shall be necessary in such city, town or village before such an ordinance can be passed." Laws 1903, p. 101; Starr & C. Ann. St. Supp. 1903, p. 70, c. 24.

The appellee village having, as before said, a population of 1,077 inhabitants, it is not necessary, under either of the amendatory acts of 1903, to the jurisdiction of the municipal board to adopt an ordinance for the construction of local improvements by special assessment or by special taxation, that a petition of property owners shall be presented to the board of trustees asking that the improvement be made. Under section 4 of the act of 1897, as amended by the act of 1899, a petition signed by the owners of one-half of the property abutting on the line of the improvement, and also by a majority of the resident property owners, is necessary to the adoption of such an ordinance by the board of trustees of the village.

It is urged, however, that each of such amendatory acts adopted in 1903 contravenes the prohibition of the Constitution of 1870 against the enactment of local or special legislation. Section 22 of article 4 of the Constitution of 1870 declares "the General Assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: * * * Incorporating cities, towns or villages, or changing or amending the charter of any town, city or village. * * * granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise."

The village of Milford was incorporated under the provisions of the general incorporation act providing for the incorporation of cities and villages. This general incorporation act is the charter of the village, and of all cities and villages in the state organized under it. Enactments empowering the city councils of cities or boards of trustees of villages to construct local improvements by special assessment or by special taxation, if legal, become a part of the charters of such municipalities, and acts amendatory of such enactments constitute changes or amendments of the charters of such municipalities, and such amendatory acts, it is declared by said section 22 of article 4 of the Constitution, shall be uniform and general in their operation, and not local or special. *People v. Cooper*, 83 Ill. 585; *Potwin v. Johnson*, 108 Ill. 70; *Bessette v. People*, 198 Ill. 334, 62 N. E. 215, 56 L. R. A. 558. Enactments which deny to the governing body of certain only of the cities and villages of the state power to adopt ordinances for the construction of local improvements, except when petitioned so to do by the owners of property affected by the improvement, at the same time clothe

the property owners in such cities and villages with a privilege and an immunity not possessed by the owners of property in the other cities and villages of the state, and are for that reason unconstitutional, if local or special in character. Neither of the amendatory acts of 1903 contains an emergency clause, nor does the latter in express terms purport to repeal the former of them, nor does either of them expressly repeal the amendatory act of 1899, though they are repugnant to each other and also to the act of 1899. As we are of the opinion that both of said acts of 1903 are unconstitutional, it is not important to consider the effect of such repugnancy. Each of these amendatory acts of 1903 changes or amends the charters of certain only of the cities, towns, and villages of the state, and also grants to owners of property in certain only of the cities, towns, and villages of the state the privilege of inducing and empowering the municipality, by petition, to construct a local improvement, or of refusing to invest the city with power to make a local improvement by special assessment or special taxation, by declining to join in a petition therefor—privileges and immunities which are denied to or not given or granted to the owners of property in other cities, towns, or villages of the state. These acts, therefore, attempt to legislate in matters as to which section 22 of article 4 of the Constitution of 1870 prohibits the enactment of local or special laws. If the amendatory acts are local or special laws, they are unconstitutional and invalid.

A law is not to be denominated local simply because it may operate only in certain of the municipalities of the state, if, by its terms, it includes and operates uniformly throughout the state under like circumstances and situation. The cities and villages of the state may be classified for purposes of legislation on the basis of population, if such basis has some reasonable relation to the purposes and objects to be attained by the legislation, and in some rational degree accounts for the variant provisions of the enactment. A classification of cities, towns, and villages by population cannot be arbitrarily adopted as a ground or reason for investing some of them with powers denied or not granted to others, if, though there be difference in population, there is no difference of situation or circumstances of the municipalities placed in the different classes, and the difference in population has no reasonable relation to the purposes and objects to be attained by the statute. As we said in *People v. Knopf*, 183 Ill. 410, 56 N. E. 155, on page 420, 183 Ill., page 159, 56 N. E.: "The rule is that a classification cannot be adopted arbitrarily upon a ground which has no foundation in difference of situation or circumstances of the municipalities placed in the different classes. There must be some reasonable relation between the situation of municipalities classified and the purposes

and objects to be attained. There must be something, in the nature of things, which in some reasonable degree accounts for the division into classes." Again, we said in *Bessette v. People*, supra (page 347, 193 Ill., page 219, 62 N. E., 56 L. R. A. 558): "It is true that a classification of the cities and villages of the state by population, as a basis for legislation, may be valid, but a classification cannot be adopted arbitrarily upon a ground which has no foundation in difference of situation or circumstances of the municipalities placed in the different classes. 'There must be some reasonable relation between the situation of municipalities classified and the purposes and objects to be attained.' *People v. Knopf*, 183 Ill. 410, 56 N. E. 155; *People v. Martin*, 178 Ill. 611, 53 N. E. 309; *People ex rel. v. Cooper*, 83 Ill. 585." In *People v. Cooper*, supra, we said: "It is the substance, and not the mere form, given to an enactment, which must determine its constitutionality. If the act must necessarily produce a result clearly and unquestionably forbidden by the Constitution, it cannot be upheld, whatever may be its form or profession."

A class of cities cannot be arbitrarily erected by the Legislature for the sole purpose of enabling the lawmaking body to confer powers upon such cities and villages which cannot be enjoyed by other cities and villages of the state, or of conferring on the electors of such cities and villages, or on the owners of property therein, privileges or immunities not permitted to be enjoyed by the electors or property owners in the other municipalities of the state, unless there be some sound reason and principle justifying the view that such cities and villages so classified are reasonably and rightfully to be regarded as comprising a separate and distinct class of municipalities. If the result of legislation is to establish dissimilarity in the powers of different cities in respect of the making of local improvements, the act would clearly be unconstitutional if its operation be restricted to certain only of the cities and villages in the state, unless there is actually some dissimilarity in the situation and circumstances of the different municipalities bearing a rational relation to the dissimilarity of powers to be exercised by them. A more densely populated city has increased responsibilities and duties, and may need legislation different from that required in smaller cities and towns. Additional powers may therefore be necessary in the larger cities that are not in the smaller cities and villages, and the population of cities may justify their classification as the basis for the enactment of laws to govern in the cities of the different classes. Thus the classification of the cities and villages of the state into two classes, one of those having a population of 50,000 or less and the other having a population of 50,000 or more, and giving those having a population of 50,000 or more

power to adopt ordinances providing for the making of local improvements by special assessments, or by special taxation without a petition of property owners, and denying that power to the other class—those having a population of less than 50,000—as was done by the act approved April 19, 1899, amending section 4 of the act concerning local improvements, approved June 14, 1897, was grounded upon a distinction which exists in the circumstances and conditions of cities and villages falling within the two different classes. The first class included all the cities having a population of 50,000 and over, and all cities which might attain that population. The second class included all municipalities having a smaller population than 50,000. The constitutionality of this act of 1897 is not challenged. That it is a valid enactment has been recognized by this court in *City of Bloomington v. Reeves*, 177 Ill. 166, 52 N. E. 278; *Patterson v. City of Macomb*, 179 Ill. 163, 53 N. E. 617; *Whaples v. City of Waukegan*, 179 Ill. 310, 53 N. E. 618; *McVey v. City of Danville*, 188 Ill. 429, 58 N. E. 955; *Merritt v. City of Kewanee*, 175 Ill. 537, 51 N. E. 867; *Trah v. Village of Grant Park*, 192 Ill. 351, 61 N. E. 442—and in other cases, and cannot now be regarded as an unsettled question. It proceeds on the theory that large and populous cities require different powers and different legislation from that which is requisite to meet the wants and needs of smaller and less populous municipalities, and classifies the cities and villages of the state in accordance with that view. But the classification adopted by each of the amendatory acts of 1903 seems purely arbitrary. The first of these amendatory acts creates two classes of municipalities, namely, one class embracing all cities having a population of more than 20,000 and less than 50,000, and the second embracing all cities having a population of more than 50,000 and less than 20,000. The first class comprises cities of intermediate population, and the second class places together the great metropolis of the state, with a population approaching 2,000,000 of people, and the smallest incorporated village in the state. The act proceeds on the theory that, in cities of more than 20,000 and less than 50,000, the owners of property should possess the privilege and immunity of authorizing or declining to authorize the construction of local improvements by special assessment or special taxation, and that the owners of property in all other cities and villages in the state, great and small, should not possess that privilege; and also upon the theory that the governing board of cities of the designated intermediate population should be restricted in respect of power to order local improvements to be made by special assessment or special taxation, and should be controlled by the wishes of the property owners in regard to the construction of public improvements at the expense of the owners of the property, while in

all other cities and villages the governing body should possess power to make improvements, to be paid for by the property owners, against the will of such owners or the majority thereof.

The right of the owner of property to petition for the making of local improvements, or the right to refuse to join in such petition, enables such owner to assist in securing an improvement which will, in his view, beneficially affect his property, and in preventing the making of an improvement which imposes what he believes to be an unreasonable burden of taxation upon it. It is a privilege which he may exercise to secure the advantage of the improvement of his property, or be availed of for the protection of his property. Can it be there is nothing in the situation and circumstances of property owners or their property in cities having a population of 50,000 and more, and also in cities having a population of 20,000 and less, and villages of still lesser population, which renders the existence of the privilege unnecessary or unimportant, if the creation and preservation of the right be so important to the owners of property in cities having a population of less than 50,000 and more than 20,000 as to justify the classification of such property owners in a separate class, and the enactment of legislation relating to such class? The selection of cities having a population of less than 50,000 and more than 20,000 as constituting a distinct class from the other cities of the state, and demanding particular and peculiar legislation, investing the inhabitants and property owners of such cities with special privileges and immunities, and placing all other municipalities in the state in another class, and giving the governing boards of the cities so classified dissimilar powers, and to their inhabitants and electors different privileges and immunities, cannot be defended against the charge that the classification is purely arbitrary, and without any reference or relation whatever to the legislation that is proposed to be predicated in the supposed distinction between the cities and villages placed in the different classes. The latter of the enactments of 1903 still more glaringly offends against the fundamental law. It places all cities having a population of less than 28,000 and more than 20,000 in one class, and denies to them power to adopt ordinances making local improvements except on a petition of property owners. It places all other municipalities—the great metropolis and the smaller incorporated villages—in another class, and gives the governing bodies in that class power to make local improvements without consulting the property owners, but selects certain of such municipalities—those having more than 28,000 and less than 50,000—as a further special class, and authorizes the electors in such latter municipalities to determine, by ballot, whether an ordinance for making a local improvement may be adopted without

a petition of the property holders. When considered in view of the population of certain cities as disclosed by the census, it is manifest this latter act was adopted for the purposes of securing local and special legislation for the benefit of certain particular cities in the state which could not be named in the act, but could be designated with no less certainty by means of the classification. What actual or rational distinction can possibly be imagined which will justify the creation of a class of cities having a population of less than 28,000 and more than 20,000, and investing the owners of property in cities of that class with the privilege of petitioning for local improvements, and denying power to municipal authorities of such cities to make local improvements except on such petitions, and empowering cities having a greater population than 28,000 with power to make such improvements without a petition and without regard to the wishes of the owners of property in such cities, as was proposed to be done by the latter of the acts of 1903? Or how can an act be defended against the charge that it is local or special legislation, which proposes to create as a separate class all cities and villages having a population of between 28,000 and 50,000 and conferring on each of the said municipalities, because the population is between these numbers, the special and exclusive right and privilege of determining for itself, by the ballots of its legal voters, whether the governing body of the municipality shall have power to adopt ordinances making local improvements, to be paid for by special assessment or special taxation, without the petition of property owners?

The conclusion is irresistible that in each of these enactments the classification of the municipalities by population does not bear any true relation to the purposes and objects of the legislation. It is clear that the classification adopted in each of the acts is not based upon any distinction having a rational or reasonable relation to the special legislation affecting the classes. The classification is wholly arbitrary, and does not justify the legislation which would clothe some of the municipalities of the state with chartered powers not possessed by others, and which would also confer special privileges and immunities on property owners and electors in some of such municipalities which are denied to the owners of property and to electors in other of the cities and villages of the state. Both of the amendatory acts of 1903 contravene the organic law, and are inoperative and void. The amendatory act of 1899 remains in force, and under it the board of village trustees of the appellee village were lacking in power to adopt the ordinance, in the absence of a petition by the owners of the property to be taxed to pay for the proposed improvement. The judgment appealed from must be and is reversed.

Judgment reversed.

(212 Ill. 513)

DOREMUS et al. v. CITY OF CHICAGO.*

(Supreme Court of Illinois. Dec. 13, 1904.)

MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENT—SETTING ASIDE ASSESSMENT—REASSESSMENT—LIMITATIONS.

1. A judgment cannot be vacated by the court which rendered it, after the term, except in obedience to the mandate of an appellate court on reversal.

2. Laws 1897, p. 121, § 57, provides that if any assessment be annulled by the city council or board of trustees, or set aside by any court, a new assessment may be made and like notice given and proceedings had as required in the first. Laws 1897, p. 122, § 60, provides that if from any cause any city shall fail to collect any special assessment, which shall not be set aside by the order of any court, the city council may, at any time within five years after the confirmation of the original assessment, direct a new assessment. *Held*, that where several terms had elapsed between the confirmation of an assessment and an order denying the sale, so that the court had no jurisdiction to set aside the judgment of confirmation, the order denying the sale was not a setting aside of the judgment of confirmation, and hence a subsequent assessment could only have been made under section 60, and, not having been made in five years from the confirmation of the original assessment, it was barred by limitations.

Appeal from Cook County Court; O. N. Carter, Judge.

Action by the city of Chicago for the collection of a special assessment against Abraham F. Doremus and others. From a judgment in favor of plaintiff, defendants appeal. Reversed.

On January 8, 1893, the city council of the city of Chicago passed an ordinance for the improvement of West Madison street from Crawford avenue to West Forty-Sixth street. A petition was filed in the county court for the levy of a special assessment to pay for the same, and on July 11, 1893, a judgment of confirmation was rendered. The city proceeded to let the contract and complete the work. At the July term, 1895, of said county court, application was made by the county collector for judgment and order of sale of appellants' property for the delinquent installment of said assessment then due. Objections were filed by appellants which went to the validity of the assessment and the jurisdiction of the county court in confirming the same, which objections were sustained by the court, and the order of sale was refused. The particular ground upon which the sale was denied does not further appear. In 1897 and 1898 applications for judgment and order of sale were again made on the collector's warrant for the same assessment, but subsequently withdrawn. In 1899 another application was made, and judgment and order of sale refused. On March 3, 1903, a new ordinance was passed by the city council, which recited the prior proceedings; that the work was done under contract; that a balance

*Rehearing denied December 13, 1904.

¶ 1. See Judgment, vol. 30, Cent. Dig. § 668.

was unpaid; that the county court had refused judgment of sale on the original assessment as to certain lots; that the ordinance ordering said assessment was defective, by reason of which the owners had not paid their fair portion of the cost of the improvement; and it was ordered that a new assessment be made and the old assessment annulled. A petition was filed in the county court for the levy of a second assessment under the latter ordinance. Five objections were filed by the appellants, as follows: First, that the new ordinance and assessment roll improperly included \$3,000 interest and \$1,174.88 costs; second, that the proceedings fall under section 48 of the act of 1872 (Laws 1871-72, p. 257), or under section 60 of the act of 1897 (Laws 1897, p. 122), and not under section 46 of the act of 1872 (Laws 1871-72, p. 256), or under section 57 of the act of 1897 (Laws 1897, p. 121), and consequently were barred by the five-year statute of limitations; third, that the words in the ordinance of 1903, "and the said original assessment be and the same is hereby annulled," were nugatory for the purpose of bringing it within section 46 or section 57; fourth, that the judgment of the county court of 1895 did not declare the original ordinance defective nor set the assessment aside; fifth, that the city was guilty of laches. Upon a hearing on the new assessment roll, the county court ordered it recast so as to eliminate the \$3,000 of interest and \$207.10 of the costs, and overruled the other objections, and confirmed the assessment as recast. Thereupon this appeal was perfected by appellants.

Kerr & Kerr (Richard S. Thompson, John J. Swenie, and T. F. Monahan, of counsel), for appellants. William M. Pindell (Edgar Bronson Tolman, Corp. Counsel, and Robert Redfield, of counsel), for appellee.

WILKIN, J. (after stating the facts). It is insisted by the city, appellee, that the action of the county court in refusing judgment and order of sale in 1895 was, in effect, a setting aside of the original assessment, rendering the confirmation void, and thus authorizing appellee to pass a new ordinance and levy a new assessment under section 57 of the local improvement act of June 14, 1897 (Laws 1897, p. 121). On the other hand, it is insisted by appellants that the proceedings to make the new assessment could only have been under the provisions of section 60 of the act of 1897, and that under the new assessment was void because not made within five years after the confirmation of the original assessment, and is therefore barred by the statute of limitations.

Section 46 of the act of 1872 is substantially identical with section 57 of the act of 1897, as follows: "If any assessment shall be annulled by the city council or board of trustees, or set aside by any court, a new

assessment may be made and returned, and like notice given and proceedings had as herein required in relation to the first," etc. Hurd's Rev. St. 1903, p. 404, c. 24. Section 48 of the act of 1872 is substantially identical with section 60 of the act of 1897, and is as follows: "If from any cause any city . . . shall fail to collect the whole or any portion of any special assessment . . . which may be levied, which shall not be canceled or set aside by the order of any court, . . . the city council . . . may, at any time within five years after the confirmation of the original assessment, direct a new assessment to be made upon the delinquent property for the amount of such deficiency and interest thereon from the date of such original assessment, which assessment shall be made, as nearly as may be, in the same manner as is herein prescribed for the first assessment."

The sole contention of counsel for the city is that the present new assessment was made under section 57, because the county court, by refusing to render said judgment and order of sale, did, in effect, set aside the first assessment. We do not think this contention can be sustained, or that it is in harmony with the decisions of this court. In the first place, several terms of the county court had elapsed between the confirmation of the original assessment and order denying the sale, and therefore the court would have been without jurisdiction to set aside the judgment of confirmation if the proceedings had been for that purpose. In the case of *McChesney v. City of Chicago*, 161 Ill. 110, 43 N. E. 702, it was said: "A judgment cannot be vacated by the court which rendered it, after the term at which it was rendered, except in obedience to the mandate of an appellate court on reversal. The repeal of an ordinance for a special assessment pending an appeal from a judgment confirming the assessment does not justify the court in vacating the judgment after several terms of court have passed, notwithstanding the provisions of the city and village act that, if an assessment shall be annulled or set aside, a new assessment may be made. Judgment of confirmation affirmed on appeal bats a second judgment under a new ordinance for the same improvement, notwithstanding the repeal of the former ordinance and the attempted setting aside of the former judgment at a subsequent term, pending the appeal." In the case of *People v. McWethy*, 165 Ill. 222, 46 N. E. 187, it was again said (page 224, 165 Ill., page 188, 46 N. E.): "The judgment of confirmation of the assessment under the first ordinance was a final judgment, and remained in full force and effect notwithstanding the ordinance of July, 1892, and the court which rendered it could not set it aside or deny its binding force at a subsequent term, but the court, as well as the city and all parties to it, was bound by it." To the same effect is

City of Chicago v. Nicholes, 192 Ill. 489, 61 N. E. 434. But even if this were not so, the application for an order of sale was collateral to the judgment of confirmation, and in no sense a proceeding to set aside that judgment. This case is distinguishable from those like *Murray v. City of Chicago*, 175 Ill. 340, 51 N. E. 654, in which the ordinance was "void upon its face for want of power in the city council to pass it." We think it clear that the order of the county court refusing judgment and order of sale did not have the effect of setting aside the original assessment within the meaning of section 57, *supra*. That assessment is, so far as shown by this record, in full force and effect, and the city council was without power to pass the new ordinance levying a second assessment under that section. The only authority given it to do so must be found in section 60 under which it could only have done so within five years from the confirmation of the original assessment. Having failed to act within the time required by the statute, it was barred, and its action without force or effect.

Several other questions are raised on the record by appellants, but, as the foregoing conclusion disposes of the case, it will be unnecessary to consider them.

The county court erred in overruling appellant's second objection and confirming the assessment, and its judgment will therefore be reversed, and the cause remanded to the county court with directions to dismiss the petition.

Reversed and remanded, with directions.

(212 Ill. 456.)

MERRIFIELD et al. v. CANAL COM'RS OF ILLINOIS & M. CANAL et al.*

(Supreme Court of Illinois. Oct. 24, 1904.)

WATER POWER—CANALS—CONTRACTS—CONSTRUCTION—BREACH—JUDGMENTS—RES ADJUDICATA.

1. Where, in an action to determine defendants' rights to a water power under a certain contract, the court held that defendants were entitled to withdraw from plaintiffs' canal feeder one-fourth of the water flowing therein, subject to certain limitations, such judgment unappealed from was *res judicata* between the parties as to the construction to be placed on the contract, but did not constitute a final adjudication as to whether adequate means to restrict the flow of the water in defendant's flume had been adopted by complainants, so that defendants would receive the quantity of water to which such judgment entitled them.

2. A contract for the construction of a canal feeder entitled defendants' assignors to one-fourth of the water flowing in the feeder, subject to the limitation that defendants should not be entitled to water so as to reduce the water in the canal below a depth of six feet during navigation season. Shortly after the canal was built, in 1838 or 1839, defendants' flume was constructed with a permanent stone bottom, on a level with the bottom of the feeder, with movable gates to regulate the quantity of water, so that when the gates were open water

flowed from the feeder into the flume from the bottom with the "head" afforded by the water in the feeder. Defendants and their assignors continued to receive water into the flume in this manner for a period of more than 88 years, until the canal commissioners leased so much of the water power as could be used without interfering with an ample supply of water for the canal, when weirs were constructed by the commissioners at the opening of defendant's flumes, so that water flowed into them only after the depth in the feeder had risen above 8.2 feet, which caused a loss of the "head" etc. *Held*, that the manner of use for such period of time constituted the practical construction of the contract rights of the parties, and that the construction and maintenance of the weirs was unlawful.

Wilkin, Cartwright, and Hand, JJ., dissenting.

Appeal from Circuit Court, La Salle County; Chas. Blanchard, Judge.

Bill by the Canal Commissioners of the Illinois & Michigan Canal of the State of Illinois and the Ottawa Hydraulic Company against Louis W. Merrifield and another. From a decree in favor of complainants, defendants Merrifield and Galloway appeal. Reversed.

Eddy, Haley & Wetten and Jarvis R. Burrows (Clyde A. Morrison, of counsel), for appellants. Lester H. Strawn, for appellees.

BOGGS, J. The appellees the Canal Commissioners of the Illinois & Michigan Canal of the State of Illinois and the appellee the Ottawa Hydraulic Company, a corporation organized under the laws of the state of Illinois, filed this, their bill in chancery, praying for an injunction restraining the appellants Louis W. Merrifield and George Galloway, his employé and other persons and corporations, from removing weirs which the canal commissioners had placed or were about to place in certain flumes which had been constructed for the purpose of conveying water from the Fox river feeder of the Illinois & Michigan Canal to certain industries operated by the defendants to the bill. The bill was dismissed as to all the defendants thereto except the defendants Merrifield and Galloway. A hearing on bill, answer, replication, and proof resulted in a decree restraining the appellants substantially in accordance with the prayer of the bill. This is an appeal perfected to reverse the decree.

In 1838 the board of commissioners of the Illinois & Michigan Canal were about to enter upon the work of constructing a "feeder" by which to convey water from Fox river southwardly from a point near the village of Dayton, on said Fox river, to the main channel of the canal at Ottawa, a distance of about four miles. John Green and William Stadden then owned the east half of section 29, town 34 north, range 4 east of the third principal meridian, at Dayton. This tract of land formed the west shore line of Fox river at the point where it was determined to begin the construction of the feeder to receive the water from said river. Said Green and Stadden, on the 5th day of June, 1838, executed an instrument in writing authorizing the canal commissioners to enter

*Rehearing denied December 9, 1904. For dissenting opinion, see 72 N. E. 537.

upon their premises and proceed to the construction of a dam and lock and other necessary structures in that part of the bed of Fox river to which the riparian rights of Green and Stadden extended, and also to construct a "channel" on the said land for the purpose of receiving the water to be taken from the river, and conveying the same from thence to and discharging it in the Illinois & Michigan Canal at a point some four miles below. The instrument reads as follows:

"Whereas the board of commissioners of the Illinois and Michigan canal, in surveying different routes for a navigable feeder from the best practicable point on Fox river to the Illinois and Michigan canal at the town of Ottawa, and such basins of lateral canals connecting the Illinois river with said canal at that point as in their opinion will most enhance the value of the property of the State pursuant to an act entitled 'An act to amend an act entitled an act for the construction of the Illinois and Michigan canal, approved January 9, 1836,' have surveyed one route passing over the lands and premises of the subscribers:

"Now, therefore, we, the subscribers, for the purposes of encouraging the construction of said feeder, as also said canal, and also for the application of water to manufacturing purposes for the use of the State, or any person claiming, by purchase or otherwise, under the State, and as an inducement for determining on such route and location for said feeder and basins as will pass over or otherwise benefit our lands and premises, do hereby fully and absolutely release, acquit and discharge the People of the State of Illinois and the board of commissioners of said canal of and from all damages which we may sustain or might claim in consequence of the construction of the feeder and basins, or their or either of their fixtures and appendages, of whatsoever kind, at, on, over or through our lands and premises, and of and from all claims and demands for or on account of any lands, waters or streams that may be entered upon, taken or appropriated for the construction and use of the said feeder and basins and their fixtures and appendages: provided, however, that these presents be understood with this limitation, viz.: That the subscribers forbear to relinquish, and hereby reserve to themselves, whatever claim or right they may have acquired to one-fourth part of the water that may flow in the Fox river, diminished as that quantity may chance to be, in the just measure of its proportion, by the leakage, evaporation, etc., necessarily incident to such good and workmanlike dam and lock structures as shall be deemed requisite for the said feeder and basins and useful to the State and after the necessary quantity has been drawn out for the purpose of the navigation of said canal, but agreeing that in the application or use of said fourth part aforesaid, the same shall be

drawn out of said feeder, within seven-eighths of one mile from the head of the guard lock, according as and in the manner to be directed by said commissioners or other authorized agents. This reservation being subject to the farther limitation that it shall not at any time authorize the subscribers, even within the quantity of said proportion, to reduce the water of the said Illinois and Michigan canal during the season of navigation below the depth of six feet, which, only, shall be done by the permission of some authorized agent of the State. They, the said subscribers, hereby relinquishing to the People of the State of Illinois, for the reasons and purposes assigned, as aforesaid, all and whatever right and claim they may have to the residue and all other portions or portion of the waters of the said Fox river beyond and above the one-fourth reserve as aforesaid, and they do hereby acquit and discharge the People of the said State of Illinois and the board of commissioners of the said canal from all liability whatsoever for the constant use and exercise of the rights and powers herein declared: provided, if the board of commissioners shall alter or change the dimensions of said feeder as now located, the said board are to pay to said subscribers, or either of them, such damages as they may sustain in consequence of said change.

"In witness whereof we hereunto set our hands and seals this 5th day of June, in the year of our Lord, 1838.

"John Green. [Seal.]

"William Stadden. [Seal.]

"Signed, sealed and delivered in presence of Giles Spring and James Turney."

A dam was constructed by the commissioners across Fox river at this point; also a lock at the dam on the premises of said Green and Stadden on the west side of the river; and the commissioners also dug the feeder from the lock to the outlet thereof in the canal at Ottawa. The feeder was, when constructed, a channel of the width of 60 feet at the top and 40 feet at the bottom, and was capable of conveying water to the depth of 5 feet a portion of the way and 4 feet the remainder of its length. Four flumes were by the commissioners put in the banks of the feeder within the limits of the Green and Stadden land for the purpose of receiving water for power uses reserved by said Green and Stadden. These flumes were constructed in 1838 or 1839, and remain in practically the same condition to this day. The water power reserved by Green and Stadden by proper assignments came to be owned, at the time of filing this bill, as follows: Three parts thereof by the appellant Merrifield, three parts by the Standard Fire Brick Company, and two parts by the Columbia Straw Paper Company.

In 1852 the canal commissioners entered into a contract with the Ottawa Hydraulic Company, by which they purported to sell and lease to the Ottawa Hydraulic Company

for a term of 20 years from the 1st day of May, 1852, so much of the water and water power furnished by the Fox river feeder to said canal as could be used, in the manner stated in said contract, by said Ottawa Hydraulic Company without interfering with an ample supply of water for said canal, and agreed that said Ottawa Hydraulic Company should have the privilege of using and subleasing the said water. At the expiration of this lease, in 1872, it was renewed for a further period of 20 years, and on the expiration of that term was again renewed for a third period of 20 years, thereby continuing the same in force until the 1st day of May, 1912.

On and before the 2d day of March, 1899, the appellant Merrifield had one of the flumes connected with a plant which he operated, for the purpose of generating electricity, and had another of the flumes connected with a tile factory owned by him, and drew water from the feeder through these two flumes for the purpose of operating the machinery at these respective plants. On said last-mentioned date the Ottawa Hydraulic Company commenced an action of trespass on the case in the circuit court of La Salle county against the appellant Merrifield for the purpose of fixing the respective rights of the parties thereto in said water and water power furnished by said Fox river feeder, and for the purpose of determining whether said Merrifield was using more water than he was entitled to. In said suit such further proceedings were had that on or about the 1st day of February, 1901, this court, by its judgment rendered in said cause, found said defendant, Louis W. Merrifield, guilty, and entered a judgment in favor of the plaintiff and against the defendant for \$1 and costs, only nominal damages being sought in said suit, which said judgment still remains in full force and effect.

After the termination of this litigation between appellant Merrifield and the Ottawa Hydraulic Company, the canal commissioners installed in each of the flumes by means of which Merrifield was drawing water from the feeder a contrivance called a "weir," for the purpose of regulating the amount of water that should pass from the feeder through each of said flumes. The weir that was placed in the flume at the electrical power station was so constructed and installed as to give to said Merrifield all of the water power of said feeder to which, in the opinion of the canal commissioners and according to the decision of the court in the trespass case brought against him by the hydraulic company, he was entitled to take, and the weir installed in the flume of the said Merrifield at his tile mill permitted him to use two-thirds as much water as the weir in the flume at said electrical power station. Such division of the water was made at the request of said Merrifield, and upon his agree-

ment not to use water through both flumes at the same time. The appellant Merrifield contended these weirs so obstructed the flow in the flumes as to deprive him at all times of a portion of the quantity of the water and of the "head" of water that he was entitled to receive under the Green and Stadden contract, and to deprive him at other times, when the stage of the water is low in the feeder, of any water whatever, and he and his coappellant, George Galloway, an employé of his, removed the weirs from the flumes. The canal commissioners notified said Merrifield and said Galloway that their action in removing said device was unlawful, and again put in said device in said flumes, and warned the said Merrifield and the said Galloway not to interfere with the same. Afterwards, in the night between the 10th and 11th days of March, 1901, the said Merrifield caused said device to be again destroyed and torn out, and the said Merrifield thereafter threatened that he would tear out and destroy any device or weir placed in his said flumes which would prevent him from using all the water he might need for his electrical power station. The canal commissioners replaced the weirs, and filed this, their bill to enjoin the removal of the same, and the decree appealed from granted the restraining order asked in the bill.

The appellant Merrifield contends that under the proper construction of the contract between Green and Stadden and the canal commissioners one-half of the water in the Fox river was to be diverted from that stream and caused to flow through the feeder, and that said Green and Stadden reserved the right to withdraw from the feeder and use for their own purpose one-half of the water so to be taken from the river, "diminished as that quantity may chance to be, in the just measure of its proportion, by the leakage, evaporation, etc., necessarily incident to such good and workmanlike dam and lock structures as shall be deemed requisite for the said feeder and basins and useful to the state, and after the necessary quantity has been drawn out for the purpose of the navigation of the said canal, but agreeing that in the application or use of said fourth part aforesaid the same shall be drawn out within seven-eighths of one mile from the head of the guard lock, according as and in the manner to be directed by said commissioners." The Ottawa Hydraulic Company, in the action of trespass brought against the appellant Merrifield, contended that under the true construction of the contract between Green and Stadden and the canal commissioners Green and Stadden reserved, and that they and their heirs and assigns were entitled to, the one-fourth part, only, of the water which came into the feeder from the river, diminished as that quantity might chance to be by evaporation, etc., and for the purpose of navigation of the canal, as speci-

fied in the contract. The canal commissioners construed the Green and Stadden contract as did the hydraulic company.

It appeared from the transcript of the proceedings had in the trespass case which the hydraulic company brought against Merrifield that the circuit court, in hearing and disposing of that proceeding, gave to the Green and Stadden contract the same construction contended for by the Ottawa Hydraulic Company, and under such interpretation of the contract entered judgment against Merrifield. The canal commissioners accepted this interpretation and decision of the circuit court as the true and legal meaning and construction of the Green and Stadden contract, and as fixing the rights of Merrifield and the Ottawa Hydraulic Company in respect of their rights, respectively, in the water which came into the feeder.

It appeared from the record of the proceeding in the action of trespass that the issue was whether the appellant Merrifield was receiving more water from the feeder than he was entitled to take as an assign of the said Green and Stadden, and that the determination of this issue involved the construction by the court of the provisions of the contract between Green and Stadden and the canal commissioners in respect of the reservation by Green and Stadden of the right to use water from the feeder. The trespass case was heard by the court without the intervention of a jury. The litigants presented to the court propositions to be held as the law applicable to the contentions between them. These propositions asked the court to construe and interpret the Green and Stadden contract according to the respective views of the parties. The court refused to hold the propositions asked on behalf of the appellant Merrifield and held that the propositions presented in behalf of the hydraulic company correctly construed the contract.

Proposition No. 1 asked by the hydraulic company and held by the court declared that under the proper construction of the Green and Stadden contract the water which the said Green and Stadden reserved "was the one-fourth part of the water of the Fox river which passed through the guard lock at Dayton, Illinois, into said feeder, diminished as that quantity might chance to be, according to the provisions of said release in that regard."

Proposition No. 2 presented in behalf of the hydraulic company and held by the court was as follows: "That under the release of water power in question made by John Green and William Stadden, the said John Green and William Stadden, their heirs and assigns, did not become entitled to withdraw from the Fox river feeder a quantity of water equal to one-fourth part of all the water in the Fox river at Dayton, Illinois, only diminished by its proportion of leakage, evaporation, and water for the navigation of the canal, as more particularly set forth in said

release, even though such quantity of water might be all the water flowing in said feeder; but the true interpretation of the meaning of said release is that said John Green and William Stadden, their heirs and assigns, are only entitled to withdraw from said feeder one-fourth of the water flowing in said feeder, and that one-fourth subject to the limitations and reductions set forth in said release, and said one-fourth subject to the further limitation and control of the canal commissioners or some authorized agent of the state to the extent that the water of the canal should not be reduced below the depth of six feet during the season of navigation."

Other propositions, giving the like construction to the contract, were presented to the court by the hydraulic company, and were approved as correct construction of the contract. It was then proven that the circuit court was called upon to decide, as one of the material questions in the case, the true construction of the Green and Stadden contract, and that it did decide the point and enforced the contract in accordance with such decision, and that the judgment so entered remained in full force and in no wise reversed or impeached.

When one of the material questions involved in a suit at law has been adjudicated by a court of competent jurisdiction, though the judgment may not constitute a complete bar to a subsequent action, the adjudication is to be deemed a final and conclusive determination of that question in any subsequent suit between the same parties. *Hanna v. Read*, 102 Ill. 596, 40 Am. Rep. 608. That is to say, as between the Ottawa Hydraulic Company and the appellant Merrifield the question as to the quantity of water Green and Stadden and their assigns were entitled to take under the correct construction of the contract with the canal commissioners arose for decision and was conclusively and finally settled in the trespass suit, and that the court in such litigation having decided that under said contract said Green and Stadden reserved for their own use and for the use of their heirs and assigns the one-fourth part, only, of the water which came into the feeder from Fox river, subject to be diminished by evaporation, etc., and after the necessary quantity had been drawn out for purpose of navigation of the canal, etc., that decision is final as between the parties to that litigation.

The Green and Stadden contract provided that in the application or use of the said one-fourth part of the water reserved by Green and Stadden, the same should "be drawn out of said feeder within seven-eighths of one mile from the head of the guard lock, according as and in the manner to be directed by the said commissioners." It was within the power of the commissioners of the canal to control and direct the withdrawal of the water from the feeder by Green and Stadden,

and by the appellant Merrifield, the assign of Green and Stadden; and the commissioners having sold and leased to the hydraulic company all of the water and water power furnished by the said Fox river feeder which the said commissioners could lawfully sell, and which could be used without interfering with an ample supply of water for said canal, it became the duty of the said canal commissioners to take such steps as might be found proper to so control the withdrawal of water from the feeder by Merrifield as should be necessary to enable the hydraulic company to obtain the quantity of water it was entitled to have and use under the contract between it and the canal commissioners. Merrifield and the hydraulic company having submitted to a court of competent jurisdiction, in the action at law regularly pending between them, the question of the quantity of water Merrifield was entitled to have from the feeder under the proper construction of the Green and Stadden contract, and that construction having been settled by the judgment of the court, which judgment remained unreversed and in no manner impeached, the canal commissioners would be fully justified in taking such steps as might be necessary and proper to restrict the outflow of the water in Merrifield's flumes in accordance with his rights as determined by the court in the suit between himself and the hydraulic company. It was within the power, and seems fairly to have been the duty, of the canal commissioners to adopt some adequate and proper means to restrict the flow of the water into Merrifield's flume so that he should receive the quantity it had been determined by the court that he was entitled to use and enjoy under the Green and Stadden contract. The canal commissioners caused the weir in question to be constructed and placed in Merrifield's flume for the purpose of so controlling the flow of water from the feeder that he should withdraw no more than he was entitled to have and use under the decision of the court in the suit which the hydraulic company had instituted against him for the purpose of obtaining the judicial ascertainment and declaration of the rights of Merrifield under the Green and Stadden contract. Whether this weir was so contrived and constructed and so placed in the flume as to effect the correct apportionment of the water in the feeder demanded careful consideration of the chancellor. Our investigation of the record as to this point has brought us to the conclusion that the appellant Merrifield had just cause to contend that the weir deprived him, during a portion of the time, of water which he was entitled to have flow into the flume, and that it deprived him at all times of the full benefit of what is known to the parties as the "head" of water.

The flume was built in 1838 or 1839, and, so far as the evidence discloses, no material change has since then been made in it—

certainly not since 1855, a period of more than 40 years—before any contention arose as to the rights of the assigns of Green and Stadden to take water from the feeder through the flume. The flume was constructed with a permanent stone bottom, which was put in on a level with the bottom of the feeder. The mouth of the flume was provided with two gates, which were moved up and down by cogs designed and made for that purpose. By means of the gates the quantity of water which would flow from the feeder into the flume could be restricted or the flow thereof entirely obstructed. The inside dimensions of the flume were seven feet in width by five feet in depth, and the bottom of the flume being on a level with the bottom of the feeder, the flume would therefore receive water whenever there was any water in the feeder, unless the gates were closed entirely down. The flume was of the length of twenty-five feet, the water being discharged from it into what is called the "penstock." The weir placed in the flume by the direction of the canal commissioners was so constructed that no water could flow through the flume into the penstock unless there was more than 3.2 feet of water, in depth, in the feeder. The flume as originally constructed in 1838 or 1839, and as maintained continuously from that early date, received water from the bottom of the feeder whenever there was any water in the flume, unless the gates were closed down. The flume was maintained during the long years after its construction before the Ottawa Hydraulic Company had contracted for water, and for many years thereafter, received water from the feeder under conditions and circumstances under which no water could flow into it after the weir was installed. The flume, in the absence of the weir, received the water with a head of water at all times when water flowed into the flume at all, and this the weir interfered with and entirely destroyed, or at least materially diminished. In these two respects the weir injuriously deprived the appellant of the full use and benefit of the water to which he was entitled. The engineer of the canal commissioners who devised the weir conceded that the weir would produce a "slight loss of head," but insisted that he had so designed the weir that the loss of head would be compensated for by an extra quantity of water which the weir would admit for that purpose. He also testified that the water in the flume between the weir and the feeder would have to rise to a depth of 3.2 feet before any water could pass over the crest of the weir into the penstock. Before the installation of the weir the feeder would receive and convey water at all times when the gates were raised, as the bottom of the flume and the bottom of the feeder were on the same level.

The adjudication created in the trespass case reached but a single question, namely,

the quantity of water the assigns of Green and Stadden were entitled to receive from the feeder. The manner or mode in which they were entitled to take the quantity they had the right to receive was not brought in question in that action. Whether the weir permitted such assigns to receive the quantity in the mode and manner they were entitled to have it under the contract remained to be determined by the chancellor in this proceeding. The chancellor was called upon to determine, among other things: (1) Whether, under the Green and Stadden contract, it was competent for the commissioners to so divert and control the flow of water from the feeder to the flume, as did the weir, that no water could flow into the flume of the appellant Merrifield except at times when there was more than 3.2 feet of water in the feeder; and (2) whether, under that contract, it was competent for the canal commissioners to so construct the weir as to prevent the water from flowing into Merrifield's flume from the bottom of the feeder at all times when he was entitled to have water under the contract. The provisions of the contract with Green and Stadden touching upon the propositions are as follows: "Agreeing that in the application or use of said fourth part, as aforesaid, the same shall be drawn out of the said feeder within seven-eighths of one mile from the head of the guard lock, according as and in the manner to be directed by the said commissioners or other authorized agent. This reservation being subject to the farther limitation that it shall not at any time authorize the subscribers, even within the quantity of said proposition, to reduce the water of the said Illinois and Michigan Canal, during the season of navigation, below the depth of six feet, which, only, shall be done by the permission of some authorized agent of the state." The contract, it will be observed, clothed the canal commissioners with authority and discretion in respect of these matters. Immediately after the execution of this contract of reservation by Green and Stadden, the commissioners proceeded to construct the feeder and the flumes. The manner in which they caused the flumes to be made disclosed the views entertained by the commissioners as to the rights of Green and Stadden and their assigns in the mode and manner of the use of the water reserved under the contract. The commissioners caused the flumes to be built with the stone bottom of the flume and the bottom of the feeder on an exact level. They caused to be framed in the mouth of each flume two gates, which could be raised or lowered. These gates could be shut entirely down and made to rest on the bottom on the flume, thereby, if both gates were down, excluding all water from the flume; or the gates, or either of them, could be partially raised, in which event the water would flow into the flume at the bottom thereof. The gates provided the means of controlling

and directing the flow of the water from the feeder into the flume, and were placed there for that purpose when the flumes were constructed. If controlled by the gates, the water would enter the flume at the bottom whenever allowed to flow into it at all, and the water would always have a head of water in proportion to the depth of the water in the feeder. If the flumes thus operating should withdraw the water during the season of navigation to such an extent as to reduce the water in the canal to a depth of six feet or less, the commissioners could, in pursuance of the conditions of the reservation by Green and Stadden, close the gates of the flumes and thereby retain the water in the feeder so far as might be necessary to maintain the requisite depth in the navigable channel of the canal. The flumes remained as originally constructed, the gates constituting the means of controlling the inflow of the water, and the owners of the Green and Stadden water power were supplied with water in this manner during all the time after the construction of the canal until the weirs were installed. This was the condition and the mode of operation in force long before and at the time the Ottawa Hydraulic Company leased water rights from the canal commissioners, and so remained after the hydraulic company became interested in the quantity of water withdrawn from the feeder by these flumes until the weirs were designed and installed—a period of more than 40 years. The contract between the hydraulic company and the canal commissioners was entered into in 1852, and from thenceforward until the weir was installed—a period of more than 48 years—the assigns of Green and Stadden continued to receive water from the feeder through the flumes in this manner. For over 60 years the flumes have been maintained in the same condition, and those entitled to the water power have enjoyed such rights in the same beneficial mode and manner.

The manner of the construction of the flumes, the acts and conduct of the commissioners continuously since then, the uninterrupted enjoyment of the benefits thereof by the owners of the water, the knowledge and acquiescence on the part of the hydraulic company, constitute a practical exposition and construction by the parties of their rights under the Green and Stadden contract. In view of the great length of time, the uniform and continuous action and acquiescence of all the parties, the chancellor should have regarded the rights of all the parties as fixed by the construction which they have themselves placed upon the contract. They have determined and settled their respective rights by acts and conduct throughout so many years that the court should refuse to consider whether, under the contract, the commissioners have power to so change the flumes by weirs as to effectuate a radical change in the flow of the water into the flumes, to the in-

jury of the appellant Merrifield. It is a doctrine frequently declared in cases where the rights and powers of contracting parties are the subject of investigation that great weight will be given to such acts and conduct of the parties as are indicative of the construction they themselves have placed on their rights and powers under the contract, and not inconsistent with a fair and reasonable rendering of the contract itself. In 9 Cyc. p. 588, it is said: "Where the parties to a contract have given it a particular construction, such construction will generally be adopted by the court in giving effect to its provisions; and the subsequent acts of the parties showing the construction they have put upon the agreement themselves are to be looked to by the court, and in some cases may be controlling." The general principle there stated has been approved in many cases decided in this court, and cited in note 45 to the text, and also collected in 2 Ill. Cyc. Digest, 677.

The flumes as constructed and so long allowed to remain and be enjoyed by the owners of the water power, secured to such owners, at all times when they were entitled to receive water at all, such head of water as the depth of water in the feeder above the bottom of the flumes would afford. The weir practically deprived them of water and of this head at all times when there was less than 3.2 feet of water in the feeder; and when there was more than that depth of water in the feeder the weir deprived the appellant Merrifield of the head, and substituted therefor an additional quantity of water. It is not and cannot be contended that under a proper construction of the contract the owners of the Green and Stadden water power were not entitled to water at all times when there was no more than 3.2 feet of water in the feeder. During the season of navigation this depth of water in the feeder may be requisite to secure the necessary quantity in the canal for navigation purposes, but the weir operates on the theory that this arbitrary depth of water must be maintained at all times in the feeder, and, as a consequence, if installed, would deprive the appellant Merrifield of any water whatever unless there remained more than 3.2 feet in the feeder, whether such quantity was needed to maintain the necessary navigable depth in the canal or was otherwise necessary or useful for the purposes of the state. The contract reserves to Green and Stadden and their assigns the said one-fourth portion of the water in the feeder, diminished in just proportion by leakage, evaporation, etc., necessarily incident to a good and workmanlike dam and structure, etc., and useful to the state, "after the necessary quantity has been drawn out for the purposes of navigation," with the further limitation that the reservation should not authorize Green and Stadden or their assigns to so draw the water from the feeder during the "season of navigation" of the canal as to reduce the water in the canal to a depth of less than six feet. The

weir retains in the feeder at all times in each year, after the season of navigation has passed, water that the contract reserves to the use of the owners of the Green and Stadden water power, and even during the season of navigation may prevent the flume from receiving water that is reserved by the contract, and not needed to remain in the feeder in order to retain the requisite depth of water in the canal that may be needed for the purposes of navigation. The weir prevented the rightful passage of water into the flume, and injuriously deprived the appellant Merrifield of the full use and benefits of the water power to which he was entitled. The chancellor therefore erred in holding the commissioners had power to place and maintain the weir in the flume.

The decree will be reversed, and the cause will be remanded for such other and further proceedings consistent with this opinion as may to justice and equity appertain.

Reversed and remanded.

WILKIN, CARTWRIGHT, and HAND,
JJ., dissent.

(212 Ill. 326.)

ILLINOIS TRUST & SAVINGS BANK v.
CITY OF PONTIAC.*

(Supreme Court of Illinois. Oct. 24, 1904.)

ERROR—QUESTION FOR REVIEW.

1. Where, during a trial by the court, there is no ruling and no proposition of law held, refused, or modified, there is nothing which the Supreme Court can consider on error.

Error to Appellate Court, Second District.

Action by the Illinois Trust & Savings Bank against the city of Pontiac. From a judgment of the Appellate Court (112 Ill. App. 545), affirming a judgment for plaintiff for less than claimed, plaintiff brings error. Affirmed.

Millard R. Powers, for plaintiff in error.
W. O. Graves, City Atty., and A. C. Norton,
for defendant in error.

CARTWRIGHT, J. Plaintiff in error having recovered a judgment in the circuit court of Livingston county against defendant in error for only \$1,392.11 upon a claim for \$14,919.48, sued out a writ of error from the Appellate Court for the Second District to review the judgment, alleging that it was entitled to recover the whole of its claim upon the stipulated facts. The Appellate Court affirmed the judgment, and plaintiff in error has brought the record to this court by writ of error to review the judgment of the Appellate Court.

We find no question of law in the record for our consideration. The suit was in assumpsit for hydrant rentals alleged to be due from the defendant, and, a jury having been waived, the cause was submitted to the court for trial upon a written stipulation as to the facts, which also provided that all pleadings

*Rehearing denied December 9, 1904.

of the plaintiff and defendant under which the evidence would be admissible should be considered filed. There was no ruling by the court during the trial, and there was no proposition of law held, refused, or modified. There is no question which we can consider. *Robbs v. Greifenhagen*, 194 Ill. 73, 62 N. E. 308. The judgment of the Appellate Court is therefore affirmed.

Judgment affirmed.

(212 Ill. 356)

BRENNAMAN et al. v. SCHELL.*

(Supreme Court of Illinois. Oct. 24, 1904.)

PURCHASE OF LAND—TITLE IN NAME OF ANOTHER—RESULTING TRUST—EXPRESS AGREEMENTS—ADVANCEMENTS—PAROL CONTRACTS—STATUTE OF FRAUDS—HUSBAND AND WIFE—DEPRIVATION OF DOWER—FRAUD.

1. Complainant, having received \$1,500 from her husband prior to their separation, used \$800 of the same to purchase the lot in controversy. She was induced by her children to have the conveyance executed to defendant, who was then her unmarried daughter, with whom she resided, in order that in case it was desired to mortgage or convey the same it would not be necessary to obtain the consent of complainant's husband, the daughter agreeing to reconvey the lot to her mother on request. *Held* that, since the daughter's agreement was merely such as the law would imply, it did not create an express trust which was unenforceable under the statute of frauds, nor prevent the facts from creating a valid resulting trust in favor of complainant.

2. Where a mother was reluctantly induced to take title to certain property, purchased by her with her own money, in the name of her daughter, for the purpose of obviating the necessity of obtaining the consent of the mother's husband in case of a conveyance or mortgage of the property, such facts were sufficient to rebut the presumption that an advancement was intended by the conveyance to the daughter, instead of a resulting trust in favor of the mother.

3. Since a married woman is entitled by statute to the sole possession and enjoyment of her lands, free from control of her husband, the husband's right of dower, though vested, being incapable of assertion or beneficial enjoyment until after the wife's death, a purchase of land by a married woman with her separate funds, the title to which was taken in the name of her daughter, was not fraudulent as to the husband, though for the purpose of depriving him of dower.

4. A parol agreement by the beneficiary of a resulting trust that the trustee should retain title to the property in question for her individual benefit under certain conditions was void under the statute of frauds.

Appeal from Circuit Court, McLean County; C. D. Myers, Judge.

Suit by Susannah Schell against Elizabeth Brennaman and others. From a decree in favor of complainant, defendants appeal. Affirmed.

This is a bill, filed on March 17, 1903, in the circuit court of McLean county by the appellee against the appellants, Elizabeth Brennaman and her husband, John Brennaman, and one Henry C. Bishop, for the purpose of having a trust declared in favor of

appellee in lot 2, block 6, Phoenix's Addition to the city of Bloomington. The bill alleged that on September 29, 1896, the appellee purchased said lot from one Fritzen for \$800, and caused the deed to be made to her daughter, the appellant Elizabeth Brennaman, with the mutual understanding and agreement that said appellant, who was then Lizzie E. Schell (now Brennaman), would convey the same on request; that appellee has caused improvements to be made upon the house on the premises, costing \$1,000, and has occupied the same; that the deed was delivered to said Lizzie, or Elizabeth, for the purpose of vesting the title in trust for the use and benefit of appellee; that said Lizzie never paid any part of the purchase money, and, after her marriage with John Brennaman, borrowed from said Bishop \$875, and, to secure the same, on October 7, 1902, executed a mortgage for said last-named sum; that said mortgage was in bad faith and without any color of right; that when it was made there was a mortgage on the premises for \$353.75, which said Lizzie paid off out of the proceeds of the loan from Bishop; that appellee has offered to repay her said amount, and any taxes she may have paid, and has requested her to convey the lot to appellee, but that said Elizabeth refuses so to convey; that appellee is ready and willing to pay Elizabeth all the money she has advanced, and offers to pay the same; that appellee is entitled to a conveyance of said lot, and the cancellation of the Bishop mortgage, and prays for an accounting; and that the Bishop mortgage may be canceled, and said Elizabeth and her husband may be decreed to convey the lot to appellee by a good and sufficient deed.

Answers were filed by the three defendants, John and Elizabeth Brennaman and Bishop, to the bill, and subsequently there was filed by Elizabeth and John Brennaman an amended answer. The answer of Elizabeth Brennaman and her husband denies all the material allegations of the bill, and sets up that the agreement referred to in the bill was void as not being in writing in accordance with the requirements of the statutes of this state. The answers also set up that the conveyance made by Fritzen to Elizabeth Brennaman was made to fraudulently defeat the dower right of appellee's husband, and also that it was made as an advancement to appellant, and also that, after the deed was made, there was an agreement between appellee and her daughter by which the former agreed not to question the daughter's title to the lot.

After the cause was at issue, it was referred to a master in chancery to take testimony and report. The master's report finds substantially that the allegations of the bill are true, and that the appellee is entitled to the relief prayed for in the bill. Exceptions were filed to the report, which were overruled, and a final decree was rendered in fa-

*Rehearing denied December 8, 1904.

vor of appellee on December 19, 1903, which decree was substantially in accordance with the prayer of the bill, and found that the equity of the cause was with the complainant, Susannah Schell; that, without the knowledge of the complainant, Elizabeth Brennaman and her husband mortgaged the premises to Bishop for \$875; that out of this sum they paid a mortgage then on the premises, amounting to \$375; that, as between Bishop and complainant and defendants, this mortgage is not questioned, but stands as a valid lien against the lot; that the money paid by the defendant on the prior mortgage of \$375, and for repairs and improvements and taxes, amounted in all to \$440; that the defendant, out of the proceeds of the mortgage which she put upon the premises held by her in trust for her mother, owed to appellee, after deducting said credits of \$440, the sum of \$466.32; and the decree thereupon ordered that Elizabeth Brennaman and her husband execute a deed to the appellee, conveying said lot, subject to the Bishop mortgage, which mortgage appellee was directed to assume and agree to pay and deliver to the master in chancery of the court within 30 days of the date of the decree for appellee; and that said Elizabeth should pay into the hands of the master \$466.32 within 30 days of the signing of the decree, and, upon such payment being made, that the master should deliver such deed and money to the appellee, and, in default of said deed being executed and delivered, and in default of such payment within the time named, the master should execute and deliver to appellee a sufficient deed, subject to the Bishop mortgage, which appellee was to assume and agree to pay; that said master's deed should be sufficient to transfer all the interest of Elizabeth and John Brennaman in and to said lot; and, in default of the payment of \$466.32 by Elizabeth Brennaman, the same should stand as a decree against her, and, if not paid within 30 days, that an execution issue therefor.

From the decree so rendered, the present appeal is prosecuted.

Livingston & Bach and Barr & Brennan, for appellants. Thomas W. Tipton, for appellee.

MAGRUDER, J. (after stating the facts). First. The theory of the bill in this case is that the appellant Elizabeth Brennaman holds the legal title to the lot in question in trust for her mother, the appellee, and that such trust is a resulting one. The sum of \$800 was paid for the lot, and the money so paid belonged to appellee. But when Fritzen, the vendor of the lot, made the deed, he made it to Lizzie Schell (now Brennaman), appellee's daughter, instead of making it to the appellee herself. The proof is quite clear to the effect that the money with which the lot was bought was appellee's money. There

had been some trouble between appellee and her husband, and a separation had taken place between them, although there had been no divorce. Appellee's husband made arrangements to sell a farm, which he owned, for \$10,500, and, believing that he was about to leave her, she refused to sign the deed, but finally did so upon his agreeing to give her \$1,500. Accordingly, he paid her \$1,500 of the purchase money, and himself took \$9,000. The \$800 with which the lot now in controversy was purchased was a part of this \$1,500 so paid to her by her husband. The proof tends to show that this sum of \$1,500 was first used in purchasing a farm, the title to which was taken in the name of her son, Robert Schell. But he held the title for the benefit of his mother, the present appellee. Subsequently Robert Schell sold the farm, and out of the proceeds were realized a certain sum of money, of which the sum of \$800 here referred to was a part. Before this sum was used in the purchase of the lot now in controversy, it had been deposited in bank in the name of appellee's daughter, Mrs. Brennaman, but it was for the use of her mother, the appellee. Without going further into the details of the testimony, we are satisfied that, although the money originally given appellee by her husband was invested from time to time and the investments were changed, yet the money always remained hers, and that the sum of \$800, which was a part of it, was her money at the time of the purchase of the lot in question.

Under this state of facts there was a resulting trust in favor of the appellee. That is to say, the appellant Mrs. Brennaman held the title under a resulting trust in favor of her mother, the appellee. It is well settled that, where the purchase money for land is paid by one person and the title thereby purchased is conveyed to another person, the law construes such facts as constituting a resulting trust. Such a resulting trust arises by operation of law. It does not spring from the contract or agreement of the parties, but from their acts. The beneficial estate follows the consideration, and attaches to the party from whom the consideration comes. Such trusts may be established by parol evidence, and the statute of frauds has no application to them. Our statute of frauds expressly provides that "resulting trusts, or trusts created by construction, implication, or operation of law, need not be in writing, and the same may be proved by parol." *Van Buskirk v. Van Buskirk*, 148 Ill. 9, 35 N. E. 383. The doctrine is thus stated in 15 Am. & Eng. Ency. of Law (2d Ed.) 1132: "It is the well-settled rule that, where the consideration for an estate is paid by one person and the legal title is conveyed to a third person, such third person being a stranger to the person paying the consideration, the person taking the legal title holds the land by way of a resulting trust in trust for the person

making the payment. This trust arises from the character of the transaction, and is independent of any express agreement on the part of the grantee to hold in trust for the payor." *Mayfield v. Forsyth*, 164 Ill. 32, 45 N. E. 403; *Emmons v. Moore*, 85 Ill. 304; *Dorman v. Dorman*, 187 Ill. 154, 58 N. E. 235, 79 Am. St. Rep. 210; *Lewis v. McGrath*, 191 Ill. 401, 61 N. E. 135; *Reed v. Reed*, 135 Ill. 482, 25 N. E. 1095; *McNamara v. Garrity*, 106 Ill. 384. All the conditions required by the authorities to constitute a resulting trust existed in the matter of the purchase of the lot by appellee and the conveyance of the title thereof to appellee's daughter. In *Reed v. Reed*, supra, it was held that the trust can only arise from the original transaction at the time it takes place, and at no other time, and that the funds must be advanced and invested at the time the purchase is made. Here the money was advanced and paid at the time of the purchase, and at the time of the conveyance of the title to the appellant Mrs. Brennaman.

The bill alleges that, at the time of the purchase of this lot and its conveyance by Fritzen to Elizabeth Schell as aforesaid, there was a mutual understanding and agreement between Lizzie Schell and her mother that the former would convey the lot to her mother on request. The proof also shows that Lizzie told her mother at the time of the purchase that she would convey the lot back to her. In view of this agreement or understanding, it is contended by counsel for appellants that there was here not a resulting trust, but an express trust, and that, under the statute of frauds, such express trust is void as not being in writing. We do not agree with this contention of counsel. It is true that a resulting trust arises by operation of law, and from the acts of the parties, and not from any contract between the parties; but where the agreement or understanding between the parties at the time of the purchase is merely such as the law would imply, no express trust is created. This doctrine is thus stated in 15 Am. & Eng. Ency. of Law (2d Ed.) p. 1154: "The fact that the person in whose name the title is taken verbally agrees at the time of the conveyance to hold the property in trust for the person by whom the purchase money was paid, upon the same terms which the law would imply, does not create an express trust, which would be unenforceable on account of the statute of frauds, and thereby prevent the implied trust from resulting from the transaction itself; for, as has been said, an invalid agreement cannot destroy a good cause of action, and this is no less true of resulting trusts than of other legal rights."

In *Furber v. Page*, 143 Ill. 622, 32 N. E. 444, we said (page 630, 143 Ill., page 445, 32 N. E.): "It is well established that no parol agreement, and no payments, whenever made, will create a resulting trust, unless the transaction is such, at the moment the title

passes, that a trust will result from the transaction itself. * * * So, while a parol agreement will not aid or extend the trust, it will not prevent a trust resulting, if the facts are present that produce the implication of law from which it arises." In the case at bar, the trust upon which Mrs. Brennaman agreed to hold this title for her mother at the time the conveyance was made was not a different trust from that which the law itself would imply. The trust, being a resulting one, could not be executed or carried out without a conveyance of the legal title at some time or other to the party owning the beneficial interest. Therefore the agreement to convey the title upon request was nothing more than the acknowledgment of an obligation which the law itself implied and imposed.

In *McNamara v. Garrity*, 106 Ill. 384, land was bought by McNamara and Garrity from one Davidson, but the title was conveyed by Davidson to McNamara, and it was there held that a resulting trust arose in favor of Garrity as to an aliquot part of the land purchased, although at the time of the purchase there was an agreement that, "when the purchase money should all be paid, McNamara was to convey to Garrity his ten-acres of the tract."

In *Dorman v. Dorman*, 187 Ill. 154, 58 N. E. 235, 79 Am. St. Rep. 210, where the facts showed that Dorman purchased certain lands, the title to which was conveyed by the vendor at his request to Mrs. Dorman, his wife, it was held that there was a resulting trust in favor of Dorman, who had paid the purchase money, although the title was taken in the name of his wife, and although it there appeared that "he took title in her name with the understanding and expectation that she would reconvey the same to him on request." The case of *Dorman v. Dorman*, supra, as thus stated, is on all fours with the case at bar. Here Mrs. Brennaman agreed at the time of the purchase that she would convey the title to her mother upon request, and such was the nature of the agreement in the *Dorman Case*; but such agreement was not there, nor can it be here, held to operate as creating an express trust.

Second. It is contended on the part of the appellants that the property was conveyed to Lizzie Schell by her mother as an advancement. The general rule is that, if the purchase money is paid by the husband or father, and the legal title is taken in the name of the wife or child, the implication of a resulting trust does not arise, but the presumption is that the conveyance to the wife or child was intended as an advancement. *Smith v. Smith*, 144 Ill. 299, 33 N. E. 35; *Dorman v. Dorman*, supra. It is well settled, however, that such presumption in favor of the transaction being an advancement may be rebutted by evidence showing that, at the time of the conveyance of the legal title, it was the intention of the husband or

father that the wife or daughter should not take the beneficial interest. 15 Am. & Eng. Ency. of Law (2d Ed.) pp. 1156-1164. Whether or not the purchase in the name of a wife or child is an advancement is a question of intention, and, where it is shown that at the time of the conveyance to the child it was not intended by the parent that the child should take the beneficial interest, a trust will result in the parent's favor. 15 Am. & Eng. Ency. of Law (2d Ed.) p. 1163; *Dorman v. Dorman*, supra. Such intention may be shown by proof of antecedent or contemporaneous acts or facts, or of acts or facts occurring so soon after the purchase as to be fairly considered parts of the transaction. 15 Am. & Eng. Ency. of Law (2d Ed.) pp. 1157, 1158. It may be shown that the conveyance was not intended to be an advancement, by such proof of acts and circumstances as clearly indicate that the intention was not to make an advancement. *Johnston v. Johnston*, 138 Ill. 385, 27 N. E. 930.

The evidence in the case at bar shows that the appellee did not intend to make an advancement when the title was conveyed to her daughter. On the contrary, appellee desired the title to be conveyed directly to herself. But her son and daughter suggested to her that, as a separation existed between her and their father, she might have difficulty in inducing her husband and their father to join in a conveyance in case they should conclude to sell the land, or in a mortgage in case they should conclude to borrow money upon it. It has been held that where title has been taken in the name of the child without the consent of the parent, by whom the purchase money is paid, such fact is sufficient to rebut the presumption of an advancement. 15 Am. & Eng. Ency. of Law (2d Ed.) p. 1164, and cases referred to in notes. While it cannot be said that the title here was taken in the name of Mrs. Brennaman without the knowledge or consent of the appellee, her mother, yet the proof does show that the appellee was reluctantly persuaded to put the title in her daughter when she preferred to have it in herself. This circumstance tends to show that there was no intention to make an advancement to the daughter. Again, as soon as the purchase of the lot was made, the appellee went into possession of the premises, and improved the same to the extent of \$1,000, and paid taxes upon the same, and paid off mortgages which rested upon the lot, and subsequently, when both she and her daughter, who after her marriage lived a while with her upon the premises, vacated them, the appellee rented the premises to third parties, and herself appropriated the rents. In our opinion, the proof in the present case is sufficient to rebut any presumption in favor of an advancement.

Third. It is furthermore contended by counsel for appellants that appellee caused

the conveyance to be made to her daughter, instead of herself, in order to prevent her husband from asserting his right of dower in the premises, and that therefore the conveyance to the daughter was made for a fraudulent and unlawful purpose, so that a court of equity will not aid the appellee in enforcing the trust sought to be set up. The proof does not sustain the contention that the appellee intended to defraud her husband out of his dower in the premises, but she yielded to the solicitation of her son and daughter in the matter merely for the purpose of avoiding the necessity of calling upon the husband, or father, to sign deeds or mortgages when it should become necessary to do so. But in answer to this objection, it is sufficient to quote what was said by this court, speaking through the late Mr. Justice Bailey, in the case of *Kirkpatrick v. Clark*, 132 Ill. 342, 24 N. E. 71, 8 L. R. A. 511, 22 Am. St. Rep. 531: "If the lot in question had been conveyed directly to the defendant, it would have vested in her husband no right or interest except an inchoate right of dower, and it was no fraud upon him if his wife, in purchasing the lot, had the title conveyed to a trustee for the express purpose of preventing such right from attaching. Even at common law, where the husband was entitled to the possession and enjoyment of his wife's lands during their joint lives, it was never supposed to be a fraud upon his rights for his wife to have lands purchased with her separate means, or derived from sources other than her husband, conveyed to a trustee for the sole purpose of placing them beyond his control and having them held for her separate use, and such trusts were habitually resorted to for that purpose. But under our statute a married woman is entitled to the sole possession and enjoyment of her lands free from the interference and control of her husband, the husband's right of dower, even after it has become vested, being imperfect and incapable of assertion or beneficial enjoyment until after her death. How, then, can he be said to have rights in lands which his wife does not yet own, but which she contemplates purchasing, which it would be a fraud upon him to deprive him of? Dower in lands which the wife does not yet own is an interest to which the husband has neither a legal, equitable, nor moral right and the wife is entirely at liberty to so manage her purchases made with her own means, if she can, as to prevent his acquiring such right." See, also, *Tink v. Walker*, 148 Ill. 234, 35 N. E. 765. In the case at bar, the evidence shows that appellee's husband died in 1902, before the present bill was filed, so that no dower claim can be asserted in his behalf against this lot.

After the purchase of this lot by appellee, her daughter, then Lizzie Schell, lived with her mother some three years until her marriage. After her marriage with the appel-

lant John Brennaman, she lived for a short while with her mother upon these premises—from October to March—but during most of the time after her marriage, which occurred in March, 1900, the daughter and her husband lived upon premises of their own. Some proof was introduced on the part of the appellants for the purpose of showing that appellee agreed with her daughter, when she and her husband came to live with appellee, that, if the daughter would do so, appellee would allow her to retain the title to the property in question. The agreement thus claimed to have existed was not in writing, but, if it existed at all, was merely a verbal agreement. The appellee positively contradicts the statement, made by her daughter and the latter's husband, that any such agreement was ever made by her. Her son died and left some insurance money, which she used in paying off some mortgages upon the property, so that she did not have the benefit of his testimony in this case. The master and the court below found that no such agreement existed, and we see no reason to doubt the correctness of this conclusion from our examination of the evidence.

The daughter and her husband, without the knowledge of their mother, executed a mortgage for \$875 upon the property. They used a part of this money in paying off an old mortgage of between \$300 and \$400 which existed upon the property, and in paying some taxes. But the decree entered below gives them credit for all that was thus paid out by them for the benefit of the property. The decree only requires her to return so much of the money which they raised by mortgaging the property as remained after they received credit for what they so paid out.

After a careful examination of the record, we are satisfied that the decree of the circuit court was correct. Accordingly, that decree is affirmed.

Decree affirmed.

(212 Ill. 332)

CHICAGO & W. I. R. CO. v. NEWELL.*

(Supreme Court of Illinois. Oct. 24, 1904.)

CARRIERS—CROWDED TRAIN—PASSENGERS ON PLATFORM—DANGEROUS SPEED—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY—INSTRUCTIONS.

1. Where a railroad train was so crowded with passengers that some of them were standing on the platform, and the train rounded a curve at the rate of 25 or 30 miles an hour, and a passenger was thrown off, in an action for his injuries it could not be said as a matter of law that there was no negligence in so operating the train.

2. Where a passenger was injured by being thrown from the platform of a railroad train as it rounded a curve, in an action for the injuries, it appearing that neither seats nor standing room in the cars could be conveniently ob-

tained, it was a question for the jury whether plaintiff was guilty of contributory negligence.

3. A railroad company holding a franchise and right to operate a railway is liable to passengers injured on the railway by the negligence or wrongful act of another company operating the same.

4. There is no error in refusing instructions covered by those given.

5. Where a railroad train was so crowded that certain passengers could not conveniently obtain seats or standing room inside the cars, and when the train rounded a curve at the rate of 25 or 30 miles an hour a passenger was thrown from a platform and injured, in an action for the injuries it was proper to sustain an objection to a question to a witness as an expert as to whether trains could be operated over the tracks where the accident happened, with safety, at such speed, the question being immaterial under the facts.

6. It was not error to permit a witness to testify as to the crowded condition of the train at a point several blocks distant, it appearing that the train had not stopped between that place and the place of the accident.

7. Where a railroad train was so crowded that passengers could not conveniently obtain seats or standing room in the cars, and plaintiff, while standing on the platform, was thrown therefrom as the train rounded a curve at the speed of from 25 to 30 miles an hour, it was not error to exclude an ordinance permitting trains to run 35 miles an hour at the place of the accident.

Appeal from Appellate Court, First District.

Action by Thomas Newell against the Chicago & West Indiana Railroad Company. From a judgment of the Appellate Court affirming a judgment in favor of plaintiff, defendant appeals. Affirmed.

G. W. Kretzinger, for appellant. Proudft & Lantz, for appellee.

WILKIN, J. Appellee recovered a \$5,000 judgment against appellant in the superior court of Cook county for personal injuries, and that judgment has been affirmed by the Appellate Court.

It was alleged in the several counts of the declaration that the defendant owned and operated a certain railroad, and had authorized and permitted the Chicago, Indianapolis & Louisville Railway Company to run its trains over the same for the carriage of goods and passengers for reward; that the plaintiff became a passenger on a certain train belonging to the latter company, to be carried from Chicago to Monon Park, in the state of Indiana, for a certain compensation; that it failed to furnish him a seat in the cars of its train, but so negligently crowded the train with passengers that he, using due care in that regard, was obliged to stand upon the platform of one of the cars; that the train was so carelessly, negligently, and recklessly managed and run over and upon a certain curve on a rough part of said road that "the car upon which the plaintiff was riding was violently swayed from side to side and jerked and jolted, and the plaintiff, in the exercise of due care, was with great force and violence thrown from said car and sustained the injuries complained of." The de-

*Rehearing denied December 9, 1904.

¶ 2. See Carriers, vol. 9, Cent. Dig. §§ 1376, 1377, 1402.

defendant filed a plea of the general issue, and also a special plea setting up the leasing of the road to the said Chicago, Indianapolis & Louisville Railway Company, and averring its nonliability for the negligence and torts of said lessee; but the court sustained a general demurrer to such special plea, and the defendant elected to stand by the same. A replication being filed to the plea of not guilty, the case was tried before a jury, with the result above stated.

The errors of law assigned upon the record which are relied upon for a reversal of the judgment below are, first, that the trial court erred in refusing to give the peremptory instruction to the jury to find for the defendant; second, the refusal to give certain instructions asked by the defendant upon the submission of the case to the jury; third, the giving of the fifth instruction on behalf of the plaintiff; and, sixth, the improper exclusion and admission of testimony.

Under the first assignment of error it is insisted that the evidence wholly failed to show negligence upon the part of the defendant and due care by the plaintiff, as alleged in the declaration; that there is an absence of evidence in the record tending to show that the appellant was the owner of the track at the place of the injury; and that, as a matter of law, it is not liable for the negligent acts of its lessee.

A committee of Orangemen had arranged with the company for four trains to be run from Chicago to Cedar Lake, at which place that society held a picnic on the 12th day of July, 1899. The trains were to leave Chicago at different hours during the morning and afternoon—one at about the hour of 10 o'clock a. m. Appellee, with a proper ticket, boarded that train at the station in Chicago, and, according to his own testimony, sought a seat in each of the several cars, passing from the rear to the front of the train, and finding the seats all occupied and the aisles filled with passengers standing. Upon his arrival on the platform of the first car he was unable to get back into the car because of the crowded condition, and the train started and he was compelled to ride in that position. Other testimony tends to corroborate his statement. At Seventy-Ninth street, in the city of Chicago, the railroad track upon which the train was running makes a sharp curve, and the testimony shows that the train ran around that curve at so rapid a rate of speed as to throw the plaintiff and another passenger off of the platform upon which they were to the ground, and to throw many of those who were standing in the aisles off their feet and others off the seats. The plaintiff was seriously injured, and the other passenger thrown to the ground and killed.

Under this state of facts—which, to say the least, the evidence fairly tended to establish—it cannot be seriously contended that the railroad company operating the train was not guilty of the negligence com-

plained of in the declaration. There is evidence tending to show that as the train rounded the curve it was going at the rate of 25 or 30 miles an hour. Necessarily, the rapid rate of speed and the curve in the track exposed those persons standing on the platforms to danger of being thrown from the train. It cannot certainly be said, as a matter of law, that there was no negligence in thus operating the train. Ordinarily, it is prima facie evidence of negligence for a passenger to stand or ride upon the platform of a moving railway train; but where, as the evidence tends to show in this case, neither seats nor standing room in the cars could be conveniently obtained, it became a question of fact for the jury whether the plaintiff was guilty of contributory negligence by being upon the platform from which he fell. It is only when the inference of negligence necessarily results from the statement of facts that the court can properly instruct the jury that such facts establish negligence as a matter of law. Standing or sitting upon the platform or steps of a railway car when the train is in motion, although it may be prima facie evidence of negligence, is not, under all circumstances, negligence per se and as a matter of law. *Chicago & Alton Railroad Co. v. Fisher*, 141 Ill. 614, 31 N. E. 406, and authorities cited.

We think the evidence proved the ownership of the railroad by the appellant, and, in fact, the defense that it was not liable for the negligence of its lessee assumes and admits that fact. That a railway company holding a franchise and right to operate the railway is liable to passengers injured on such railway by the negligence or wrongful act of another company operating the same has been decided by this court, in principle at least, since the case of *Lesh v. Wabash Navigation Co.*, 14 Ill. 85, 56 Am. Dec. 494. In *Peoria & Rock Island Railroad Co. v. Lane*, 83 Ill. 448, we said (page 449): "It is first urged that appellant is not liable for the negligence or mismanagement of the employees of that company whilst running on their tracks; that the Rockford, Rock Island & St. Louis Company are alone liable for their negligence. There is no doubt but they are liable for their own acts, and some courts have held that the company owning a road is not liable for the negligence of their lessees, or of other roads using their tracks by arrangement or consent; but this court has repeatedly held that a company holding the franchise and exclusive right to operate a road must so use it as not to endanger passengers or property, whether the use be by themselves or others they may permit to use the road, and that if they permit another company to run their trains on and over their tracks, and injury grows out of negligence of the use of the road thus authorized, the company owning the road and franchise will also be liable." *Pennsylvania Co. v. Ellett*, 132 Ill. 654, 24 N. E. 559; *Chicago & Erie*

Railroad Co. v. Meech, 163 Ill. 305, 45 N. E. 290; *Chicago & Western Indiana Railroad Co. v. Doan*, 185 Ill. 168, 62 N. E. 826; *West Chicago Street Railroad Co. v. Horne*, 197 Ill. 250, 64 N. E. 331. We are still of the opinion that the doctrine announced in those cases is well supported by both reason and authority.

The evidence fairly tended to support the plaintiff's cause of action as alleged in his declaration, and the court therefore properly refused to take it from the jury.

The instructions which the court refused to give upon the request of the defendant all related to the question of the plaintiff's want of due care, and in various ways called the attention of the jury to the fact that he was riding upon the platform at the time of his injury. All that was stated in either of them proper to be given to the jury was contained in the first, second, third, sixth, and ninth instructions given at the request of the defendant. Those refused were therefore properly rejected.

The fifth instruction given on behalf of plaintiff stated a correct principle of law applicable to the case. It was based on the rule, heretofore referred to, which makes the owner of a railroad liable for the negligent operation of trains upon it by its lessees. As a whole, the instruction is in conformity with the decision in *Pennsylvania Co. v. Ellett*, supra.

The defendant introduced an expert witness, who was asked to give his opinion whether trains could be operated over the tracks where the accident happened, with safety, at the speed of 25 or 30 miles an hour, to which an objection was sustained. The question called for the statement of an immaterial fact as applied to the case. The material question was not whether trains could be operated over the track at the rate of 25 or 30 miles an hour, but whether or not this particular train was properly operated in view of all the facts and circumstances surrounding it.

Two witnesses were permitted to testify as to the crowded condition of the train at Archer avenue, a point several blocks distant from the place of the accident, and this, it is contended, was error. The evidence clearly showed that the train was not stopped between Archer avenue and the place of the injury. Therefore evidence of the condition at Archer avenue proved the condition at Seventy-Ninth street.

The defendant also complains of the refusal of the trial court to permit it to introduce ordinances of the city of Chicago which permitted trains to run 35 miles an hour at the place of the accident, and also in allowing the plaintiff to offer evidence to the effect that parties on the train complained as to the crowded condition of the train, without showing that the person to whom the complaint was made was an agent or officer of the company. The ordinances were clearly irrele-

vant. They did not authorize, or pretend to authorize, the company to commit an act of negligence in running its train at the permitted rate of speed. The evidence does show that the complaint as to the crowded condition of the train was made to one of the officials with whom the arrangement for transportation was made. Even if that testimony had been improperly admitted, the error would not justify a reversal of the judgment below.

Other questions are raised in the case, which we have considered, but do not regard as of sufficient importance to require particular notice. The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

(213 Ill. 301.)

MARTIN v. MARTIN et al.*

(Supreme Court of Illinois. Oct. 24, 1904.)

APPEAL—FINDINGS OF APPELLATE COURT—CONCLUSIVENESS.

1. Practice Act (Hurd's Rev. St. 1903, p. 1412, c. 110), § 87, provides that if the Appellate Court shall determine a cause different from the trial court as the result of its finding of facts different from that court, it shall recite in its final order, judgment, or decree the facts as found, and its judgment shall be conclusive as to all matters of fact in controversy. *Held*, that, where the Supreme Court reversed a case because the findings of fact were not sufficiently specific, and remanded it to the Appellate Court, with directions to incorporate in its judgment findings of the ultimate and material facts in the case, and that court did so, such findings are conclusive on the Supreme Court, and will not be reviewed.

Error to Appellate Court, Second District.

Serena M. Martin filed a claim against the estate of Edward Martin, deceased, of which J. F. Martin and others were executors, and recovered judgment. This judgment was reversed by the Appellate Court (113 Ill. App. 597), and claimant brings error. Affirmed.

Edward Martin died testate on the 3d day of December, 1893, upon the farm where he had resided for many years at Red Hook, Duchesne county, N. Y. He was an unmarried man, and his sister, Serena Martin, prior to her death, which occurred in 1877, had been his housekeeper for many years. The plaintiff in error, who was his niece, had been a member of the family from the time she was nine years of age, and upon the death of her aunt assumed the position in the home which her aunt had formerly occupied, and that relation was continued until her uncle's death. Edward Martin, during his life, accumulated a fortune, which, with what he had prior to his death given to the plaintiff in error, amounted to more than a half million dollars. He claimed a domicile in Kendall county, in this state, and on December 14, 1893, his will was admitted to probate in that county, and Samuel Beers, John O'Connor, and the plaintiff in error,

*Rehearing denied December 9, 1904.

who were named in the will as executors and executrix, qualified as such, and on March 5, 1894, filed their inventory, showing real estate of the value of \$58,250 and personal estate of the value of \$323,655.03. Prior to his death Edward Martin had conveyed to the plaintiff in error the home farm at Red Hook, which was of the value of \$20,000. On the 24th of April, 1894, Joseph Fielding Martin, one of the residuary legatees under the will of Edward Martin, deceased, filed his petition in the county court of Kendall county, alleging the inventory filed was incomplete, and that the executors, or some of them, withheld certain mortgages, school bonds, and street railway bonds belonging to the estate. Upon the return of the citation the petition was amended so as to charge that the plaintiff in error had said securities in her possession, which she claimed as her own property. A hearing was had, and it was held that the mortgages, school bonds, and street railroad bonds mentioned in the petition were not a part of the estate of Edward Martin, deceased, but were the individual property of the plaintiff in error. An appeal was taken to the circuit court, where it was found that all the securities in dispute belonged to the estate of Edward Martin, deceased, and the plaintiff in error was ordered to turn the same over to the executors, with all moneys collected thereon. A writ of error was sued out from the Appellate Court to reverse the order of the circuit court, and that court affirmed the order of the circuit court except as to what was called "the Illinois farm mortgages," as to which it was reversed, and the cause was remanded, with directions to the circuit court to enter an order finding said mortgages to be the property of the plaintiff in error, and a writ of error was sued out from this court to reverse the judgment of the Appellate Court, which judgment was reversed so far as it affirmed the order of the circuit court, and the cause was remanded to the circuit court with directions to enter an order finding all of said securities to be the individual property of the plaintiff in error. Said securities consisted of two promissory notes of H. Phipps, Jr., \$100,000, secured by mortgage; street railway bonds, \$10,000; school bonds, \$7,000; and Illinois farm mortgages, \$50,200—amounting in all to \$167,200. The opinion filed by this court in that case will be found reported as *Martin v. Martin*, 170 Ill. 18, 48 N. E. 694, from which it will appear this court sustained the title of the plaintiff in error to said securities upon the theory that Edward Martin had given the same to the plaintiff in error in consideration of the affection he had for her and in recognition of the faithful manner in which she had cared for him and his household subsequent to the death of her aunt, and that said gift was fully executed by the delivery of said securities to the plaintiff in error during the life of said Edward Martin.

Subsequent to the filing of the petition of Joseph Fielding Martin, the executors of Edward Martin, deceased, filed their petition in the county court of Kendall county against the plaintiff in error, alleging that she had in her possession a promissory note executed by the Catholic bishop of Chicago, payable to Edward Martin, for the sum of \$5,500, and also a promissory note executed by the Catholic bishop of St. Joseph, Mo., payable to Edward Martin, for the sum of \$15,000, which were not indorsed, and that she claimed said notes as her individual property; averred that they were the property of the estate of Edward Martin, and asked that they be turned over to them, as executors of his estate. The petition was heard, and the notes were held to be the property of the estate. The order of the county court was affirmed on appeal by the circuit court, but the judgment of that court was reversed by the Appellate Court, which judgment was affirmed by this court, and is reported as *Martin v. Martin*, 174 Ill. 371, 51 N. E. 691, 66 Am. St. Rep. 290. The basis of the holding in that case was that said notes were given to the plaintiff in error by Edward Martin during his lifetime, and, the possession thereof having been delivered to her by him prior to his death, her title thereto, as against his executors, was complete.

After the filing of said petitions by Joseph Fielding Martin and said executors, the plaintiff in error filed a claim against the estate of Edward Martin, deceased, in the county court of Kendall county, based upon certain checks drawn in her favor by Edward Martin for the sum of \$62,080.02; also for the sum of \$32,562.75, alleged to have been collected by the deceased on bonds, mortgages, and other securities, as principal and interest belonging to the claimant, which he had failed to account for to her. The claim was dismissed by the county court for want of prosecution, and an appeal was prosecuted by the claimant to the circuit court, where, upon a trial before the court and a jury, a verdict and judgment were rendered in favor of the claimant for the sum of \$62,080.02, which judgment was reversed by the Appellate Court, and the case was remanded to the circuit court for a new trial. *Martin v. Martin*, 89 Ill. App. 147. Upon the case being reinstated, a second trial was had in the circuit court, which resulted in a verdict in favor of the plaintiff in error for the sum of \$83,367.73, and upon writ of error to the Appellate Court that judgment was reversed without remanding (*Martin v. Martin*, 101 Ill. App. 640), and the Appellate Court made the following finding of facts: "We find as a fact that there was no legal or valuable consideration for the checks offered in evidence and upon which we find the verdict of the jury was based. We further find as a fact that there was no contract between Edward Martin and the claimant, either express or implied, for services rendered or to be rendered

by the latter to the former; that the promise of Edward Martin to claimant to 'compensate her as he saw fit,' was not understood by the parties as constituting a legal contract to pay, and was not so acted upon by them, but was only understood as expressive of an intention on the part of Edward Martin, and an expectation on the part of the claimant, that Edward Martin, would, out of his fortune, do better by claimant in a financial sense than she could do for herself. We further find as a fact that, as to moneys which Edward Martin collected upon bonds or other securities which he had previously given to claimant, either for principal or interest, he had fully repaid her therefor by the gifts to her of other securities of greater value in place of the securities themselves, and by the giving of checks for the interest collected to a greater amount than he had received, said checks being other checks than those involved in the present suit. We find as a fact that she has frequently admitted that she had received all the interest collected by him upon her securities, and that in fact that is true, and she has now no legal claim against his estate therefor." A writ of error was sued out from this court, and the judgment of the Appellate Court was reversed on the ground that the finding of facts by that court was not sufficiently specific, and the case was remanded to that court with directions to enter a judgment affirming, reversing and remanding, or reversing the case without remanding, and, if it was reversed without remanding, that said court incorporate in its judgment the finding of the ultimate and material facts in the case. *Martin v. Martin*, 202 Ill. 382, 67 N. E. 1. Upon the case reaching the Appellate Court, it adhered to its former decision reversing the cause without remanding, and in obedience to the mandate of this court incorporated in its judgment the following finding of facts, which, for convenience, we have paraphrased:

(1) "We find that the claimant was a niece of Edward Martin, and that she came to make her home in the family of Edward Martin and a sister of his, Serena Martin, when the claimant was only nine years old, and that she continued to reside with her uncle and aunt until the death of her aunt, Serena, which occurred in 1877."

(2) "We find that Edward Martin was a man of large fortune, and had never been married, and had no family or home, other than with his sister and niece, and that they resided at Red Hook, in the state of New York."

(3) "We find that the claimant continued to keep house for Edward Martin after the death of her aunt, Serena, and was devoted to her duties as housekeeper for her uncle, and that she was kind and affectionate toward him, and that he was likewise attached to her, and regarded her as in every way a worthy object of his munificence."

(4) "We find that at the time of the death of Serena Martin the deceased told claimant that she should remain there in the house just as she had always done before, and that he would compensate her as he saw fit."

(5) "We find that Edward Martin determined that he would from time to time, as he saw fit, give the claimant such sums of money, notes, mortgages, bonds, and other property as he might determine, and that in pursuance of this purpose, and influenced by his tender regard for the claimant, and in recognition of her faithfulness and devotion to her duties, the deceased did from time to time make generous gifts of notes, bonds, mortgages, and other securities, aggregating over \$200,000, exclusive of the matters involved in this suit."

(6) "We further find that the checks offered in evidence for the purpose of establishing the claims of Serena M. Martin were executed by the deceased, Edward Martin, with the intention and purpose of making a gift of the proceeds of said checks to Serena M. Martin, in pursuance of the same purpose as set forth in above findings."

(7) "We find further that the aggregate amount of all these checks is \$62,080.02, and that the verdict of the jury was for the full amount of these checks and 5 per cent. interest thereon; making a total of \$83,367.73."

(8) "We find that none of these checks were presented to the banks upon which they were drawn prior to the death of Edward Martin."

(9) "We find that five of these checks were drawn on the First National Bank of Joliet, Illinois, dated April 13, 1893, and that the amount of these five checks is \$8,275."

(10) "That five checks were drawn on the United States Trust Company of New York, dated April 13, 1893, for the aggregate amount of \$20,805.02, and that four others were on the United States Trust Company, dated October 14, 1893, and aggregating \$33,000."

(11) "We find that the checks dated April 13, 1893, were placed by him in claimant's safety deposit box in a bank at Poughkeepsie, N. Y., with the intention that the claimant should have the benefit of them as a gift."

(12) "We find that these checks were drawn with the sole purpose of making a gift of the proceeds to claimant, and that claimant never otherwise had the checks in her possession, and had no knowledge that they had been executed until after the death of Edward Martin, the drawer."

(13) "We find that the checks dated October 14, 1893, were delivered to claimant before the death of the drawer, and were in her possession and control when he died."

(14) "We find that the items of Serena M. Martin's claim, so far as the same is based on interest collected for her account and cash received on principal of notes and the securities for her use were fully paid, dis-

charged, and settled by Edward Martin in his lifetime, and that there is nothing whatever due on these accounts from the estate of Edward Martin to the claimant, and that as to this last item the jury found against the claimant, with which finding we agree."

Serena M. Martin has sued out a writ of error from this court to review said record, and has assigned the following errors: (1) The said Appellate Court erred in reversing the judgment of the circuit court of Kendall county. (2) The said Appellate Court, having erroneously reversed said judgment, erred in refusing to remand said cause for a new trial. (3) The said Appellate Court, having erroneously reversed and refused to remand said cause for a new trial, erred in failing and refusing to find all the ultimate facts material to be considered in determining the legal questions arising upon the issues involved. (4) Said Appellate Court erred in its finding of facts by so improperly and inseparably intermingling the facts found with conclusions of law that the legal questions in issue cannot be fully passed upon by the Supreme Court. (5) The said Appellate Court erred in refusing to fully comply with the directions of the Supreme Court in its opinion and its remanding order.

Henry S. Wilcox, for plaintiff in error.
Henry W. Wolseley, for defendants in error
Samuel Beers and John O'Connor, executors,
and Henry W. Wolseley, executor ad litem.
J. Fielding Martin, pro se.

HAND, J. (after stating the facts). The contention made upon this writ of error is the same as the contention made by plaintiff in error when this case was here before; that is, that the finding of facts of the Appellate Court are not sufficient, in law, to enable this court to pass upon the questions involved upon this record as raised by the assignment of errors. Section 87 of the practice act (Hurd's Rev. St. 1903, p. 1412, c. 110) provides, if the Appellate Court shall finally determine a cause different from the trial court as the result of its finding of facts concerning the matters in controversy, in whole or in part, different from that court, it shall be its duty to recite in its final order, judgment, or decree the facts as found, and the judgment of said court shall be final and conclusive as to all matters of fact in controversy in such cause. This statute has been repeatedly construed by this court, and it has uniformly been held that the Appellate Court, in its finding of facts, should not find the evidentiary facts, and that it should not find conclusions of law, but should find the ultimate controlling facts.

In *Davis v. Chicago Edison Co.*, 195 Ill. 31, 62 N. E. 829, on page 35, 195 Ill., page 831, 62 N. E., it was said: "The rule is that the Appellate Court shall find the ultimate and controlling facts. That court is not required to recite the evidentiary facts which

it took into consideration in reaching its ultimate conclusion of facts. *Hancock v. Singer Mfg. Co.*, 174 Ill. 503 [51 N. E. 820]; *Huyett & Smith Mfg. Co. v. Chicago Edison Co.*, 167 Ill. 283 [47 N. E. 384, 59 Am. St. Rep. 272]."

In *Williams v. Forbes*, 114 Ill. 167, 28 N. E. 463, the Appellate Court made the following finding of facts: "That the note sued on, and which is the foundation of the claim of appellee in this case, was given by Delilah Deeds, deceased, without any consideration whatever; that it was a mere gift, intended by Delilah Deeds, deceased, to be given to appellee in the nature of a testamentary bequest; and that there is no other cause of action or supposed cause of action, save the note, claimed by appellee in this suit." On page 170, 114 Ill., page 463, 28 N. E., Mr. Justice Scholfeld, speaking for the court, said: "The argument addressed to us by counsel for appellant is one that should have been addressed to the Appellate Court upon petition for rehearing. It is purely a discussion of facts to establish that the Appellate Court erred in finding the facts differently from what they were found to be by the circuit court. No ruling on any question of law was excepted to which is now pressed as ground of error. Indeed, the only question of law which, on the finding of facts by the Appellate Court, it is possible now to raise, is whether, on those facts, the law authorizes or precludes a recovery. Section 87 of the practice act, as amended by the act of June 2, 1877, in force July 1, 1877 (Pub. Laws 1877, p. 153), provides: 'If any final determination of any cause, as specified in the preceding sections, shall be made by the Appellate Court, as the result wholly or in part of the finding of the facts concerning the matter in controversy, different from the finding of the court from which such cause was brought by appeal or writ of error, it shall be the duty of such Appellate Court to recite in its final order, judgment or decree the facts as found, and the judgment of the Appellate Court shall be final and conclusive as to all matters of fact in controversy in such cause.' This language needs no interpretation, and it is impossible by construction to import a meaning into it not apparent upon its face. We can add no words to make its meaning more intelligible. The decision of the Appellate Court in such cases being conclusive as to all matters of fact, we cannot review them. Whether the finding of that court is right or wrong, that is the end of it; and so we have expressly held in *Harzfeld v. Converse*, 105 Ill. 534. See, also, to like effect, *Hayward v. Merrill*, 94 Ill. 350 [34 Am. Rep. 229]; *Thomas v. Fame Ins. Co.*, 108 Ill. 91; *Tenney v. Foote*, 95 Ill. 99; *Missouri Furnace Co. v. Abend*, 107 Ill. 44 [47 Am. Rep. 425]."

In *Caywood v. Farrell*, 175 Ill. 490, 51 N. E. 775, the finding of facts made by the Appellate Court was: "The court finds that it

does not appear from the evidence that the said Felix G. Farrell was indebted in any sum to said James Caywood when the writs of garnishment were issued, nor at any time afterward before the rendition of the judgment in garnishment proceedings." The court, on page 482, 175 Ill., page 776, 51 N. E., speaking by Mr. Justice Phillips, said: "It is clear that the Appellate Court, on finding the facts differently from the lower court, is only required to recite in its order or judgment of reversal the ultimate facts in issue as made by the pleadings, or the conclusion of such ultimate fact or facts from the evidentiary facts. Such recital of ultimate facts must include or cover all the material issues made by the pleadings vital to determine a right of recovery. In an action for negligence, for fraud, or for money claimed to be due, these are, respectively, the ultimate facts in such cases, and a finding of such facts by the Appellate Court is sufficient under the statute, conclusive on this court, and not subject to revision. *Chicago & Alton Railroad Co. v. Pennell*, 110 Ill. 435; *Williams v. Forbes*, 114 Ill. 167 [28 N. E. 463]. The finding of the Appellate Court, as set out in this record, was of an ultimate fact, and sufficient, under the statute, if it covered or included all the ultimate facts 'concerning the matter in controversy.'"

In *Brown v. City of Aurora*, 109 Ill. 165, the findings of facts were: "That the sidewalk upon which the injury was received was, at the time the said injury was received, reasonably safe, as a sidewalk, for the appellee [plaintiff in error] to pass over it if he exercised ordinary care; that before and at the time appellee passed over said sidewalk on the occasion of receiving said injury he was fully aware of the condition as to its slipperiness and all other defects in and of said walk, and at the said time of so passing over the said sidewalk he (the appellee) did not exercise that ordinary care that a reasonably prudent man would have done under the same circumstances; and we further find that the appellant did exercise ordinary care in constructing and maintaining said walk, and was in the due exercise of such care in maintaining said walk at the time of said injury." The court, speaking by Mr. Justice Mulkey, on page 167, said: "Now, what was the main and ultimate fact which the plaintiff was bound to prove in order to recover? Manifestly, the city's negligence as charged in the declaration. * * * If the Appellate Court had no right to find there was or was not negligence on the part of the city, what should it have found? Should it merely have gone on and recited that this witness swore to this fact and that witness swore to that fact, and so proceeded until everything testified to had been gone over? To have done so would really have been finding nothing, for all that would have been apparent upon a mere reading of the bill of exceptions. The Appellate Court, where it differs from the

conclusions reached by the trial court, is required to recite in its final order the facts as found by that court. The expression 'facts as found' necessarily implies the drawing of a conclusion or inference from the evidentiary facts embodied in the bill of exceptions, and this conclusion or inference to be drawn is nothing more than the *factum probandum*, or ultimate fact or facts, upon which the case depends, and which it was the duty of the Appellate Court to find."

The judgment of the Appellate Court, when the case was here before, was reversed, and the cause was remanded to that court with directions to find the ultimate facts upon which the legal conclusion arose that the checks were without consideration. For the guidance of the Appellate Court it was then said (202 Ill. 382, 87 N. E. 1): "The defense sought to be made was that the checks were not founded on any consideration, and that all amounts collected on bonds or securities belonging to the plaintiff in error had been paid by the deceased to her. These were the controverted questions of fact in the case." Upon the reinstatement of the case the Appellate Court made the finding of facts contained in the statement preceding this opinion. It found by paragraph 6 that the checks which were the basis of the larger part of the claim were executed by Edward Martin with the intention and purpose of making a gift of the proceeds of said checks to Serena M. Martin; by paragraphs 11 and 12, that the checks dated April 13, 1893, were placed by Edward Martin in the claimant's safety deposit box with the intent that she should have the benefit of them as a gift, and that she did not know they had been executed until after the death of Edward Martin; by paragraph 13, that the checks dated October 14, 1893, were delivered to the claimant before the death of Edward Martin, and were in her possession and control when he died; and by paragraph 8, that none of said checks were presented to the banks upon which they were drawn prior to the death of Edward Martin. The ultimate controlling facts, therefore, found by the Appellate Court, upon which it based its conclusion as to the first controverted question, namely, that the checks were founded on no consideration, were that they were gifts, and had not been presented to the banks prior to the death of Edward Martin.

It is urged, however, that the court also found, by paragraph 6, that Edward Martin executed the checks with the intention and purpose of making a gift of the proceeds of said checks to Serena M. Martin, in pursuance of the same purpose as set forth in above findings, and "that the above findings" show that said checks were not executed as gifts, but that they were supported by a valid consideration, that is, the services of Serena M. Martin. An examination of "the above findings" will disclose at most an attempt to state some of the reasons which

governed the Appellate Court in reaching the conclusion that the checks were executed as gifts. In other words, the court sets out in the finding of facts a part of the evidentiary facts upon which its conclusions as to what were the ultimate controlling facts were based. This court cannot consider the evidentiary facts, but will consider and is bound only by the ultimate facts found by the Appellate Court (*Brown v. City of Aurora*, supra), and which in this case are that the checks were executed and delivered as a gift, from which the conclusion necessarily follows that they were without consideration. *Williams v. Forbes*, supra. The recital in the finding of facts of a part of the evidentiary facts upon which the finding of the Appellate Court as to the ultimate controlling facts are based will not impeach their finding as to the ultimate controlling facts, but the evidentiary facts contained in their finding will be rejected as surplusage. The Appellate Court also found, by paragraph 14 of its finding, that the claim of the plaintiff in error, so far as the same is based on interest collected for her account and cash received on principal of notes and the securities for her use, was fully paid, discharged, and settled by Edward Martin in his lifetime, and that there is nothing whatever due on these accounts from the estate of Edward Martin to the claimant. These findings we think conclusive upon this court. In *Caywood v. Farrell*, supra, the finding was that Farrell was not indebted in any sum to said James Caywood, which finding was held sufficient and conclusive upon this court.

We are of the opinion the finding of facts of the Appellate Court contains all the ultimate controlling facts in the case, and is binding upon this court, and bars the plaintiff in error's action upon said checks and account. The judgment of the Appellate Court will therefore be affirmed.

Judgment affirmed.

(212 Ill. 268)

SHICKLE-HARRISON & HOWARD IRON CO. v. BECK.*

(Supreme Court of Illinois. Oct. 24, 1904.)

MASTER AND SERVANT—INJURIES TO SERVANT—DANGEROUS MACHINERY—DUTY TO WARN—PROXIMATE CAUSE—FELLOW SERVANTS—TRIAL—QUESTIONS FOR JURY—INSTRUCTIONS.

1. In an action for injuries to a servant by being caught in the cogwheels of a crane, whether plaintiff was in the exercise of due care, and whether the danger which resulted in the injury was hidden or obvious, were for the jury.

2. Where plaintiff had been directed to assist C. in operating a crane in a steelmill, and C., having been directed to teach plaintiff the business of operating the crane, negligently started the same after plaintiff had been directed, in the night, to go over the footboard or walk on the crane to obtain some oil, whereby plaintiff

was injured, C.'s act in starting the crane was that of plaintiff's fellow servant.

3. C., having been directed to teach plaintiff the operation of a crane in a steelmill, directed plaintiff, during the night, to go over the footboard of the crane and call the machinist. The machinist, having examined a part of the crane on a higher level than the walk, directed plaintiff to get some oil, whereupon plaintiff started to go down a ladder leading to the operating cage of the crane, and, in the darkness, one of his feet was caught in the cogwheels on the crane being suddenly started by C. Plaintiff had no knowledge of the existence of the cogwheels, and could not see them, on account of the darkness. *Held*, that the proximate cause of the injury was defendant's failure to acquaint plaintiff with the existence and location of the cogwheels, and not the act of plaintiff's fellow servant, C., in starting the crane.

4. Where the danger from certain cogwheels attached to a crane in a steelmill could not be perceived by plaintiff on account of the darkness, whether it was defendant's duty to point out such danger to plaintiff was for the jury.

5. Where the court charged that it was plaintiff's duty to take ordinary care to learn the dangers of his employment, and that he was required to inform himself, and was bound to take notice of the ordinary operation of familiar natural laws, and to govern himself accordingly, and if he failed to do this he assumed the risk, and could not recover if he was injured as the result of his failure to see what was apparent to any person using his eyes, a further instruction that it was defendant's duty to explain to plaintiff the dangers of the business was not objectionable on the ground that it impliedly required defendant to point out obvious dangers.

6. It was not error for the court to refuse a requested instruction where the proposition contained therein was embodied in another instruction given.

Appeal from Appellate Court, Fourth District.

Action by Joseph Beck against the Shickle-Harrison & Howard Iron Company. From a judgment in favor of plaintiff, affirmed by the Appellate Court, defendant appeals. Affirmed.

Appellant, a corporation, was engaged in manufacturing steel and iron at East St. Louis, Ill. It has in use for moving heavy articles a machine called a "crane." A crane is composed in part of two large steel girders extending entirely across the room in which it is situated. On each side of the room the ends of the girders rest on wheels on an elevated track at a height of from 20 to 25 feet above the ground. The tracks are supported by steel columns. The two girders are about 5 feet apart. On top of these two girders is another track, and on this track is the hoist of the crane, referred to in the evidence as the "break," "heavy hoist," and "auxiliary drum," which runs back and forth across the room. The motive power of the crane is electricity. The crane moving in this case east and west on the track above the columns, and the hoist moving north and south lengthwise of the girders, makes it possible for the craneman to drop his hoist at any place in the room. The wheels on which the crane rests have a plain running surface on the inside, similar to a car wheel. The cogwheels which connect with the line shaft

*Rehearing denied December 9, 1904.

* 1. See *Master and Servant*, vol. 34, Cent. Dig. §§ 1062, 1069.

that operates the wheels are bolted to, and are on the outside of, the wheels on which the crane rests, making it a double wheel. The crane is operated from a cage which is hung from the girders, and is immediately in front of the cogwheels.

At the time of the injury, March 19, 1901, appellee had been in the employ of appellant for 12 or 15 months. During that time he worked as a gasmaker, then in the chipping department, in the annealing room, and as a machinist's helper in and about the shops. On Monday evening, March 17, 1901, he was directed by the foreman of the machine department to service with Connelly, a crane-man in charge of one of the cranes, for the express purpose of having Connelly instruct him in the use and operation of the crane, that he might learn and become fitted for that service. Pending such training or apprenticeship, appellee was under the control and direction of Connelly. His work was from 6 o'clock in the evening until 7 the next morning. About two o'clock of the second morning, while on the crane above the cage, appellee's foot was caught in the cogwheels described, and received the injury for which this suit was brought.

The declaration consists of six counts, substantially the same in formal allegation and inducement. The first count alleges that on the 20th day of March, A. D. 1901, at county of St. Clair, state of Illinois, the defendant owned and operated a certain steel plant; that the plaintiff was in the employ of the defendant, and had been for 18 months prior to said date, as a laborer in and around the several different departments in said plant; that on the date aforesaid the defendant undertook to instruct him how to operate a certain machine known as a "crane," which machine was used by the defendant in its said plant to carry heavy articles of steel from place to place; that the plaintiff was ignorant of the working of the machine and the construction and operation of the same, and that it was the duty of defendant to instruct plaintiff in what manner said machine was operated, and to instruct and show him the danger in operating said machine, but, contrary to its duty in this regard, the defendant carelessly and negligently failed and omitted to point out and discover to the plaintiff the dangerous parts of the machine, and omitted to warn plaintiff that there was danger in operation thereof, and negligently allowed the plaintiff to remain around said machine, engaged in trying to ascertain the nature and working thereof, until he was injured; that on the day aforesaid, while he was on said machine under and by directions of the defendant, he undertook to climb down off said machine for the purpose of procuring an oil can to be by the defendant used in oiling said machine, and while in the exercise of due care, and without knowledge of any danger, and without knowledge of the make-

up of said machine, or that the same had an uncovered cog in which he might be injured, while getting down, his right foot was caught in the uncovered cog, the side of his foot was crushed, and the foot permanently injured; that he was ordered by the foreman in charge of said machine to go after the oil can; that he had no knowledge of any danger in attempting to descend from said machine; that the defendant had such knowledge; that, on account of the injury to plaintiff, he was compelled to remain in a hospital four months, and that he has laid out and expended the sum of \$100 in trying to heal his injuries—to his damage in the sum of \$1,999. The second count charges negligence of the defendant in failing to provide sufficient light; the third, in failing to instruct the plaintiff or warn him of dangers, and to provide sufficient light; the fourth is based upon the negligence of the foreman, Connelly, in allowing plaintiff to descend from the machine, and, while he was thus exposed, negligently causing the machine to move; the fifth alleges negligence of Connelly in moving the machine without notice to the plaintiff; and the sixth count alleges negligence in failing to have the cogwheels properly and safely guarded. To this declaration defendant pleaded the general issue. The case was tried by jury. At the close of plaintiff's evidence, and again at the close of all the evidence, defendant moved the court for a peremptory instruction to the jury to find defendant not guilty. The motion was denied and the instruction refused in each instance. The jury returned a verdict for the plaintiff for \$1,000 damages. A judgment was entered on this verdict, which has been affirmed by the Appellate Court for the Fourth District, and the record is brought here by appeal.

The foregoing statement of the facts is taken almost wholly from the opinion of the Appellate Court in this cause.

Wise & McNulty, for appellant. Webb & Webb and Dill & Wilderman, for appellee.

SCOTT, J. (after stating the facts). It is urged that the court erred in denying the motion made at the close of all the evidence for a peremptory instruction in favor of the defendant, first, because the master was only charged with the duty of warning the servant of the hidden dangers incident to his employment, and because the danger from which the injury resulted in this instance was a plain, visible, and obvious one; second, because the plaintiff was guilty of contributory negligence; and, third, because the plaintiff and Connelly, who was engaged in operating the crane, and who set the crane in motion at the time of the accident, were fellow servants.

It appears from the testimony of appellee that the foreman of the establishment directed him to learn the business of op-

erating the crane, and for this purpose he was at work under the supervision and control of Connelly. When the necessity for the services of a machinist arose, Connelly directed the plaintiff to go over the foot-board or walk on the crane on which they were working and call the machinist. For this purpose, appellee climbed up the ladder leading from the cage from which the crane was operated to the walk above the cage, passed along that walk, and called Doran, the machinist. When Doran came, he examined the drum, which is a part of the crane that is on a higher level than the walk, and then directed appellee to go and get some oil. Appellee started to go down the ladder leading to the cage for this purpose, and, as it was so dark that he could not see plainly, he was feeling his way with his foot, when the crane was started, and his foot caught in the cogwheels, and the injury of which he complains was inflicted. He did not know of the existence of the cogwheels, and could not see that they were cogwheels, on account of the place not being properly lighted. Under these circumstances, it is apparent that the question whether he was in the exercise of due care, and whether the danger which resulted in the injury was a hidden one, or one that was plain and obvious, were questions of fact to be determined by the jury.

We are inclined to the view that the act of Connelly in starting the crane while appellee was on the walk was the act of a fellow servant, but that was not the proximate cause of the accident. Had appellee known of the existence of the cogwheels and the danger therefrom, the exercise of due care on his part would have avoided the injury which he received, notwithstanding the crane was started, under the circumstances shown by the evidence in this case. The proximate cause of the injury was the failure of the defendant to acquaint appellee with the existence and location of the cogwheels. Had the place where the cogwheels were located been properly lighted, it is apparent that their existence and the risk attendant upon stepping near them while the crane was in operation would have been so obvious to a man of ordinary intelligence that no duty of pointing out the same would have rested upon the defendant. But it appears from the testimony of the appellee that he could not perceive the wheels on account of the darkness, and it was therefore a question for the jury whether facts existed which made it the duty of defendant to point the same out to him. The evidence most favorable to appellee, which is all that we can consider in disposing of this assignment of error, with the reasonable inferences to be drawn therefrom, tended to establish negligence on the part of the master in failing to warn the

servant of the danger which resulted in the injury complained of, and the motion for a peremptory instruction was properly denied. In the light of the evidence for appellee, the risk was a special one, which was not obvious or patent, and of which the servant was not cognizant, and it was therefore the duty of the master to notify him of the existence thereof. *United States Rolling Stock Co. v. Wilder*, 116 Ill. 100, 5 N. E. 92; *Chicago & Alton Railway Co. v. Bell*, 209 Ill. 25, 70 N. E. 754.

Complaint is made of the action of the court in giving instruction No. 4 requested by appellee. This instruction advised the jury that it was the duty of the defendant "to explain to the plaintiff the dangers of said business," and the only objection made to the instruction worthy of consideration is that it was not necessary for the defendant to point out obvious and patent dangers. An instruction given on the part of the defendant, which, as abstracted, bears no number, advised the jury that it was the duty of the plaintiff to take ordinary care to learn the dangers of his employment, and that he was required "to inform himself, and was bound to take notice of the ordinary operation of familiar natural laws and to govern himself accordingly, and that, if he failed to do this, the risk was his own," and that, if the plaintiff was injured as a result of his failure to see what was apparent and open to any person using his eyes, he could not recover. We think the two instructions, taken together, correctly state the law, and the objection is therefore without merit. *Wenona Coal Co. v. Holmquist*, 152 Ill. 581, 88 N. E. 946; *Beidler v. King*, 209 Ill. 302, 70 N. E. 763.

It is then contended that the court erred in refusing instructions numbered 3 and 4 asked by the defendant. The third rests on the hypothesis "that the plaintiff voluntarily went to work to repair the crane." There is nothing in the evidence upon which to base such an instruction. The plaintiff's testimony was that he was traveling over the crane, engaged in doing an errand. Appellant's evidence indicates that he climbed out of the cage and upon the walk through mere curiosity. There was no evidence whatever that he "went to work to repair the crane."

Defendant's refused instruction numbered 4, in substance, is that if the risk was one which, under the law, would be held to be an assumed risk, it was not the duty of the defendant to instruct the plaintiff as to the danger. The proposition contained in this instruction was embodied in another given on behalf of the defendant, and there was therefore no error in refusing this one. The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

(213 Ill. 440.)

LANPHERE v. CITY OF CHICAGO.*

(Supreme Court of Illinois. Oct. 24, 1904.)

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—ORDINANCE—RESOLUTION—VALIDITY—REPORT OF ENGINEER.

1. Hurd's Rev. St. 1903, c. 24, par. 513, provides that an estimate of the cost of a public improvement shall be made in writing by the engineer, over his signature, which shall be itemized and made a part of the record of the first resolution. *Held*, that where the estimate of the engineer was made a part of the record of the resolution by reciting the same therein in full, with the exception of the preamble and the engineer's signature, it was sufficient; the information as to the description of the improvement, etc., contained in the preamble, being all contained in the record of the resolution, and the resolution reciting that the estimate was made by the engineer.

2. Local Improvement Act 1897, § 10 (Laws 1897, p. 105), provided that the engineer's estimate, as well as the certificate thereof presented to the city council with the ordinance providing for the improvement, should contain the item "lawful expenses attending the same"; but such law was amended by Hurd's Rev. St. 1903, c. 24, par. 600, providing that the expenses attending a special assessment proceeding shall be paid by cities from their general funds. *Held*, that it is not necessary to include the cost of the assessment in the engineer's estimate of the cost of improvement, or the certificate of such estimate.

3. Local Improvement Act, § 7 (Hurd's Rev. St. 1903, p. 392, c. 24), provides that the notice of the public hearing on proceedings for a public improvement shall contain "the substance of the resolution adopted by the board and the estimate of the cost of the proposed improvement." *Held*, that where the notice contained the estimate of the engineer in full, with the exception of the preamble and his signature, it was sufficient.

4. Under Starr & O. Ann. St. Supp. 1902, pp. 151-153, c. 24, para. 43, 44, providing that an ordinance providing for a public improvement shall prescribe the extent, nature, kind, character, and estimated cost of the improvement, there was no variance between a first resolution and ordinance merely because the first resolution did not describe the details of the improvement, such as catch-basins, etc.

5. An ordinance for the grading and paving of a street, and providing for iron covers for catch-basins, weighing 470 pounds each, "of the same size and pattern as those used in new work by the city of Chicago during the year 1902," was not objectionable as failing to describe the nature, character, locality, and description of the improvement.

Appeal from Cook County Court; O. N. Carter, Judge.

Proceedings by the city of Chicago against Hattie M. Lanphere to confirm a special assessment. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

F. A. Johnson and F. W. Becker, for appellant. Robert Redfield and William M. Pindell (Edgar Bronson Tolman, Corp. Counsel, of counsel), for appellee.

HAND, J. This is a proceeding to confirm a special assessment for curbing, grading, and paving Monroe avenue from the south curb line of Sixtieth street to the north curb

line of Sixty-Seventh street, in the city of Chicago. Appellant appeared and filed objections to the confirmation of said assessment, which were overruled, and she has appealed.

It is first contended that the estimate of the engineer was not made a part of the record of the first resolution, inasmuch as the preamble and the signature of the engineer were omitted from the record of said resolution. The estimate of the engineer was made a part of the record of the first resolution by reciting the same therein in full, with the exception of the preamble thereto and the engineer's signature. This was a substantial compliance with the provisions of the statute that "said board shall also cause an estimate of the cost of such improvement * * * to be made in writing by the engineer of the board * * * over his signature, which shall be itemized to the satisfaction of said board, and which shall be made a part of the record of such resolution." Hurd's Rev. St. 1903, c. 24, par. 513. The requirements of the statute are for the protection of the owner of property to be assessed (*Bickerdike v. City of Chicago*, 203 Ill. 636, 68 N. E. 161), and it "can only be complied with by incorporating in the record the estimate as a part of the record of such resolution" (*Kilgallen v. City of Chicago*, 206 Ill. 557, 69 N. E. 586). The information as to the description of the improvement, street to be improved, etc., contained in the preamble to the estimate, was all contained in the record of the resolution immediately preceding the estimate as recorded, and the resolution recites that the estimate was made by the engineer. A substantial, and not a literal, compliance with the statute is all that was required. In the record, as made up, the owner whose property was sought to be assessed could find all the information which the statute provides shall be given to him to enable him to determine the character of the improvement and its estimated cost; and the fact that the information contained in the preamble to the estimate was not twice repeated, or the engineer's signature recorded, is not such a substantial deviation from the requirements of the statute as to avoid the assessment, and to require the court to refuse a judgment of confirmation.

It is next contended that the engineer's estimate, as well as the certificate thereof, presented to the city council with the ordinance providing for the improvement, did not contain the item "lawful expenses attending the same," found in section 10 of the local improvement act of 1897 (Laws 1897, p. 105). That act was amended in 1901, and it was provided by the amendment (Hurd's Rev. St. 1903, c. 24, par. 600) that the expenses attending a special assessment proceeding shall be paid by cities out of their general funds; and in *Gage v. City of Chicago*, 195 Ill. 490, 63 N. E. 184, and *Thompson v. City of Chicago*, 197 Ill. 599, 64 N. E. 392, it was held that, since the amendment of

*Rehearing denied December 9, 1904.

1901, it was error to include in the confirmation judgment the cost of making and levying the assessment. It being unlawful to include the expenses of making and levying the assessment in the judgment of confirmation, it was not necessary, and would have been improper, to include the same in the engineer's estimate of the cost of the improvement, or the certificate of such estimate presented to the city council with the ordinance providing for the improvement.

The further contention is made that the notice of the public hearing is defective, as it did not contain the estimate of the engineer, in this: that the preamble, and the signature of the engineer thereto, were omitted from the notice. Section 7 of the local improvement act (Hurd's Rev. St. 1903, p. 392, c. 24) provides the notice of the public hearing shall contain "the substance of the resolution adopted by the board and the estimate of the cost of the proposed improvement." The notice contained the estimate of the engineer in full, with the exception of the preamble, and the engineer's signature. That was sufficient. The statute does not contemplate that the resolution and the estimate shall be set out in *hæc verba* in the notice of the public hearing, but only the substance thereof. That was done, and the notice was sufficient.

It is also contended that there is a variance between the first resolution and the ordinance, inasmuch as the first resolution did not describe the details of the improvement, such as catch-basins, etc., whereas the ordinance did. In *Gage v. City of Chicago*, 207 Ill. 56, 69 N. E. 588, on page 60, 207 Ill., page 590, 69 N. E., it was said: "The resolution of the board does not specifically mention the binder course of broken limestone or the wearing surface. For this reason it is urged the improvement described in the ordinance is not that described in the resolution of the board. An ordinance must prescribe the nature, character, locality, and description of the improvement. It is not required that the resolution shall prescribe the 'description of the improvement,' but only the 'extent, nature, kind, character and estimated cost' thereof. Starr & C. Ann. St. Supp. 1902, c. 24, pars. 43, 44, pp. 151-153. The resolution here under consideration answered these requirements of the statute, and more minuteness in matter of mere description in the resolution was not necessary." There was, under the authority of that case, no variance between the resolution and the ordinance.

The last contention made is that the ordinance failed to describe the nature, character, locality, and description of the proposed improvement. The ordinance provides for iron covers for the catch-basins, weighing 470 pounds each, "of the same size and pattern as those used in new work by the city of Chicago during the year 1902." There were 10 catch-basins, and it is said, under the authority of *Washburn v. City of Chi-*

cago, 202 Ill. 210, 66 N. E. 1033, "the description of said covers found in the ordinance was insufficient. In the *Washburn Case* the ordinance provided for supply pipes and water hydrants of the "city of Chicago standard," and it was held the ordinance failed to properly describe the improvement. The ordinance in this case differs from the ordinance in that case. Here reference is made to a specific object or thing, while there no object or thing was referred to, but a "standard," the existence of which the court could not take notice of without proof. At most, the ordinance in this case is ambiguous. The ambiguity, however, is a latent one, and the ordinance is sufficient upon its face without proof of the size of the iron catch-basin covers in use by the city of Chicago in the new work put in by it in the year 1902. This case is clearly distinguishable from the *Washburn Case*.

The judgment of the county court will be affirmed.

Judgment affirmed.

(212 Ill. 395.)

KIRKWOOD v. SMITH et al.*

(Supreme Court of Illinois. Oct. 24, 1904.)

DEEDS—DEPOSIT FOR DELIVERY AFTER DEATH OF GRANTOR—EVIDENCE.

1. A deed delivered to a third person for delivery to the grantee after death of the grantor passes title to the grantee, though the grantor retains control of the premises and receives the profits thereof during life.

2. Evidence in a suit to cancel deeds for want of delivery held to sustain a finding of delivery.

Appeal from Circuit Court, Vermilion County; E. R. Kimbrough, Judge.

Bill by Okie Hanes Kirkwood and others against Diana Smith and others. From a decree dismissing the bill, plaintiff Kirkwood appeals. Affirmed.

O. M. Jones, for appellant. E. Winter and G. F. Rearick, for appellee.

BOGGS, J. This was a bill in chancery filed by the appellant and a number of others as the heirs at law of Margaret Bockoven, deceased. The bill alleged that the said deceased, at the time of her death, which occurred on the 28th day of January, 1902, was seised of the title in fee to the northwest quarter of section 25, town 18 north, range 11, west of the second principal meridian, in Vermilion county, Illinois; that she died intestate, and that the lands descended to the said complainants, as the heirs at law of said deceased, as tenants in common, and prayed for a decree partitioning and allotting the same in severalty to the complainants, according to their several alleged interests therein. The bill further alleged that there appeared of record in the recorder's office of Vermilion county deeds

*Rehearing denied December 9, 1904.

¶ 1. See Deeds, vol. 16, Cent. Dig. § 140.

to the several appellees, purporting to convey to them, respectively, portions of said tract of land; that though said deeds had been executed and acknowledged by said Margaret Bockoven, deceased, the complainants averred the instruments had not been delivered by the said deceased, nor accepted by the grantees therein, and were for that reason void; and the bill prayed that the said deeds should be canceled as clouds upon the title of the complainants in the bill. Answers were filed to the bill and replications to the answers, and the cause was referred to the master to take and report the proof, together with his conclusions of law and fact. The master reported the proof taken and his conclusion that the deeds were void for want of delivery, and recommended they be canceled, in accordance with the prayer of the bill. Objections filed by the appellees to the findings and conclusion of the master were overruled, and were, by agreement, filed as exceptions to the report before the chancellor. The chancellor sustained the exceptions, and dismissed the bill for want of equity. The appellant was allowed and has perfected this appeal.

Mrs. Mary Bockoven and her husband lived on the lands in controversy as their home for many years. The title in fee was in Mrs. Bockoven. They had no children, and she survived her husband for a number of years. On November 8, 1897, some years after the death of her husband, Mrs. Bockoven went to the house of Henry Arndt, a neighbor, and caused one William M. Sheets, a notary public, to come there and to prepare four deeds to convey portions of the land in question to Diana Smith, a niece, Margaret E. Sprowls (now Brown), and Amos B. Sprowls, and Lydia Stockton, a sister, respectively. The grantees Margaret E. and Amos B. Sprowls were children of a girl who had been raised by Mrs. Bockoven, but who was not a relative. The deeds each recited a consideration of one dollar and love and affection entertained by the grantor for the grantees. She thereupon signed the deeds and acknowledged each of them before the said Sheets in his capacity as notary public, and he attached his certificate of acknowledgment thereto in due form of law. The deeds were also executed in the presence of Levi C. Underwood and Henry Arndt, who attached their names to the several deeds as witnesses to their execution. Mrs. Bockoven placed the deeds in the possession of the said Sheets, to be delivered by him to the grantees after her death. At the same time Mrs. Bockoven executed a will, by which she disposed of her personal property only, making no reference in her will to the lands, and deposited the will with Sheets. Mr. Sheets kept the deeds to Diana Smith, Margaret E. Sprowls, and Amos B. Sprowls in his possession until after the death of Mrs. Bockoven, and then delivered them to the respective grantees.

Mrs. Stockton, the grantee in the other of the four deeds which were held by Sheets, died in the early part of the year 1901, and Mrs. Bockoven requested Mr. Sheets to deliver to her the deed to Mrs. Stockton. Mr. Sheets complied with that request, and Mrs. Bockoven burned the deed, and on the same day executed a deed for the same premises to Martha J. Robinette (a sister), one of the appellees, and delivered that deed to Mr. Sheets. After Mrs. Bockoven's death Mr. Sheets delivered this deed to Mrs. Robinette. The heirs at law of Mrs. Lydia Stockton, deceased, the grantee in the deed that was burned, have conveyed their interest in the land described in the deed that was burned, to Mrs. Robinette. On the day of the execution of the deed by Mrs. Bockoven to Mrs. Robinette, the former also executed another will which affected only her personal property. This will was also deposited with Sheets.

The contention of the appellant is that the grantor, Mrs. Bockoven, did not intend to make an absolute disposition of her property to take effect irrevocably after her death, and did not place the deeds in the hands of Mr. Sheets with the intention of relinquishing all dominion and control over them. The transaction was a voluntary settlement. In such cases there is a greater presumption in favor of delivery than in cases of bargain and sale. *Masterson v. Cheek*, 23 Ill. 72; *Reed v. Douthitt*, 62 Ill. 348.

It appears from the proof the deeds were delivered by Mrs. Bockoven to Mr. Sheets with instructions to deliver them to the grantees thereof, respectively, after the death of the grantor. This much seems to be conceded by appellant, but the argument is that, before the deeds can be regarded as valid and effectual conveyances, it must be found and held, from the evidence, as a fact, that Mrs. Bockoven intended, when she parted with the manual possession of the deeds, that these instruments should pass absolutely and irrevocably from her control and dominion, and that she should have no power thereafter over the title to the lands. That it was her intention that the deeds should remain in the possession of Mr. Sheets during her lifetime, and should at her death be handed by Mr. Sheets to the grantees therein, respectively, was readily to be deduced from the proof, and no rule of law or evidence required further proof in behalf of the appellees.

The appellants urge that subsequent acts of Mrs. Bockoven indicate she did not understand that she had divested herself of all the right to recall the deeds, repossess herself of them, and make some other disposition of the land. These acts are (1) that Mrs. Bockoven retained possession of the premises and enjoyed the rents and profits arising therefrom during her lifetime; and (2) that after the death of Mrs. Stockton, the grantee in one of the deeds, the grantor,

Mrs. Bockoven, called on Mr. Sheets for, and received, the deed to Mrs. Stockton, destroyed the same, and executed another deed purporting to convey the same premises to Mrs. Robinette. If Mrs. Bockoven placed the deeds in the hands of Mr. Sheets to be delivered by him to the grantees after her death, and without reserving the right to recall or revoke, the delivery was effectual and complete. *Bogan v. Swearingen*, 199 Ill. 454, 65 N. E. 426. The fact the deeds were not to be delivered or recorded until after the death of the grantor did not affect the delivery. *Kelly v. Parker*, 181 Ill. 49, 54 N. E. 615; *Bogan v. Swearingen*, supra. Nor did the fact that the grantor was entitled to and enjoyed the rents and use of the land during her lifetime render the conveyance but a testamentary disposition of the land, or in any manner affect the delivery of the deeds. *Bogan v. Swearingen*, supra. Such use and enjoyment of the land were consistent with the plan and scheme of the settlement of the property of the grantor, and had no efficacy to establish that she had not parted with all dominion over the deeds and over the title to the lands. If the delivery was complete the grantor could not destroy the effect of her act and reinvest herself with the title by procuring the deed to be returned to her possession. *Munro v. Bowles*, 187 Ill. 346, 58 N. E. 331, 54 L. R. A. 863; 3 *Washburn, Real Property*, 2156. Mrs. Stockton died during the lifetime of the grantor and without having knowledge that the deed to her had been executed and placed in the hands of Sheets, to be delivered to her after the death of the grantor, Mrs. Bockoven. But it is unnecessary to determine whether acceptance by her is to be presumed, for the reason that if such presumption does not arise, and the conveyance is to be deemed inoperative for the want of acceptance, then the title would pass to Mrs. Robinette by the deed made by Mrs. Bockoven after the death of Mrs. Stockton. If acceptance by Mrs. Stockton is to be presumed because the grant was purely beneficial and that the title therefore passed to her, such title descended to her heirs at law and passed from them to Mrs. Robinette by deeds executed by such heirs to her. In any event, the appellant and her co-complainants had no title in the lands, and the bill was properly dismissed. The decree of the circuit court is correct and it is affirmed.

Decree affirmed.

(113 Ill. 338)

DEE v. DEE et al.*

(Supreme Court of Illinois. Oct. 24, 1904.)

WILLS—CONSTRUCTION—VESTED REMAINDER—
TRUST—CLAUSES—REPUGNANCY—
PARTITION.

1. Testator left his wife and 11 children living on his farm, which was not fully paid for; and his will provided that the wife should have

all the property during her life, or as long as she should remain a widow, "to receive all the rents and profits thereof for the benefit of my family," and that at her decease it should be divided among the children; and the wife and one of the sons were appointed executrix and executor. *Held*, that testator's intention was that the wife should use the income from the property as her discretion directed for the benefit of all the children as long as they continued members of that household, and the will did not create a trust, with the wife and children as equal beneficiaries, each taking a one-twelfth part.

2. Testator's will provided that, as soon as the farm on which he resided should be paid for, the widow and executrix should purchase 80 acres of land for one of testator's sons, to be paid for out of the proceeds of all the land owned at that time, provided that, in case the wife should die before testator's farm should be fully paid for, then such son was to have a certain specified tract. *Held*, that such provision was not void for uncertainty because of the fact that it did not fix the price or location of the land to be purchased; it being the duty of the widow to purchase and have conveyed to the son an 80-acre tract of the same value as the one specifically described.

3. The second clause of a will gave all testator's property to his wife, to her use during her life, and to receive the rents and profits for the benefit of testator's family. By the third clause it was directed that, as soon as the farm on which testator then resided should be paid for, the widow and executrix should purchase 80 acres of land for one of the sons, to be paid for out of the proceeds of all the land owned at the time, provided that, if the wife should die before the son, the son should have a certain specified tract; and the fourth clause provided that, on the death of the wife, all the property should be divided between the children. *Held*, that the third clause was not void on the ground of repugnancy, since, so far as the rents and profits were concerned, this clause was a charge on them, and, in case of the death of the widow before payment for testator's farm, the son was to have a specified tract excepted from the operation of the fourth clause, under the rule that general provisions in a will must give way to a specific one.

4. Where testator's will gave his wife all his property to her use during her life, or as long as she should remain a widow, to receive all the rents and profits for the benefit of testator's family, and at her decease it was to be divided among testator's children, the remainder taken by the children vested at the death of testator.

5. Where testator's will gave his wife all his property to her use during her life or widowhood, to receive all the rents and profits thereof for the benefit of his family, and at her decease to be divided among his children, the language of the will was an express condition against partition prior to the extinguishment of the particular estate of the widow.

6. Where testator's will gave his wife all his property to her use during her life or widowhood, and on her death to be divided among his children, in case of her marriage, the estate of the children would take effect in possession, and entitle them to partition.

7. Where testator's will gave his wife all his property, real and personal, to her use during her life or widowhood, and at her decease to be divided among his children, the widow having sold personal property and invested the proceeds in real estate, the title should have been placed in her for life, or as long as she remained the widow of testator, with remainder to those entitled under the will, and the taking of title in herself and one of the children was unauthorized.

Appeal from Circuit Court, McLean County; C. D. Myers, Judge.

*Rehearing denied December 9, 1904.

Suit by John Dee against Hanorah Dee and others. From a decree in favor of defendants, complainant appeals. Reversed.

D. D. Donahue, H. M. Murray, Fleming, Trowbridge & Oglevee, and H. L. Fleming, for appellant. Barry & Morrissey, for appellee Hanorah Dee. Lillard & Williams, for other appellees.

SCOTT, J. The bill herein represents that Patrick Dee died on August 15, 1889; that he left surviving him Hanorah Dee, his wife, and eleven children; that four of those children have since deceased, leaving no descendants. One of them, who was a daughter, however, had married and died without descendants, but her husband survived. John Dee, complainant in the bill and appellant here, is one of the surviving children of Patrick Dee, and the other children who survive and Hanorah Dee, the widow, are defendants in the bill and appellees.

It appears from the bill that Patrick Dee left a last will and testament, which was probated September 16, 1889, in McLean county, which, omitting formal parts, is as follows:

"First. I will and direct that all my just debts and funeral expenses be paid in full.

"Second. I give and bequeath to my beloved wife, Hanorah Dee all of my property, both real and personal to her use during her life or as long as she shall remain my widow to receive all the rents and profits thereof for the benefit of my family, and at her decease to be divided as follows, to wit:

"Third. I will and direct that as soon as the farm on which I now reside, known as the Jennings farm is paid for, my said wife shall purchase eighty (80) acres of land for my son William Dee to be paid for out of the proceeds of all the land owned at the time: Provided, if my said wife should die before the said Jennings farm is fully paid for, then and in that case the said William Dee is to have the eighty (80) acres on which I now reside being the west half of the southwest quarter (S. W. $\frac{1}{4}$) of section No. four (4) township twenty-three (23) north range four (4) east of the 3rd P. M.

"Fourth. I will and direct that after the decease of my said wife, Hanorah Dee all my property both real and personal shall be divided between all of my children, both boys and girls equally, share and share alike."

The fifth clause appointed the wife and William, one of the sons, executrix and executor, but they did not qualify.

The bill further alleges that the testator left 501 acres of land and \$4,000 worth of personal property; that by the will Hanorah Dee was created a trustee to collect the rents and profits and the income of the personal property during life or widowhood, and that each of the children and the wife was given a one-twelfth part of the income,

rents, and profits, as beneficiaries of the trust; that she accepted the trust, and that she has disposed of the \$4,000 worth of personal property without accounting for the same; that Hanorah Dee has purchased 230 acres of land and a certain lot in the city of Bloomington with the rents and profits of the land and the proceeds of the sale of the personal property received by her, and that the title has been taken by her in her name and in the name of William Dee, but that these lands in equity belong to the complainant and the other beneficiaries; that the fee in remainder to the real estate of which Patrick Dee died seised passed to his children in equal parts, and that Hanorah Dee and each of the children was entitled to a one-twelfth part of the land purchased by Hanorah Dee, with the rents and profits, and that each of the children was entitled to a one-eleventh part of the land purchased with the proceeds arising from the sale of the personal property—and sets out the interests inherited by Hanorah Dee and the surviving children of Patrick Dee from the deceased children, and the interest inherited by the husband of the deceased daughter, and prays that the deeds to the 230 acres of land and the lot in Bloomington may be set aside, and the rights and equities of the parties declared in those lands; that an account of the rents and profits may be had; that partition may be had of all the lands mentioned in the bill in accordance with the rights of the parties as therein stated, and for general relief.

Certain of the children who were made defendants appeared and demurred to the bill, and stated special reasons: First, because complainant is not entitled to partition until the death or marriage of Hanorah Dee; second, that while Hanorah Dee is trustee the funds are to be accumulated until her death or remarriage. Hanorah Dee also demurred, setting up specially the following grounds of demurrer: First, no partition can be had until the death of Hanorah Dee; second, the will does not make Hanorah Dee a trustee—third, the rents and profits belong to Hanorah Dee in her own right; fourth, complainant has no interest in the real estate purchased by Hanorah Dee.

Thereupon complainant obtained leave to amend the bill and to file a supplemental bill. By the amended bill it is stated that the mortgage on the land owned by Patrick Dee at the time of his death has been fully paid; that Hanorah Dee, from the rents and profits of said land, purchased 80 acres of land for William Dee, which was conveyed to him, but that the third clause of the will is void for repugnancy and uncertainty, and that said William Dee acquired no right to the 80 acres of land; that the price of that land and the amount paid in satisfying the mortgage are less than \$10,000, and that the income received by Hanorah Dee from the lands left by Patrick Dee amounted to \$65,-

000 over and above the sums expended in purchasing the 80 acres and paying the mortgage debt; that each of the 11 children received by the fourth clause of the will the same estate as they would receive under the laws of descent, and that the fourth clause of the will was void; that all of the children have reached their majority; that Hanorah Dee and all the children of Patrick Dee lived on his said land at the time of his said death, but that none of them now live on any of such land; that Hanorah Dee resides in Bloomington, Ill., and the children have become separated; that the active duties imposed on Hanorah Dee as trustee have ceased; that each of the beneficiaries is capable of attending to his own affairs, and the trust is now void. The supplemental bill states that Hanorah Dee, since the beginning of this suit, repudiated the trust and claims the rents in her own right, and prays that she be required to account, and be removed as trustee.

The demurrers were extended to the amended and supplemental bills, and sustained by the court. The complainant appeals to this court. In so far as we have found it necessary to consider them, his contentions are, first, that a trust was created by the second clause of the will, with the wife and children as equal beneficiaries, each taking the one-twelfth part of the income; second, the third clause gave William Dee no right to have the funds used to purchase 80 acres of land, because the second clause made a complete disposition of such funds, and because the third clause is void for uncertainty. William Dee could not acquire any interest in the 80 acres owned by Patrick Dee at the time of his death, specifically described in the will, because his title thereto depended upon a void condition precedent, which was impossible of performance, and because the third clause is repugnant to the fourth clause; third, the fourth clause gives a vested estate in remainder, entitling appellant to partition, or, if not, it is void, because it gives the same estate as the laws of descent give, and the children take as heirs, and not as purchasers, holding by the better and worthier title, and appellant is entitled to partition on that theory.

Cardinal rules for the interpretation of a will are that the intention of the testator, as indicated by the words he has used, shall be ascertained and effectuated, if that can be done, and that the instrument shall be read from the four corners thereof, that each and every clause, sentence, and word may be given meaning and effect, if it be possible so to do. Authorities cited by appellant show that the devise of the property to Hanorah Dee, to her use, for the benefit of another or others, specifying them, is the proper formula for the creation of a trust for the benefit of such other or others. The difficulty about the application of this doctrine in the present case is found in the fact that the term

here used is "for the benefit of my family." Did the testator by that expression mean to require an equal division of the rents and profits among his wife and all his children, giving one-twelfth to each? If so, a trust was created. If, on the other hand, it was the mere expression of the purpose or motive which moved him in making this devise, no trust exists. As has been frequently said, in construing a will the court derives but little assistance in determining the meaning to be given the various terms and expressions used therein from the examination of adjudged cases. No two wills are precisely alike, and the conditions which surround one testator differ so widely from those which surround another that the conclusion reached in one instance is rarely of great service as a guide in another. We have been favored with elaborate briefs in this case, and have examined the various authorities to which we have been referred. We cannot here enter upon a detailed discussion of the numerous cases upon which the respective parties rely. So far as the question of the existence of a trust is concerned, we regard *Allen v. McFarland*, 150 Ill. 455, 37 N. E. 1006, and *Bryan v. Howland*, 98 Ill. 625, as approaching the present case more nearly than any other to which our attention has been called. In *Allen v. McFarland*, supra, the language of the will was: "I leave all my property in the hands of my wife, Cecelia Matilda Allen, to manage to the best interests of our children and herself. The said children are Charles Abram, Grace Matilda and Mary Elizabeth." The widow took possession of the property, and received the income, rents, and profits therefrom. A bill was filed to require the widow to account to the children for the rents and profits, on the theory that the children took an interest therein. The circuit court held that the mother took the property as trustee for the benefit of herself and the said children, share and share alike. On appeal to this court, this construction was deemed erroneous, and it was said (page 464, 150 Ill., page 1009, 37 N. E.): "The thought of the testator seems to have been to leave his estate under one management during the lifetime of his wife, to be controlled as he had controlled it, in the interest and for the benefit of the family. * * * It is apparent that his wife was intended by him to take his place in the management of his estate, and was clothed with a broad, and practically unlimited, discretion in such management. He seems to have had great confidence in her integrity and ability to manage the estate, and left to her discretion, without restriction, what would be management in the interests of herself and children." In the case of *Bryan v. Howland*, supra, land was conveyed to Allen H. Howland, his heirs and assigns, in trust for the separate benefit of Henry Allen Howland, to permit the latter to use, occupy, possess, enjoy, improve, rent, and build upon the said

tracts or lots of land "in any manner he may deem best for the support, maintenance and benefit of himself and his children, during his natural life." There, as here, the use was given to the person said to be a trustee absolutely and unqualifiedly, and the word "benefit" was used there, as here, in the clause upon which the claim that a trust existed was based; but this court held that no trust was created, as there was no language providing that the use, occupancy, possession, and enjoyment should be devoted to the purposes to which the person to whom the use was given was authorized to devote such use, occupancy, possession, and enjoyment. It is true that the words "in trust" are unnecessary, and no particular form of words is necessary, to the creation of a trust. Still it is necessary that some language unequivocal in character should be used, from which an intention to raise a trust can be attributed to the testator. *Hagan v. Varney*, 147 Ill. 281, 35 N. E. 219. After a careful examination of the various provisions of this will, read in the light of the testator's environments, his condition in life, the nature, extent, and situation of his property, as the same appear from the bill, we are of the opinion it was not his purpose to create a trust.

In our judgment, this case should follow *Allen v. McFarland*, supra. The testator left his wife and 11 children living on his farm, which was not fully paid for. His evident purpose was to substitute his wife for himself, that she might manage and carry forward the business, and maintain and educate the children as he would do if he were living. He contemplated that she would relieve the land of the mortgage indebtedness. He specified that the devise of the rents and profits was "for the benefit of my family." In using that expression, we think he had in mind the group of persons residing in his household, consisting of his wife and children, and that his design was that his wife should use the income from all his property as her discretion directed for the benefit of those persons so long as they continued members of that household. There is no question but that, after the death of his wife, he intended his property should be divided among his children. In providing for that division, he uses words that make certain the objects of his bounty. He says, "shall be divided between all of my children, both boys and girls equally, share and share alike." We cannot escape the conviction that, had it been his purpose to have the income from the property divided in the same manner, or divided equally between the children and their mother, he would have used language indicating that purpose with greater certainty. Again, his confidence in his wife is shown by the fact that she is given unlimited discretion in the management of the property, and yet, if the construction of appellant is to be followed, the only portion of his estate that

she receives is one-twelfth of the net income thereof. Such a division would seem to be inconsistent with the great faith he reposed in her when the extent of her rights in his estate in the event of his intestacy, or her renunciation of his will, is considered.

Under the second clause of the will of Patrick Dee, his widow took a life estate in all his property, both real and personal, determinable, however, upon her remarriage. Whether the burden of educating and maintaining during their minority the other members of the family of Patrick Dee is one that she could have been compelled to assume by virtue of the second clause of his will is unnecessary to determine, as no complaint is made in that respect, and each of the children has now attained the age of legal majority.

A number of questions are discussed by counsel for appellant touching the rights, obligations, and duties of Hanorah Dee as trustee. It is unnecessary to consider any of these, under the construction which we have placed upon this clause.

It is then insisted that the third clause, in so far as it directs the wife to purchase 80 acres of land for William Dee, is void for uncertainty, because it should fix the price to be paid, as well as the location of the land to be purchased, and it is argued that it does neither. In support of this position we are cited to *In re Traylor*, 81 Cal. 9, 22 Pac. 297, 15 Am. St. Rep. 17, where it was held that a clause was void, requiring the executors to purchase a tract of land and vest the title to the same in certain devisees, where the land was not described, nor the price to be paid therefor fixed. That holding was undoubtedly correct, as it was impossible to ascertain from the will either what tract of land was intended by testator, or what amount of his property he was willing to have devoted to the purchase of the land for these particular persons. We are inclined to the view that, where it is possible to ascertain from the will the description of the land which the testator directs shall be purchased, or the amount which he directs shall be devoted to the purchase of land, the devise is good. The suggestion that such a provision is not effective unless it both locates or describes the land, and fixes the price at which it shall be purchased, is not well considered. The owner of the land at the time the executor seeks to purchase it will have something to say about the price at which it shall be purchased, and cannot be required to sell at the price fixed by the testator. Such a provision would place it in the power of the person owning the land, when the executor seeks to carry out that provision of the will, to defeat the intention of the testator entirely. It was the purpose of Patrick Dee, in the event of the death of his widow prior to the time when the land which he owned at his death should be fully paid for, that William Dee should become the owner of a certain 80-

acre tract, specifically described in the third clause of the will, and the testator's bounty may be thereby measured. It was the duty of the widow to purchase and have conveyed to William Dee an 80-acre tract of the same value as the one specifically described in the third clause, which was to become his property under certain contingencies.

It is urged, however, that this clause is void for repugnancy; that, so far as the rents and profits are concerned, they are all devised by the second clause, and for that reason cannot be taken to satisfy the bequest of 80 acres to William Dee, and that the general intent of the will is that all the real estate owned by the testator at the time of his death should be divided equally among all his children, and that the third clause, in so far as it devises 80 acres of the land of which Patrick Dee died seised to William Dee in a certain contingency, is the expression of a special intent, which should not prevail as against the general intent of the document.

The rejection of one clause in a will to uphold another, on the ground that the two clauses are repugnant, is a desperate remedy, to be resorted to only in case of necessity. Every effort should be made by the court to reconcile clauses apparently repugnant, that effect may thereby be given to each. *Jenks v. Jackson*, 127 Ill. 341, 20 N. E. 65; *Healy v. Eastlake*, 152 Ill. 424, 39 N. E. 260.

So far as the inconsistency between the second and third clauses is concerned, we regard the third as being a charge upon the rents and profits devised by the second; that is, the third requires Hanorah Dee to purchase the 80-acre tract out of the rents and profits received by her, in a certain contingency. If that contingency does not arise, then William Dee is to take an 80-acre tract owned by the testator at the time of his death, in which event that tract is excepted from the operation of the fourth clause under the rule that general provisions in a will must give way to a specific provision; that, where there is a general devise of property in one part of the will, and a specific disposition of the property in another part, the latter is generally to be regarded as excepted out of the general devise. *Dickison v. Dickison*, 138 Ill. 541, 28 N. E. 792, 32 Am. St. Rep. 163.

It is averred by the amended bill that the fourth clause of the will is void because the children of the deceased take precisely the same title by that clause that they would take by inheritance, or that, if this be not the correct view, each of the children took a vested remainder in the undivided one-eleventh of the land of which Patrick Dee died seised, the particular estate being in the widow, and that in either event appellant is entitled to partition of the lands which Patrick Dee owned at the time of his death; while the view taken by Hanorah Dee is that the remainder devised the children is contingent, there being no words of gift to them, except

as they are found in the direction that all the property of the testator "shall be divided between all of my children" after the death of the wife.

The general rule is that where the devisees compose a class, and there are no words of devise, except a simple direction to divide the property at a specified time, the gift will not vest until the time of division. *McCartney v. Osburn*, 118 Ill. 403, 9 N. E. 210; *Kingman v. Harmon*, 131 Ill. 171, 23 N. E. 430; *Bates v. Gillett*, 132 Ill. 287, 24 N. E. 611; *Strode v. McCormick*, 158 Ill. 142, 41 N. E. 1091. In the case of *Knight v. Pottgleser*, 176 Ill. 368, 52 N. E. 934, it is said this "general rule is subject to an exception so well established and universally recognized as to practically constitute another general rule, which is: Though a gift arises wholly out of directions to pay or distribute in futuro, yet if such payment or distribution is not deferred for reasons personal to the legatee, but merely because the testator desired to appropriate the subject-matter of the legacy to the use and benefit of another for and during the life of such other, the vesting of the gift in remainder will not be postponed, but will vest at once, the right of enjoyment only being deferred." In *Hellman v. Hellman*, 129 Ind. 59, 28 N. E. 310, where a will gave a life estate to the widow, and directed that upon her death "all my estate, excepting the bequests herein made, shall be divided in equal shares among all my children," and should any be dead leaving children, such children to be entitled to the distributive shares of their parents, it was held that, notwithstanding there was no language of gift except the direction to divide, the remainder taken by the children was vested, and not contingent. In *re Thomman's Estate*, 161 Pa. 444, 29 Atl. 84, seems analogous to the one before us. The only words of gift in that case were preceded by a direction to sell the testator's farm after the death of his wife, and were as follows: "And the proceeds thereof shall be equally divided between my children, share and share alike." The court held that, as the only purpose of postponing the sale and distribution was to benefit the wife, the vesting was immediate upon the death of the testator. It is apparent that the devise made by the fourth clause of this will is within the exception noted in *Knight v. Pottgleser*, supra. Here the only purpose, so far as we can determine, in postponing the division of the estate, was that the widow might enjoy it during her lifetime or widowhood. The time of division was not postponed for or on account of anything personal to the legatees—as, for example, until the youngest arrived at the age of 21 years, or until some one of the children desired to engage in business. It is manifest, therefore, that the remainder taken by the children of the deceased vested at his death.

Is appellant entitled to partition prior to the death of Hanorah Dee? It is evident

from the language of the will that it was the purpose of the testator to postpone a division of the estate until her death. The general rule is that an adult tenant in common may demand partition as a matter of right (*Martin v. Martin*, 170 Ill. 639, 48 N. E. 924, 62 Am. St. Rep. 411), and the fact that he is a remainderman, and that the particular estate has not expired, is not a valid objection (*Drake v. Merkle*, 153 Ill. 318, 38 N. E. 654); but equity will not award partition at the suit of one in violation of his own agreement, or in violation of a condition or restriction imposed upon the estate by one through whom he claims (21 Am. & Eng. Ency. of Law, 1158; *Hill v. Reno*, 112 Ill. 154, 54 Am. Rep. 222; *Ingraham v. Mariner*, 194 Ill. 269, 62 N. E. 609; *Brown v. Brown*, 43 Ind. 474; *Hunt v. Wright*, 47 N. H. 396, 93 Am. Dec. 451); nor is such a condition or restriction in the instrument conveying the estate invalid, as repugnant to the estate granted, or as against public policy (*Hunt v. Wright*, supra).

We regard the language of the will fixing the time at which the estate shall be divided as an express condition against partition prior to that time. No partition can be had, therefore, until the particular estate of Hanorah Dee is extinguished.

The second clause of the will gives to Hanorah Dee the rents and profits so long as she lives, or until she remarries. The fourth clause provides for the division of the estate "after the decease of my said wife Hanorah Dee"; and it is urged by appellant that, in the event of Hanorah Dee remarrying, the construction which we have placed upon this will would leave the rents and profits accruing between her remarriage and her death undisposed of. This disregards the doctrine of acceleration. If there be a gift to A. for life, and to B. in remainder, the estate in remainder takes effect from and after the determination of the particular estate, whether that estate be determined by revocation, death, incapacity of the devisee to take, or by his refusal to take, or by any other circumstance; the remainder being only postponed in order that the life estate may be given to A. (*Blatchford v. Newberry*, 99 Ill. 11. Whenever the life estate of Hanorah Dee terminates, that of the remaindermen will take effect in possession, and partition may then be had.

The construction which we have placed upon this will gives effect to each and every clause thereof, consistent, as we think, with the testator's purpose, while that contended for by appellant would destroy both the third and fourth clauses.

It appears from the bill that Hanorah Dee sold the personal property, and invested the proceeds in real estate, and took title to herself and William Dee, and the bill contains a prayer for general relief. Appellant does not question her right to so invest the mon-

ey, but complains that the title was not taken to the proper persons. The bill is without equity in all other respects, but, if the widow invested the proceeds of the personal property in real estate, the remaindermen not challenging her power or authority to make that investment, the title should be placed in her for life, or as long as she remains the widow of Patrick Dee, with remainder to the persons entitled to the remainder in the personality under his will. (*Burnett v. Lester*, 53 Ill. 325; *Welsch v. Belleville Savings Bank*, 94 Ill. 191; *Buckingham v. Morrison*, 136 Ill. 437, 27 N. E. 65. For this reason only the decree of the circuit court will be reversed, and the cause remanded to that court for further proceedings in conformity with the views herein expressed.

Reversed and remanded.

(212 Ill. 300)

SANITARY LAUNDRY CO. v. PEOPLE.*
(Supreme Court of Illinois. Oct. 24, 1904.)

APPEAL—ORDER OF ALLOWANCE—BOND.

1. Where a bond for appeal to the Supreme Court was approved, but the order of the circuit court allowed an appeal to the Appellate Court, the appeal to the Supreme Court must be dismissed.

Appeal from Circuit Court, Cook County: C. M. Walker, Judge.

Action by the people of the state of Illinois against the Sanitary Laundry Company. From a judgment for plaintiff, defendant appeals. Appeal dismissed.

Fulton H. Sears, for appellant.

PER CURIAM. This was an action of debt, brought in the circuit court of Cook county by appellee against appellant, for personal property taxes for the years 1900 and 1901. The cause was tried before a jury on the 28th day of March, 1904, and a verdict and judgment were rendered for appellee in the sum of \$1,957.69 debt and the same amount in damages. A motion for new trial was made and disposed of on the 16th day of April, 1904, the new trial being denied and judgment entered. The record then shows: "Thereupon the defendant, having entered its exceptions herein, prays an appeal from the judgment of this court to the Appellate Court in and for the First District of the state of Illinois, which is allowed upon filing herein its appeal bond in the penal sum of \$2,500, to be approved by the court within 20 days from this date, and 30 days' time from this date is hereby allowed the defendant in which to file a bill of exceptions herein." The bond is in the sum of \$2,500, and is approved, but is for an appeal to this court. There is no order of the circuit court allowing an appeal to this court, and this appeal must therefore be dismissed. Appeal dismissed.

*Rehearing denied December 9, 1904.

(212 Ill. 239.)

HOLDEN et al. v. CITY OF CHICAGO.*

(Supreme Court of Illinois. Oct. 24, 1904.)

MUNICIPAL IMPROVEMENTS—NEW SPECIAL ASSESSMENTS.

1. The judgment on a special assessment for municipal improvements was reversed and remanded to allow proof that the term "flat stones" had a well-known and commercial meaning among people engaged in constructing such improvements, so as to render valid the ordinance under which the improvements were made. *Held*, that the judgment so remanding the cause was not such a final disposition of the case or setting aside the assessment as under Act 1897, §§ 57, 58 (Hurd's Rev. St. 1899, p. 374), required a new special assessment.

Appeal from Cook County Court; F. W. Shonkwilder, Judge.

Proceedings by the city of Chicago against Charles R. Holden and others to enforce a special assessment for paving a street. From a judgment for plaintiff, defendants appeal. Reversed.

See 56 N. E. 1118; 62 N. E. 550.

George W. Wilbur, for appellants. William M. Pindell (Edgar Bronson Tolman, Corp. Counsel, and Robert Redfield, of counsel), for appellee.

RICKS, C. J. This is an appeal from a judgment of the county court of Cook county affirming a new special assessment to pay an alleged deficiency for the paving of a part of Ogden avenue in the city of Chicago. The original proceedings were commenced in 1896, and the assessment therefor was thereafter confirmed as to all of the property. Subsequently writs of error were taken out as to the property involved in this proceeding, and the judgment of confirmation was set aside on the ground that the flat stones under the curbstones were not described. 185 Ill. 528, 56 N. E. 1118. The cause was redocketed, objections were filed, and a trial had on May 9, 1900. The county court sustained objections and dismissed the petition. Subsequently, and at the June term, 1901, the petitioner sued out a writ of error from this court for the purpose of reviewing the judgment of the county court. The particular error relied upon was that upon the redocketing of the cause under the remanding order from this court and the rehearing thereof the city of Chicago offered to prove that the term "flat stones," as used in the ordinance, had a definite, well-known, and established meaning in the city of Chicago with reference to street improvements, and upon that writ this court took the view that such evidence was competent, as the ordinance was only declared defective in the matter of the insufficiency of the description of the flat stones, and that the defect might be cured by the evidence suggested, if it could be adduced, and that its exclusion was error. We reversed the judgment of the county court, and remanded the cause for a new trial. 194 Ill. 213, 62 N. E. 550. The

remanding order was subsequently filed in the county court, and said cause was redocketed, but was not retried, dismissed, or in any manner disposed of.

Appellee seems to have treated the cause under the original proceeding as disposed of, as the ordinance declares "that the Supreme Court has set aside the judgment of confirmation heretofore entered against divers tracts of land assessed in said proceeding, and declared said ordinance defective," and appellee, so assuming, proceeded to levy a new assessment, as we must assume from the declaration of the ordinance, under sections 57 and 58 of the act of 1897, in relation to local improvements, as found on page 374 of Hurd's Rev. St. 1899.

By section 57 it is provided: "If any assessment shall be annulled by the city council or board of trustees, or set aside by any court, a new assessment may be made," etc. And section 58 contains the following: "This provision shall only apply when the prior ordinance shall be held insufficient for the purpose of such assessment, or otherwise defective so that the collection of the assessment therein provided for becomes impossible." Unless, then, the assessment was annulled by the city council, or was set aside by some court, or the ordinance held insufficient for the purpose of such prior assessment, so that the collection thereof became impossible, appellee was not authorized to make a new assessment.

The judgment of this court remanding the cause was not a final judgment disposing of the cause, or holding that the assessment was annulled or set aside, or that the ordinance was so insufficient that the collection of the assessment made under it was impossible, but, on the contrary, it was said that, if the proof which it was proposed by the city to make upon the second hearing that the term "flat stones" had a well-known and commercial meaning among people engaged in the business of constructing such improvements, could be made, it was not only possible, but entirely proper, that the assessment should be sustained, and to determine that question the cause was remanded. Appellee did not see fit to avail itself of the opportunity given it by this court to make the proof it complained it could make, nor did it suffer the lower court to dismiss the cause for want of such proof, nor was the assessment annulled by the city council; so that it would seem that the jurisdictional matters upon which alone such new assessment could be predicated did not exist when the new assessment now in question was levied or attempted to be levied and the ordinance therefor passed. We think the action of the city in passing the ordinance and making the levy of the new assessment was improvidently done, and that the judgment of the county court confirming the same should be reversed.

Judgment reversed.

*Rehearing denied December 3, 1904.

(212 Ill. 286)

MAYER v. SCHNEIDER.*

(Supreme Court of Illinois. Oct. 24, 1904.)

REMOVAL OF CAUSES—CLAIM AGAINST DECEDENT'S ESTATE—OBJECTION—TIME FOR FILING PETITION.

1. The act concerning the removal of causes to the federal courts provides that the party entitled to remove a cause shall file his petition in the state court, at the time or any time before defendant is required by laws or the rules of the court in which the suit is brought, to answer or plead to the declaration of plaintiff. *Held* that, where one of the heirs of a decedent appeared in probate court and filed objections to the allowance of a claim against the estate, he had no right afterwards to file a petition for the removal of the cause.

Appeal from Appellate Court, Second District.

Proceedings by Mary L. C. Schneider to collect a claim from the estate of Bertha C. C. Schneider, deceased. From a judgment of the Appellate Court affirming a judgment in favor of claimant (112 Ill. App. 628), William L. Mayer, one of the heirs, appeals. Affirmed.

John F. Haas, for appellant. H. M. Kelly, for appellee.

CARTWRIGHT, J. The Appellate Court for the Second District affirmed the judgment of the circuit court of La Salle county, allowing a claim of appellee against the estate of Bertha C. C. Schneider, deceased, at the sum of \$4,755.50, and ordering the claim classified as of the seventh class, to be paid by the administrator of said estate in due course of administration. Appellant, one of the heirs, and who objected to the allowance of the claim and appealed to the Appellate Court, has prosecuted this further appeal.

Appellant presents two grounds for a reversal of the judgment of the Appellate Court, one of which is that the court erred in its finding upon the controverted question of fact. It is insisted that the evidence did not warrant the inference drawn from it by the Appellate Court, that there was a contract between appellee and Bertha C. C. Schneider to pay for the services upon which the claim was based. The alleged contract was verbal, and its existence was a question of fact conclusively settled by the judgment of the Appellate Court.

The other error alleged consists in affirming the ruling of the circuit court denying appellant's petition for the removal of the cause from that court to the Circuit Court of the United States. In our opinion the decision of the circuit court was correct. If appellant ever had a right to remove the cause to the Circuit Court of the United States, he had lost it by failing to comply with the act of Congress granting the privilege. A provision of that act is that the party entitled to remove a cause from a state court shall

file his petition therein in the state court at the time, or any time before, the defendant is required by the laws of the state, or the rule of the state court in which the suit is brought, to answer or plead to the declaration of the plaintiff. If the presentation and allowance of a claim against the estate of a deceased person is such a suit or proceeding as may be removed from a state court to a Circuit Court of the United States, and if the right to remove depends upon the citizenship of an heir entitled to share in the distribution of any assets that may remain after the payment of debts and expenses of administration, who appears and objects to the allowance of the claim, instead of the citizenship of the personal representative of the deceased, the act of Congress must be complied with, and there is no right to a removal after a trial in the state court. In this case the appellant had two trials on the merits and an appeal to the Appellate Court before the attempted removal of the cause. Appellee was administratrix of the estate of Bertha C. C. Schneider, and on November 19, 1901, she filed two claims against the estate in the probate court of La Salle county. On November 25, 1901, the probate court appointed Edgar Eldredge as administrator ad litem to appear and defend for the estate. On November 26, 1901, appellant entered his appearance and filed objections to the claims. On January 2, 1902, the appellant and Eldredge appeared in the probate court, when the claims were consolidated, and there was a jury trial, resulting in a verdict for appellee and an allowance of \$7,595.39 as of the seventh class. In pursuance of the statute allowing to any person aggrieved by the judgment of the probate court an appeal to the circuit court, appellant was granted an appeal and gave a bond in the sum of \$250. There was a trial by jury in the circuit court, resulting in a verdict and allowance for \$7,494. Appellant again appealed to the Appellate Court for the Second District, where the judgment was reversed, and the cause was remanded to the circuit court. After the reinstatement in the circuit court, appellant presented his petition for the removal of the cause, alleging that he was a citizen of the state of Ohio.

Whatever controversy there was between appellant and appellee began when appellant appeared in the probate court and filed his objections to the allowance of appellee's claims. The claims filed by appellee took the place of declarations, and the administration act permitted objections thereto not only by the executor or administrator, but by the widow, heirs, or other persons interested in the estate, and allowed an appeal to the circuit court to any one aggrieved by the judgment, order, or decree of the probate court. Appellant had a right to object to the claims of appellee, and did so by filing his objections, which constituted his pleas. Having pleaded to the claims without then ask-

*Rehearing denied December 9, 1904.

ing for a removal from the state court, and having tried the case twice in state courts, he had no right afterward to file a petition for the removal of the cause. He says that he never became a party to the cause until he appealed from the allowance in the probate court. If that were true his position could not be maintained, but the suit was at all times the same, and his relation to it was the same from the time he appeared and filed his objections. The judgment, in any case, would be against the personal representative, and appellant's defense was in the name of the administrator. The defense, although made by him, was the defense of the estate. Appellant assumed additional liabilities by giving the appeal bonds to the circuit court and Appellate Court; but the controversy was still between the appellee and the estate. Appellant did not have the privilege of experimenting with the probate and circuit courts before exercising the right to remove the cause therefrom, if he had any such right. The judgment of the Appellate Court is affirmed.

Judgment affirmed.

(212 Ill. 256)

TOWN OF CICERO v. BARTELME.*

(Supreme Court of Illinois. Oct. 24, 1904.)

MUNICIPAL CORPORATIONS—DEFECTIVE SIDEWALKS—INJURIES TO PEDESTRIANS—TRIAL—VARIANCE—PLEADING—AMENDMENT—LIMITATIONS—APPEAL—SUPREME COURT—REVIEW.

1. An objection of variance will be overruled on appeal to the Supreme Court if there is evidence in the record which, when taken as true, together with all inferences which may be legitimately drawn therefrom, fairly tends to sustain the averments of the declaration.

2. In an action for injuries, plaintiff testified that she caught her foot in a hole in a sidewalk; that she stumbled in a hole, as near as she could remember. Another witness testified that immediately after the injury there was a piece broken out of one of the boards, which looked like a fresh break, which he had not noticed before, though he was familiar with the walk. *Held*, that such evidence tended to support the averment in the declaration that plaintiff stepped on the board, which broke and split beneath her weight, and that there was not, therefore, a fatal variance, on the ground that the proof showed that she stepped into a hole, instead of on a decayed plank.

3. Where, in an action for injuries, the negligence alleged in the original declaration was that defendant wrongfully suffered a sidewalk to remain out of repair, an additional count, subsequently filed, in which it was alleged that the sidewalk was broken and full of holes, and that plaintiff stepped into one of such holes, and was thereby injured, did not state a new cause of action, but constituted a mere restatement of the cause of action previously alleged.

4. Where an additional count in an action for injuries on a defective sidewalk described the walk as situated on the southeast corner of Thirty-Second street and S. avenue, and leading from the sidewalk on the east side of said S. avenue over and across a certain ditch or drain along the south side of Thirty-Second street, such description should be construed as locating the walk upon the south side of Thirty-Second

street, and not along the ditch or drain, which corresponded with the original declaration and proof, so that there was no variance as to the locus in quo described in the additional count from that described in the original declaration.

Appeal from Appellate Court, First District.

Action by Mary Bartelme, as conservatrix of Ella M. Peck, insane, against the town of Cicero. From a judgment in favor of plaintiff, affirmed by the Appellate Court, defendant appeals. Affirmed.

John J. Sherlock (Atwood, Pease, Corbin & Loucks, of counsel), for appellant. Gideon S. Thompson, for appellee.

HAND, J. This is an appeal from a judgment of the Branch Appellate Court for the First District affirming a judgment of the superior court of Cook county in favor of appellee for the sum of \$3,500 for injuries sustained by Ella M. Peck by reason of a defective sidewalk which was under the control of the appellant. The action was commenced in the name of Ella M. Peck, who subsequently was adjudged insane, and Mary M. Bartelme, her conservatrix, was substituted in her stead as plaintiff. The declaration, as originally framed, contained one count, and averred that the defendant "wrongfully and negligently suffered the said sidewalk to be and remain in bad and unsafe repair and condition, and divers planks wherewith said walk was constructed to become and remain rotten and decayed, whereof the said town of Cicero had notice, and the plaintiff, who was then and there passing along and upon the said sidewalk, exercising due care and diligence for her own safety, necessarily and unavoidably stepped upon a plank in the said sidewalk that had become, and for a long time had remained, decayed and rotten, and the said plank then and there broke and split with the weight of the said plaintiff, and the foot of the said plaintiff was thereby caught and entangled in the said broken plank, and the said plaintiff was thereby then and there tripped and thrown and fell to and upon the ground and sidewalk there," by means whereof she was injured, etc.

It is first urged that there was a variance between the declaration and the proof, in this: that the evidence showed the injury was occasioned by reason of Ella M. Peck stepping in a hole in said sidewalk, and not by reason of her stepping upon a decayed and rotten plank, which broke and split beneath her weight. The witnesses differed somewhat as to the condition of the walk before and after the injury. Ella M. Peck, who was alone at the time she was injured, testified that she caught her foot in a hole in the sidewalk; that she stumbled in a hole, as near as she could remember. Archie P. Gaylord, who assisted Ella M. Peck to her home after the injury, testified that when he saw the walk, immediately after

*Rehearing denied December 9, 1904.

the injury, there was a piece broken out of the south edge of the north board; that the piece that was out was lying down underneath, and that it looked like a fresh break, which he had not noticed before; that he was familiar with the condition of the walk at this place, and had known its condition for three years; that the hole that he saw in the walk was between the east sidewalk and the ditch, and along the south edge of the north plank; that he had gone over the walk every day, and had not seen that break there before; and that he was across there about 8 o'clock that morning, and did not see any hole there.

In passing upon the question of a variance between a pleading and the proofs, this court cannot weigh the evidence; and if there is evidence in the record, when taken as true, together with all inferences which may legitimately be drawn therefrom, fairly tending to sustain the averments of the declaration, the objection that there is a variance between the declaration and proof must be overruled. While the question is not free from doubt, we are inclined to think that the evidence above referred to, with the inferences that the jury might legitimately draw therefrom, fairly tended to support the averment of the declaration that the plaintiff stepped upon the board, which broke and split beneath her weight, etc., and that the court did not err in refusing to instruct the jury peremptorily to return a verdict in favor of the defendant on the ground of variance. *Lake Street Elevated Railroad Co. v. Shaw*, 203 Ill. 39, 67 N. E. 374.

After the jury had returned their verdict, and more than two years after the accident, by leave of court the plaintiff filed an additional count to her declaration, in which it was averred that the defendant wrongfully and negligently suffered the said sidewalk to be and remain in a bad and unsafe condition, and to become rotten and decayed, and to be broken and full of holes, and that while plaintiff was passing over said walk, with all reasonable care for her safety, she "stepped into one of the holes in said walk," and the foot of the plaintiff was caught and entangled in said hole, and she was thrown down and injured. The plea of the statute of limitations was filed to said additional count, and the action of the court in sustaining a demurrer to said plea is assigned as error. We think it clear that the additional count did not set out a cause of action different from that set out in the original declaration. In *Swift & Co. v. Madden*, 165 Ill. 41, 45 N. E. 979, which was an action on the case to recover damages for a personal injury, it was held (page 45, 165 Ill., page 980, 45 N. E.): "The cause of action may be regarded as the act or thing done or omitted to be done by one which confers the right upon another to sue—in other words, the act or wrong of the defendant towards the plaintiff which causes a grievance for which the

law gives a remedy." In that case it was said that the cause of action of the plaintiff was the negligence of the defendant in failing to keep in repair machinery in its factory where the plaintiff was required, by his employment with the defendant, to labor. In the original declaration filed, it was charged that it was the duty of the defendant to keep in good and safe repair certain machinery which the plaintiff was required to use while in the service of the defendant as a laborer, but the defendant failed to observe its duty in that regard, and, on the contrary, negligently and wrongfully permitted the machinery to be and remain in an unsafe and dangerous condition, so that the plaintiff, while employed by the defendant in working with the machinery with due care on his part, was injured. In the additional count, after setting out the relation of the parties to each other, it was averred that it was the duty of the defendant, when the machinery was out of repair and unsafe and dangerous, to repair the same, yet the defendant, although notified that the machinery was out of repair and unsafe, while it promised that the machinery should at once be repaired, and thereby caused plaintiff to continue in its service, did not regard its duty, but carelessly and negligently permitted the machinery to be and remain out of repair, and in an unsafe and dangerous condition. The court, upon demurrer to a plea of the statute of limitations, held that the additional count set out the same cause of action as the original declaration, and that a demurrer was properly sustained to said plea. In this case the cause of action set out in the original declaration and in the additional count is the same, that is to say, the negligence of the defendant in wrongfully suffering said sidewalk to be and remain out of repair and in an unsafe condition, and the statement in the additional count that the sidewalk was broken and full of holes, and that the plaintiff stepped into one of said holes and was thereby injured, were but the restatement of the cause of action set out in the original declaration, and not the statement of a new cause of action.

It is also said the locus in quo described in the additional count is different from that described in the original declaration, and varies from that established by the proof. The averment in the additional count is, "said public walk or crossing being situated at the southeast corner of Thirty-Second street and Sheldon avenue, and leading from the sidewalk on the east side of said Sheldon avenue over and across a certain ditch or drain along the south line of said Thirty-Second street." From this description it is plain the walk was located upon the south side of Thirty-Second street, and not along a certain ditch or drain, which corresponds with the averments of the original declaration and the proof. To hold otherwise would be to hold that the sidewalk

crossed a certain ditch or drain, and at the same time ran along said ditch or drain.

The judgment of the Appellate Court will be affirmed. Judgment affirmed.

(212 Ill. 261)

GLOS v. HANFORD et al.*

(Supreme Court of Illinois. Oct. 24, 1904.)

TAXATION—TAX SALES—PROCESS—DATE—DELINQUENT LIST—PUBLICATION—CERTIFICATES—TAX DEEDS—VACATION—PLEADING—DEMURRER—WAIVER—PARTIES—DEPOSITS IN COURT.

1. Hurd's Rev. St. 1903, p. 1542, c. 120, § 194, provides that on the day advertised for tax sale the county clerk and the collector shall make a certificate, to be entered on the record following the order of court, that such record is correct, and that the judgment was rendered on the property therein mentioned, etc., which certificate shall be the process on which all real property or interests therein shall be sold for taxes. *Held*, that a certificate under such section, executed and dated on a day other than the day of the sale, was insufficient, and that a sale under such certificate was void.

2. A certificate to a delinquent tax list reciting, "I, W. P. N., publisher of The Inter-Ocean, do hereby certify that the foregoing list of lands and lots contained in the newspaper known as The Inter-Ocean, to which this certificate is attached," etc., and signed, "W. P. N.," was defective for failure to certify the relation of the person making it to the newspaper, as required by Hurd's Rev. St. 1903, p. 1540, c. 120, § 186.

3. Under Hurd's Rev. St. 1903, p. 1540, c. 120, § 186, requiring the newspaper in which the delinquent list was published to be filed as a part of the records of the county court, a certificate to such filing by the "county clerk," instead of "the clerk of the county court," was insufficient, though the offices were filled by the same person.

4. A bill to set aside certain tax deeds as a cloud on title, alleging that the deeds were void by reason of many uncertainties and irregularities in the proceedings, affidavits, and notices previously set forth, and for want of proper proceedings, affidavits, and notices, was demurrable for failure to point out the defects, or to allege that the defects appeared on the face of the proceedings.

5. Where, after the overruling of demurrers to complainants' bills to set aside tax deeds, defendant filed answers not only denying that the tax titles were invalid, but specifically averring that all the proceedings were regular, defendant waived his right to object to the ruling on the demurrer.

6. Where defendant's wife purchased certain tax deeds after the filing of a bill and the service of summons in a suit to set the same aside, she was not a necessary party to the suit.

7. Where, pending suit to set aside certain tax deeds, defendant transferred the same to his wife, an order before final decree requiring complainants to deposit the amount found due for interest and costs with the clerk for the use of defendant and his wife, as their interest might thereafter be determined, was proper.

8. Where certain tax deeds included other property than the lots owned by plaintiffs in a suit to set the deeds aside, a decree directing that the deeds be delivered up and canceled by the clerk of the circuit court was error, in so far as the property included in the deed, other than that in controversy, was concerned.

Appeal from Circuit Court, Cook County;
E. F. Dunne, Judge.

Action by Julia B. Hanford and others against Jacob Glos. From a judgment in favor of complainants, defendant appeals. Affirmed.

This is a bill filed in the circuit court of Cook county on May 19, 1902, by the appellees to set aside three tax deeds held by the appellant, Jacob Glos, and claimed to be clouds upon the title of appellees to lots 1 and 2 in block 1 in Walter S. Dray's Addition to Park Manor, in Cook county. One deed, known as No. 4,529K, was issued upon a sale for delinquent general taxes for the year 1895; the second deed, known as No. 4,881K, was issued upon sale for delinquent special assessment warrant No. 19,582; and the third deed, known as No. 4,883K, was issued upon sale for delinquent special assessment warrant No. 20,601. All three sales were made at the general sale for taxes in Cook county in 1896, and the sale of the year 1896 for delinquent taxes and special assessments was advertised in the delinquent list for that year to commence on August 10, 1896. Judgments were rendered against the property in controversy on July 15, 1896, for delinquent general taxes for the year 1895, and for delinquent special assessment warrants Nos. 19,582 and 20,601.

The bill sets out the proceedings in full, upon which the tax deeds were issued, and the same were received in evidence without objection upon the ground of variance. The bill alleges "that by reason of the many uncertainties, insufficiencies, and irregularities in said proceedings, affidavits, and notices above set forth, and for want of proper proceedings, affidavits, and notices, and for want of compliance with the statute in such case made and provided, said deeds conveyed no title whatsoever to said defendant, Jacob Glos," and that said deeds, for want of compliance with the statute, were null and void. The bill also alleged "that no notice of such purchases, or either or any of them, written or printed, or partly written and partly printed, stating when the pretended purchaser of the premises at such tax sales as aforesaid purchased the lands or lots, or in whose name the said premises, lands, or lots were taxed or assessed, or the description of the lands or lots purchased, or of the premises of your orators, or for what year said premises, lands, or lots were taxed or assessed, or when the time of redemption would expire, was served upon the said firm of Hall, Dresser & Co. [who, it is alleged, were agents of complainants for said premises], or upon any or either of them, as is required by the statute in such cases made and provided, nor was any such notice as aforesaid served upon your orators, or any or either of them, at the time when such notices should have been served, or at any time; and your orators further show that the said firm of Hall, Dresser & Co. and your orator Julia Blanche Hanford could have been found upon diligent inquiry in the coun-

*Rehearing denied December 9, 1904.

ty of Cook at least three months before the expiration of the time of redemption, and each of them, on such pretended sales as aforesaid."

The appellant filed a general demurrer to the bill, which demurrer was overruled. Thereupon the defendant filed an answer denying that said tax sales and tax deeds were null and void, and claiming that his title was good and valid, and in his answer saying "that all the proceedings concerning the levy, assessment warrant, collector's return, advertisement, judgment, sale, issuance of certificates and of deeds of said premises because of delinquent taxes and special assessments were strictly regular, legal, proper, and valid, and that by virtue of said tax sales and deeds this defendant acquired a valid legal title to said premises, and now holds the legal title to the same." The original bill was amended by leave of court. A demurrer was filed to the bill as amended, and overruled. Thereupon the defendant filed an answer to the bill as amended, containing the same denials and the same averments as the answer to the original bill. Replications were filed, and proofs documentary and oral were introduced. On March 21, 1904, the court rendered a decree in conformity with the prayer of the bill, finding that said tax deeds were null and void, and constituted clouds upon the title of complainants, and should be removed, and ordered, adjudged, and decreed "that the said deeds of conveyance from the said Philip Knopf, county clerk, to the defendant herein, Jacob Glos, described in the bill of complaint herein, and recorded in the recorder's office of the said county of Cook, as described in said bill of complaint, be, and the same are each of them, hereby set aside and declared null and void as against the complainants, their heirs and assigns, as a cloud upon the title of complainants, and that the said deeds be delivered up and canceled." The present appeal is prosecuted from the decree so rendered.

Jacob Glos (John R. O'Connor, of counsel), for appellant. Clarence T. Morse, for appellees.

MAGRUDER, J. (after stating the facts). Counsel for appellees sets up a number of grounds upon which it is claimed that the tax deeds sought to be set aside are null and void. We only deem it necessary, however, to notice two of such grounds, which, in our opinion, are sufficient to justify the decree of the court below.

1. The first ground urged against the validity of the tax deeds is that there was no valid precept or process for a sale in the case of either of said tax sales. The three precepts for the sale of the premises in question were not made on August 10, 1896, the day of the sale, nor did they bear date as of that day; but one of them was made or bore

date on July 15, 1896, the date when the judgment was rendered, and the other two were made or bore date on July 20, 1896, five days after the rendition of the judgment. Under section 194 of the revenue act (Hurd's Rev. St. 1903, p. 1542, c. 120), the county clerk's certificate to the delinquent tax list should be made on the day advertised for sale, and, if made on the day the judgment was rendered, the sale is void for want of proper process. *Kepley v. Scully*, 185 Ill. 52, 57 N. E. 187; *Kepley v. Fouke*, 187 Ill. 162, 58 N. E. 303; *Glos v. Gleason*, 200 Ill. 517, 70 N. E. 1045. Said section 194 requires the county clerk to make a certificate to be entered on the record, and this certificate must be dated as of the day of the sale. The presumption is that the certificates were made at the times when they bear date, and as the certificates in the case at bar do not bear date as of August 10, 1896, the day of the sale, they are not in conformity with the statute. The validity of a tax title depends upon strict compliance with the statute, and, as the certificates here were not made at the time required by the statute, the process under which the officer making the tax sale was authorized to act was not valid.

2. The certificate to the delinquent list, which is the foundation of the three tax deeds in controversy, is defective. It commences as follows: "State of Illinois, county of Cook, ss.—I, William Penn Nixon, publisher of *The Inter-Ocean*, do hereby certify that the foregoing list of lands and lots contained in the newspaper known as *The Inter-Ocean*, to which this certificate is attached," etc. The certificate is signed, "William Penn Nixon." This identical form of certificate was held by this court to be defective in *McChesney v. People*, 174 Ill. 46, 50 N. E. 1110. It fails to certify the relation of the person making it to the newspaper, as required by section 186 of the revenue act. Again, the delinquent list was not properly filed. The file marks upon the delinquent list are signed by "Philip Knopf, county clerk." In *McChesney v. People*, supra, it was held that the offices of county clerk and clerk of the county court are distinct, though filled in this state by the same person, and that the filing by such person of a newspaper advertisement of delinquent lands, certifying to the fact as "county clerk," is not a compliance with section 186 of the revenue act (Hurd's Rev. St. 1903, p. 1540, c. 120), requiring such newspaper "to be filed as part of the records of the county court." The file mark should have shown that the delinquent list was filed in the office of the clerk of the county court of Cook county as is by law required, not in the office of the county clerk of Cook county. *Glos v. Woodard*, 202 Ill. 484, 67 N. E. 3.

It is not denied on the part of appellant's counsel that the defects in question exist, nor is it contended that the tax deeds are not null and void on account of such defects.

But the contention of counsel for appellant is that the allegation of the bill is too general in its nature, in averring that the deeds were void because of the defects appearing upon the face of the proceedings, and in not pointing out specifically upon the face of the bill what such defects are. We are inclined to think that this objection to the bill was good upon demurrer. The bill ought to show upon its face in what respect the tax title is invalid. But the appellant has waived his right to insist upon this objection here, because, after his demurrers to the original and amended bills were overruled, he did not stand by his demurrers, but answered the bill both as originally filed and as amended. In his answers he not only denied that the tax titles were invalid, but specifically averred that all the proceedings prior and incident to the tax sale and tax deeds were valid and regular. "The rule is that a defendant, by answering a bill in chancery after the overruling of his demurrer thereto, waives the demurrer, except so far as he may have the same advantage on final hearing, and he cannot assign for error the ruling upon the demurrer." *Baumgartner v. Bradt*, 207 Ill. 345, 69 N. E. 912, and cases there cited. In *Gleason & Bailey Mfg. Co. v. Hoffman*, 168 Ill. 25, 48 N. E. 143, we said: "By answering after a general demurrer is overruled, the right to assign error in overruling the demurrer is waived."

3. The point is made that Mrs. Emma J. Glos should have been made a party. Appellees were under no obligation to make her a party. If she was a purchaser at all, she was a purchaser pendente lite; the deed executed to her by her husband, Jacob Glos, having been made after the filing of the bill and the service of summons. She took her title subject to whatever decree the court might ultimately render in the case. *Harms v. Jacobs*, 160 Ill. 589, 43 N. E. 745. Moreover, Mrs. Glos suffered no injury, because an order was entered before final decree requiring the complainants to deposit the amount found due for interest and costs with the clerk for the use of Jacob Glos and Emma J. Glos, as their interests might thereafter be determined, and the decree finds that this was done. Such an order is not erroneous. *Bonner v. Illinois Land & Loan Co.*, 96 Ill. 546.

4. Counsel for appellant also claim that the decree is erroneous in ordering "that said deeds be delivered up and canceled." We are inclined to think that the decree is erroneous in this respect, inasmuch as the deeds described other lands than the lots owned by the appellees. In *Glos v. Adams*, 204 Ill. 546, 68 N. E. 398, we said (page 548, 204 Ill., page 398, 68 N. E.): "It further appears that the tax deed sought to be set aside and canceled included other lands than the premises claimed by appellee. In the decree the court set aside said deed, and ordered that it be delivered up by Glos, and canceled by

the clerk of the circuit court. This was error. The deed should not have been set aside and canceled, except as to the premises described in the bill. *Gage v. Curtis*, 122 Ill. 520, 14 N. E. 30." It is not necessary, however, to reverse the case because of this defect in the form of the decree. The decree may be modified here by this court. *Low v. Graff*, 80 Ill. 360. The decree will therefore be modified by the addition of the following words, to wit, "In so far as these deeds relate to the property described in the bill of complaint herein;" said words to be inserted in the decree after the following words, to wit, "that said deeds be delivered up and canceled." The decree of the circuit court, after being modified as above indicated, is affirmed, and the costs will be equitably divided between the parties.

Decree affirmed.

(212 Ill. 327)

**RUSSELL v. HIGH SCHOOL BOARD OF
EDUCATION OF SCHOOL DIST.**

NO. 131 et al.*

(Supreme Court of Illinois. Oct. 24, 1904.)

SCHOOL DISTRICT — POWERS — CONSTITUTIONAL
LAW — LIMITATION OF INDEBTEDNESS — STAT-
UTES — CONSTRUCTION — MAINTENANCE OF
HIGH SCHOOL.

1. Under the school law (Laws 1889, p. 239), providing for the organization of school districts and the maintenance therein of free schools in which the children of the state may receive a good common school education, and Const. art. 8, § 1, providing that the General Assembly shall provide a thorough and efficient system of free schools, whereby all children of the state may receive a good common school education, any school district may establish and maintain a high school department.

2. Since, under the direct provisions of Const. art. 9, § 12, no school district has power to become indebted for any purpose to an amount, including its existing indebtedness, in the aggregate exceeding 5 per centum on the value of the taxable property therein, Laws 1901, p. 296, amending the School Law (Laws 1889, p. 277) §§ 41, 42, providing that any school district having a population of at least 2,000 inhabitants is authorized to establish and maintain a high school, and authorizing the election of a board of education therefor, are ineffectual to authorize a district to incur a debt beyond 5 per centum of the taxable property in a school district.

Appeal from Circuit Court, Cook County;
E. F. Dunne, Judge.

Suit by Elizabeth A. Russell against the High School Board of Education of School District No. 131 in Cook county and others. Decree for defendants, and plaintiff appeals. Reversed.

L. C. Ruth, for appellant. Thatcher, Griffen & Wright, for appellees.

CARTWRIGHT, J. Appellant, a resident and taxpayer of School District No. 131 in Cook county, filed her bill in the circuit court of said county against the appellees, alleging that the taxable property within said district, as ascertained by the last assessment for

*Rehearing denied December 9, 1904.

state and county taxes for the year 1903, was \$638,992; that the district had issued bonds and become legally indebted to the amount of \$16,500, and that the high school board of education threatened to issue interest-bearing bonds of the district to the amount of \$31,000, which would make the indebtedness of said district more than 7 per cent. of the value of said taxable property; and praying the court to enjoin the defendants from issuing bonds or contracting any obligation which, with existing indebtedness of the district, should exceed 5 per cent. of the value of the taxable property of said district as ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness. The defendants answered the bill, admitting its allegations as to taxable property and indebtedness of the district, but alleged that the district had a population of 2,418, and that a high school had been established therein, known as "Morgan Park High School District"; that the district was not indebted on account of the establishment or maintenance of said high school, and that the proposed issue of \$31,000 of bonds was not within the prohibition of the Constitution. The cause was heard upon the bill and answer, and the bill was dismissed for want of equity, at the cost of complainant.

The school law provides for the organization of school districts and the maintenance therein of free schools in which the children of the state may receive a good common school education. Laws 1889, p. 239. Under that act any school district can maintain different departments, and grade and classify the scholars so as to promote the efficiency of the school. It may maintain and establish grades and divisions for instruction of advanced scholars in the same higher branches that are taught in high schools. Section 1 of article 8 of the Constitution declares: "The General Assembly shall provide a thorough and efficient system of free schools, whereby all children of this state may receive a good common school education." That section is both a mandate to the Legislature and a limitation upon their power to establish schools except for the purpose of a good common school education. But a high school for the education of more advanced pupils is a school of the character required by the Constitution. Any school district may establish and maintain a high school department. *Richards v. Raymond*, 92 Ill. 612, 34 Am. Rep. 151; *Powell v. Board of Education*, 97 Ill. 375, 37 Am. Rep. 123. As originally enacted in 1889, the school law provided that any school township might, in pursuance of an election for that purpose, establish a township high school, and the township should be regarded as a school district for that purpose, and the township board of education should have the powers and discharge the duties of directors of such district. It was also provided that two or

more adjoining townships or parts of townships might co-operate in the establishment and maintenance of a high school. The evident purpose of these provisions was to enable a township or several school districts to establish a high school where it would be impossible or undesirable for single districts to maintain schools of that grade separately. In 1901 sections 41 and 42 of the school law were amended, and the portion of the amendment material in this case is the following proviso to section 42: "Provided, that any school district having a population of at least two thousand (2,000) inhabitants, may in the same manner as herein provided for establishing and maintaining a township high school, establish and maintain a high school for the benefit of the inhabitants of such school district, and elect a board of education therefor with the same powers hereby conferred on township boards of education." Laws 1901, p. 296. School District No. 131 established such a high school for the benefit of the inhabitants of the school district, and the question is whether it can incur an indebtedness in excess of 5 per cent. of the assessed value of the taxable property of the district for the purposes of the high school.

Section 12 of article 9 of the Constitution provides: "No * * * school district * * * shall be allowed to become indebted in any manner or for any purpose, to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes, previous to the incurring of such indebtedness." It would seem that the language leaves no room for interpretation. The provision is that any school district having a certain population may establish and maintain a high school for the benefit of the inhabitants of such school district; and the fact is that District No. 131 has established a high school for the district, and in doing so has exercised a power which it already had, the only difference being that the high school is in charge of a different board of education. With reference to township high schools, section 41 provides that for the purposes of building schoolhouses, supporting the school, and paying the necessary expenses, the territory for the benefit of which a high school is established shall be regarded as a school district. There is no warrant for saying that when District No. 131 established a high school it became two districts, the one within and coextensive with the other, or the one superimposed upon the other. The establishment of the high school by the school district under the control of a different board of education was a mere division of existing powers of the school district between two boards of education. What the new board of education can do the district was already authorized to do through the existing board

of education. If the Legislature, by authorizing a school district to establish a high school, can also authorize it to incur indebtedness beyond the constitutional limit, they could get rid of all the restrictions of the Constitution by authorizing the management of each grade or department of the public school by a different board of education, with different buildings. Such a construction of our Constitution has never been adopted.

Even if it could be said that there are two corporations covering the same territory, the creation of the new one would be nothing but a division or redistribution of existing powers under the school law, and in *Wilson v. Board of Trustees*, 133 Ill. 443, 27 N. E. 203, it was said that the organization of the sanitary district was essentially and palpably different from the creation of new corporations vested with some of the functions of local government of pre-existing municipal corporations. It was within the power of the Legislature to provide for the establishment of a high school under the control of a board of education elected for that purpose; but they could not, by multiplying the boards of education in the same territory, authorize the district to incur indebtedness beyond the constitutional limit. The proposed issue of \$31,000 of bonds, including the existing indebtedness of the school district, would exceed the limit, and the court erred in dismissing the bill.

The decree is reversed, and the cause is remanded to the circuit court of Cook county, with directions to enter a decree in accordance with the prayer of the bill enjoining the defendants from issuing bonds or contracting any obligation which, with the existing indebtedness of School District No. 131, shall exceed 5 per cent. of the assessed value of the taxable property therein, to be ascertained by the last assessment for state and county taxes previous to incurring such indebtedness.

Reversed and remanded.

(212 Ill. 232)

CHICAGO CITY RY. CO. v. MATTHIESON.*

(Supreme Court of Illinois. Oct. 24, 1904.)

APPEAL AND ERROR—REVIEW—TRIAL—IMPEACHMENT OF WITNESS—INCONSISTENT STATEMENTS—ORDER OF PROOF—DISCRETION OF COURT—INSTRUCTIONS.

1. Where there was no ruling on a motion to exclude a paper admitted in evidence, and no exception taken to its admission, the motion cannot be reviewed.

2. A paper was shown a witness on cross-examination, and he stated that he had signed it; that his statement when the paper was written was no different from his statement in court; that he did not state what was written. But when the paper was admitted and the witness had read it, he merely stated that he signed it. *Held*, that the court did not err in admitting the paper.

3. Though a written statement by a witness inconsistent with his oral statement used for impeachment should be introduced in rebuttal instead of on cross-examination, the judgment will not be reversed for failure to observe such rule, as the order of proofs is within the discretion of the trial court.

4. If a witness sought to be impeached by a prior inconsistent statement, neither directly admits nor denies the statement, but gives an indirect answer, it is proper to show the prior statement.

5. Evidence of declarations of a witness out of court, in corroboration of testimony given by him on the trial, is inadmissible, even after he has been discredited by evidence of inconsistent statements out of court.

6. The striking out of proper testimony is no ground for reversal where the witness afterwards repeated the same testimony.

7. Refusing a proper instruction is not error where the same principle has been covered.

Appeal from Appellate Court, First District.

Action by Johanna M. Matthieson, administratrix, against the Chicago City Railway Company. Judgment for plaintiff was affirmed by the Appellate Court, and defendant appeals. Affirmed.

William J. Hynes and Edward C. Higgins (Mason B. Starring, of counsel), for appellant. Francis J. Woolley, for appellee.

CARTWRIGHT, J. William C. Matthieson, a painter, who had been working at his trade during the day, in going home in the evening drove north with his son, 19 years old, in appellant's car tracks on Halsted street in a light wagon, in which there were pails and utensils used in painting and calclining. At Thirty-Third street, as he was turning east, the left hind wheel of the wagon was broken, he was thrown out and fatally injured, and the horse ran away. This suit was brought by appellee, as administratrix of his estate, in the superior court of Cook county, charging the appellant with causing his death by negligence in running one of its cars against the wagon. A plea of the general issue was filed by the defendant, and there was a trial by jury. There were a number of witnesses on each side, apparently disinterested, who testified directly contrary to each other. The evidence for the plaintiff tended to show that the horse was going slowly in the car tracks; that a north-bound car came up rapidly behind and slowed down somewhat, while the bell was violently rung; that the horse became somewhat excited and increased his speed; that when in the act of turning out of the car tracks into Thirty-Third street the speed of the car was increased, and it struck the tail-board and left hind wheel of the wagon, breaking them and tipping the wagon over, when the horse ran away. The evidence for the defendant was that the wagon was not struck by the car at all; that when in the car tracks on Halsted street the horse was excited, acting wild, and going at a rapid rate; that in turning east out of the car

*Rehearing denied December 9, 1904.

¶ 4. See *Witnesses*, vol. 50, Cent. Dig. § 1245.

tracks the wheel was wrenched and broken; that on account of the speed of the horse the wagon was swung around and tipped in such a way as to throw Matthieson out after he had gone some distance in Thirty-Third street; and that the fright of the horse was increased by the falling out of the pails and utensils in the wagon when the wheel broke down. The trial resulted in a verdict and judgment for \$5,000, and the judgment was affirmed by the Appellate Court for the First District.

The first error alleged consists in the admission of evidence on behalf of the plaintiff. The most material question of fact in controversy was whether the car struck the wagon, as claimed by the plaintiff. On that question Frederick Kern testified, for the defendant, that he was sitting in front of his store, on the west side of Halsted street, at Thirty-Third street, reading a paper; that he heard the sound of a car bell ringing pretty loud and looked up; that he saw a little wagon ahead of the car about 25 or 30 feet; that the horse was on a lively trot, and as Matthieson turned short and went around the corner the wagon upset or tipped over with the whitewash and other things that were in the wagon. On his cross-examination he was shown a paper and said that the name subscribed to it was his signature. He read the paper and again stated that he signed it. The paper was then offered in evidence, and the court held that a part of it might be read to the jury unless counsel for defendant wished to examine witness further about it. There was no further examination at that time and a part of the paper was read, in which it was stated that when the witness first saw the wagon the car was three or four feet from it; that it might have been five or six feet away; that the car was going slowly, and did not stop at any time before the accident, and that he could not see light between the car and wagon when the man fell. On redirect examination by counsel for defendant the witness said that the paper, except the signature, was not in his handwriting; that he never read it and had no recollection of seeing it, and that what he stated at the time the paper was written was not in any way different from what he stated in his testimony. Counsel for defendant then moved to exclude the paper, but there was no ruling on the motion and no exception, so that on the motion to exclude the paper there is nothing to review. The court offered counsel an opportunity to examine the witness further concerning the paper before it was read; and if the subsequent testimony of the witness had then been introduced a different question would be presented. The witness was a German who did not read English readily, and his final testimony was to the effect that he did not state what was written in the paper; but when the paper was admitted the witness had read it and merely stated that he had

signed it. His admission was *prima facie* evidence that the statement was his own, and the court did not err in admitting it.

It is further urged that the court erred in permitting the inconsistent statement to be read during the cross-examination of the witness. The proper time would have been when plaintiff presented his side of the case in rebuttal. *Chicago City Railway Co. v. McLaughlin*, 146 Ill. 353, 34 N. E. 796. It is not a proper method to mingle testimony for the defendant with that for the plaintiff, unless there is something to warrant a suspension of the ordinary rule. In the orderly trial of a cause one party introduces his evidence and then the other party is heard, and the introduction of impeaching evidence during the examination of a witness is not in accordance with that rule, but the order in which evidence is introduced is generally regarded as in the discretion of the court. In that view the admission of the paper at the time it was read was not error for which the judgment could be reversed.

The witness Kern was also asked, on his cross-examination, if he did not make a statement to another person, and the statement was inconsistent with his testimony at the trial as to the distance between the car and the wagon. He said that it might have been that he did; that the statement that he made to that person was probably a year after the coroner's inquest, when his memory was not as good as at the inquest. The person named was afterwards called by the plaintiff to prove that the statement was made by Kern, and it is insisted that this was error. The rule is that if the witness neither directly admits nor denies the statement, but gives any indirect answer not amounting to an admission, it is competent for the opposite party to prove that it was made. *Ray v. Bell*, 24 Ill. 444. In this case the witness did not directly admit that he made the statement, and it was not error to admit the evidence that he did make it.

After the paper signed by the witness Kern had been read to the jury, counsel for defendant, on redirect examination, offered in evidence the original deposition of the witness taken at the coroner's inquest, three days after the death of Matthieson, in which he testified substantially as on the trial. The deposition was excluded and the defendant excepted. It is insisted by counsel that, after the court had admitted the contradictory statement for the purpose of casting discredit upon the testimony, the defendant had a right to show by the deposition that the version of the occurrence given at the inquest, prior to the alleged contradictory statement, was consistent with, and in corroboration of, his testimony given on the trial. The decisions as to what circumstances will justify the admission of evidence of prior statements consistent with the testimony of a witness are not harmonious, although the difference seems to be more fre-

quently in the language of the courts than the application of the rule. It is not necessary, however, to review the decisions, for the reason that the rule in such cases has been long established in this court. The purpose of introducing evidence of statements out of court inconsistent with or contradictory to statements given upon a trial is to discredit the witness, and such inconsistent or contradictory statements are never, in any case, evidence of the fact. If two statements are contradictory they cannot both be true; and the fact that they were made tends to show that the witness is unreliable, on account of an uncertain memory or want of truthfulness. It seems clear that such evidence could not be overcome or explained by proving that the witness at some other time made a statement consistent with his testimony. The witness is discredited by the fact that he has contradicted himself and related the transaction in different ways, and to admit evidence that at some time he had made a statement consistent with his testimony would only show that at different times he had been making different statements about the same matter. The only way to meet evidence of a contradictory statement is to prove that the witness did not make it. Evidence of a previous statement consistent with the testimony of a witness is no more competent as evidence of the fact than the contradictory statement. For these reasons proof of the declarations of a witness out of court in corroboration of testimony given by him on the trial of the case is, as a general rule, inadmissible, even after he has been impeached or discredited. *Stolp v. Blair*, 68 Ill. 541. To this general rule there are exceptions, which were first stated in *Gates v. People*, 14 Ill. 483. In that case Devol was a witness on the trial of *Gates* for the murder of *Liley*. Devol was under indictment as an accessory after the fact to the same murder. He testified to an interview with *Gates* when *Gates* was in jail on another charge, and before he had been arrested for the murder. The defendant called witnesses to show that the character of Devol for truth and veracity was bad, and also proved that the indictment was then pending against him as an accessory after the fact to the murder of *Liley*. The court then admitted evidence that Devol, on coming out of the jail, gave the same account of the interview as he testified to on the trial. The general reputation for truth and veracity of Devol was attacked, and the natural inference from the fact that an indictment was pending against him would be that he would try to relieve himself from suspicion by showing that *Gates* and his brother were the guilty parties, and it was said that evidence of his statement to the sheriff before he was accused and when no such motive existed, and when he could not have foreseen the result of his interview, was properly admitted to sustain his

credibility. It was held that former statements of a witness may be given in evidence in particular cases, "as where he is charged with testifying under the influence of some motive prompting him to make a false statement. It may be shown that he made similar statements at a time when the imputed motive did not exist, or when motives of interest would have induced him to make a different statement of facts. So, in contradiction of evidence tending to show that the witness' account of the transaction was a fabrication of a recent date, it may be shown that he gave a similar account before its effect and operation could be foreseen." That was a case of showing a consistent statement when the motive for a false statement did not exist. In *Waller v. People*, 209 Ill. 284, 70 N. E. 681, a witness testified that, in the affray when the homicide was committed, defendant kicked him, and there was testimony of witnesses that in giving an account of the affair the witness omitted to state that the defendant kicked him. The inference raised by this testimony was that the material addition to his former statements was a recent fabrication of the witness after the statements testified to by the other witnesses. It was therefore held competent for the people, in rebuttal, to support the credibility of the witness by showing that the kicking was not a new addition to his account, but that in relating the transaction to other witnesses about the time of it he said the defendant kicked him. Of course, it is not necessary that the record should show a charge or allegation of an improper motive influencing the witness to give testimony different from the contradictory statement, or a charge, in terms, of a recent fabrication. If the inference, from the testimony, of a contradictory statement would be to stamp the testimony on the trial as arising from some motive or as a recent invention, evidence of similar statements before the motive had any existence or showing that the testimony is not a recent fabrication is admissible, but not otherwise. There was no such ground for admitting the deposition in this case, and the court did not err in excluding it.

It is next contended that the court erred in striking out the testimony of a witness that the horse of Matthieson, in coming up Halsted street, was acting wild. The witness was describing the manner of the horse, and said that he ran fast and was wild. The statement was not a mere conclusion and ought not to have been stricken out. *Overtown v. Chicago & Eastern Illinois Railroad Co.*, 181 Ill. 323, 54 N. E. 898. The witness immediately after repeated that the horse was going fast and was fresh and wild, and explained just what she meant, so that the defendant had all the benefit that it would have had if the ruling had been different. The striking out of the testimony is not ground for reversal.

It is argued that the court erred in refusing to give to the jury instructions asked by the defendant to the effect that, if Mathieson could, by the exercise of ordinary care, have escaped the injury, they should find for the defendant, and that they should not be influenced by appeals for sympathy, and should try the case the same as though the defendant was a living person and not a corporation. These instructions were correct, but the points were fully covered by other instructions stating the same principles.

Finally, it is urged that the court erred in permitting the plaintiff, after resting her case, to call another witness. That was within the discretion of the court, which we think was not abused. The judgment of the Appellate Court is affirmed.

Judgment affirmed.

(212 Ill. 400.)

MERRIFIELD'S ESTATE v. PEOPLE.*

(Supreme Court of Illinois. Oct. 24, 1904.)

INHERITANCE TAX—GIFTS IN CONTEMPLATION OF DEATH.

1. Conveyances without consideration, though absolute, made three days before the grantor submitted to a contemplated surgical operation, from the effects of which he died, are in contemplation of death, and therefore subject to an inheritance tax, under Hurd's Rev. St. 1903, c. 120, par. 366.

Appeal from La Salle County Court; M. O. Southworth, Judge.

In the matter of the estate of L. B. Merrifield, deceased. From a judgment sustaining the assessment of an inheritance tax certain persons appeal. Affirmed.

Leonard B. Merrifield, a resident of the city of Ottawa, La Salle county, Ill., departed this life intestate on April 15, 1903, leaving, him surviving, Mary C. Merrifield, his widow, and Louis W. Merrifield and Lilla M. Wood, his children and sole heirs at law. At the time of his death he was about 65 years of age. He had, up to a few months prior to his death, been actively engaged in business, and had accumulated a fortune. For a period of from eight to ten years prior to his death he had been afflicted with an enlargement of the prostate gland, from which at times he suffered great pain. He had had a severe attack some three or four months prior to his death, after which, up to the time of his going to the hospital, he was under the care of a physician, and confined to his house. In the month of April, 1903, under the advice of his physician, he determined to submit to a surgical operation. On the 18th day of that month he went to the Chicago Hospital, in the city of Chicago, and on that day an operation was performed, from the effects of which he died two days thereafter. Before his departure for Chicago, on April 10th, by conveyances and

assignments absolute in form, he conveyed and assigned all his property, both real and personal, with the exception of two life insurance policies, aggregating \$3,000, and promissory notes and accounts aggregating \$4,204.84, to his wife and children. Real estate of the value of \$6,900 and personal property of the value of \$101,998.30 were transferred by him to Mrs. Merrifield, and real estate of the value of \$7,500 and personal property of the value of \$45,000 were transferred by him to Louis W. Merrifield, and personal property of the value of \$45,000 was transferred by him to Lilla M. Wood. Thomas W. Burrows was appointed administrator of his estate, and D. B. Snow was appointed appraiser to appraise his estate under the provisions of an act entitled "An act to tax gifts, legacies and inheritances in certain cases and to provide for the collection of the same," approved June 15, 1895, in force July 1, 1895, and such proceedings were had before the county judge of La Salle county as resulted in an assessment of an inheritance tax of \$887.98 to be paid by Mary C. Merrifield, of \$325 to be paid by Louis W. Merrifield, of \$250 to be paid by Lilla M. Wood, and of \$80 to be paid by the estate of Leonard B. Merrifield, deceased. An appeal was prosecuted to the county court of said county. The matter was heard upon oral testimony, depositions, and a stipulation in writing, and the action of the county judge was approved, and a further appeal has been prosecuted to this court.

The issue in this court is narrowed to a very small compass by virtue of the stipulation that the only question to be decided in this case is, were the deeds, gifts, grants, conveyances, and assignments executed by Leonard B. Merrifield on April 10, 1903, made in contemplation of the death of said Leonard B. Merrifield, within the meaning of the act to tax gifts, legacies, and inheritances?

Jarvis R. Burrows and Charles E. Woodward, for appellants. H. J. Hamlin, Atty. Gen., for the People.

HAND, J. (after stating the facts). It is provided by section 1 of the inheritance tax act (Hurd's Rev. St. 1903, c. 120, par. 366) that all property, real, personal, and mixed, or any interest therein or income therefrom, which shall be transferred by "deed, grant, sale or gift, made in contemplation of the death of the grantor or bargainor, or intended to take effect in possession or enjoyment after" the death of the grantor or bargainor, shall be subject to a tax, etc. In construing this act in *Kochersperger v. Drake*, 167 Ill. 122, 47 N. E. 321, 41 L. R. A. 446, it was held the imposition of such tax was not imposed as a burden upon the property itself, but upon the right of succession thereto. From the admitted facts in this case it is clear no consideration was paid Leonard B. Merrifield by Mary C. Merrifield, Louis W. Merrifield, or Lilla M. Wood for the conveyances

*Rehearing denied December 9, 1904.

and transfers made to them, respectively, of said property, but that the same was conveyed and transferred to them to place the title thereto in them prior to the death of Leonard B. Merrifield. It is therefore clear the transfers to each of them by him were gifts, and we think it equally clear said transfers were made by Leonard B. Merrifield in contemplation of death. The statute provides in case of gifts an inheritance tax shall be collected if (1) the gift was made in contemplation of the death of the donor, or (2) was intended to take effect in possession or enjoyment after the death of the donor. It will be observed, however, the statute does not provide the donee of property shall be liable for an inheritance tax, but only provides he shall be liable for an inheritance tax when the transfer is made in contemplation of the death of the donor.

It is urged that the stipulation found in the record to the effect that the transfers to Mrs. Merrifield and to Louis W. Merrifield and Lilla M. Wood were absolute, that they were accepted by them, that they entered into the possession and ownership of the property transferred to them, respectively, and that after said transfers were executed Leonard B. Merrifield had no interest in the property, shows that the transfers were gifts *inter vivos*, and not gifts *causa mortis*, and that the title to the property vested in said donees during the life of Leonard B. Merrifield, and that the donees are not liable to pay an inheritance tax by reason of the transfers of said property to them. We think the stipulation may be given full force and effect, and that it may be conceded that the transfers were absolute, and that after the execution and delivery thereof the title vested in the donees thereof absolutely as against Leonard B. Merrifield, and still the person receiving said property be held liable to pay an inheritance tax by reason of such transfers. The stipulation does not state the transfers were not made by Leonard B. Merrifield in contemplation of death. In the eye of the law the transfers may have been absolute and yet have been made by Leonard B. Merrifield in contemplation of death, and, if so made, the donees are liable to an inheritance tax. In other words, a gift *inter vivos*, if made in contemplation of the death of the donor, will subject the donee, under the statute, to the payment of an inheritance tax, while, if made not in contemplation of death, it would not.

It is said, however, by appellants, that a transfer of property made without consideration, in contemplation of death, is a gift *causa mortis*, and that the stipulation is that the gift was absolute; hence it could not be a gift *causa mortis*, as a gift *causa mortis* is conditioned upon the death of the donor. A gift *causa mortis*, strictly speaking, applies only to personal property, and the gift is defeated if the donor recover. In this case the subject-matter of the transfers was both

real and personal property, and the transfers were absolute, and not upon the condition that they should be revocable in case of the recovery of the donor. They were, however, made in contemplation of his death. They fall, therefore, more nearly within the description gifts *inter vivos* made in contemplation of death than within the designation gifts *causa mortis*. While no witness testified, and it was not stipulated, that the transfers were made in contemplation of the death of Leonard B. Merrifield, the county court properly reached the conclusion from the admitted facts that the transfers were made by Leonard B. Merrifield in contemplation of death. This is a new question in this court. We have examined the authorities cited and relied upon by the appellants from other states, and are of the opinion nothing is found therein inconsistent with the views herein expressed when applied to a case like this. If, however, it is held therein that the donee of property is not liable to pay an inheritance tax by reason of the fact, alone, that the transfer to him was absolute, although made in contemplation of the death of the donor, we are not disposed to be governed by them in giving a construction to our own statute, as we think it clear the statute in force in this state will not bear such construction. The judgment of the county court will be affirmed.

Judgment affirmed.

(212 Ill. 492)

SHAFFNER v. SHAFFNER.*

(Supreme Court of Illinois. Oct. 24, 1904.)

ALIMONY—FAILURE TO PAY—CONTEMPT—INABILITY TO PAY—SUFFICIENCY OF SHOWING—DEMAND—PAYMENT.

1. Failure of a divorced husband to comply with a decree directing the payment of alimony is *prima facie* evidence of contempt.

2. In a proceeding against a divorced husband for contempt in failing to comply with an order requiring the payment of \$80 per month alimony, a showing that respondent though engaged in the practice of law did not keep any books showing his receipts, and that while for the seven months preceding the proceeding he had earned from \$100 to \$150 per month, it had all been required to pay his expenses, was too general to excuse the failure to pay.

3. The duty of a divorced husband to comply with a decree requiring the payment of alimony is not affected by the fact that the divorced wife's father contributes to her support.

4. A demand for payment of alimony is not a necessary prerequisite to a commitment for contempt in failing to pay, where defendant was given opportunity to pay when notice was served on him and his noncompliance with the decree was willful.

5. In a proceeding against a divorced husband for contempt in failing to pay alimony, the payment of alimony, accruing more than one year before the proceeding, can be enforced.

Appeal from Appellate Court, First District.

*Rehearing denied December 9, 1904.

¶ 4. See Divorce, vol. 17, Cent. Dig. § 753.

Suit by Jennie Shaffner against B. M. Shaffner, in which complainant was granted a divorce and defendant ordered to pay alimony. From a judgment of the Appellate Court affirming an order adjudging defendant guilty of contempt, for failure to comply with the order requiring the payment of alimony, defendant appeals. Affirmed.

B. M. Shaffner, pro se.

SCOTT, J. On October 23, 1888, in the circuit court of Cook county, appellee obtained a divorce from appellant, and on the 29th of that month he was decreed by the court to pay her the sum of \$80 per month as alimony. On February 7, 1902, appellee filed her affidavit in that court showing that the sum of \$1,200 was due her on that decree, and that defendant had not paid anything thereon since June, 1901. Thereupon an order was entered requiring the defendant to show cause why he should not be attached for failure to comply with the decree, and on February 13, 1902, he filed a sworn answer stating that he intends no contempt, and has not been guilty of contempt, but that he has been, and still is, unable to pay the unpaid alimony on account of a lack of money or means with which to satisfy the same; that he owns no real estate; that his law library and household goods are mortgaged to one W. G. King; that certain of the notes secured by the mortgage are due, respondent is unable to pay the same, and King is threatening to foreclose; that the jewelry owned by himself and his present wife has been pledged for two years last past, and that the pledgee is threatening to sell the same on account of the nonpayment of the principal and interest secured by the pledge; that he is indebted to the Ashland Block Association for rent for his law office for three months, and that there are judgments against him in the courts of record of Cook county for about \$3,500; that for the last two years he has made a bare living for himself and family at the practice of law; that on February 7, 1902, he paid to the solicitors of complainant \$20, and within a few days will be able to pay \$30 more, and that he expects to pay about the sum of \$50 per month hereafter, but that at present he is unable to pay any back alimony or to exceed \$50 per month hereafter. On March 7, 1902, he filed a further affidavit showing that he had paid \$15 on account of the alimony on March 4, 1902, and \$10 on March 7, 1902, and that he will be able within a week or 10 days to make a further payment.

The court, having considered these affidavits, ordered that the appellant be attached for contempt. Thereupon, on March 15, 1902, appellant moved that the order of attachment be set aside and the cause continued; and, in support of that motion, filed his affidavit showing that he was not present when the order of March 7th was entered, and averring that he had had an arrange-

ment with solicitors for appellant by which the matter was to be continued until March 8th. The solicitors for appellee filed counter affidavits. The matter came on to be heard again on March 18, 1902, when the appellant testified in open court substantially to the matters averred in his answer, and in addition thereto that appellee resides with her father and receives from him \$50 or \$75 per month for her support; that appellant has an invalid brother and contributes \$5 a week to his support, and that his total indebtedness, including \$300 or \$400, which he owes for household expenses, is in the neighborhood of \$7,000; that he has paid \$90 on account of alimony since the institution of this proceeding; that since June 1, 1901, he has not earned enough to pay living and running expenses; that he keeps no accounts, as his business is all cash business and does not require a set of books; that in the month of June, 1901, he earned not to exceed \$125; that in July, August, and September of that year he did not earn to exceed \$25; that in September he did not receive from his business to exceed \$25 or \$50; that in October he did not take in to exceed \$100 or \$150—November was about the same; in December he received probably \$100 or \$125, and not to exceed that, and possibly below, for the month of January, 1902; that he did not receive to exceed \$100 for both the months of February and March, 1902; that he has paid as office rent 70 odd dollars per month up to four or five months ago, since which time his net expenditure for office rent has been reduced by subletting part of the rooms; that he pays no rent for the house in which he resides; that he once had the title to that property, but lost it through foreclosure; that his son had a few hundred dollars, and made some arrangement by which he has taken up or satisfied the mortgage indebtedness, and appellant occupies the property without paying rent; that he has married again; that his family consists of himself, his wife, and a stepdaughter 17 or 18 years of age; that his expenses at home run about \$2 a day; that he does not use \$50 a year on his own person; that he is engaged in attempting to form a combination among certain business interests, and that if he succeeds his compensation will be sufficient to pay all his indebtedness, and that the matter will be determined one way or the other within 60 days.

Thereupon the court continued the cause until the 2d day of June, 1902. At that time appellee filed a further affidavit, showing that, since the institution of the proceeding, \$320 had accrued on the decree for alimony, and that during that time she had been paid the sum of \$95 by appellant; that she had been informed and advised that appellant had received a very large fee amounting to several thousand dollars during that period. Appellant then filed an affidavit stating that

he had not received any such fee; that the combination which he had expected to effect had not been consummated; that, since the beginning of this suit, he had paid \$95 alimony, said payments being made at the rate of \$50 per month for the months of February and March, and expected within a day or two to pay the further sum of \$100 for the months of April and May; and that his financial condition remains the same as shown by his affidavit of February 7, 1902. Thereafter, on June 23, 1902, an order was entered adjudging appellant guilty of contempt of court because of his failure to pay alimony to appellee in accordance with the decree for alimony, and committing him to the county jail of Cook county for a period of six months, or until he shall have paid the sum of \$1,200 to appellee, or until he be discharged according to law. That order has been affirmed by the Appellate Court for the First District, and the appellant brings the cause to this court.

It is first urged that the court erred in adjudging the defendant guilty of contempt, for the reason that the evidence showed that he had attempted to comply with the decree but had been entirely unable to do so. A showing that a divorced husband has failed to comply with the decree directing the payment of alimony to the former wife is prima facie evidence of contempt. Where he seeks to satisfy the court that his failure to pay is due entirely to his inability to pay, the burden is on him to establish that fact. We do not think the showing made by appellant was sufficient to purge him of contempt. His testimony is entirely too general and indefinite in reference to the amount of money that he received from his practice between June, 1901, and February, 1902. During that period of seven months, he paid nothing whatever on account of this decree. He is actively engaged in the practice of law, but swears that he keeps no books showing his accounts with clients. He states that his earnings during the months of October, November, December, and January, which were a part of that seven months period, were from \$100 to \$150 per month. He does not show what was done with this money except to say that it took it all to pay living and running expenses. This is not sufficiently definite. Estimates and guesswork will not answer. He who seeks to establish the fact that his failure to pay is the result of lack of funds must show with reasonable certainty the amount of money he has received. He must then show that that money has been disbursed in paying obligations and expenses which, under the law, he should pay before he makes any payment on the decree for alimony. It is proper that he first pay his bare living expenses; but whenever he has any money in his possession that belongs to him, and which is not absolutely needed by him for the purpose of obtaining the mere necessities of life, it is his duty to make a pay-

ment on this decree. We are not satisfied from his answer, affidavits, and testimony that he has pursued this course. The answer and last affidavit filed by him indicate a purpose on his part to reduce the amount of the alimony without any action on the part of the court, rather than an attempt made in good faith to comply with the decree.

The fact that appellee receives an allowance from her father for her support is entirely without significance. The decree for the payment of \$80 per month fixes the legal obligation of appellant. Assistance rendered appellee by her parent in no wise affects the duty resting upon appellant to satisfy his own obligation in this regard.

Authorities from other states are cited to show that a proper demand for the payment of alimony is a prerequisite to a commitment for a contempt in failing to pay, and in *Blake v. People*, 80 Ill. 11, although the question of the necessity of demand was not before the court, it was said: "It is not perceived in what respect decrees for alimony differ from other decrees for the payment of money. Imprisonment for noncompliance therewith, unless willful, or unless upon a refusal of defendant, upon proper demand made, to deliver up his estate in satisfaction of the decree, is within the inhibition of the Constitution against imprisonment for debt." The only purpose of a demand is to give the defendant an opportunity to pay. Here the decree for alimony was originally entered by consent of the defendant. He knew exactly what its provisions were, and it was his duty to comply therewith without any demand, if it designated the time when, the place where, and the person to whom the payments were to be made. We are unable to determine from the abstract before us whether this decree was thus specific. In this proceeding, however, prior to the entry of the order of attachment, a notice was served upon the defendant by complainant's solicitor to the effect that complainant would on a day certain ask for a rule on the defendant to show cause why he should not be punished for contempt for failure to comply with the decree. Defendant then had an opportunity to pay the solicitor, and did in fact make a small payment to him. Under the circumstances shown here, failure to prove a demand cannot avail the defendant for two reasons: First, he was given an opportunity to pay when the notice was served upon him; and, second, his noncompliance with the decree must be regarded as willful.

It is then urged that courts will not compel payment of alimony beyond a year prior to the application, as the allowance is for the wife's maintenance from year to year. English cases are referred to in support of this doctrine. The question has not before been presented in this court, but in each of the cases of *Wightman v. Wightman*, 45 Ill. 167, *Barclay v. Barclay*, 184 Ill. 471, 56 N. E. 821, and *Deen v. Bloomer*, 191 Ill. 416, 61 N. E.

131, this court affirmed an order committing the defendant for contempt in failing to pay alimony for a period greater than one year; one purpose of the commitment being to enforce payment of the entire amount in arrears. Under these circumstances, we are not disposed to adopt the rule on this subject which appellant invokes. The judgment of the Appellate Court will be affirmed. Judgment affirmed.

(212 Ill. 481)

MCNEILL v. CITY OF CHICAGO et al.*

(Supreme Court of Illinois. Oct. 24, 1904.)

MANDAMUS — POLICE PATROL—APPOINTMENT—SUFFICIENCY OF PETITION.

1. A de facto police patrolman whose name has been dropped from the pay roll is not entitled to mandamus to compel the restoration of his name.

2. The fact of appointment of petitioner many years before to the office of police patrolman, and holding the same continuously until his name was dropped from the pay roll, does not show that he was such officer de jure at the time his name was dropped.

3. Petitioner for mandamus to restore his name to the pay roll as police patrolman alleged his prior appointment; the adoption of the civil service act of 1895 (Acts 1895, p. 85) by the city of Chicago, and that commissioners were appointed and the various places classified; that he was entitled to the protection of that act, but was removed without charges having been preferred against him; that the civil service commissioners certified the pay roll on which his name appeared for two years after the act was adopted; that he took the civil service examination, and passed with a grade of 99 on a scale of 100, and stood No. 11 on the eligible list; that the superintendent of police dropped his name from that list on the pay roll; that the first board of civil service commissioners in 1895, at the request of the chief executive officers of the city, adopted the practice of passing on and certifying all pay rolls, including the pay rolls of all police patrolmen, which practice had continued ever since. Held not to authorize the court to conclude that such certification of the pay roll was an evidence that petitioner was within the civil service.

Appeal from Appellate Court, First District.

Petition for mandamus by George R. McNeill against the city of Chicago and others. A judgment for defendants was affirmed by the Appellate Court (93 Ill. App. 124), and petitioner appeals. Affirmed.

This is a petition for mandamus, filed by George R. McNeill, making the city of Chicago, Carter H. Harrison, as mayor of said city of Chicago, Joseph H. Kipley, as superintendent of police of said city of Chicago, and Robert Lindblom, Edward M. Carroll, and John W. Ludwig, as civil service commissioners of said city, parties defendant, whereby the petitioner sought to obtain an order of the court directing that his name, as police patrolman of the city of Chicago, be again placed upon the pay roll of the police department of said city, from which pay roll

his name had been improperly and unlawfully stricken.

From the petition as amended it appears, after stating the incorporation of the city, the election of the mayor, the organization of the police department, including the office of superintendent of police, that defendant Kipley was in May, 1897, appointed such superintendent of police, and that said mayor and superintendent of police are still acting as such; that on June 14, 1887, the appellant was duly appointed to the office of police patrolman in Chicago, took the oath of office, entered upon his official duties as such police officer of said city, and served continuously from said date as police patrolman until May 31, 1895, "when he was by said superintendent of police assigned to duty as patrol sergeant of police"; that he served as such patrol sergeant until June 19, 1897, when, by order of said superintendent, appellant resumed his duties as such police patrolman of said city, "and hath remained such police patrolman from thence hitherto"; that during all his said service "he has never been charged with any misconduct or dereliction of duty in his said office, nor has ever been reprimanded for misconduct or neglect of his duties as such officer"; that on December 18, 1897, by direction of said superintendent, appellant took the civil service examination as to his qualifications as policeman of said city, which examination was conducted by the civil service commissioners under the civil service act of Illinois (Acts 1895, p. 85) in force March 20, 1895, and was "passed" upon such examination with a standing of 99 upon a scale of 100, and was No. 11 upon the list of eligibles; that on March 14, 1898, appellant's name was, by and under such direction, dropped from said pay roll, and said superintendent "has caused the name of your petitioner to be omitted and excluded from the pay roll of the police department of the city of Chicago, and still so causes the name of your petitioner to be omitted from said pay roll"; that, by reason of said superintendent's aforesaid action, petitioner has not been paid any portion of the salary accruing and due to him as a police officer since March 14, 1898; that he has made demand upon the said city, said mayor, and said superintendent that petitioner's name should be restored to the police pay rolls of said city, to the end that he might draw his salary due him as a police officer, but that said defendants last above mentioned have, respectively, refused to comply with said demand, and still do refuse so to do; that his salary was \$83.33 per month, less 1 per cent. thereof deducted by the police pension board of said city.

To this petition defendants filed an answer, in which they admit that said defendant, George R. McNeill, was on the 14th day of June, 1887, duly appointed police patrolman of the city of Chicago, as alleged in said petition, but the defendants say said

*Rehearing denied December 13, 1904.

appointment was made by the mayor, but without the concurrence and consent of the city council of Chicago; that said petitioner served continuously as a police patrolman in said city from the date of his appointment until the 31st of May, 1895, when he was by said superintendent appointed and assigned to duty as a patrol sergeant of police; that thereafter petitioner served continuously as such patrol sergeant of police until June 19, 1897, when, as defendants aver, he was reduced and appointed to the rank of police patrolman by the mayor and superintendent of police of the city of Chicago; that petitioner, on the 14th day of March, 1898, was "discharged by said Joseph Kiple, superintendent of police of the city of Chicago, by and with the concurrence and assent of the said Carter H. Harrison, mayor of said city of Chicago, and the civil service commission of said city of Chicago"; that he was discharged for the good of the service, and because, in the judgment of his superior officers, he was an inefficient officer, and because, prior to said last-mentioned date, there were upwards of 100 more police patrolmen upon the pay rolls of the department of police than had been appropriated for by the city council for said year, and on account of such deficiency in appropriation the said petitioner and upwards of 100 more police patrolmen were discharged from the service of said city and from said department "in manner above stated"; that the following was the order under which said petitioner was discharged:

"City of Chicago, Department of Police.

"Joseph Kiple, Chief of Police.

"General Order No. 10. March 14, 1898.

"All patrolmen of the 21st, 22d, 23d, 24th, 25th, 27th, 28th, 29th and 30th precincts of the third division, not certified for appointment by the civil service commission, are hereby discharged from the force, to take effect at 5 P. M. this date. All patrolmen affected by the above order will report at the office of the civil service commission for certification, in the following order: 21st, 22d, 23d, 24th, 25th precincts at 5 P. M.; 27th, 28th, 29th and 30th precincts at 6 P. M.

"Joseph Kiple, General Superintendent."

The answer also admits that sections 1481 and 1482 of the Revised Code of Chicago, passed April 8, 1897, were in force March 14, 1898, and were as follows:

1481. "The superintendent shall have the management and control of all matters relating to the department, its officers and members."

1482. "Said superintendent shall have power to remove from the police force any police patrolman, and with the concurrence of the mayor he may remove or reduce in rank any officer or member of said department."

The answer also admits that an act of the Legislature, entitled "An act to regulate the

civil service of cities," was adopted by the city of Chicago in the prescribed method, and became in force in said city in August, 1895; that all the police patrolmen of the police department of the said city at the present time are civil service employes, each having been certified and appointed to his position pursuant to civil service examination and in accordance with the civil service law and the rules of the civil service commission of Chicago, and that all positions of the police patrolmen appropriated for by the city council of Chicago are now filled by police patrolmen who have taken a civil service examination and been certified and appointed in pursuance to the civil service rules; that, if petitioner is granted a writ of mandamus restoring him to the position of police patrolman, he will crowd out and displace a civil service employe duly examined, certified, and appointed.

To this answer a replication, such as is usually filed in chancery cases, was filed. A jury was waived, and the cause tried upon the law and the facts before the court. Judgment was for the respondents, and the cause was appealed to the Appellate Court for the First District, where the judgment of the circuit court was affirmed, and appellant brings the case here by appeal.

W. P. Black and A. B. Chilcoat, for appellant. John W. Beckwith, Asst. Corp. Counsel (Edgar Bronson Tolman, Corp. Counsel, of counsel), for appellees.

RICKS, C. J. (after stating the facts). By the affirmance of the judgment of the trial court by the Appellate Court, the questions of fact were settled adversely to appellant.

There is no complaint as to the rulings of the trial court upon any matters arising in the trial, except the refusal of the trial court to hold as the law applicable to the case certain propositions submitted by appellant. These propositions are, in substance, that a police patrolman is an officer; that, under the act for the incorporation of cities and villages, such officer can only be removed by the mayor, and that he must report the same to the council within 10 days, with his reasons, and that if the council, by a two-thirds vote of the yeas and nays, disapprove such removal, the officer shall be restored; that only the mayor can remove, and he only for cause; that the superintendent of police has no power to remove a policeman, and that the ordinance set up in the answer giving him such power is ineffectual; that the order of Superintendent Kiple of March 14, 1898, purporting to remove petitioner, was wholly ineffectual; that by the civil service act, when adopted by the city of Chicago and the offices and places classified, the entire police force came within its provisions and entitled to its benefits; that, when the civil service act was adopted and the classification made, those entitled to its protection could not thereafter be removed except in the manner

provided by the act, and that policemen who had been duly appointed and were in the service of the city when the act was adopted, when classified pursuant to the act as a part of the classified civil service, were embraced within the provisions of and entitled to the protection of the act.

Whether these propositions should have been marked "held" or "given" by the trial court must depend upon a consideration of them from two standpoints. If they were incorrect statements of the law, they were properly refused; if, though correct propositions of law in the abstract or as applied to some conceivable case, they were not applicable to the case at bar for want of sufficient averments in the petition or lack of evidence upon which to predicate them, they were properly refused.

The petition in this case is in all material respects like the petition in *Stott v. City of Chicago*, 205 Ill. 281, 68 N. E. 736, and is for the purpose of restoring appellant to the pay roll, from which he claims he has been illegally dropped. Following a line of undisputed authorities, we held in the *Stott* Case that, in order to entitle a petitioner to the right of mandamus, the petitioner must show his clear legal right to the relief he seeks, and that where the right is predicated upon the claim by virtue of an office, and especially where compensation of an officer is the matter in controversy, the petitioner must show that he is an officer *de jure* as well as *de facto*. In this case petitioner alleges that he "was duly appointed to the office of police patrolman in said department of police in said city of Chicago" on the 14th day of June, 1887, and that he served and held that office thence hitherto. He further alleges that in May, 1895, he was assigned by the superintendent of police to duty as a police sergeant, and, by the order of said superintendent of police, resumed his duties as police patrolman on June 19, 1897. So far as appears from the allegation of the petition, then, the petitioner received no reappointment between the year 1887 and the time he alleges he was dropped from the pay roll, and appellees in their answer admit that he was duly appointed police patrolman in 1887, but deny that he has ever since been such an officer, or is such an officer now.

Assuming, as appellant contends, that his allegation and the admission in the answer are sufficient to establish his appointment to the office he claims, in 1887, and assuming, as he contends by the propositions of law submitted, that he was then an officer of the city and not a mere employé, are we, without either allegation or proof, to assume that he was reappointed and requalified as such an officer every two years thereafter?

Section 1 of article 6 of the city and village act (*Hurd's Rev. St. 1903, c. 24*) declares who shall be city officers, and police patrolmen are not among them. Section 2 provides for the appointment or election of

a city marshal and such other officers as may by said council be deemed necessary or expedient, but the determination of said city council that officers other than those specifically named in the charter are necessary or expedient is to be made by an ordinance passed by a two-thirds vote of all the aldermen elected. Section 3 of the same article provides that all officers, except as otherwise provided by the statute, shall be appointed by the mayor, by and with the advice and consent of the council, that the council define the duties and powers of all such officers, and expressly provides that the term of office shall not exceed two years. How can it be said, then, that an allegation that appellant was appointed to an office in 1887, and that he qualified then and took upon himself the duties of that office and has ever since held the office, can be held, without any other allegation or any proof other than that he was appointed in 1887 and drew his salary from that time until 1898, sufficient to show his reappointment biennially from 1887 to the time he claims he was illegally removed from office or dropped from the pay roll?

Appellant does allege that the police department of the city of Chicago was created in 1881, under the head of "Executive Department of the Municipal Government of the said City of Chicago," and that it was known as the "Police Department," and embraced "the superintendent of police, a secretary to said superintendent, one captain of police for each police district, and such number of lieutenants, detectives, sergeants, and police patrolmen as has been or may be prescribed by ordinance"; but he does not allege that there was, before or after 1881, any ordinance fixing the number or specifically authorizing the appointment of any person or persons to the office of police patrolman. He does set out the ordinance authorizing the appointment of the superintendent of police, and states that the ordinance required that he should be appointed biennially after 1881, and that Kiple was appointed superintendent under that ordinance; but his petition is silent as to any authority for his own appointment, and the proof is as void upon that question as are the allegations of his petition. In order to hold that appellant was in 1898, and still is, according to the allegations of his petition, a police patrolman, we must hold his allegation that he was duly appointed in 1887 equivalent to the allegation that either before or after 1881, when the police department was created, an ordinance was passed authorizing the appointment of some number of police patrolmen, and that petitioner was within that number and was appointed, and that he qualified and was reappointed biennially thereafter to the same office, and that in each instance he qualified and took upon himself the duties of the office.

The *Stott* Case was disposed of upon the

pleadings, and this case went to trial, and in such case, although the petition might be in some substantial respects deficient, yet if it were answered as in the case at bar, and the allegations of the petition admitted and the proof clearly and explicitly showed the right of the petitioner to the relief he sought, it might be held that, the insufficient petition having been answered and the allegations of it admitted, the proof would supply the defects and the relief be granted. But without any proof other than that the petitioner was appointed in 1887, and served thence to 1898, and drew his pay, which is all the proof in the record as to his *de jure* right to any office, we think the contention of appellant that the court should assume all the things that have been pointed out that are neither alleged nor proved, but that are necessary to establish his *de jure* right, is more than the mere averment that he was duly appointed in 1887 and since then drew his pay will warrant us in doing.

There was neither sufficient averment nor any evidence in the record that would require the trial court to make the holdings of law requested by appellant upon the theory that in 1898 he was a *de jure* officer, or was at the time of the trial a *de jure* officer, of the city of Chicago. The most that the evidence tends to show is that he was a *de facto* officer until he was dropped from the pay roll, and if he was not a *de jure* officer, although a *de facto* officer, it is entirely plain to us that he is not entitled to the extraordinary writ of mandamus to compel the restoration of his name to the pay roll. If appellant was but a *de facto* officer, he was holding his position, drawing his pay, and exercising the functions of his office at the mere will of the city, and could be deprived of it at any moment the city might elect by being refused his pay, or a demand being made upon him to cease the performance of official duties.

In his petition the appellant also alleges the passage and adoption of the civil service act of 1895 by the city of Chicago, and that he was then a police patrolman, and that commissioners were appointed and the various places classified, and that he was entitled to the protection of that act, but was removed without any charges having been preferred against him; that the civil service commissioners certified the pay roll, upon which his name appeared, for two years or more after the act was adopted; that in December, 1897, he took the civil service examination, and passed with a grade of 99 on a scale of 100, and stood No. 11 on the eligible list, and that the superintendent of police dropped his name from that list on the pay roll on the 14th day of March, 1898; and he claims that the city is estopped by these acts to deny that he is a police patrolman and protected by the civil service act. But in the same petition the appellant explains how the civil service commission came to certify

the pay roll, and states: "The first board of civil service commissioners, in 1895, at the request of the chief executive officers of the said city of Chicago and the comptroller of said city, adopted the practice of passing upon and certifying all pay rolls of the employees of said city of Chicago, including the pay rolls of all police patrolmen in the employ of said city, which practice has continued from thence hitherto." Surely, under such allegation as that, even if admitted, which it is not, by the answer, the court would not have been authorized to conclude that such certification of the pay roll was an evidence that appellant was within the civil service.

But to this part of the petition which alleges that appellant was within the civil service, appellees answer, setting up certain ordinances of the city of Chicago, by which it is provided that the superintendent of police shall appoint the police patrolmen, and that he can remove them at his will, and expressly deny that petitioner was ever certified for appointment by the civil service commission, and say that he was removed from the pay roll and from his office on March 14, 1898, by order of Kiple, the superintendent of police. To this answer appellant filed a general replication, such as is usually filed in chancery cases, and which could not have the effect of being a traverse of the matters set up in the answer. We have held that in this class of proceedings the petition performs the office of a declaration and the answer that of a plea, and that the succeeding plea should be a common-law replication and designated as a replication. *People v. Crabb*, 156 Ill. 155, 40 N. E. 319; *Chicago Great Western Railway Co. v. People*, 179 Ill. 441, 53 N. E. 986; *Mayor and City Council of Roodhouse v. Briggs*, 194 Ill. 435, 62 N. E. 778.

So far as the averments of the answer are concerned, then, they stand unquestioned. Appellant did not aver or introduce in evidence the classification and rules made by the civil service commission, and so upon that subject there was no evidence before the court. In his testimony the appellant says: "I took another examination about December 18, 1897, a few months before March 14, 1898, when they took the policemen under the civil service rule." He states, also, that after passing his examination he was placed upon the eligible list, and was ordered to report to the police station March 14th to be sworn in under the civil service act, and that, when he did report, his name was taken off the list and he was not sworn in, but he received notice of his discharge. According to his own testimony, then, he was not yet taken into the classified service. By the express language of section 12 of the act to regulate the civil service of cities, it is only applicable to those officers who "shall have been appointed under said rules and after said examination." By his own

showing, appellant had not been appointed after his examination, but appointment was refused him, and the court did not err in refusing to give the holdings asked upon the theory that appellant was protected by the civil service act. We think the judgment of the Appellate Court, under the record here disclosed, is right, and it is affirmed.

Judgment affirmed.

(212 Ill. 506)

CHICAGO & E. I. R. CO. v. REILLY.*

(Supreme Court of Illinois. Oct. 24, 1904.)

RAILROADS—INJURIES AT CROSSINGS—PROJECTIONS FROM CARS—NEGLIGENCE—PRESUMPTIONS—RES IPSA LOQUITUR.

1. Plaintiff, while standing at a street crossing, was injured, as he alleged, by a piece of scantling protruding from a flat car of a passing train. The accident happened in the night, when it was so dark that plaintiff's companion could not see him across the street. Plaintiff did not see what struck him, and the only evidence with reference to the projection was that of his companion, who testified that he noticed lumber on the train, and that the sleepers under the timber on the car slipped, and that the timber projected between 18 inches and 2 feet beyond the side of the car. *Held*, that such facts did not raise a presumption of negligence on the part of the railroad company, within the rule of *res ipsa loquitur*.

Appeal from Appellate Court, First District.

Action by John Reilly against the Chicago & Eastern Illinois Railroad Company. From a judgment in favor of plaintiff, affirmed by the Appellate Court, defendant appeals. Reversed.

Calhoun, Lyford & Sheean, for appellant. John C. Trainor, for appellee.

RICKS, C. J. This is an appeal from a judgment of the Appellate Court affirming a judgment of the circuit court of Cook county for \$6,500 in favor of appellee on account of personal injuries.

Appellee claimed to have been struck and injured by a piece of timber projecting from a car in appellant's train. The accident happened at the intersection of appellant's tracks with Dearborn street, near 115th street, in Chicago, Ill., on October 30, 1897, at about 8 o'clock p. m. At this point the main tracks of appellant—two in number—run in a north-westerly and southeasterly direction across Dearborn street, a little south of 115th street. Dearborn street runs north and south, and Clark street is immediately west of Dearborn street. Appellee himself was the only actual witness to the accident, and he stated that he had just turned his head when he was struck, and also stated that he did not see what struck him. One John Brown, who had been with him a short time before, was standing on the opposite side of the street when the accident happened, but did not see Reilly struck, as the night was dark and

foggy, and he could not see across the street. Appellee and Brown had left the former's house, on the east side of Clark street, between 115th and 116th streets, crossed diagonally the block in the rear of the house, and came out on Dearborn street, intending to cross the tracks and go north to 115th street. Their progress across the tracks being blocked by a north-bound freight train on the northernmost of the two tracks, they crossed the first track, and were standing between the two, waiting for the train to pass. Appellee stood on the east side of Dearborn street, and Brown on the west. While so standing, appellee claims to have been struck by a piece of scantling or timber protruding from 18 inches to 2 feet from a flat car in the freight train, which was loaded with heavy timber, and received the injuries complained of. Several hours later he was found by a policeman, lying on the top of an embankment at the side of the tracks, 100 to 150 feet from the Dearborn street crossing. Appellant offered no testimony concerning the happening of the accident, as it did not know of it at the time. It learned of it, in a general way, in a day or so, but claims to have learned none of the particulars until a month or more later, when it claims it was impossible to trace the cars of the train, and find out the condition in which they arrived in Chicago on the evening of the accident.

The declaration consists of two counts. The substance of the first count is that the cars in question were negligently loaded with timber, so that a piece thereof projected. The substance of the second count is that the train was so operated and managed that the said piece came to project, and defendant knew of the dangerous position of the scantling.

Appellant contends that before plaintiff could recover in this case he was compelled to prove either that the car was negligently loaded in the first instance, or that it became unsafe during the course of its passage, and that defendant either knew, or in the course of ordinary care should have known, of the defect before the accident; and it is further contended that there is no evidence upon any of these propositions; that all there was to the testimony was the bare proof that the scantling projected from the car.

The judgment in this case is sought to be sustained on the theory that the maxim *res ipsa loquitur* applies, and unless this contention is allowed to prevail the judgment will have to be reversed, for, unless the accident or injury sustained by the plaintiff bespeaks the defendant's wrong, there is no proof of culpable negligence. There is no evidence to show how the car of lumber from which the timber that caused the accident projected was originally loaded—whether skillfully or otherwise—or whether the projecting timber was the result of accident or negligence, or how long it had been in the

*Rehearing denied December 13, 1904.

position it was when it caused the injury. The rule of *res ipsa loquitur* was discussed and clearly expounded in *Cleveland, Cincinnati, Chicago & St. Louis Railway Co. v. Berry* (Ind. Sup.) 53 N. E. 415, 46 L. R. A. 33. In that case a railroad track inspector was injured by an iron pin thrown from the tender of the train while he was standing about 10 feet from the track, and it was contended that the rule *res ipsa loquitur* applied; but the court held otherwise, and, in discussing the rule, said: "Does the rule *res ipsa loquitur* apply to this case? Does the accident itself bespeak the wrong of the appellant? Actions in tort to recover for injury to person or property are divisible, according to the intent of the doer of the injury, into those based upon (1) willfulness and (2) negligence. The latter class is subdivisible, according to the relative rights and duties of the doer and of the sufferer of the injury, into (1) cases in which the doer owes the sufferer a higher duty in relation to the causal act or omission than the sufferer owes the doer—that is, the doer is under a special, absolute duty, which is not reciprocal, imposed by positive law, or arising from the contract relation between the parties; and (2) cases in which the rights and duties of the doer and sufferer are co-ordinate and complementary. *Pollock on Torts*, 19; *Wabash, St. Louis & Pacific Railway Co. v. Locke*, 112 Ind. 404, 14 N. E. 391, 2 Am. St. Rep. 193. In cases within the latter subdivision the parties are strangers. They stand at arm's length. Each has the right to go about his own business, expecting the other to use due foresight not to injure him. Each owes the other the duty of exercising due care to avoid injuring or being injured. If an action is based upon the breach of this duty, the plaintiff must aver and prove that the causal act or omission was one which a reasonably prudent person in the defendant's place would have foreseen might cause the injury." And it was further said: "In the class of cases to which this belongs, wherein the gist of the action lies in the failure of the defendant to exercise reasonable care, the maxim *res ipsa loquitur* can be allowed no broader scope than this. If the evidence which shows the injury discloses in itself that the defendant, in relation to the causal act or omission, did not exercise that degree of care which the law requires, the plaintiff has discharged the burden of proving negligence; otherwise not." Numerous cases are cited by the court in support of, and which we think clearly establish, the above propositions.

In the case at bar the plaintiff was standing on a street crossing, and the appellant only owed him the same duty that it owed the public in general—that is, reasonable diligence and care to avoid injury. So far as anything in the record discloses, the injury sustained by the plaintiff was the result of a pure accident, and for such the law pro-

vides no compensation. *Lewis v. Flint & Pere Marquette Railway Co.*, 54 Mich. 55, 19 N. W. 744, 52 Am. Rep. 790. The only evidence the record contains with reference to the promoting cause of the injury would indicate it to have been the result of accident. Brown, the only eyewitness to describe the projecting timber which it is claimed struck the plaintiff, stated: "I noticed lumber on the train. The sleepers under the timbers on the car slipped." The witness also stated that the night was so dark and foggy, and no light near, that he could not see the plaintiff, who was just across the street. So, while he did testify that the timber projected about 18 inches or 2 feet beyond the side of the car, the conditions were not such as to preclude the possibility of mistake in the estimate of the witness. There is no evidence as to how, when, or where the car was loaded, or how long a time the timber had been projecting from the car. The condition can be accounted for as readily on the hypothesis of pure accident and absence of negligence as upon the ground of negligence, and the rule is well settled that negligence cannot be presumed where nothing is done out of the usual course of business, unless that course itself is improper. *Mitchell v. Chicago & Grand Trunk Railway Co.*, 51 Mich. 236, 16 N. W. 388, 47 Am. Rep. 560. The appellant's course of business in this instance is not attacked in any way. There is nothing to show that the projecting timber, even if it can be said it would be evidence of negligence if intentionally allowed to remain in the position it was, had been so long projecting that the appellant could or should have had notice thereof. As said in *Wabash, St. Louis & Pacific Railway Co. v. Locke*, 112 Ind. 404, 14 N. E. 391, 2 Am. St. Rep. 193: "Where, an event takes place, the real cause of which cannot be traced, or is at least not apparent, it ordinarily belongs to that class of occurrences which are designated as purely accidental; and in a case like this, where the plaintiff asserts negligence, he must show enough to exclude the case from the class of accidental occurrences." And further said: "Where, as in the case under consideration, the obligation is not in its nature so nearly absolute, and the circumstances of the accident suggest at first blush that it may have been unavoidable notwithstanding ordinary care, the plaintiff charging negligence assumes the burden of proving that the defendant has by some act or omission violated a duty incumbent on it, from which the injury followed in natural sequence. *Nitroglycerin Case*, 15 Wall. 524, 21 L. Ed. 206; *Mitchell v. Railway Co.*, 51 Mich. 236, 16 N. W. 388, 47 Am. Rep. 566; *Patterson on Railway Accident Law*, § 373."

We are of the opinion that the case at bar does not belong to that class of cases where the rule of *res ipsa loquitur* can be applied, and unless it does, the peremptory

instruction offered by appellant should have been given, and it was error to refuse it.

The judgment of the Appellate Court is therefore reversed, and the cause remanded to the circuit court of Cook county for further proceedings in accordance with the views herein expressed. Reversed and remanded.

(187 Mass. 112)

CHERRY v. SPRAGUE.

(Supreme Judicial Court of Massachusetts. Suffolk. Nov. 29, 1904.)

NOTES — ADDITIONAL STIPULATIONS — EFFECT — LAWS OF SISTER STATE — EVIDENCE — PRESUMPTIONS — APPEAL — RECORD — QUESTIONS REVIEWABLE.

1. The addition to a note of a stipulation that unpaid interest should bear interest at a specified per cent, and that on commencement of suit the customary attorney's fees should be added to the judgment and taxed as costs, did not deprive the instrument of the character of a promissory note.

2. Where a note was payable in South Dakota, and was sent to the payee by mail, and received by him in that state, it was a South Dakota contract.

3. On appeal in an action on a note, contentions founded on the statutes and decisions of another state cannot be considered, where the bill of exceptions contains no statement of such contentions, nor of any evidence of the laws of the other state, making it apparent that the decision of the trial court was made without considering such matters.

4. In the absence of any evidence as to the law of another state, it is to be presumed that the common law of that state is the same as that of Massachusetts.

5. In an action on a South Dakota contract there is no presumption that the statutory law of South Dakota is the same as that of Massachusetts.

6. A third person placing his name on the back of a note before delivery to the payee is an original promisor or maker, not entitled to have demand or notice of nonpayment; and, as to him, no consideration need be proved.

Exceptions from Superior Court, Suffolk County; Chas. W. Bell, Judge.

Action by U. S. G. Cherry against Charles H. Sprague. Judgment for plaintiff, and defendant brings exceptions. Exceptions overruled, and order overruling a demurrer affirmed.

Aug. H. Read, Wilfred J. Gaffney, and Chas. A. Mendall, for plaintiff. Chas. H. Sprague, pro se.

BARKER, J. The instrument declared on as a promissory note is of the following tenor:

"\$218.00. Sioux Falls S. D., April 15, 1895. Four months after date for value received I promise to pay to the order of U. S. G. Cherry Two Hundred and Eighteen Dollars, with interest at six per cent. per annum, at the Union National Bank, Sioux Falls, South Dakota.

"Unpaid interest shall bear interest at twelve per cent. and if suit is commenced

the customary attorney's fee shall be added to the amount of the judgment and taxed up as part of the costs in the cause.

"Due Aug. 15, '95.

"No. 3,682.

"[Signed]

Odin Fritz.

"[Indorsed]

"Charles H. Sprague.

"C. Everett Washburn.

"U. S. G. Cherry."

The instrument contains an unconditional promise to pay at a day certain the definite sum of \$218, with interest at 6 per cent. per annum from August 15, 1895, to the order of the plaintiff. If this were all, it would, of course, be a promissory note. But the additional stipulations do not change the promise into a conditional one in any respect, and they relate solely to the manner in which the unconditional promise to pay the definite sum may be enforced if broken. This distinguishes the case from *Haskell v. Lambert*, 18 Gray, 592; *Costello v. Crowell*, 127 Mass. 293, 34 Am. Rep. 367; *Sloan v. McCarty*, 134 Mass. 245; and *Moore v. Edwards*, 167 Mass. 75, 44 N. E. 1070. In each of those cases the added stipulations made the contract conditional, or the promise one to pay an indefinite amount, or not to pay the sum named absolutely and at all events. It is settled that the incorporation into an instrument which contains an unconditional promise to pay a definite sum of money of additional stipulations does not of itself necessarily deprive the instrument of the character of a promissory note. A recital that an additional rate of interest will be paid after maturity, and that the maker deposited certain collateral, and a statement of the terms upon which the collateral has been deposited, and on which it may be sold upon nonpayment of the note, does not have that effect. *Towne v. Rice*, 122 Mass. 67, 73-75, and cases cited. The test is that intimated by Mr. Justice Field in *Sloan v. McCarty*, supra. If the additional stipulation relates to the manner in which the unconditional promise to pay a definite sum may be enforced, and does not change the promise from one to pay that sum absolutely and at all events, or change the general nature of the whole contract, the instrument is a promissory note, notwithstanding the additional stipulations relating to the manner of enforcement of the promise if it shall be broken.

In the present instance, as the suit is brought by the original promisee, it is of no importance whether the instrument is negotiable or nonnegotiable, and we do not consider or decide that question.

As the instrument was a promissory note, and as it was payable in South Dakota, and was sent to the payee by mail, and received by him in that state, it was a South Dakota, and not a Massachusetts, contract. *Nashum Savings Bank v. Sayles*, 184 Mass. 520, 522, 69 N. E. 309, and cases cited; *Callender, McAuslan & Troup Co. v. Flint* (Mass.) 72 N. E. 645.

¶ 2. See Bills and Notes, vol. 7, Cent. Dig. §§ 249, 51.

It is contended upon the plaintiff's brief that by the law of South Dakota the stipulation as to an attorney's fee was void, and the instrument a negotiable promissory note, and, further, that under the statute of that state the 18th day of August, 1895, being a Sunday, the note matured on August 19, 1895, the day on which it was protested for nonpayment. The brief cites in support of these contentions the cases of *Chandler v. Kennedy*, 8 S. D. 56, 65 N. W. 439, and *National Bank of Pierre v. Feeny*, 9 S. D. 550, 70 N. W. 874, 46 L. R. A. 732, and *Rev. Civ. Code S. D. 1903, § 2236, p. 844*. But the bill of exceptions upon which the case is here contains no statement of these citations, nor of any evidence of the law of South Dakota; and it is apparent that the decision of the court below was made without taking into consideration the cases and the statute mentioned and that we cannot consider them.

No proof as to the law of South Dakota having been offered, the court below was right in ruling that the common law of that state is to be presumed to be the same as that of this commonwealth, and that there is no presumption that the statutory law of the two states is the same. *Kelley v. Kelley*, 161 Mass. 111, 36 N. E. 837, 25 L. R. A. 806, 42 Am. St. Rep. 389. Therefore we are to determine whether the rulings of the court below should be set aside as contrary to the common law of this state. Examining them with this view, we are of opinion that the defendant has no just ground of exception. His requests that there was no evidence of due presentment, or of due notice to the defendant of nonpayment, and that the instrument became due on August 18, 1895, were given, and he has no exception on those points. His contentions that the validity of the instrument and the question whether he is liable thereon are to be determined by Massachusetts laws are disposed of by the doctrine of *Nashua Savings Bank v. Sayles*, *supra*. His other requests, and his exception to their refusal and to the ruling that under the common law of this state the defendant was a joint maker of the note, and not entitled to demand and notice of nonpayment, are disposed of by our decisions, which show that by the law of this state, aside from statutory enactments, a third person placing his name on the back of a promissory note before delivery to the payee is an original promisor or maker, not entitled to have demand or notice of nonpayment, and that as to him no consideration need be proved. *Sumner v. Gay*, 4 Pick. 311; *Woods v. Woods*, 127 Mass. 141; *Spaulding v. Putnam*, 128 Mass. 363. The same considerations which require the overruling of the exceptions dispose of the questions raised by the demurrer.

Exceptions overruled. Order overruling demurrer affirmed.

(71 Ohio St. 1)

STATE ex rel. SHEETS, Atty. Gen., v. WYMAN.

(Supreme Court of Ohio. Nov. 1, 1904.)

MUNICIPAL CORPORATIONS—POLICE DEPARTMENT—CLASSIFIED LIST.

1. By the words "classified list" in section 149 of the Municipal Code of 1902 (96 Ohio Laws, 70) is meant the register prescribed by section 164 (page 74).

(Syllabus by the Court.)

Application by the state, on the relation of John M. Sheets, Attorney General, for writ of quo warranto to one Wyman. Petition dismissed.

This proceeding was commenced by John M. Sheets, Attorney General, filing a petition in quo warranto by leave of court to oust the defendant from the office of chief of police of the city of East Liverpool. The petition, so far as it is necessary to state the same to a proper understanding of the points decided, is, in substance, that the appointment of the defendant to the office of chief of police was in violation of the Municipal Code of 1902 (96 Ohio Laws, 20). It is averred that on May 4, 1903, the date on which the act took effect, there were serving in the police department of said city eight patrolmen, and that the police department prior thereto was composed of eight patrolmen and a city marshal, and that there was at that time no office of chief of police in said city, and that seven of said eight patrolmen who were serving in the police department when the act took effect had been ever since and then were serving as such patrolmen, and by virtue of the provisions of said Code they then were, and ever since had been, in the classified list of the classified service of the police department of said city in the rank and capacity of patrolmen, and that when said Code took effect the defendant was not a patrolman, and was not employed in any manner in the police department of said city; that on July 20, 1903, the city council, by ordinance, determined that the police department of the city should be composed of one chief of police, seven patrolmen, and one night policeman, the chief of police being first in rank and pay, the patrolmen being second in rank and pay, and the night policeman being the third in rank and pay, and that the police department should be classified accordingly; that the board of public safety of said city met August 20, 1903, and classified the said officers of the police department as provided by said ordinance, and that on September 11, 1903, said board held an examination of applicants for admission to the classified service of the police department of said city; that defendant was one of such applicants, and that he passed said examination, and that his name, together with the names of two other candidates, whose names were taken from the register, and not from the classified list or from the

classified service, were certified to the mayor, and that the defendant was by the said mayor appointed to said office of chief of police of said city. It is also averred in the petition that the defendant was ineligible to such examination and appointment because of solicitation that had been made in his behalf for appointment to such office.

It is unnecessary to notice the issues made by the answer and reply. The case was referred to a special master to take the testimony and report his findings of fact and conclusions of law. The special master found there was no solicitation on behalf of the defendant, and found the other facts heretofore stated as averred in the petition, and stated as his conclusions of law that the defendant was ineligible to appointment to such office for the reason that he was not on the classified list of the police department of said city. The case was submitted upon exception to the finding of the special master with respect to the solicitation, and upon motion to confirm his report subject to this exception.

J. M. Sheets, S. W. Bennett, and George E. Davidson, for relator. Brookes & Thompson and Billingsley, Clark & De Ford, for defendant.

SUMMERS, J. (after stating the facts). It is provided by section 151 of the Municipal Code of 1902 (96 Ohio Laws, 71) that the police and fire departments in every city shall be maintained upon the merit system, as provided in this act; and by section 149 (page 70) it is provided that the police department of each city shall be composed of a chief of police and such inspectors, captains, lieutenants, sergeants, corporals, detectives, patrolmen, and other police court officers, station house keepers, drivers, and substitutes as shall have been provided by ordinance or resolution of council, and that the chief of police shall be appointed from the classified list of such department. Section 153 (page 71) provides that the directors of public safety shall classify the service in the police and fire departments in conformity with the ordinance of council determining the number of persons to be employed therein, and shall make all rules for the regulation and discipline of such departments and for the qualification and examination of all appointees thereunder; and section 156 (page 72) provides that, the board of public safety shall enforce and administer the merit system as provided in this act. Section 158 (page 72) provides that the board of public safety shall within 30 days after the organization of such board classify all offices and places of appointment and employment in each city in the department of public safety with reference to the examinations hereinafter provided for. The offices, employment, and places so classified by the said board of public safety shall constitute

the classified service of the department of said city, and no appointments to such places shall be made except under and according to the rules hereinafter mentioned. Immediately upon the classification of such department, such board shall furnish to the mayor a list of all offices, employment, and places in any way connected with such department within said classified service, with the names of the incumbents, their compensation, and the nature of their duties; and said board shall from time to time promptly furnish to the said mayor, in writing, at his request, all other information desired by him for the proper fulfillment of his duties. Section 162 (page 74) provides for the examination of all applicants for offices or places of employment in such classified service; and section 164 (page 74) is as follows: "From the results of the examinations made by said board, said board shall prepare a register, for each grade or class of positions in the classified service of such city, of the names of the persons whose general average standing upon such examination for such grade is not less than the minimum fixed by the rules of said board and where otherwise eligible; and such persons shall take rank upon the register as candidates, in the order of their relative examinations, as determined by examination, without reference to priority of the time of examination." Section 165 (page 75) provides that the board shall, by its rules, provide for promotions in the classified service on the basis of ascertained merit and seniority in service, and on examination, and shall provide in all cases where it is practicable that vacancies shall be filled by promotion. Section 166 (page 75) provides that the mayor shall notify said board of any vacancy which may exist in the classified department of such city, and said board shall certify to said mayor the names and addresses of the three candidates standing highest upon the register for the class or grade to which said position belongs. The mayor shall notify said commission of each position to be filled separately, and the mayor shall fill such place by appointment of one of the persons certified to him by said board; and section 167 (page 75) provides that no officer, secretary, clerk, sergeant, patrolman, fireman, or other employé serving in the police or fire departments of any city of the state at the time this act goes into effect shall be removed or reduced in rank or pay except in accordance with the provisions of this act.

It seems to have been the purpose of the Legislature in the enactment of the Code so far as possible to provide that officers and employés in the police and fire departments, in office when the new Code went into effect, should not be disturbed in their office or employment, and that thereafter these departments should be under the so-called "merit system," and that appointments thereto could be made only in the manner provided by the Code. But it was not the intention of the

Legislature that appointments to any vacancies that might exist in any of the offices or employments in the classified service could be made only from the list of incumbents of offices and employments in the classified service. It is not difficult to understand why the Legislature, in adopting the merit system, should provide that those already in office might remain without examination, but it does not appear why it also should be provided that a vacancy in the highest office could be filled only from their number. These provisions of the new Code are taken, in substance, from the so-called "Pugh-Kibler Code," a code that was prepared by a commission appointed by the Governor under authority from the General Assembly, but which code was not adopted; and it is apparent from the provisions of that code that the merit system commissioners therein provided for were required to prepare from the returns or reports of the examiners, or from the examinations made by the commission, a register for each grade or class of positions in the classified service of each city, and in case of a vacancy in any office or employment in the classified service the commission was to certify to the appointing officer the name of the candidate standing highest upon the register for the class or grade to which the position belonged, and the appointing officer was required to fill the place by the appointment of the person so certified. The Code provision is substantially the same. It is that the names of the three candidates standing highest upon the register are to be certified, and the mayor is required to fill the place by appointment of one of the three. The only ground for the contention that the appointment must be made from the persons already in office is the provision in section 158, that immediately upon the classification of such department such board shall furnish to the mayor a list of all offices, employment, and places in any way connected with such department within said classified service, with the names of the incumbents, their compensation, and the nature of their duties, and the provision in section 149 that the chief of police shall be appointed from the classified list of such department. This provision does not support the contention. The provision of section 158 is not that the names of the incumbents shall comprise a classified list, but that the board shall furnish the mayor a list of the offices and employments within the classified service, and then, in order that the persons in office or employment in these departments at the time the new Code went into effect may not be disturbed, it is further provided that the board shall accompany the list with the names of the incumbents; and the reason for the provision in section 149 that the chief of police shall be appointed from the classified list of such department is that there may not be any doubt of the legislative intent that that office also shall be under the merit

system, and that appointees thereto other than those in office at the time the Code takes effect shall be required to be selected by examination. That section provides that the police department shall be composed of a chief of police and such other officers as may be provided by ordinance of council, and it well might be contended that it was not necessary for council to provide by ordinance for the office of chief of police, that such office was provided for by the statute itself, and that, therefore, that office would not necessarily come under the merit system. It is evident that the classified list referred to in section 149 is the register provided for by section 164. This conclusion finds support also in the wording of sections 148 and 150 (page 70). Those sections provide that in case of riot, or other like emergency, the mayor shall have power to appoint, for temporary service, in the police and fire departments, respectively, additional patrolmen and firemen, who need not be in the classified list of such department; the classified list evidently being the registry of those who had taken the examination, for it would be absurd to provide that in an emergency the mayor should not be restricted in his appointments to those already in service.

The petition is dismissed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, and CREW, JJ., concur.

(71 Ohio St. 43)

VILLAGE OF CANFIELD v. BROBST.

(Supreme Court of Ohio. Nov. 1, 1904.)

MUNICIPAL CORPORATION—VIOLATION OF ORDINANCE—CONVICTION—PETITION FOR WRIT OF ERROR—DENIAL—REVIEW OF ORDER.

1. Where one who has been tried and convicted before the mayor of a municipal corporation for violation of an ordinance applies, under section 1752, Rev. St. 1892, to the court of common pleas, or a judge thereof, for leave to file a petition in error to review the proceedings and judgment of the mayor, and the court or judge to whom the application is made refuses to grant leave to file the petition in error, such refusal is not reviewable on error in the circuit court.

(Syllabus by the Court.)

Error to Circuit Court, Mahoning County.

William Brobst was convicted of violating an ordinance of the village of Canfield. From the refusal of the circuit court to dismiss a petition in error, the village brings error. Reversed.

The defendant in error, William Brobst, was charged by affidavit, before the mayor of the village of Canfield, in this state, with keeping a place where intoxicating liquors were sold at retail in violation of an ordinance of said village, which was claimed to be authorized by section 4364-20, Bates' Ann. St., as that section then provided before its amendment by the Beal law. On the 8th day of January, 1903, he was tried and convicted, and the mayor adjudged him

to pay a fine of \$200 and costs, and to stand committed until the fine and costs should be paid. A bill of exceptions was taken and allowed, and Brobst applied to the court of common pleas for leave to file a petition in error asking a reversal of the proceedings and judgment of the mayor. The application was heard and refused, and leave to file the petition in error was not obtained. Thereupon Brobst prosecuted error in the circuit court to reverse the decision of the court of common pleas refusing leave to file the petition in error. The village, by its counsel, moved the circuit court to dismiss the petition in error filed therein, because it had no jurisdiction to entertain and consider it, but the motion was overruled, and the circuit court found that the court of common pleas erred in refusing leave to file the petition in error in that court, and reversed the decision refusing such leave, and remanded the case to the court of common pleas, with instructions to grant leave to file the petition in error. The village duly excepted, and prosecutes error here to reverse the judgment of the circuit court.

C. A. Manchester and W. B. Wheeler, for plaintiff in error. E. N. Brown, for defendant in error.

PRICE, J. (after stating the facts). The defendant in error was tried before the mayor of Canfield on a charge of violating one of the ordinances of the village, and on conviction was adjudged to pay a substantial fine and the costs of the prosecution. He took a bill of exceptions, and applied to the court of common pleas for leave to file a petition in error in that court to obtain a reversal of the judgment of the mayor. On consideration of the petition in error and bill of exceptions, the court of common pleas refused leave to file the petition in error. Is such refusal reviewable on error in the circuit court? That is the question presented to us by the record. A majority of that court has held that it is reviewable, and its published opinion is found in 24 Ohio O. C. 555.

In the absence of a brief for defendant in error, we have examined the reasons advanced for the holding made by the majority, and in our judgment they are not sound. The right to prosecute error to a judgment of a court is purely statutory, and, if such remedy is not provided by statute, none exists. Moreover, where the statute provides the right of review on error, it may fix such conditions to its exercise as the Legislature in its wisdom may adopt. The Municipal Code provides for trials before the mayor, and the procedure whereby a conviction for violation of a municipal ordinance may be reviewed in a higher court. It is found in section 1752, Rev. St. 1892, as follows: " * * * A conviction under an ordinance of any municipal corporation may be re-

viewed by petition in error, in the same manner and to the same extent as was heretofore permitted on writs of error and certiorari, and the judgment of affirmance or reversal may be reviewed in the same manner; and for this purpose a bill of exceptions may be taken, or a statement of facts embodied in the record on the application of any party; but no such petition shall be filed except on leave of the court or a judge thereof, and such court or judge has power to suspend the sentence, as in criminal cases." We need not look far for a reason for this provision of our Municipal Code, restricting the right to file petitions in error, and which does not exist in the general practice statutes regulating proceedings in error. Municipal councils are authorized to pass ordinances for the preservation of order and the protection of the people within their jurisdiction. Ample means for a fair trial of one who is charged with violating an ordinance are provided, and if the convicted party feels aggrieved over the result of his trial he may apply to the court of common pleas, or a judge thereof, for leave to file a petition in error to review the proceedings and judgment of the mayor. If the court or judge thereof, presumed to be learned in the law, is of opinion that there is no merit in the application, leave is refused, and the case does not reach the docket of that court.

Evidently the Legislature intended to provide a summary method of disposing of applications which exhibit no merit, and prevent the accumulation of cases in the common pleas, some for delay merely, perhaps, or having no substantial grounds for reversal. This legislative provision is made special for the review of cases of conviction for violation of ordinances of municipal corporations, and, according to well-settled rules of construction, should and does prevail over the general statutes for the review of judgments of inferior courts or tribunals. These general provisions seemingly relied upon by the lower court are sections 7356 and 6709, Rev. St. 1892. The former provides that "in any criminal case, including a conviction for a violation of an ordinance of a municipal corporation, the judgment or final order of a court or officer inferior to the common pleas court may be reviewed in the common pleas court." No doubt such case may be reviewed in the common pleas court, but the provision does not pretend to modify section 1752, which prohibits the filing of a petition in error in that court to review a conviction for violation of an ordinance except on leave of the court or a judge thereof. The common pleas may acquire and have jurisdiction in such case, or it may refuse to let the case be filed. The power to review is complete in any case of which the court of common pleas acquires jurisdiction according to the rule prescribed in section 1752, Rev. St. 1892. So with section 6709, referred to. "A judgment rendered or final order made by any

court of common pleas, or a judge thereof may be reversed, vacated or modified by the circuit court of the county wherein such court of common pleas is located, for errors appearing upon the record." This section, conferring jurisdiction on the circuit court, assumes a case filed, prosecuted, and disposed of in the court of common pleas, or before a judge thereof, where the errors, if any, appear of record. It does not contemplate a case which was never filed in the court of common pleas for want of leave to enter that court, of which no record is required to be kept.

It may be urged that, if the foregoing sections do not cover the case, authority for the holding of the circuit court is found in section 6707, Rev. St. 1892, which provides: "An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, * * * is a final order which may be vacated, modified, or reversed, as provided in this title." It will not be claimed that the refusal of leave to file a petition in error in the case at bar is an order of the common pleas court made in an action, because the application for leave was not an action, and the refusal of leave was not made in any action. Was such refusal "an order affecting a substantial right made in a special proceeding," under section 6707, Rev. St. 1892? The circuit court decided in the affirmative, and justifies its decision on that view of the section. But is the position sound as applied to this case? The application for leave to file a petition in error cannot be dignified with the name of a proceeding, special or otherwise. The term "special proceeding" is sometimes defined as a proceeding in a court which was not, under the common law and equity practice, either an action at law or a suit in chancery. The term is used in code states in contradistinction to "action." *Encyclopedia of Pleading and Practice*, vol. 1, p. 112. The defendant in error sought to institute a proceeding. He could do so only upon leave of the common pleas court or a judge thereof. The asking leave is not a special proceeding, and does not become such until the door of the court is opened for its entrance. The application may be made to a judge of the court in or out of vacation. It is not entitled to a place on any docket until the leave is granted. We think it entirely clear that such application is not a special proceeding, but a request for leave to file a proceeding to review the judgment of the mayor.

If the circuit court is right in its judgment, the bar provided by section 1752, Rev. St. 1892, is useless, and its repeal should be recommended, because, if the refusal of leave to file is reviewable in the circuit court, it would be as well, perhaps, that there be no restriction on the remedy of prosecuting error from the mayor's court, so that all

cases for the violation of municipal ordinances may be filed in the common pleas court without let or hindrance. But we are convinced that such is not the policy of our law upon the subject, to the end that the punishment of offenders against municipal ordinances may be summary, and that some merit in the errors assigned against the mayor must be shown to the court of common pleas, or judge thereof, before a case for review reaches a place on the docket of that court; and it was entirely competent for the Legislature to say, as we think it has said, that, unless leave to file proceedings in error is granted, the case shall end. This construction of section 1752, Rev. St. 1892, was adopted in *Carroll v. O'Connor*, 25 Ohio St. 617, and in *Rothwell v. Winterstein*, 42 Ohio St. 249, where similar provisions were under consideration. The judgment of the circuit court is reversed, and the petition in error filed in the circuit court is dismissed. Judgment reversed.

SPEAR, C. J., and DAVIS, SHAUCK, CREW, and SUMMERS, JJ., concur.

(179 N. Y. 408)

PEOPLE v. SPENCER.

(Court of Appeals of New York. Nov. 22, 1904.)

CRIMINAL LAW—APPEAL—REVIEW—HOMICIDE—INSANITY AS A DEFENSE—EVIDENCE.

1. On trial for murder, where there is evidence of insanity, and the jury are instructed that the prosecution must prove defendant sane when he committed the crime, and that he is entitled to the benefit of any reasonable doubt on that question, a verdict convicting defendant of murder in the first degree, where there is nothing to show that it was against the weight of evidence, or caused by mistake, error, or prejudice, is conclusive.

2. Where accused defends on the ground of insanity, a nonexpert witness may be examined as to facts bearing on the question of sanity, and characterize the acts which he testifies to as rational or irrational, but his opinion on the general question of the prisoner's mental condition is inadmissible.

3. Where the court, after excluding questions, recalls the witness, and gives counsel permission to examine him, any error is cured.

4. Under Code Cr. Proc. § 472, providing that sentence must be at least two days after the verdict, if the court intends to remain in session so long, or, if not, as remote a time as can reasonably be allowed, the defendant may be sentenced on the same day verdict is received, if the court does not intend to remain in session longer.

Appeal from Court of General Sessions, New York County.

William Spencer, otherwise called William Rogers, was convicted of murder in the first degree, and appeals. Affirmed.

James D. McClelland, for appellant. William Travers Jerome, Dist. Atty. (Howard S. Gans, of counsel), for the People.

MARTIN, J. The indictment charges that on the 15th day of June, 1903, the defend-

¶ 2. See Criminal Law, vol. 14, Cent. Dig. § 1045.

ant, with malice aforethought, shot and killed one Charles S. McFarlane. The proof discloses that on that day the defendant shot and killed McFarlane. The shooting occurred in the corridors of the Criminal Court building in the city of New York, where the decedent and another had appeared on that day for the purpose of prosecuting the defendant upon the charge of violating the policy law. This charge was preferred by the decedent, who was an agent of the Anti-Policy Society, and it was to him that the defendant attributed all his troubles in that respect. He came to the building knowing that the decedent was expected at that time. He was armed, although it was not his daily custom to carry a revolver, but he carried one occasionally. He waited in the corridor, watching for the arrival of McFarlane, against whom he had made threats of violence. When he discovered the decedent, he approached him deliberately, waited until he was within a few feet of him, and then shot and killed him. After a scuffle with another agent of the society, whom he also shot, he followed the decedent, and shot him twice more, inflicting a second wound, which, like the first, was sufficient to cause death. After the shooting, when interrogated by the officers, he was calm, inquired about the liability of his bondsman by reason of his nonappearance at the trial of the policy prosecution, and suggested that the shooting was in self-defense. He expressed regret that he had shot Bray, the other agent of the society, and asserted that McFarlane was the only one he intended to do harm. He also claimed that McFarlane had been hounding him, that he was not "chicken-hearted," and that he "would just as soon go to the chair for something as to the jail for nothing." These facts were denied, and no question was raised upon the trial as to the killing of the decedent, or the sufficiency of the evidence upon the question of intent, deliberation, and premeditation. The sole defense interposed was that of insanity, and proof was introduced upon the trial tending to show that the defendant was a paretic and insane when the homicide was committed. To support that defense the defendant called several lay witnesses with whom he was acquainted, who testified to facts tending to establish that defense. In addition, several medical experts were called, who gave evidence in reply to hypothetical questions which assumed certain facts; among others, that there was evidence of the defendant's having had epilepsy, and that he was in the initial stages of paresis. In answer to such hypothetical questions the expert witnesses gave the opinion that the defendant was insane, and irresponsible for his acts in killing the decedent. Upon the other hand, there was proof by the prosecution as to the defendant's conduct and the various acts performed by him, together with the testimony of two ex-

perts, who gave the opinion that he was sane at the time of the commission of the offense. Thus the evidence presented a question of fact, which was practically the only question in the case, and was whether the defendant was sane at the time of the homicide. That question was submitted to the jury in a charge which was at least fair to the defendant, and the jury found a verdict against him. Although it is true that the law presumes every individual to be sane, and upon this presumption the prosecution may rest without proof, yet, in a case where the defense is insanity, while the prisoner is required to establish it, still, if there is evidence tending to prove that defense, the general question is presented whether the crime was committed by a person responsible for his acts, and upon that question the affirmative is with the people. *Brotherton v. People*, 75 N. Y. 159; *People v. Tobin*, 176 N. Y. 278, 285, 68 N. E. 359. The learned recorder so instructed the jury, and also charged that, if there was any reasonable doubt upon that question, the benefit of it was to be given to the defendant, and they were to acquit him upon that ground. Manifestly, whether the defendant was, at the time of the homicide, sane or insane, was a question of fact for the jury. "On the review of a conviction of murder in the first degree, where the defense of insanity was interposed, the verdict will be regarded as conclusive upon that issue, in the absence of such elements in the case as show that the verdict was against the weight of evidence, or that it was influenced by some mistake, error, or prejudice." *People v. Hoch*, 150 N. Y. 291, 44 N. E. 976; *People v. Taylor*, 138 N. Y. 398, 34 N. E. 275; *People v. Sutherland*, 154 N. Y. 345, 48 N. E. 518; *People v. Kennedy*, 159 N. Y. 346, 352, 54 N. E. 51, 70 Am. St. Rep. 557. Therefore, under the doctrine of these authorities, as there is no sufficient ground to hold that the verdict was against the weight of evidence, or that it was influenced by mistake, error, or prejudice, it must be treated as final and conclusive upon that issue.

The appellant also claims that the court erred in excluding questions put to the witness Hattie Ross by his counsel. The following questions were asked the witness: "Q. Miss Ross, how did the defendant's conduct impress you that day?" Objected to, and objection sustained. "Q. State whether or not his manner and his speech, and the way he displayed himself to you in words and acts, was that of a rational human being or not." This was also objected to on the ground that no foundation had been laid, and the objection was sustained. The counsel then asked: "Q. Did he impress you, Miss Ross, as being a rational or irrational person?" That was likewise objected to and excluded. The rule as to the examination of a lay witness is that he may be examined as to facts within his own knowledge

bearing upon the question of sanity, and may then be permitted to characterize the acts of which he testifies as rational or irrational. He may not, however, express an opinion upon the general question whether the mind of the individual was sound or unsound. The opinion of witnesses who are not experts on the general question of the state of a prisoner's mind and his mental condition is inadmissible. Accordingly, where a nonexpert was asked, "From what you saw of him that night, what impression did his words and acts make upon your mind? What impression as to his condition of mind did his conduct and acts and words make upon you at the time?" these questions were held to be improper and inadmissible, and that such evidence was properly excluded. *Real v. People*, 42 N. Y. 270; *People v. Straitt*, 148 N. Y. 566, 42 N. E. 1045. Thus it is seen that the questions asked the witness Ross were not within the rule permitting a lay witness to testify as to acts of the prisoner and to give an impression as to whether such acts were rational or irrational, but related to the defendant's condition of mind, the witness being, in effect, asked to state whether his words and acts were those of a rational human being, and whether he impressed the witness as being a rational or irrational person. Clearly, that evidence was inadmissible. But there is another answer to this ruling, which is, that the court subsequently called Miss Ross to the stand, and stated to the counsel for the defendant that he might examine her as to the matters contained in the questions which were excluded. This the counsel for the defendant declined to do. We are of the opinion not only that the questions asked by the defendant's counsel were properly rejected, but, when the court gave him an opportunity to ask the witness those questions, which was declined, if there were error in the ruling, it was thereby eliminated.

The appellant also claims that the court erred in asking Dr. Van Giesen a question based upon the evidence of another witness as testing the opinion of the doctor as to the defendant's insanity. The court stated the evidence of such other witness, which was to the effect that he (the witness) asked the defendant why he shot McFarlane; that he hesitated for a moment, and then said that McFarlane had been hounding him, that he arrested him about seven weeks prior, and that he had been hounding him ever since; that he said he had shot McFarlane because he had been hounding him; that he was no chicken-hearted nigger; that he would just as soon go to the electric chair for something as to go to jail for nothing. The question asked was whether, "Assuming that to be true, can you state, in your opinion, if that answer by the defendant did not show a cognition on his part that he had committed a wrong in shooting McFarlane?" To that the doctor answered he did not think

it necessarily showed that he was aware that he was committing a wrong when he shot McFarlane. The court then said: "That is not my question, doctor. That is not an answer to my question, doctor." The witness then said, "May I have the question repeated?" It was repeated by the stenographer, and the witness answered: "I don't think it does, at the time. He may have such a cognition afterwards." The court again repeated that it meant at the time he made the answer. The attorney for the defendant asked the court to take the duration of time into consideration after the shooting, to which the court replied, "No; I will simply confine myself to my question now." The question was then repeated as follows: "At the time that the statement was made to Roundsman Kelleher, according to the witness, assuming the statement of the witness, which has been read to you, to be true, did that answer or statement indicate a cognition, at the time, on his part, that he had committed a wrong when he shot McFarlane?" The witness then said: "Did your honor say 'indicate'? The Court: Indicate or manifest. A. It indicates; yes. Q. It does indicate it? A. Yes, sir." The defendant then took an exception to the court's question upon the ground it did not cover particularly the state of facts that the record presented, because there was an interval between the shooting. To this the court replied: "No, that will do. There was no objection made to the question or exception taken, but you may have an exception now." The counsel for the defendant then asked leave to recall Dr. Van Giesen, which the court refused, to which an exception was taken. But it appears, however, that Dr. Van Giesen was immediately recalled, and the defendant's counsel sought to further question him, which the court declined to permit; but subsequently he was again recalled, and the defendant was permitted to put the question which he desired to ask, and which the court at first declined to permit. The stenographer then repeated the question in full, when the defendant's counsel said: "Now, what did you understand to be the meaning of that word 'cognition' in that connection? A. To have cognition of a thing is to have knowledge and consciousness of it. Q. But in that answer did you mean to have the court and jury understand that that extended to the operation of the act itself—of the killing and the shooting?" That was objected to as unintelligible, and the objection was sustained. The court then inquired if that was all from the witness, and the defendant's counsel replied it was.

It seems quite apparent that the question by the defendant's counsel was not as intelligible as it should have been. It is somewhat difficult to understand the purport of the last question, and when the court excluded the evidence upon the ground that it was unintelligible it seems quite manifest that

the defendant's counsel was more anxious for an exception than to state the question so that it should be understood by the court and counsel. We find in this ruling no error which affected the substantial rights of the defendant, or that would justify an interference with the judgment upon that ground.

The defendant also claims that the verdict was against the evidence, and that justice requires a new trial. We are of the opinion that under the evidence the issue involved only a question of fact for the jury; that its determination was final; and that nothing appears upon the record which would justify this court in concluding that the verdict was against the evidence, or that justice required a new trial.

Another contention by the defendant is that the conduct of the district attorney was of such a character as to require the granting of a new trial. We have examined the record in vain to find any evidence of such action upon his part as would justify the granting of a new trial upon that ground, as there is nothing to show that the case falls within the principle of *People v. Mull*, 187 N. Y. 247, 80 N. E. 629, or any of the cases cited, as bearing upon that question.

Again, the defendant claims that the judgment should be reversed for the reason that he was sentenced on the same day that the jury found its verdict, and was not given the two days provided for by section 472 of the Code of Criminal Procedure. That section provides that the time appointed for pronouncing judgment "must be at least two days after the verdict, if the court intend to remain in session so long, or, if not, as remote a time as can reasonably be allowed." It appears that this was the last case tried at the term held for June, 1903, which had extended into the month of July, and that the court was not to remain longer in session. Hence, under the provisions of that section, it is apparent that the court had the right to sentence the defendant at once, without continuing its session for any longer time, in view of the fact that the court was about to end. Moreover, it is to be observed that there was no necessity for making a motion for a new trial before judgment was pronounced, as this was a case in which the judgment was of death, and the motion for a new trial could be made at any time before the defendant's execution. Section 468, Code Cr. Proc.

The defendant also claims that the court erred in permitting the witness Hattie Ross to be recalled during the examination of Dr. Prout, who was required to stand aside until such examination was had, provided the defendant should conclude to examine her. It is obvious that the question of the order of proof and the order in which the witnesses should be called, as well as the right to require the witness Prout to stand aside until the evidence of Miss Ross should be taken,

was within the discretion of the court, and not the subject of review here.

Having reviewed all the questions presented by the defendant upon this appeal, and having found none which would justify this court in disturbing the verdict of the jury or the judgment appealed from, it follows that the judgment of conviction must be affirmed.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, and WERNER, JJ., concur. VANN, J., not voting.

Judgment of conviction affirmed.

(179 N. Y. 417)

PEOPLE ex rel. COSSEY v. GROUT, Comptroller.

(Court of Appeals of New York. Nov. 29, 1904.)

MASTER AND SERVANT — EIGHT-HOUR LAW — PUBLIC CONTRACTS—CONSTITUTIONAL LAW.

1. Laws 1897, p. 462, c. 415, § 3, as amended by Laws 1899, p. 1172, c. 567, known as the "Labor Law," limiting the hours of labor of employes of independent contractors for public works to not more than eight hours in any calendar day, except in cases of emergency caused by fire, flood, or danger to life or property, is unconstitutional, as in violation of the state Constitution as to the rights of municipal corporations.

2. Where a municipal contractor has constructed and delivered certain scows to the city of New York under his contract, and they have been accepted by the city, and he has received proper certificates, he may compel the payment of the amount due by mandamus, though he has failed to comply with the stipulation of the contract to comply with provisions of Laws 1897, p. 462, c. 415, § 3, as amended by Laws 1899, p. 1172, c. 567, known as the "Labor Law," in relation to employment of servants for more than eight hours per day, such provision of the law being unconstitutional.

Haight, J., dissenting.

Appeal from Supreme Court, Appellate Division, First Department.

Action by the people, on the relation of Harry Cossey, for writ of mandamus against Edward M. Grout, comptroller of the city of New York. From an order of the Appellate Division (89 N. Y. Supp. 1113) affirming an order of the Special Term denying a motion for peremptory mandamus, relator appeals. Reversed.

L. Laffin Kellogg and Alfred C. Petté, for appellant. John J. Delany, Corp. Counsel (Theodore Connolly and Terence Farley, of counsel), for respondent.

CULLEN, C. J. In October, 1903, the relator entered into a contract with the city of New York by the commissioner of street cleaning whereby he agreed to construct and deliver to the city 10 scows for the sum of \$5,225 each. By his contract the relator agreed to comply with the provisions of chapter 415, p. 461, of the Laws of 1897, as amended, known as the "Labor Law," so

far as they were constitutional and applicable thereto, and that no laborer, workman, or mechanic should be required to work more than eight hours in any one calendar day except in the case of extraordinary emergency. The relator was to be paid from time to time in installments as the work progressed. Under this contract he constructed and delivered six scows to the city authorities, which have been accepted and retained by those officers, and he received proper certificates establishing the performance of his work. The respondent, the comptroller of the city, resisted payment of relator's claim on the sole ground that the relator had permitted his workmen to work for more than eight hours a day in the absence of any extraordinary emergency. An application for a writ of mandamus to compel the comptroller to pay the relator for the scows delivered was denied by Special Term, as stated in the order, "on a question of law only, viz., that the presumption is in favor of the constitutionality of the eight-hour provision of the labor law referred to in the motion papers herein, and not in the exercise of the discretion of this court." This order was affirmed by the Appellate Division by a divided court. As the writ was not denied in the exercise of discretion, the order is appealable to this court.

The validity of the so-called labor legislation recently enacted in many of the states has been the subject of much litigation and controversy both in the state and in the federal courts. In this court there have been radical differences of opinion among its members on the questions presented by such statutes. Several cases have been presented to and decided by the court. In those cases are to be found exhaustive discussions of the questions involved, and the opinions there delivered show that the members of the court approached the examination of the subject from very divergent points of view. While, as I shall show hereafter, there is no inconsistency in the several decisions made by us, so far as the propositions actually determined are concerned, it may be frankly admitted that in the arguments used to sustain the conclusion reached there are at times found in the opinion in one case dicta in conflict with that found in the opinion in another. None of these conflicting propositions, however, was necessary to the determination of the particular case in which it was asserted. As these cases have been so recently before the court, it seems to me that no good purpose would be subserved by now reopening the whole discussion of the subject, nor does there appear much prospect that by such action we would finally reach harmony among ourselves. I think the wise course is to adhere strictly to the decisions actually made by the court without further examination of the general questions involved, and regardless of the individual opinions of our

several members. In this spirit I shall approach the question now before us.

The earliest case under the labor law which came before us was that of *People ex rel. Rodgers v. Coler*, 166 N. Y. 1, 59 N. E. 716, 52 L. R. A. 814, 82 Am. St. Rep. 605. That was an application by a contractor with the city to compel the payment of his claim. It was resisted on the ground that the contractor had failed to comply with the labor law so far as it required payment by him to his employes of the prevailing rate of wages. It was held that the labor law, so far as it required that in contracts with the municipality the contractor should agree to pay his employes the prevailing rate of wages, was unconstitutional and void, and that the contractor was entitled to payment, though he had failed to comply with that provision. That case differs from the one now before us in but one respect. There the contractor had failed to pay the prevailing rate of wages; here the contractor permitted daily labor in excess of eight hours. This difference in circumstances would not justify a distinction in principle, and therefore the decision in the *Rodgers Case* must control the disposition of the present case, unless the *Rodgers Case* has been overthrown by the subsequent cases in this court or in the Supreme Court of the United States.

In this connection it is necessary to refer to only three of the cases cited by the counsel for the respective parties. The first is that of *People v. Orange County Road Construction Company*, 175 N. Y. 84, 67 N. E. 129, 65 L. R. A. 33. That case has in reality no bearing on the question now before us. Section 384h of the Penal Code made any one contracting with the state or a municipality, who should require more than eight hours' work of an employé, guilty of a misdemeanor, and punishable by a fine. As is pointed out in the opinion rendered in the case, the statute did not assume to punish a contractor for violating his contract, but for doing the prohibited act; i. e., requiring more than eight hours' labor from an employé, regardless of whether or not he had agreed by his contract not to require such a term of labor, and even though his contract might have been made years before there was any legislation on the subject. It was held that this penal enactment could not be sustained as a police or health regulation, because of the arbitrary distinction drawn between workmen employed on a state or municipal work and those performing similar labor under other contracts. The question of the effect of a violation of a provision of the contract not to employ workmen for more than eight hours was not involved in the case nor passed on by the court.

The next case to be considered is *Atkin v. Kansas*, 191 U. S. 207, 24 Sup. Ct. 124, 48 L. Ed. 148. There a statute of Kansas en-

acted that any one who, having thereafter contracted with the state or a municipality for the performance of a public work, should require or permit any workman to work thereon more than eight hours in a day, should be punishable by fine and imprisonment. The relator was convicted and punished under this statute. His conviction was upheld by the Supreme Court of the state of Kansas (67 Pac. 519, 94 Am. St. Rep. 343), and the case was taken to the Supreme Court of the United States by a writ of error. As the case came from the state court, the only question cognizable by the Supreme Court of the United States was whether the legislation of Kansas was in conflict with the federal Constitution. The question whether the legislation was in conflict with the Constitution of Kansas was not before the federal court, nor did that court have any jurisdiction to pass upon it. The Supreme Court sustained the conviction. It held substantially two propositions: First, that, so far as the federal Constitution was concerned, a municipality is a mere agency of the state, and subject to the absolute control of the Legislature; second, that the constitutional liberty of the contractor was not violated, because he had no right to contract with the state or municipality except on such terms as the Legislature might prescribe. This case doubtless disposes of all claim that labor legislation of the kind now before us is in contravention of the Constitution of the United States, but it does not necessarily impair the authority of the decision in the Rodgers Case, though it does affect part of the reasoning by which the conclusion in that case was reached. The prevailing opinion in the Rodgers Case proceeded on two grounds: (1) That the labor law invaded the constitutional rights of the municipality; (2) that it invaded the constitutional rights of the contractor by depriving him of his liberty to contract with his employes and in confiscating the stipulated price for his work in case he failed to comply with its provisions. The second ground—the supposed invasion of the rights of the contractor—is entirely swept away by the decision in the Atkin Case, because, as pointed out by the Supreme Court of the United States, no man has any right to contract with the public, any more than with an individual, except on such terms and conditions as the state chooses to prescribe; and, so far as the confiscation of his property, the contract price, is concerned, he never acquires any right to such payment except on the performance of the terms of his contract. The first ground of the decision in the Rodgers Case—that the labor law was an unconstitutional violation of the city's rights and powers—is not, however, determined by the Atkin Case. Though a municipality has no rights, as against the state, protected by the federal Constitution, its relation to the state government and the extent of the power of the

Legislature to control it are to be determined exclusively by the provisions of the state Constitution, which may bestow upon a municipality such degree of autonomy as the people see fit. Hence, so far as the decision in the Rodgers Case rests on this ground, it is in no way impaired by the Atkin Case.

The last case we considered is that of *Ryan v. City of New York*, 177 N. Y. 271, 69 N. E. 599. That case arose under the labor law, the plaintiff, an employe of the city, suing for the difference between the wages actually paid him by the city and the prevailing rate of such wages. It was there held by a majority of the court that the direction of the labor law that the city should pay its employes the prevailing rate of wages was constitutional, and imposed upon the city officers the duty of fixing wages at the prevailing rate, but that the acceptance by the employe of a different rate, and his continuance in the employment of the city at such rate, constituted a waiver of all claim on his part for greater compensation. The prevailing opinion in that case was written by the late chief judge of this court, who pointed out that there was no inconsistency between the disposition of that case and that of the Rodgers Case, whatever conflict there might be between some of the arguments in the two cases. The distinction between the cases, already foreshadowed in the concurring opinion of Landon, J., in the Rodgers Case, in this: Where the municipality lets work by contract, it is interested only in the result obtained, and, if that result complies with the requirements of the contract, it is immaterial to the city what the contractor's employes may have been paid, or how long they may have worked. But where the municipality itself undertakes the construction of a public work, there it assumes the risk of success or failure in the performance of the work, and the Legislature, in such control of a municipality as it has frequently exercised—for instance, in directing the opening of a particular street, the building of a particular courthouse, the acquisition of particular land for a park, and the like—might, in the belief and judgment that good work was best obtained by good pay and moderate term of labor, direct the rate of wages to be paid, and the time laborers were to work, as it has done in case of state work, the validity of which we have upheld. *Clark v. State of N. Y.*, 142 N. Y. 101, 36 N. E. 817. So, doubtless, the Legislature, in the interest of economy, could prescribe a maximum rate of wages, which the city, in the employment of labor, could not exceed. It thus appears that there is a clearly appreciable distinction between the two cases, and that the authority of the Rodgers Case still obtains.

If, despite the decision of the Supreme Court of the United States in the Atkin Case, the claim that the provisions of the labor law violate the liberty or rights of the contractor is to be treated as still open, I desire

to add a few words. I fear that the many outrages of labor organizations, or of some of their members, have not only excited just indignation, but at times have frightened courts into plain legal inconsistencies, and into the enunciation of doctrines, which, if asserted in litigations arising under any other subject than labor legislation, would meet scant courtesy or consideration. The notion that a contractor can acquire any title or right to the compensation stipulated by the contract to be paid to him except on compliance with the terms and conditions upon which it was agreed to be paid, and may successfully assert that, though he has intentionally violated his contract, he is still entitled to his compensation, seems to me one of those fallacies that would never gain currency save in labor litigations. If the contract into which the relator entered with the city had not been invalid, because of want of power in the Legislature to prescribe that character of contracts for municipalities, on what basis would the relator's claim rest? The city never agreed to pay him the stipulated price absolutely and unqualifiedly for the boats furnished, but only on condition that he should work his laborers thereon only eight hours, and to this qualification or condition he expressly agreed. Had the labor law otherwise been constitutional, what possible ground of complaint had he? He was to be paid, not for doing the work only, but for doing it in a particular manner, and the contract was entire. Who ever heard, before this, a claim that the forfeiture of the value of work done or material furnished under an entire contract by the failure of the obligor to completely perform it was an unconstitutional confiscation of property? Look at the elementary law of this state. In *Champlin v. Rowley*, 13 Wend. 258, the plaintiff agreed to sell and deliver 100 tons of hay. He delivered 50 tons, but failed to deliver the remainder. It was held that he could not recover for that which he had delivered. In *McMillan v. Vanderlip*, 12 Johns. 185, 7 Am. Dec. 299, the plaintiff agreed to spin yarn for a specified price per run during a fixed term. He ceased work before the end of the term. Held, he could not recover for the work he had done. In *Catlin v. Tobias*, 26 N. Y. 217, 84 Am. Dec. 183, the plaintiff's assignors contracted to sell and deliver to the defendant certain quantities of glass. They did furnish certain glass, which defendants used, but the deliveries were less than contracted for. Held, the plaintiff could not recover for the glass delivered. In the cases cited the parties lost the value of their work or their materials because they did not live up to their contracts. If in this case the relator should meet the same fate because he has not lived up to his contract, why would a forfeiture be unconstitutional as to him and not unconstitutional in the other cases?

But it is urged that the thing or condition

in which he violated his contract was not material. To this it is a complete answer that the parties voluntarily contracted that it should be material, and that, unless the relator complied with it, he should get no pay. Here again the question is settled by authority, though not in suits arising under the labor law. *Foot v. Aetna Life Insurance Company*, 61 N. Y. 571, was an action on a life insurance policy; defense, breach of warranty of the truth of statements made in the application for insurance. It was urged for the plaintiff that the statement alleged to be false was immaterial. To that claim this court, through Judge Earl, said: "Parties to insurance contracts have the right to make their own bargains as in other cases."

* * * All the representations of the assured contained in the policy by being written therein or incorporated therein by reference to the proposal are warranties, and must be substantially true, or the policy will be void. It matters not whether the representations are material or not. The parties made them material by inserting them; and it matters not if the parties insured made the untrue statements innocently, believing them to be true." I ask if an insurance company may make such character of contract as it sees fit, and by that contract may make a thing material which in fact is not so, why may not other parties do the same? Or, rather (this is the real question), why is it unconstitutional for the Legislature to confer on other parties the same liberty of contract, and to direct that for a breach of the contract the same results shall follow in one case as in the other, even though the breach relates to a "fantastic" thing? Why is it not just as much unconstitutional confiscation that the estate of a deceased should forfeit all the premiums paid by him under a policy because of a mistake in the statement of the cause of death of his stepmother as in the case of this relator?

I am entirely willing to accept the illustration of a contractor agreeing that his workmen shall wear black hats and shoes. The proposition on behalf of the relator then is that there is not power in government, or at least not in any government which guarantees its citizens against deprivation of property except by due process of law, to enact that a party who has agreed that, as a condition of his being entitled to receive his pay, his workmen will, in the performance of the work, wear black hats and shoes, shall, by a deliberate violation of his contract in that respect, lose his right to recover. Pray why? How would it violate the inherent liberty of the person or the fundamental rights of property to compel a man to live up to his bargain even in immaterial and foolish requirements? It is said that the decision in the *Atkin Case* sustaining the validity of the appellant's imprisonment is not an authority for the proposition that his contract pay may be taken away

for the same offense, and it is contended that such summary forfeiture is not "due process of law." Here again I shall refrain from discussing the subject on principle, but simply refer to what I deem conclusive authority on the question. For a century past, in this state, usury has been a crime punishable like other misdemeanors. During the same period the law has made all securities taken for the usurious debt absolutely void, and the lender forfeits to the borrower the whole amount of his loan. He can recover nothing. Yet there is no judicial procedure taken to forfeit the lender's money. When he sues to recover his loan, the borrower may set up the defense of usury; the lender is beaten, and loses his money. In the present case the relator sues for his pay. The city defends on the plea that the relator has violated his contract in a respect which the law makes a ground for an entire forfeiture of the contractor's pay. If the statute were otherwise constitutional, why would it be a violation of due process of law to give effect to that defense in a suit by a contractor any more than to give effect to the defense of usury in a suit by the lender? The most ingenious casuist cannot suggest a distinction in principle between the two cases in this respect.

It is finally suggested that the relator did not voluntarily assent to the obnoxious terms of his contract, but was compelled to do so. Let us return to the hypothetical case of an insurance policy. Suppose the plaintiff in an action on the policy, in answer to the defense of breach of warranty, contended that the deceased protested against making statements as to the cause of the death of his stepmother, of which he may have been ignorant, but was compelled to do so by the company's refusal otherwise to issue the policy. No one will deny that such a claim would be too frivolous to be listened to. The claim of the relator in this respect is exactly the same, and the answer to both is that no man has a right either to an insurance policy or to a contract for work except on just such terms and conditions as the other contracting party prescribes. If one does not like the terms of an insurance policy or of a contract, his remedy is not to accept it. The decision about to be made can, therefore, stand only on one ground, the unconstitutional interference of the Legislature with the right of the municipality. That proposition having been explicitly decided in the Rodgers Case, I feel it my duty to follow it regardless of my own opinion on the question.

The orders of the Special Term and the Appellate Division must therefore be reversed, and the application for the writ of mandamus granted, with costs in all the courts.

O'BRIEN, J. I agree with Chief Judge CULLEN that the statute interposed as the sole defense to the relator's claim is void for the reason that it violates the state Con-

stitution, but I do not concur in all the reasons and arguments upon which a perfectly correct conclusion seems to be based. My reasons for concurring in the general result and dissenting from at least one proposition in the opinion are these:

We certainly decided in the Rodgers Case that this same statute which required the contractor, at the peril of forfeiting all the fruits of his contract, to pay to his workmen what is termed the prevailing rate of wages, was in conflict with the Constitution, and therefore void. There cannot, of course, be any sound distinction between the clause of the statute which attempts to regulate wages and the clause which attempts to limit the hours of work. Both provisions were enacted at the same time, for the same or similar purpose, and any valid reason for condemning the former applies to the latter. Moreover, the Rodgers Case, when decided, had the support of a previous decision of this court (*People ex rel. Warren v. Beck*, 144 N. Y. 225, 39 N. E. 80), and was followed and recognized as the law until the Ryan Case was decided, which introduced the distinction between the city itself as the employer of labor and the contractor. *People ex rel. Treat v. Coler*, 166 N. Y. 149, 59 N. E. 776; *People ex rel. Rodgers v. Coler*, 166 N. Y. 8, 59 N. E. 716, 52 L. R. A. 814, 82 Am. St. Rep. 605; *People ex rel. North v. Featherstonhaugh*, 172 N. Y. 112, 64 N. E. 802, 60 L. R. A. 768. I will not stop to consider or make any comments upon that distinction. My views in that regard appear in the report of the case. I will only add now that the distinction, even if sound, can be of no practical importance, since the city can always circumvent or evade it by employing contractors.

One of the grounds upon which the Rodgers Case rests is that the statute there considered and now before us deprived the contractor of his property without due process of law, and the learned Chief Judge, as I understand the opinion, asserts that this ground has been entirely swept away by the case of *Atkin v. Kansas*, 191 U. S. 207, 24 Sup. Ct. 124, 48 L. Ed. 148. I do not concur in that view. Since that case is being constantly cited as authority for all kinds of paternal legislation, it may not be amiss to analyze it, to the end that we may know just how far it goes and what it decides. It is certainly important to know how far it overrules any of the principles involved in the decision of the Rodgers Case, since it is not at all likely that this is the last case that will come before the court arising out of these labor controversies. The learned Chief Judge states in his opinion that our statute and the Kansas statute are substantially the same. That is a very important point in the discussion. With great respect I must say that in this he is, as I think, greatly mistaken. There is a very wide difference between the two statutes in their

scope and purpose, as will be seen upon careful examination and reflection. That will be quite apparent when we consider what the two statutes accomplish, or attempt to accomplish, and the bearing of our own statute upon this case.

It is an undisputed fact that the relator in this proceeding delivered to the city property, the contract price of which exceeded \$28,000. The relator furnished this property at his own expense, and the city now has it, and uses it as its own. The statute, so far as the relator is concerned, confiscates this property, since it deprives him of the right either to have it returned or to enforce collection of the purchase price. It permits the city to declare the contract null and void, to retain the property, and grants it immunity from any obligation to pay, and furnishes a defense to any suit or proceeding brought by the contractor to recover the contract price. The city has agreed to pay for the property, but the statute now before us forbids such payment, and furnishes the city with a good defense, if the law is valid. All this is sought to be accomplished, not by any judicial proceeding or legal process, but by a legislative edict "as sweeping and relentless as the torch of Omar." It would seem to be scarcely possible that any one could argue himself into the belief that such a law does not violate the constitutional guaranties for the protection and security of private property and the sacredness of contracts. It is difficult to see how any court could hold that such a law does not interfere with property rights, contract obligations, and all remedies for their enforcement; but, as I understand the opinion, just such a decision is imputed to the highest court in the land, since it is asserted that one of its decisions has swept away all ground for the claim in this case, and from our judgment in the Rodgers Case that the statute in question deprives the contractor of his property without due process of law.

In my opinion the Kansas Case does not decide any such proposition, and does not sweep away what we held in the Rodgers Case, and should hold in this case, namely, that the statute in question violates the Constitution of the state in that it deprives the relator in this case, as it did the relator in the Rodgers Case, of his property without due process of law. In order to get a clear view of the question before the federal court and what the case decides, it ought to be examined with some care. The learned chief judge is quite correct when he states that only one question was before the court, and that was whether the state statute violated the federal Constitution in that it deprived the defendant in the case of his liberty without due process of law. It certainly did not assume to deprive him of anything else. The court had before it for construction a statute widely different from our own, since the only remedy prescribed for its enforce-

ment was by indictment and criminal prosecution. It was a criminal case, based upon a criminal statute, that obviously contained no such drastic remedies for enforcement as are to be found in the statute now before us. It did not assume, as our statute does, to destroy or confiscate the contractor's property, or to annul his contract, or to deprive him of any remedy for the collection of the fruits of his contract. It did not touch the contract at any point, nor the money earned upon it. It simply subjected his person to incarceration for violation of the law, and after conviction all his remedies against the city for collecting the price of his work were left intact. He could enforce his claim against the city for the money earned on the contract just as well after conviction as he could before. The wide difference between the Kansas statute and our own will thus be seen at a glance. The former simply punishes the contractor for a specific act or omission, while the latter deprives him of all property rights under his contract, which with us frequently amounts to thousands and even millions of dollars.

The Kansas Case decides nothing except the single proposition that the defendant in the case, having voluntarily entered into the contract, was not deprived of his personal liberty by the statute. That was the sole question before the court, and the decision does not conflict in the least with anything decided in the Rodgers Case, except possibly what was there said with respect to the personal liberty of the contractor so far as that was supposed to be involved in the right to make contracts with his workmen. There is not a word in the opinion of the court, as I now recall it, with respect to the effect of the statute upon the property rights of the contractor, and for the plain reason that the statute did not assume to disturb or interfere with these rights at all. How very different, then, is that case from the Rodgers Case and the case at bar? It is quite conceivable that a statute may be good which assumes to punish a municipal contractor for violation of some law in the execution of the contract, but it would not follow by any means that it would also be valid if it assumed to deprive the contractor of all rights under the contract when executed. The Legislature has the undoubted power to punish a person criminally for shooting game out of season in this state, but if it should attempt to deprive him at the same time, summarily, of the ownership of his gun, a very different question would be presented. The Legislature has ample power to make it a crime for a person to disturb his neighbor's oysters lawfully planted in public waters, or to remove the stakes or buoys placed in the water to mark the locality where the oyster beds have been so planted; but it has no power to confiscate the boats or other water craft used in unlawfully removing the oysters and thus vio-

lating the statute. *Colon v. Lisk*, 153 N. Y. 188, 47 N. E. 302, 60 Am. St. Rep. 609. Such cases illustrate the distinction between statutes that assume to punish as crimes forbidden acts and those that assume to confiscate property or to destroy the obligations of contracts. The Kansas statute punishes an act or omission as a crime, while our statute attempts to confiscate property. If I have succeeded in showing in this brief review of that case that it does not decide any such proposition as is claimed, it is quite unnecessary to extend the discussion.

There is, however, one feature of that decision, which, although not discussed at all in the opinion, is of considerable interest, and that is what seems to be the practical concession on the part of the court of the omnipotence of a state legislature in the creation of new crimes. It is virtually held that the Kansas Legislature had the power to make it a crime for a municipal contractor to permit his employes to work five minutes more than eight hours in the day, even though the servant wanted to work and the employer was willing to pay extra wages. Of course, if the Legislature could make it a misdemeanor to permit this, it could make it a felony, and, if all this is so, there would seem to be no limit to the power of a state legislature in that respect. Whatever may be the law of Kansas or the law in the federal courts in that respect, it is quite certain that this court has held that the power is limited, and that the Legislature has no power to denounce as crimes acts which, in their nature and consequences, are innocent and harmless. *People v. Gillson*, 109 N. Y. 389, 17 N. E. 343, 4 Am. St. Rep. 465; *People v. Arensberg*, 103 N. Y. 388, 8 N. E. 736, 57 Am. Rep. 741; *People v. Marx*, 99 N. Y. 377, 2 N. E. 29, 52 Am. Rep. 34; *People v. Hawkins*, 157 N. Y. 1, 51 N. E. 257, 42 L. R. A. 490, 68 Am. St. Rep. 736; *Matter of Jacobs*, 98 N. Y. 98, 50 Am. Rep. 630.

It is quite true that this court has recently held that the Legislature could make it a criminal offense for a baker to permit his workmen to work more than 10 hours in the day (*People v. Lochner*, 177 N. Y. 145, 69 N. E. 373), but the struggle in that case was to make what some of us thought was a labor law a health law, and so within the police power. Nothing of that kind was claimed for the Kansas statute, or is claimed. Indeed, it was expressly held that it could not come within that class of statutes enacted for the promotion or protection of health. But this is a digression that has little, if any, bearing on the case at bar. The only question that we are now concerned with is this: Does the case of *Atkin v. Kansas* decide that the statute now before us, and which was before us in the *Rodgers Case*, is free from the constitutional objection that it deprives the contractor of his property without due process of law? In my opinion, it does not, and could not, since

no question of that kind was presented by the statute or by the case; and so I conclude that that decision has not swept away one of the most important grounds upon which one of our own decisions rests. The fallacy of the argument that gives such effect to the *Kansas Case* consists in the assumption that because the court held that the Kansas statute does not unduly interfere with personal liberty, it therefore held that our statute does not invade the rights of private property. There was no question in the case in regard to the deprivation of the contractor of his property. It is obvious that a case which deals only with the question of personal liberty cannot be an authority to overthrow our decision in the *Rodgers Case*, based as it was upon an entirely different statute, which invades, and was held by us to invade, the constitutional safeguards of private property. When we consider that the Kansas statute was not aimed at the contractor's property, and does not interfere in the least with his contract or its fruits, or deprive him of the right to sue upon it, or authorize it to be canceled or destroyed, and that our statute expressly does or attempts to do all these things, thereby providing for the destruction of all the contractor's property rights, even to the extent of forbidding any municipal officer to pay him for his work, the wide difference in the destructive power of the two statutes must be apparent. The only reason why the present case is now before us is that the city authorities refused to pay the relator the contract price of the property which he delivered to the city, and which the city retains and uses as its own. Except for this statute, the comptroller would have paid the claim, and his excuse for refusing to pay contained in the record is simply that the statute forbids him to pay, and makes it a public offense if he does. Hence I think it is plain that the decision in the *Kansas Case* did not and could not sweep away any support which the *Rodgers Case* has in the proposition that our statute violated the Constitution in that it deprived the contractor of his property without due process of law.

I have a word to say with respect to the latter part of the opinion. The proposition that a law cannot be unconstitutional which simply requires a party to perform his contract before he can recover upon it cannot, of course, be disputed, and, if that is what this statute means, and all it means, it is probably about as harmless and useless a law as ever was enacted. I assume that the Legislature never supposed that it was necessary to pass a statute forbidding a party to enforce a contract that he had himself violated or had not performed. That has been the law from time immemorial, and, of course, is the law still. If the relator in this case has not performed his contract, he cannot recover, and is entitled to no relief. If he has not performed his contract, it is

not of the slightest consequence whether the statute in question is constitutional or not. In that aspect of the case the statute is not involved in the discussion. But the relator has performed his contract. He has produced and delivered to the city the property which was the subject-matter of the contract, and the city neither refused to accept nor offered to return it, or made any objection on the ground of nonperformance. Even if such an objection could survive delivery and acceptance of the property, it would have no basis whatever in the facts of this case. If we inquire wherein or in what respect the relator has failed to perform, the answer is that he stipulated not to permit his workmen to work more than eight hours a day. That is the head and front of his offending. That is the breach, and the only breach, that is claimed. It was not of the slightest consequence to the city whether he permitted his workmen to labor eight hours or nine, so long as he produced and delivered the property that he agreed to deliver. It is a fair test of the importance of that objection to inquire whether the city could have maintained any action against the contractor for the so-called breach. Of course, it could not, for the plain reason that the act of the relator in regulating the hours of work was immaterial, and entirely foreign to the subject-matter of the contract. If the contractor had stipulated that his workmen should wear black hats and boots instead of shoes, a breach of that condition, if it is a condition, would not furnish the city with any cause of action or any ground of defense. The obstacle that is in the relator's way when he seeks to recover the \$28,000 which the city agreed to pay him as the price of the property delivered is not the stipulation in the contract, but the statute. I doubt if any one would even suggest that, if there was no eight-hour statute, the stipulation in the contract would be regarded as of the slightest importance. A breach of contract can never be urged as a cause of action or defense unless the breach is of some stipulation that is material considering the subject-matter of the contract. Stipulations with respect to some extraneous matter, or such as that now under consideration, are not material.

Finally, it ought to be observed that this very question was presented, discussed, and decided in the *Rodgers Case*. The last paragraph of the opinion is devoted entirely to that question, and it was held that the omission on the part of the contractor to keep this stipulation was entirely immaterial, and no obstacle to his right to enforce the contract. We held that, if the statute was not valid, the stipulation was not binding, and I fail to find anything in the *Atkin Case* that overrules what we then decided in that regard.

HAIGHT, J. (dissenting). I did not agree to the conclusion reached by this court in the

case of *People ex rel. Rodgers v. Coler*, 166 N. Y. 1, 59 N. E. 716, 52 L. R. A. 814, 82 Am. St. Rep. 605, but after that decision was made I regard it my duty to yield obedience thereto, and to follow it in cases involving the question then raised and disposed of. But to my mind very different questions are now presented. That case involved the constitutionality of the provision of the labor law requiring contractors upon public works to pay their employes the prevailing rate of wages. The case now before us calls for a determination as to whether the provision of the labor law is constitutional which prohibits contractors upon such works from requiring more than eight hours of labor in a day from their employes. The power of the Legislature to enact laws based upon considerations of public policy or for the protection and preservation of the health of the people is beyond question. It may limit the number of hours that a person shall be required to work in underground mines, smelters, or institutions for the refining or reduction of ores and metals. It may limit the period of service where the person performing the labor is required to work beneath the surface of the earth or in other places where the operative is deprived of fresh air and sunlight, and is frequently subjected to foul atmosphere, a very high or low temperature, or to the influence of noxious gases. It may also limit the hours of labor that shall be performed by employes in bakeries. *People v. Lochner*, 177 N. Y. 145, 69 N. E. 373; *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780. The requiring of a person to work 20 hours out of 24, or of 12 hours per day in the digging of a deep sewer, or in the sweeping and cleaning of a street in extremely hot or cold weather, or in the lifting of heavy stones, or other work requiring violent exercise of the body and the muscles thereof, may impair the health of the individual. It might not be deemed wise public policy to permit a contractor upon public works to require 10 or 12 hours' service in a day while a municipality for similar services could exact but 8 hours. The state, in enacting laws, must act in accordance with the common experience of mankind, and within reasonable bounds, and, when so acting, it determines, either in the exercise of its police powers in the promotion of health or as a matter of public policy that the general welfare of employes, mechanics, and workmen, upon whom rest a portion of the burdens of government, will be subserved by limiting the hours of labor to be performed to eight continuous hours per day, and that such limitation will promote their moral, physical, and intellectual condition. I think the courts cannot properly say that the limitation is unreasonable, or that it violates the provisions of the Constitution. *Atkin v. Kansas*, 191 U. S. 207, 24 Sup. Ct. 124, 48 L. Ed. 148. Neither the question of public policy nor of the health law

was raised or determined in the Rodgers Case, and therefore I do not regard it as controlling upon the determination of the questions raised in this case.

WERNER, J., concurs with CULLEN, C. J. MARTIN and VANN, JJ., concur with O'BRIEN, J. HAIGHT, J., reads dissenting opinion. GRAY, J., absent.

Order reversed, etc.

(34 Ind. App. 172)

SCHERER et al. v. BAILEY et al. (No. 3,031.)

(Appellate Court of Indiana, Division No. 2. Nov. 29, 1904.)

HIGHWAYS—CHANGE OF LOCATION—PETITION—NECESSARY AVERMENTS—OPPOSITION TO PROCEEDINGS—FAILURE TO APPEAR BEFORE COMMISSIONERS.

1. A petition for the change of route of an existing highway under Burns' Ann. St. 1901, § 6742, should describe both the existing road and the route of the proposed road; and a petition failing to describe the old road is fatally defective, notwithstanding a description of the proposed change.

2. Under Burns' Ann. St. § 6742, providing for the location, vacation, or change of highways on petition to the county commissioners, and the publication of a prescribed notice prior to the meeting of the board, the failure of persons opposing the proceedings to appear before the county commissioners after having been duly notified does not preclude them from contesting the proceedings on appeal to the circuit court.

Appeal from Circuit Court, Ohio County; R. L. Davis, Special Judge.

Petition by Edgar U. Bailey and others for the change of a public highway, to which Flora Scherer and others filed remonstrances. From a judgment of the circuit court dismissing an appeal from the board of county commissioners, remonstrators appeal. Reversed.

John B. Coles and Cynthia Coles, for appellants. Charles B. Matson, for appellees.

COMSTOCK, C. J. Appellees petitioned the board of commissioners of Ohio county to change a public highway in said county, under section 6742, Burns' Ann. St. 1901. Notice was given by posting notices as required by the statute. Viewers were appointed, their report made, the proposed change ordered and adjudged, and the trustee of the proper township in said county directed to open and keep said highway in repair. Three of the appellants named, Earnest, Walter, and Clara Scherer, were minors. Neither of the appellants appeared before the commissioners, nor was either of them defaulted. From the judgment the appellants appealed to the circuit court. Upon proper showing the circuit court appointed a guardian ad litem for the said minors, through whom they moved to dismiss the petition upon the ground of its insufficiency to entitle the petitioners to any change of any part of the highway. This motion was overruled, and exception

taken. The appellants—the minors by guardian ad litem, and the adults by attorney—filed remonstrances. The remonstrances were not acted upon.

The minor appellants assign as error the action of the court in overruling their motion to dismiss the petition, and that the petition does not state facts sufficient to give the board of commissioners jurisdiction, or to form the basis of any action; that the court erred in dismissing the appeal from the board of commissioners, and rendering judgment against appellants for costs. The adult appellants, in their assignment of errors, challenge the action of the court in dismissing the appeal from the board of commissioners.

The petition is in the following language: "The undersigned petitioners would represent to your honorable board that they are resident freeholders of said county, and that six of them reside in the immediate neighborhood of the highway herein proposed to be changed and relocated, and are interested in the change and relocation of such highway, and do hereby petition your honorable board to change and relocate said certain public highway on the following described route in said county and state, to wit: Commencing at a point in the old road in the southeast quarter of section No. 32, town No. 4, range No. 2 W., in Ohio county, in the state of Indiana, from which a stone located at the west end of a stone wall or fence on the land of Ethan A. Wilber, in the town of Hartford, in said county and state, bears N., 11½° W., 30 links distant; thence north, 80¼° W., 4 rods; N., 64° W., 27 rods; N., 53° W., 14½ rods; N., 46½° W., 10 rods; N., 23½° W., 8½ rods; N., 3° E., 4 rods; N., 29½° E., 23 rods, to the Laughery Valley Turnpike Road, near the old sawmill; witness, small peach tree, bearing S., 81½° E., 39 links distant. Said route passes through, over, in, and upon the lands of John Scherer, Flora Scherer, Job Scherer, Earnest Scherer, deceased, Sussannah Weaver, and Nathan Weaver, and Jane E. Lynn and Eva F. Lynn." Signed by all of the petitioners.

The objections urged against the petition are: First, there is no description of any part of any highway sought to be changed and relocated; second, the line on which it is proposed to relocate a part of the highway does not return to the original road, but stops at a turnpike; third, the petition does not give the names of the owners or occupants of the land through which the part of the present road runs which is sought to be relocated; fourth, the petition does not name or describe, even indefinitely, any highway sought to be changed.

The statute in question provides for the location, vacation, or change of any highway. The word "relocation" is not found in said section. It appears in the petition, and it is manifest, that a change of route of an existing highway is sought. The petition should therefore describe by name, or in some other

manner, the existing road and the route of the proposed road. "The description of the line and character of the road should at least be so accurate and certain as to convey reasonable information to all parties, and such as to enable a surveyor to locate it." Elliott on Roads & Streets, § 831. A description of the existing road is necessary to designate the proposed change. The petition is wholly wanting in any description of the road to be changed. It states that six of the petitioners reside in the immediate neighborhood of the highway therein proposed to be changed, and asks the board to relocate said highway in a route described. The expression "old road" occurs in the petition, but only by way of recital. The petition is the foundation of the proceeding. It must contain such facts as will enable the court to lay out the road as prayed for, and inform the parties interested of the roads and lands affected. There being no description of the old road, the description of the proposed change is without foundation. This makes the petition fatally defective. Elliott, supra.

Appellees contend that, the appellants having failed to appear before the board of county commissioners after having been duly notified, they have no standing in the circuit court. In this appellees are in error. County & Township Officers, p. 188; Vawter v. Gilliland, 55 Ind. 278; Shute v. Decker, 51 Ind. 241, and cases cited; Crossley v. O'Brien, 24 Ind. 325, 87 Am. Dec. 329; Hughes v. Sellers, 34 Ind. 837; Debs v. Dalton et al., 7 Ind. App. 87, 34 N. E. 236; Kemp v. Smith, 7 Ind. 471; Hays v. Parrish et al., 52 Ind. 132; Scraper v. Pipes, 59 Ind. 158; Hughes v. Beggs, 114 Ind. 427, 16 N. E. 817; Bowers v. Snyder et al., 66 Ind. 341.

We deem it unnecessary to consider the other objections to the petition.

The judgment is reversed, with instruction to sustain appellants' motion to dismiss the petition.

**HOOSIER CONST. CO. v. NATIONAL
BANK OF COMMERCE OF SE-
ATTLE. (No. 4,875.)¹**

(Appellate Court of Indiana, Division No. 2
Nov. 29, 1904.)

**ACTION—TRIAL BY JURY—APPEAL—EVIDENCE—
REVIEW BY APPELLATE COURT—STATUTE—
CONSTRUCTION—VERDICT—CONCLUSIVENESS.**

1. An action for breach of contract is triable by a jury, though the complaint contain averments that plaintiff is unable to give various credits, and concludes with a prayer for an accounting.

2. The act of March 9, 1903 (Acts 1903, p. 841, c. 193, § 8), providing that the Appellate Court shall, if required by the assignment of errors, weigh the evidence, is applicable only to cases not triable by a jury, and an assignment of error in a cause triable by a jury that the court erred in overruling appellant's motion for a new trial does not present the question of the sufficiency of the evidence as contemplated by the statute.

¹ Superseded by opinion, 73 N. E. 1006.

Appeal from Superior Court, Marion County; Vinson Carter, Judge.

Action by the National Bank of Commerce of Seattle against the Hoosier Construction Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Hawkins & Smith, for appellant. Louis Newberger, Clarence E. Weir, Charles W. Richards, Lawrence B. Davis, Milton L. Simons, and Albert Asche, for appellee.

ROBY, J. This action is founded upon a written contract between appellant and the Atlas Lumber Company, under which the lumber company agreed to furnish a large quantity of red cedar blocks for street paving. Its interest in the contract was assigned to appellee, by whom the suit was brought. Appellee had judgment for \$988.73.

The only error assigned is that the court erred in overruling appellant's motion for a new trial. The complaint contained averments to the effect that appellee was unable to give various credits and items, and its prayer was for an accounting and judgment. The action was triable by a jury. It was a suit for breach of contract. The act of March 9, 1903 (Acts 1903, p. 341, c. 193, § 8), is not, therefore, applicable. The assignment of error does not present the question of the sufficiency of the evidence as contemplated by said act. Bush v. German-American Building Ass'n (Ind. App.) 71 N. E. 914.

There is evidence tending to support the finding, and the judgment is therefore affirmed.

(34 Ind. App. 159)
RUSCHE v. PITTMAN. (No. 4,875.)

(Appellate Court of Indiana, Division No. 2
Nov. 29, 1904.)

**MECHANIC'S LIEN—STATUTE—CONSTRUCTION—
REPAIRS.**

1. Under Burns' Ann. St. 1901, § 7256, providing that a mechanic may acquire a lien on a building repaired, and on the interest of the owner of the lot on which it stands, a mechanic who repairs a house on land in possession of a vendee holding a bond for a deed, a portion of the price of which has been paid, cannot enforce his lien, as against the holder of the legal title, on surrender of the premises after cancellation of the contract of sale.

On rehearing. Former opinion reversed, and judgment below affirmed.

For former opinion, see 70 N. E. 382.

WILEY, J. A demurrer to appellant's complaint was sustained by the trial court, and that ruling is the only question presented by the appeal.

The complaint avers that appellee sold to one Lolgorie Arnold certain real estate, by a written contract, and executed to her a bond for a deed, by the terms of which she bound herself, upon the full payment of the purchase money, which was to be paid in monthly installments, to convey to her; that the vendee took possession of the real estate,

and occupied the same until her death; that during said time she paid appellee a part of the consideration, and that at the time of her death she was hopelessly insolvent, and left no property or assets whatever with which to pay debts; that after she took possession of said property she employed appellant to make certain repairs on the dwelling house situate thereon; that appellant, under said employment, performed labor of the value of \$29; that within 60 days of the time of completing said repairs he filed notice of his intention to hold a lien on said real estate and dwelling house for the amount of his said claim, which notice of lien was duly and timely recorded in the recorder's office, etc.; that, after the death of the said Loggorte Arnold, appellee declared forfeited and canceled said contract and bond, and took possession of said real estate, and still holds the same from the heirs of the said Loggorte Arnold, under the terms of the said bond. The complaint avers that the vendee paid a part of the purchase money under her contract, but does not state what the entire purchase price was as fixed by the contract. The prayer of the complaint is that said lien be enforced, and the real estate be sold to satisfy appellant's claim.

The single question presented by the complaint for our determination is this: Can a party in possession of real estate under a contract of purchase, accompanied by a title bond binding the vendor to convey the property upon the payment of the full purchase price, cause or suffer a mechanic's lien which the holder thereof may enforce against the premises in derogation of the legal title of the vendor? In other words, under such facts, can the vendor's title be divested or clouded by a mechanic's lien based upon some repairs made upon existing buildings at the instance and request of the vendee? The law decisive of the question under consideration has been definitely settled in this jurisdiction. The case of *People's Saving Ass'n, etc., v. Spears et al.*, 115 Ind. 297, 17 N. E. 570, is in point. There appellant sold to appellee Spears certain real estate, under a contract of purchase, and put him in possession thereof. While exercising control and ownership over the property, with the knowledge and consent of appellant, he employed appellee Fawcett to make some additions to or repairs upon the building situate on the real estate. Fawcett made the repairs, and filed his notice of mechanic's lien on the real estate and building for the amount thereof. This lien was foreclosed, and the property sold to Mrs. Fawcett in pursuance of the decree of foreclosure taken by Mr. Fawcett against Spears. Appellant brought its action to recover possession of, and quiet title to, the real estate. Mrs. Fawcett filed a cross-complaint setting up the above facts in regard to the lien and foreclosure, and averred, among other

things, that she had no notice of the claim or ownership of the appellant at the time of her purchase at the foreclosure sale. The demurrer to her cross-complaint was sustained. The Supreme Court affirmed that ruling, and the ground of the decision is clearly and fully stated by Mitchell, J., in the following language: "The fact that Spears was in possession under a contract of purchase gave him no authority to overreach the plaintiff's title by contracting for repairs. Spears could bind his interest under his contract of purchase, and no more. Presumably the plaintiff's title was of record. That the purchaser in possession under a contract of purchase made improvements or repairs with the knowledge and consent of the vendor did not estop the latter to assert its prior title. Something more than mere inactive consent is necessary in order that a lien may be acquired against the owner of property." *Neeley v. Searight*, 113 Ind. 316, 15 N. E. 598; *Hopkins v. Hudson*, 107 Ind. 191, 8 N. E. 91; *Wilkinson v. Rust*, 57 Ind. 172; *McCarty v. Burnet*, 84 Ind. 23. This court, in the case of *Davis v. Elliott et al.*, 7 Ind. App. 246, 34 N. E. 591, passed upon the question we are now considering. It was there held that where labor is done and materials are furnished on buildings, and the person for whom the work was done and materials furnished was in possession of the real estate under an executory contract of conveyance, and a notice of mechanic's lien therefor was duly filed, the mechanic's lien upon a forfeiture of the executory contract did not come within the provision of section 1706, *Elliott's Supp.* (being section 7256, *Burns' Ann. St.* 1901), whereby the lien subsists against the buildings upon which labor and material were expended in case of forfeiture of leasehold or foreclosure of mortgage. The case of *Thorpe, etc., Savings Ass'n, etc., v. James et al.*, 13 Ind. App. 522, 41 N. E. 978, is in point, and is in harmony with the other cases cited. These authorities are conclusive upon the proposition that one in possession of real estate under a contract of purchase and title bond cannot defeat or cloud the vendor's title by suffering a mechanic's lien to be filed against the property for repairs to buildings situate upon it.

It follows, therefore, that the court properly sustained the demurrer to the complaint, and the judgment is affirmed.

(35 Ind. App. 45)

**SARGENT GLASS CO. v. MATTHEWS
LAND CO. (No. 4,883.)***

(Appellate Court of Indiana, Division No. 1.
Nov. 29, 1904.)

CONTRACTS—ASSIGNABILITY—APPEAL—REVIEW.

1. Where a contract is not, as between the parties, assignable, a receiver of one of the parties does not, by a transfer of the contract, confer rights on the transferee.

2. A contract by a land company, on conveyance of land to a manufacturer for a factory to Supreme Court denied.

*Rehearing denied. Transfer

for a specified purpose, to give to the factory, free of cost, natural gas as long as obtained on its lands, is not assignable.

3. Where a cause tried by the court is submitted on appeal on all the evidence preserved by the bill of exceptions, the court is required by Acts 1903, p. 341, c. 193, § 8, to determine what is right on the whole case.

Appeal from Circuit Court, Grant County; H. J. Paulus, Judge.

Action by the Sargent Glass Company against the Matthews Land Company. From a judgment for defendant, plaintiff appeals. Affirmed.

A. C. Harris, J. M. Winter, and F. C. Cutter, for appellant. Paul Brown and Ouster & Cline, for appellee.

BLACK, J. The appellant sued the appellee, alleging in the complaint that the Indiana Lead Glass Company, September 14, 1900, entered into an agreement with the appellee, which was set out in the complaint. By its terms the appellee agreed to convey to the Indiana Lead Glass Company, designated in the contract as the party of the second part, by good and sufficient warranty deed, certain described lots in the first addition to Matthews, Grant county, Ind., "to be used for factory purposes only as hereinafter stipulated; deed to be executed and delivered to said party of the second part when the factory is built and in operation"; also three residence building lots, to be selected by the party of the second part from any of the platted lots unsold in the town of Matthews. The appellee also agreed to furnish natural gas, free of cost, for the manufacture of glass, and to operate said factory upon said land, as long as natural gas is obtained on the lands and leases of the appellee at and in the vicinity of that town, and to deliver said gas through appellee's gas mains to the property line of said land. The appellee also agreed to have a named railroad company lay a side track along the side of, and convenient to, the factory, without cost to the party of the second part. The party of the second part agreed to commence the construction and equipment of a lamp chimney factory on said land on or before October 15, 1900, and to complete the construction of the factory, and to commence manufacturing lamp chimneys, without unnecessary delay, and to continue to operate the factory during the ordinary period each year.

It was alleged in the complaint that the principal inducement to the making of this agreement to the Indiana Lead Glass Company was the fact that under and by the terms thereof the appellee agreed to furnish to the Indiana Lead Glass Company natural gas, free of cost, for the manufacturing of glass, and to operate the factory upon certain lands to be donated by the appellee, as long as natural gas is obtained on the lands and leases of the appellee at and in

the vicinity of Matthews, and to deliver the gas through its gas mains at the property line of the land. The complaint proceeded, alleging the construction, equipment, and completion of the lamp chimney factory at great expense by the Indiana Lead Glass Company, which upon the completion of the factory commenced to manufacture lamp chimneys without unnecessary delay, as provided in the contract, and so continued during the ordinary period of each year, until on or about June 1, 1902, when, on the application of certain creditors of the Indiana Lead Glass Company to the judge of the Grant superior court, David C. Searles was appointed receiver for that company, and directed to take possession of all of its property, and to continue the operation of its plant; that the receiver, under the direction of that court, continued the operation of the factory, during the ordinary working period of the year, until August 19, 1902, when, by direction of that court, he, as such receiver, having given notice as required by the order of the court, proceeded to sell all the rights and property, real and personal, and choses in action of the Indiana Lead Glass Company at auction, and sold, assigned, and transferred and delivered the same, including said contract, to one George W. Anstred, to whom the receiver, under the order of the court, executed a deed to all the realty of said corporation, including that described in said contract, and a bill of sale of all personal property, letters patent, and trademarks and choses in action of said corporation, and the sale was duly confirmed and approved by the court August 21, 1902, when Anstred took possession of the plant; that the next day the appellant was duly incorporated as a manufacturing company, and August 23, 1902, Anstred sold, transferred, assigned, and delivered to it all of said property, including said contract; that, upon such purchase and the receipt and taking possession of the property, the appellant assumed and proceeded to carry out all of the conditions and requirements of said contract between the Indiana Lead Glass Company and the appellee; that this contract, and the right to free gas under it, constituted one of the main inducements to the appellant in making the purchase, and upon taking possession it immediately proceeded to expend, with the knowledge of the appellee and without objection from it, large sums of money upon extensions and new and improved machinery therein.

The complaint showed that on and prior to March 1, 1901, the appellee deeded the real estate to the Indiana Lead Glass Company, and then and thereafter caused the side track to be laid without cost to that company, and that the appellee fully complied with the terms of the contract, except as afterward in the complaint stated; that the Indiana Lead Glass Company, and the receiver and Anstred and the appellant successively, com-

plied literally on their part with all the requirements of the contract.

It was alleged that the appellee was organized and incorporated for the purpose of purchasing the land upon which the town of Matthews was located, and of building a town or city thereon, for the purpose of enhancing the value of the land, and to that end it purchased all the land, and invited and continues to invite numerous manufacturing concerns to locate their factories at that town or upon adjacent territory belonging to the appellee, and, in consideration of removal of such factories, the appellee has made a practice of deeding land to the proprietors, and building switches and furnishing gas to such factories free of cost, to the end that the population of the town may be increased and the value of the land of the appellee enhanced thereby, and that said contract was made with the Indiana Lead Glass Company pursuant to such general policy of the appellee; that appellant's factory is constructed for the use of natural gas only as a fuel, and, in pursuance of the contract, the appellee supplied natural gas for fuel to the appellant, and its factory could not be changed so as to use any other fuel without great and permanent loss to the appellant, incapable of actual measurement; that the flow and supply of such gas in the wells and territory of the appellee is and always has been sufficient, from the time of said contract, for all the purposes thereof; that the appellant's business is the manufacture of lamp chimneys alone, and without free fuel it is impossible to manufacture them at that town at a profit; that the supply of gas furnished by the appellee is irregular, unsatisfactory, and insufficient to operate its factory, because of which the appellant has repeatedly notified the appellee thereof, and demanded that gas be supplied as provided by said contract; that in response appellee notified appellant that its supply was too small because its pipes were insufficient in size, whereupon appellant caused new and enlarged gas fittings to be placed in its factory; that the pipe between appellee's main and the property line is a two-inch pipe, which could be replaced by a four-inch pipe at small cost, and the appellant has demanded such a change, but the appellee has failed and refused to make such change; that it is impossible to continue the appellant's manufacturing business without a greater supply of gas than it is receiving. Various particular sources of loss through such insufficiency of gas are stated, and it is alleged that the appellee has repeatedly threatened to cut off and discontinue the appellant's supply of gas for fuel. Prayer that the appellee be required to perform its contract, and enjoined from withholding a sufficient supply of gas, and be ordered, without discontinuing the supply, to put in, between its main and the property line, a pipe not less than four inches in di-

ameter, and sufficient to supply the appellant, and to maintain a pressure in its service pipes sufficient to supply natural gas for fuel to operate the factory, and for a perpetual injunction prohibiting the appellee from withholding from the factory sufficient gas for fuel to operate the factory so long as natural gas is obtained upon the lands and leases of the appellee, etc.

The appellee answered by general denial, and upon trial by the court there was a finding in favor of the appellee, and a temporary injunction which had been in effect pending the final hearing was dissolved.

It appeared in evidence that the receiver executed his bill of sale August 21, 1902, to Anstred, who, August 23, 1902, executed his bill of sale to the appellant. On September 5, 1902, the appellee gave the appellant a written notice that the appellee would not and did not recognize the appellant as the successor of the Indiana Lead Glass Company to any right or rights under a certain contract made by and between it and the appellee September 14, 1900, and did not recognize the appellant as the successor to any right or rights under a certain contract entered into by and between the Indiana Lead Glass Company and the appellee December 28, 1900, "both of said contracts having relation to the furnishing of gas to the factory of the said Indiana Lead Glass Company" at Matthews; also that the appellee "will not and does not furnish you any gas for the factory formerly owned by said Indiana Lead Glass Company, and now owned by you under either of said contracts, and that any and all gas you may use from the gas line of" the appellee "you are using without any right whatever"; also that the appellee "will demand and collect of you the market value of any and all gas used by you from its mains or pipe lines," and that the appellee "is ready and willing to shut off the gas from said factory now owned by you, upon notice from you so to do." The appellee, however, continued to furnish gas to the appellant, and October 15, 1902, this suit was commenced.

This evidence showed that, besides the written contract set forth in the complaint, the parties thereto also executed another contract, dated December 28, 1900, which was admitted in evidence over the objection of the appellant, the grounds of objection stated being that the proposed evidence was not within the issues on trial, and that the latter contract was without consideration. This supplemental contract of December 28, 1900, signed by the Indiana Lead Glass Company and the appellee, was for the most part in printing, in the form ordinarily used by the appellee and its customers in contracting for the supplying of natural gas by the former to the latter, being an order or request from the Indiana Lead Glass Company, addressed to the appellee, directing it to connect its natural gas mains with the factory.

subject to conditions on the back of the contract, the contract to be binding when signed by the appellee. When the factory was completed, the president and the treasurer of the Indiana Lead Glass Company called upon the general agent of the appellee at Matthews, and notified him that the factory was completed and ready for operation, whereupon the general agent delivered a draft of the supplemental contract to said treasurer, who said he wished to submit it to the legal adviser of the Indiana Lead Glass Company, and thereupon took the draft of the contract to Indianapolis. Afterward he returned it to the president of that company at Matthews, with a letter asking the president to cause certain erasures of portions of the printed matter, and to insert in the contract certain written matter. These changes were accordingly made before the execution of the supplemental contract. The written matter there inserted was as follows: "It is agreed by and between the parties hereto that the signing of this contract shall not in any wise change, alter, vary or impair any of the rights and privileges reserved to said Indiana Lead Glass Company under and by virtue of the terms of a certain contract executed by and between the Matthews Land Company and the Indiana Lead Glass Company, which bears date September 14, 1900, and that said contract shall be and remain in full force and effect according to its terms and conditions." In the supplemental contract as executed there were some erasures of printed matter on the face thereof, and a number of printed "conditions" on its back were erased. Among the "conditions" not erased was the following: "Contracts are not transferable." The contention here between counsel relates chiefly to this provision in the supplemental contract.

There was evidence introduced, to which no ground of objection appears to have been offered, that at the time of the making of the original contract it was orally agreed between the parties thereto that it was a preliminary contract, and that later on, when the factory was ready to be connected with the gas supply, another contract to cover the gas supply should be executed by the parties. There was also evidence to the effect that at the time of the execution of the original contract it was the orally expressed understanding of the parties that it was not assignable. It is not claimed or pretended that at the time when the appellee was notified of the completion of the factory it refused to further carry out the contract without a modification thereof, and that thereupon the Indiana Lead Glass Company, to prevent litigation and by way of compromise of such matter, consented to an essential change of the contract, and entered into a supplemental agreement materially modifying the original contract, and that thereupon the parties proceeded to act upon and carry into effect such materially different contract. On

the contrary, it is claimed on behalf of the appellee, in effect, that the case is one wherein the parties in the execution of the supplemental contract and proceeding thereafter to operate the factory and to receive natural gas therefor on the one hand, and to furnish gas free of cost on the other hand, were carrying into effect their original understanding and intentions, and by their conduct placing their own construction upon the original written agreement as a nonassignable contract. The evidence warrants the conclusion that the original parties did, as between themselves, by their acts and proceedings, construe the contract under which the factory was supplied with natural gas free of cost as a contract not assignable. If, as between the parties, the contract was not assignable, we see no sufficient reason for holding that the receiver, by his transfer of the contract, could confer upon the purchaser greater rights against the appellee than were held under the contract by the insolvent Indiana Lead Glass Company. To so hold would seem to be making a new contract for the parties without the consent of one of them.

The original contract was not by its terms assignable. After the real estate had been conveyed by the appellee, and it had caused the side track to be constructed, and the Indiana Lead Glass Company had constructed its factory, all in accordance with the contract, it was not yet fully executed. There remained thereafter continuously obligations of both parties to be performed in the future. The appellee was to supply natural gas, free of cost, for the operation of the factory, and the other party was to operate the factory as a lamp chimney manufactory during the usual period each year, which would require the superintendence of the officers of the corporation, and the presence of its workmen, at the town of Matthews. The appellee was a corporation whose principal interest appears to have been to secure the building and operation by others of factories upon its lands, and to induce the coming in of inhabitants, and thus to cause the enhancement of the value of its lands and enable it to dispose of them at increased prices, and to supply the people of the town with natural gas at a profit to itself. It cannot be supposed that it was induced to convey a considerable portion of its lands, and to construct railway tracks and furnish its natural gas in large quantity for manufacturing purposes, all free of cost, without reference to the supposed character of the managing officers of the donee, as well as the nature and extent of the employment to be given to its workmen, and to the apparent ability of the donee to contribute to the introduction and retention of suitable inhabitants, and thereby to help to build up the town and enhance the interests of the appellee therein. The appellee, without doubt, would exercise a choice between proposed acceptors of its donations, and the element of

confidence in the persons or corporations seeking such encouragements, as well as in the projected industries which they proposed to introduce, would constitute a material inducement to the appellee in the making of such a contract. The appellee might be willing to transfer absolutely certain tangible property to be built upon by a particular corporation selected by the appellee, with right to convey the same to others, and yet might deem it unwise, unbusinesslike, and unduly venturesome to engage to furnish fuel without cost for the operation of the factory in the indefinite future to any other person or corporation to whom the donee, without regard to the consent or wishes of the donor, might transfer the property.

The difference between the benefit to be derived by such a corporation as the appellee from the future carrying on of the manufactory by the particular corporation to which it engaged to furnish free gas, and the consequence to the appellee of the conduct of the factory by some or any other corporation that should purchase the property from the donee, might be slight or great, and it would be impossible to definitely estimate it in advance, but that such possible difference would probably have weight with the donor must be supposed. In *Sprinkle v. Trulove*, 22 Ind. App. 577, 54 N. E. 461, we had occasion to discuss this subject, and did so at some length, citing a number of authorities, in addition to which we may refer to *Rappleve v. Seeder Co.*, 79 Iowa, 220, 44 N. W. 363, 7 L. R. A. 139; *Worden v. Chicago, etc., R. Co. (Iowa)* 48 N. W. 71; *Harper v. Dalzell, etc., Co.*, 27 Wkly. Law Bul. (Ohio) 274; *Robinson v. Drummond*, 2 B. & A. 303; *Ross v. Fox*, 13 Grant, Ch. 683.

Whether, in the exercise of its legitimate discretion, a court of equity could find it proper to grant all the relief prayed for by the appellant, or any part thereof, under circumstances such as are stated in the complaint, we need not now determine. The case at bar is submitted to us upon the evidence, all of which appears in the record by bill of exceptions, and we are to determine what is right and proper upon the whole case, as provided by section 8 of the act of 1903, concerning proceedings in civil procedure. Acts 1903, p. 341, c. 193. We think we may consider the supplemental contract as having been regarded by the parties thereto as not in conflict with the original contract, and that its introduction in evidence, with proof of the acts of the parties after its execution, tended to show, not that they had made inconsistent contracts, but that by their conduct they construed as not assignable the original contract, capable of such construction by them; and, considering such construction by the parties in connection with the terms of the original contract and the character of the interests of the parties

which it was thereby intended to subserve, we may properly coincide with the conclusion of the trial court that the promise to furnish gas free of cost to the Indiana Lead Glass Company did not pass and inure to the benefit of the appellant. And so, upon the whole case, we can find no occasion for disturbing the judgment of the court below. Judgment affirmed.

(35 Ind. App. 202)

INDIANAPOLIS ST. RY. CO. v. SCHMIDT.
(No. 4,523.)

(Appellate Court of Indiana, Division No. 2.
Nov. 29, 1904.)

STREET RAILROADS—OPERATION—LOOKOUTS.

1. A street railway company operating its cars on streets to which the public are entitled in common with it is bound to anticipate the rightful presence of persons on the tracks, and is required to keep a constant lookout to avert injury to users of the streets.

On petition for rehearing. Petition denied.
For former opinion, see 71 N. E. 663.

ROBY, J. Appellant, in support of its petition for a rehearing, says: "We undertake to say that the authorities are unanimous, explicit, and emphatic upon the proposition that, before any man can be held liable to another who has negligently placed himself in a position of peril, the first party must actually know not only that the person is in a position of peril, but that he will remain so." If the charge was one of willful injury, the proposition stated would be correct. The authorities cited are cases where persons have been injured by locomotive engines and cars propelled by such engines, while upon the tracks of steam railroads. The duty owed by a corporation operating a steam railroad to footmen walking along or across its tracks is widely different from the duty owed by a street car company to travelers upon the city streets. The railroad company is under no obligation to exercise active vigilance as to such trespassers. It is under the duty of refraining from the infliction of willful injury upon them. *Dull v. Cleveland (Ind. App.)* 52 N. E. 1013. The doctrine which appellant asserts has no application to railroads laid in the street, to the use of which the public are entitled in common with the company; it consequently being bound to anticipate the rightful presence of men, women, and children on its tracks and in front of its cars. The application of such doctrine to cases like the one at bar would result in releasing the street car company from the duty of keeping a constant lookout; a duty which the law demands of corporations which have received license to propel their cars at a high rate of speed along the surface of the highway in populous districts where the public must, of necessity, pass and repass. To thus apply it would be

¶ 1. See *Street Railroads*, vol. 44, Cent. Dig. § 174.

² Transfer denied.

to ignore the patent fact that the car company, and not the foot passenger or driver, propels the vehicle which constitutes the instrument of danger, because of which the duty devolves upon it to exercise constant care and watchfulness to avert injury to the other members of the public who also use the highway. If this doctrine is sound, the company would be exonerated although its motorman looks constantly to the rear, or even goes forward with his eyes shut. *Thompson's Negligence* (2d Ed.) § 1476; 1 *Shearman and Redfield* (5th Ed.) § 99. There was evidence in the case at bar from which the jury might find that appellant, by the exercise of reasonable care after its motorman discovered appellee, or after he should have been discovered by the exercise of reasonable diligence, could have averted the collision and avoided injury. The general verdict therefore carries with it a finding of such facts. They require an affirmation of the judgment.

The petition for rehearing is overruled.

(34 Ind. App. 151)

SOUTHERN INDIANA RY. CO. v. MOORE.
(No. 4,753.)

(Appellate Court of Indiana, Division No. 2.
Nov. 29, 1904.)

MASTER AND SERVANT—DEATH OF SERVANT—ASSUMPTION OF RISK—INSTRUCTIONS—EVIDENCE—MEASURE OF DAMAGES—INTERROGATORIES—APPEAL—REVIEW OF QUESTION WAIVED ON PRIOR APPEAL.

1. Where the assignment of error to the overruling of a demurrer to a complaint was waived by failure to include it in the statement of errors relied on, or to discuss it, the objection to the sufficiency of the complaint will not be considered on a subsequent appeal.

2. Instructions in an action for the death of a servant that he did not assume risks not discoverable by ordinary inspection on his part, and that he might obey his master's order to work in a particular place, unless the danger was so apparent that a prudent person would not encounter it, were erroneous, for omitting the element of actual knowledge on the servant's part.

3. The measure of damages in an action by a parent for the death of a minor child is the value of the child's services until he attains his majority, taken in connection with his prospects in life, less his support.

4. In an action by a parent for the death of a minor child, it is error to exclude evidence showing the value of board and clothing in the neighborhood in which decedent lived.

5. In an action by a parent for the death of a minor child, it is proper to refuse to require the jury to itemize the elements of damages by finding the value of the board of the child from his death to his majority, had he lived, and as to the value of the clothing of the child during such period.

Appeal from Circuit Court, Lawrence County; James B. Wilson, Judge.

Action by Mary Moore against the Southern Indiana Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

For former opinion, see 71 N. E. 516.

F. M. Trissal and Brooks & Brooks, for appellant. East & East and McHenry Owen, for appellee.

COMSTOCK, C. J. This is the second appeal. The first one resulted in the reversal of the judgment obtained by appellee. *Southern Indiana R. Co. v. Moore*, 29 Ind. App. 52, 63 N. E. 863. Upon a second trial appellee had a verdict for \$825, and judgment for \$417, which reduction in amount is acquiesced in by both parties. The complaint was not amended or changed. It is in two paragraphs, to each of which a demurrer for want of facts was overruled. These rulings, with the refusal to sustain its motion for a new trial, form the basis of the errors assigned.

The objection to the complaint is that it appears therefrom that the negligence relied upon is the negligence of a fellow servant. When the case was here before, one assignment of error was that the court erred in overruling the demurrer to the complaint. The point was waived by failure to include it in the statement of errors relied upon or to discuss it. We do not, therefore, need to examine the question at this time, but the averments are that the negligence was that of the appellant's superintendent, "having full charge and control of the defendant's work in and about said quarry."

The jury were told, through instructions Nos. 6 and 7, that the servant did not assume risks not discoverable by the exercise of ordinary observation on his part, and that he might properly obey the order of the master to work in a certain place, unless the danger thereby incurred was so open and apparent that a prudent person would not encounter it. The criticism is that the element of actual knowledge by the servant was omitted, and that, as the instructions were given, if the danger was not apparent the servant was not chargeable with its assumption, although he did in fact know all about it. The sixth instruction began as follows: "It is a rule of law that the servant cannot recover for an injury resulting from a danger open and known to both the master and servant alike, or when the opportunity to know of the danger is equal to both master and servant." It is then stated that the rule is applicable to injuries received by reason of dangers which could only be discovered by a close inspection, etc. The seventh contains no reference to actual knowledge. The intention probably was to say that known dangers and those equally open to the observation of master and servant were assumed. The instructions are, however, deficient in the respect indicated. The element of actual knowledge was essential to a full statement of the law on the subject. We cannot say from the record, beyond doubt, that appellant was not prejudiced by the omission.

The action was brought by the mother,

† 2. See *Death*, vol. 15, Cent. Dig. §§ 109, 115.

on account of the death of her infant son, under section 267, Burns' Ann. St. 1901 (section 266, Horner's Ann. St. 1901).

The measure of damages is correctly stated by the attorneys for appellant as follows: "The value of the child's services until he would have attained his majority, taken in connection with his prospects in life, less his support and maintenance," etc. In an action by a parent for the death of his child, he is entitled to recover only for the pecuniary injury he sustained, and the proper measure of damages is the value of the child's services from the time of the injury until he would have attained his majority, taken in connection with his prospects in life, less his support and maintenance. To this may be added, in proper cases, the expenses of care and attention to the child made necessary by the injury, funeral expenses, and medical services. *Pennsylvania Co. v. Lilly*, 73 Ind. 252; *Louisville, etc., R. Co. v. Wright*, 134 Ind. 509-512, 34 N. E. 314. The service referred to is not limited to the amount which may be earned by the child, working for wages, but embraces the services that he may be shown to render; the value thereof being in all cases for the jury. *Cleveland, etc., R. Co. v. Miles* (Ind. Sup.) 70 N. E. 985.

The decedent lived with his mother, appellee, about one mile from Williams, and carried his dinner from home to the place where he worked. The witness Conner was asked the following question: "Do you know the price of board at that time about Williams—what men were charged for board at that time, as a general proposition?" The question called for the average price of board in the neighborhood of which the decedent lived and worked. Whether board was furnished by appellee or any other person would not affect appellee's right to show its value. It cost something, and the evidence sought to be elicited, although not conclusive, would have tended to show such value.

The witness Smith was asked the following question: "I will ask you if you are acquainted with the reasonable value of board and clothing of a laboring man, twenty to twenty-one years of age, working in a quarry like Rock Ledge Quarry, in that neighborhood, about two years ago, in the neighborhood of Williams—what was it reasonably worth?" To which he answered, "Yes." He was then asked: "Now, then, what was the value of that kind of board and clothing in the neighborhood at that time?" Appellant offered to prove the value of board to be 50 cents a day, and clothing \$40 per year. Witness' knowledge of the facts inquired of is not questioned. The answer would have tended to elicit pertinent evidence upon a material question. The court sustained an objection to each of the foregoing questions. This was error. *Pennsylvania Co. v. Lilly*, 73 Ind. 252; *Louisville, N. A. & C. Ry. Co. v. Rush*, 127 Ind. 545, 26

N. E. 1010; *Louisville, etc., R. Co. v. Wright*, 134 Ind. 509, 34 N. E. 314; *Jackson v. Pittsburgh, etc., R. Co.*, 140 Ind. 241, 39 N. E. 663, 49 Am. St. Rep. 192; *Black's Accident Cases*, § 267.

The court refused to submit to the jury interrogatories as follows: "How much do you find the value of the board of appellant's son from his death until he was twenty-one years of age, had he lived?" "How much do you find the value of the clothing of plaintiff's son from his death until he was twenty-one years of age, had he lived?" In the refusal of these questions there was no error, for the reason that in actions for tort it is not proper to require the jury to itemize the elements of damage. The effect of these interrogatories would have been to require the jury to itemize the elements of damage. *Ohio, etc., Co. v. Judy*, 120 Ind. 397, 22 N. E. 252.

The decedent lived with his mother, giving her the benefit of his services and attention, as well as the money earned by him in working for others. He purchased and was paying for a home for her, and the pecuniary loss sustained by her was a fair question for the determination of the jury.

Appellee's right to her judgment depends upon the proposition that appellant directed decedent to work in an unsafe place, omitting the duty of reasonable inspection to make it safe. The law is perfectly well settled that if the accident was the result of peril incident to the business in which the servant was employed, or if it was caused by the negligence of a fellow servant, there can be no recovery.

Counsel for appellant discuss other questions, which ultimately will largely depend for their solution upon the evidence. As the judgment must be reversed for the reasons given, it is not necessary to consider them.

Judgment reversed, with instructions to sustain appellant's motion for a new trial.

(24 Ind. App. 124)

KNOLL et al. v. BAKER et al. (No. 4987.)

(Appellate Court of Indiana, Division No. 1.
Nov. 29, 1904.)

EASEMENTS—PAROL LICENSE—REVOCABILITY.

1. Where defendant, an owner of land, gave plaintiff permission to connect his tile drain with that of defendant without any consideration—the tile drain of defendant having an outlet on the land of a third person—and such third person objected thereto and forbade any further use of the outlet, and plaintiff agreed to obtain a better outlet, and, in reliance upon such promise, defendant laid some tile across a tract of his land, and closed the outlet on the land of the third person, and the drain so constructed was defective and would not drain defendant's land, it was a parol license, conditional on the right of defendant to use the outlet on the third person's land, and subject to revocation at the will of defendant.

Appeal from Superior Court, Allen County; O. N. Heaton, Judge.

Action by John Knoll and others against George Baker and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

Robt. B. Drelbelbisa, for appellants. S. R. Alden, for appellees.

ROBINSON, P. J. Suit to quiet title to an alleged easement or license, and for damages for interfering therewith. In their complaint, appellants aver that they own about 18 acres of land, described, which lies immediately east of 8 acres owned by appellees; that in 1893 appellees invited and gave permission to appellants to tile drain their lands through appellees' land so long as it might be necessary to drain the same; that, in pursuance thereto, appellants constructed two tile drains through their own and appellees' land; that afterwards, in 1901, appellees removed the tiling without appellants' knowledge or consent, and have filled the ditch and rendered the same useless, whereby appellants' land is rendered unfit for cultivation; that for 10 years appellants enjoyed the right to maintain such drain without hindrance on the part of appellees until the time above mentioned. Appellees answered, in their second paragraph, that in 1893 they gave appellants permission to join tile, to be laid on appellants' land, to each of two tile drains appellees had theretofore constructed across their own land; that appellees then had a good outlet for their tile drains, extending a few rods across the lands of one Miller, and with his consent, and emptying into a public ditch; that appellants laid a few rods of tile on their own land, and connected the same with appellees' lines of tile; that thereupon Miller refused to permit appellees to maintain and use the outlet they then had, or any outlet, so long as they permitted appellants to drain into appellees' tile; that thereupon, in 1893, appellants agreed to furnish a better outlet for complete drainage across a tract of land west of and adjoining appellees' land, on condition that appellees furnish several rods of 12-inch tile for use in making such outlet; that appellees furnished the tile and some labor, but the drain constructed furnished no outlet for the drainage of appellees' lands, and the water turned therein by appellants' tile; that from and after 1893 appellees repeatedly requested appellants to furnish an outlet of the character agreed upon, but they wholly failed so to do, and by reason thereof, and of appellees' loss of the outlet over Miller's land, caused by appellants' connecting their tile with appellees' tile, appellees have no outlet for the surface water or from appellants' land, whereby a part of their land has been unfit for cultivation; that in 1901 appellees took up a part of their tile next their east line. The third paragraph of answer alleges that appellees were compelled to give up the only outlet they had for drainage if they permit-

ted appellants to tile into their drain, and that they did give up such outlet and permit such drainage to be made, and continued in consideration of appellants' agreement to furnish a better outlet across the land of one of the appellants on the west of appellees' land in 1893, and that appellants have ever since wholly failed to furnish such outlet, and appellees have ever since remained without any outlet for their tile.

Upon a trial the jury returned a verdict for appellees, and answered interrogatories to the effect that in 1893 appellants, pursuant to permission given by appellees, laid a few rods of tile on their land east of appellees' land, connecting with appellees' lines of tile; that one Miller had given appellees an outlet across his land, but, upon learning that appellants had connected their tile, forbade any further use of the outlet for the use of both appellants and appellees; that the land adjacent to appellees' land on the west was then purchased by one of the appellants; that appellants then notified appellees they would be furnished a better outlet across the land west if Miller persisted in his refusal to allow an outlet for the use of both appellees and appellants; that appellees agreed to this, and gave some 10 or 12 inch tile and some labor in helping lay tile across the land west, and closed the outlet across Miller's land. Facts are found that the tile was laid across the land to the west as planned by one of the appellants, but in such a way that it did not furnish an outlet for the tile on appellees' land; that repeatedly from 1893 to 1900 appellees have requested appellants to perform their agreement and furnish an outlet for the drainage; that since giving up the outlet on the Miller land the water from appellants' land and that falling on appellees' land collects on the low ground of appellees, and prevents the raising of crops thereon; that appellants gave appellees nothing for permission to connect the tile; and that appellees have received no benefit therefrom.

The first and third errors assigned question the sufficiency of appellees' cross-complaint, but the record shows that before the verdict was returned the cross-complaint was withdrawn.

The pleadings and the proof show that the right granted by appellees to appellants was a parol license. And it is true that where a parol license is given, and upon the faith of such license money is expended by the licensee, the licensor cannot revoke the license unless the licensee can be placed in statu quo, and that an executed parol license may become an easement, and may impose a servitude upon one estate in favor of another. See *Lane v. Miller*, 27 Ind. 534; *Joseph v. Wild*, 146 Ind. 249, 45 N. E. 467, and cases cited. But in the case at bar the jury find, and there is evidence to support the finding, that appellants gave appellees nothing for permission to connect the tile,

and that appellees received no benefit therefrom. Moreover, the license originally given appellants was not the right to drain their land by flowing the water upon lands of appellees, but to connect with a tile upon appellees' land, having an outlet upon the land of a third person. Had appellants paid a consideration for the privilege of connecting with the tile under an agreement that appellees should maintain an outlet, a different question would be presented. But there is evidence from which it appears that, as soon as Miller learned that appellants had connected with appellees' tile, he refused longer to permit appellees to have an outlet on his land. The appellants were notified of this, and, after they had failed to get Miller to consent to let the outlet remain as it was, they agreed with appellees to provide an outlet at another place across land of their own, which they had purchased on the west of appellees' land. The connection was made with appellees' tile in the spring of 1893, and in May of that year it appears that this subsequent agreement was made by which appellants were to provide an outlet to the west. While the record does not disclose that the license to connect with appellees' tile was originally given upon the condition that Miller would still permit appellees to maintain an outlet on his land, yet we think it fairly appears from the conduct of appellants soon after they had connected their tile with that of appellees that their right to enjoy the license was conditional. Upon the evidence, we think the judgment is right. See *Shirley v. Crabb*, 138 Ind. 200, 37 N. E. 180, 46 Am. St. Rep. 876.

Judgment affirmed.

NELSON v. NELSON et al. (No. 5,084.)
(Appellate Court of Indiana, Division No. 1.
Nov. 29, 1904.)

WILLS—CONSTRUCTION—INTENT OF TESTATOR—ESTATES AS VESTED OR CONTINGENT—LIFE ESTATE—POWERS TO SELL—EQUITABLE CONVERSION—CONDITIONAL INTERESTS—RIGHTS OF LEGATEE.

1. An estate in remainder is not rendered contingent by the uncertainty of the time of enjoyment, but the question whether it is contingent or vested depends on the right and capacity of the remainderman to take possession if possession becomes vacant, and the certainty that the event upon which the vacancy depends will some time happen.

2. In construing wills the intention of the testator must govern if it is not inconsistent with some established rule of law, and the court may arrive at the testator's intention by placing itself in his situation and examining the surroundings and the language used.

3. The law favors vested estates, and remainders will never be held to be contingent when they can be held to be vested consistently with the apparent intention of the testator.

4. Words in a will must be given their ordinary meaning, unless there is other language

in the will which indicates clearly that the testator did not use the words in question in their plain and ordinary sense.

5. A will devising testator's real estate to his wife, to have and to hold the same during her natural life, and empowering her to sell a sufficient amount of a certain tract to pay testator's debts in the event the personal estate proves insufficient for that purpose, gives the wife a mere life estate in the property, with power of disposition as to part.

6. A will directing that testator's real and personal estate be sold and converted into money, and the proceeds divided, and appointing an executor, does not vest in the executor any title or interest in the property, but gives him a mere naked power to sell the same, and distribute the proceeds as directed.

7. Where a will provided that at the death of the testator's wife all the real and personal property should be sold, and divided between testator's children, testator's real property was, from the date of his death, equitably converted into money, and his children had no interest in the same as real estate, and no power to sell, convey, mortgage, or will it.

8. Where testator's real estate was in equity converted into money at the date of his death, the distribution under the will should be made upon the theory that the donation in the first instance was made in money.

9. Where a will gave testator's wife a life estate in all his real and personal property, and provided that at the death of the wife all his property should be sold, and converted into money, and that "then," after the payment of the debts of the wife and a specific legacy, an equal division should be made among all the children, the distribution between the children was to be made after the death of the widow, the sale of the property, and the payment of the obligations referred to.

10. A husband of a deceased child cannot claim a share of testator's property under a clause of the will providing for an equal division of his property among all his "children."

11. A will gave testator's wife all his property for life, and empowered her to sell enough of the real estate out of a certain described tract to pay testator's debts if the personalty was insufficient. It further provided that at the death of the wife all the property which might be left should be sold, and out of the proceeds the debts of the wife and a specific legacy to one daughter should be paid, and "then, after said amounts are paid, whatever amount that may be left I will and bequeath that an equal division be made among all my children, share and share alike." *Held*, that at the death of testator his children took a mere conditional fee or interest in the proceeds of the sale of his property, which interest was to become absolute upon the death of the wife; and the death of a child prior to the death of the wife defeated her interest in the estate, and her husband, claiming as her heir or legatee, was not entitled to participate in the distribution.

Appeal from Circuit Court, Grant County:
H. J. Paulus, Judge.

Suit by John C. Nelson, administrator of John Entsminger, deceased, against Sarah H. Nelson and others. From the judgment rendered, plaintiff appeals. Reversed.

John A. Kersey, for appellant. St. John & Charles, for appellees.

MYERS, J. Appellant filed his petition in the court below to have the will of John Entsminger, deceased, construed, and for directions in the distribution of his estate. Sarah H. Nelson and others, including Simon B. Kennedy, were made defendants.

¹ 3. See Wills, vol. 49, Cent. Dig. §§ 1461, 1462, 1494, 1516.

² Superseded by opinion, 75 N. E. 679.

The material facts, so far as this appeal is concerned, are as follows: On January 20, 1890, John Entsminger died testate, the owner of certain town property in the town of Jonesboro, and certain farm lands, all in Grant county, Ind. "That at his death his children were Sarah H. Nelson, Matilda J. Lucas, Rebecca Y. Robbins, John W. Entsminger, Rose M. Kennedy, and Emma C. Brooks." That at his death he left a will, the part of which asked to be construed reads as follows:

"Item First: To my beloved wife, I will during her natural life, all my real estate in the county of Grant and State of Indiana, and is described as follows:" then follows a description of a fifty acre tract of land; also a one hundred and fifty-seven acre tract; also two tracts of land in the town of Jonesboro; all "to have and to hold the same during my beloved wife's natural life.

"Item Two: I further will and bequeath to my beloved wife all my personal property of every kind, and hereby empower her, my said wife, to collect all claims, consisting of notes, accounts, rents, profits and choses in action that are due me, or may become due to me at the time of my death, and I further empower my wife and give her full authority to collect, as aforesaid, and pay off and take receipts for all my just debts that I may be owing at the time of my death, and in the event my personal property should be insufficient to pay all my just debts that I may be owing at my death, I hereby empower my wife and give her full power to sell and convey and make title to a sufficient amount of my real estate out of that tract of land first described above, being fifty acres formerly described and purchased by me of Phillip Mather. I further will that my beloved wife shall act as executrix of all the foregoing will, and that she take charge of and transact all of the foregoing business as I have directed the same to be done without giving bond.

"Item Three: I further will that at the death of my beloved wife that what remains of my estate at the death of my said wife that there be paid to my youngest daughter Emma C. the sum of five hundred dollars to make her part equal with what my other children have already received. I then direct and will that after said five hundred dollars is paid to my said daughter that all of my estate both real and personal that may be left at the death of my beloved wife be sold and converted into money and out of said money so realized that all just debts which my said wife may during her life may have contracted be paid and that said five hundred dollars above mentioned be paid to my said daughter Emma out of said money first, and then after said amounts are paid, whatever amount that may be left I will and bequeath that an equal division be made among all my children share and share alike, each one including my daughter

Emma taking an equal share of said remainder."

Item fourth provides for the purchase of a monument, to be paid for "out of the remainder of my estate before the final and last divide is made," and he appoints John O. Nelson executor.

That about three years after the death of John Entsminger his daughter Rose M. Kennedy died testate, leaving no children nor descendants of any children, but leaving Simon B. Kennedy her surviving husband. The item of her will purporting to affect her interest in the estate of her father is in the words and figures following, to wit:

"Fifth: I will and devise to my husband, S. B. Kennedy, all my interest and right in the real estate to which I now have an interest in subject to a life estate of my mother, and which real estate is situated near Gas City, Indiana, and known as the John Entsminger farm, consisting of about 207 acres. Should the same be sold during my life, then, in that event, I direct that the proceeds of such sale as to my interest therein, shall go to my husband, S. B. Kennedy."

That Martha Entsminger, the widow of said John Entsminger, died July 7, 1902, and at her death the only surviving children of John Entsminger were Sarah H. Nelson, Matilda J. Lucas, Rebecca Y. Robbins, John W. Entsminger, and Emma C. Brooks. That Simon B. Kennedy is still living, and is the surviving husband of said Rose M. Kennedy, and her only heir, devisee, or legatee.

The above and other facts—the latter not material to this appeal—were agreed upon in the court below, and submitted to the court for decision. The lower court found that the remainder of said John Entsminger's estate should be distributed one-sixth to each of the surviving children at the death of the widow, Martha Entsminger, and one-sixth to Simon B. Kennedy. Judgment accordingly.

The errors assigned in this court are: (1) "The court erred in overruling motion for a new trial." (2) "The court erred in its decision that Simon B. Kennedy is entitled to share in the distribution of the money to arise from the sale of the real estate of John Entsminger, deceased."

The errors assigned require this court to construe the will of John Entsminger, as to whether or not the interest of the remainderman in said will took a vested or contingent interest, or a vested remainder subject to be divested upon the condition subsequent, viz., the death of the remainderman prior to the termination of the life estate. "A vested interest is one in which there is a present fixed right, either of present enjoyment or of future enjoyment." "A contingent interest is one in which there is no present fixed right of either present or future enjoyment, but in which a fixed right will arise in the future under certain specified contin-

gencies." Page on Wills, § 656. "A vested remainder is one limited to a certain person on a certain event, viz., the termination of the particular estate, in such manner that the remainderman has present capacity to take possession should the possession become immediately vacant." Gardner on Wills, §§ 128-131. "An estate in remainder is not rendered contingent by the uncertainty of the time of enjoyment. The right and capacity of the remainderman to take possession of the estate if the possession were to become vacant, and the certainty that the event upon which the vacancy depends must happen some time, and not the certainty that it will happen in the lifetime of the remainderman, determine whether or not the estate is vested or contingent." Hoover v. Hoover, 116 Ind. 498, 19 N. E. 468; Bruce v. Blasell, 119 Ind. 525, 22 N. E. 4, 12 Am. St. Rep. 436. The same rule is followed in the case of Corey, Executor, v. Springer, 138 Ind. 506, 37 N. E. 322. The law is well settled that in construing wills the intention of the testator must govern, "if it is not inconsistent with some established rule of law. Courts, in giving an interpretation to a will, may place themselves in the situation of the testator, examine the surroundings, and then, from the language used, arrive at his intention." Corey, Executor, v. Springer, supra; Mulvane v. Rude, 146 Ind. 476, 45 N. E. 659. "The law favors vested estates, and that remainders will never be held to be contingent when they can be held to be vested consistently with the apparent intention of the testator." Boling, by Next Friend, v. Miller et al., 133 Ind. 602, 33 N. E. 354; Rumsey v. Durham, 5 Ind. 71; Burke v. Barrett, 31 Ind. App. 635, 67 N. E. 552. "Words in a will must be given their ordinary meaning, unless there is other language in the will which indicates clearly that the testator did not use the words in question in their plain and ordinary sense." West v. Rassman, 135 Ind. 278, 294, 34 N. E. 991; Pugh v. Pugh, 105 Ind. 552, 5 N. E. 673.

With these general rules before us, and applying them to the interpretation of the will of John Entsminger, the question at once arises, when did the property in question vest in the children? After a careful consideration of this will, if we are to follow the intention of the testator, we conclude that it was his intention to give to his wife the fee in all of his property during her natural life, charged with the payment of his debts, and at her death to go to his children, charged with the payment of her debts, and \$500 to one of his daughters. The intention of the testator was to make his will in two parts; one part including the two first items, and the second covering the last items. He closes the first by appointing his wife executrix, and the last by appointing John C. Nelson executor. In item 4 he speaks of "the final and last divide is made," evidently re-

ferring to his property for distribution among his children. There is no provision for partial distribution to his children, but, on the contrary, he provides (1) for the sale and conversion into money of all of his estate, both real and personal; (2) he charges the fund with the payment of certain amounts; (3) the remainder he bequeaths to his children. If the intention of the testator was as we have indicated, we are precluded from following it, for to do so would be to violate a well-established principle of law. The wording of the will clearly gave to the widow a life estate in the property, with power of disposition as to part, and no greater interest. Mulvane v. Rude, Executor, 146 Ind. 476, 45 N. E. 659, and cases cited. Item 3 directs the executor to sell and convert into money all the property remaining after the death of the widow, and from the proceeds arising from such sale to pay to his daughter Emma \$500, and all the just debts of the life tenant. The balance he bequeaths to "all my children, share and share alike." By the terms of this will, no title or interest in the property vested in the executor, his right being a naked power to sell the property and distribute the proceeds as therein directed. Brumfield v. Drook, 101 Ind. 190. "The direction to sell was, in effect, a conversion of the land into personalty. In equity it must be considered and treated as money." Rumsey v. Durham, 5 Ind. 71. When, by the provisions of a will, it is plain that the real estate is to be converted into money, "a court of equity will decree that an equitable conversion of the real estate of the testator into money or personalty took place at the time of his death." Chick v. Ives (Neb.) 90 N. W. 751; Salisbury v. Slade (N. Y.) 54 N. E. 741; Roland v. Tierney (Iowa) 91 N. W. 836. It follows, then, that if the real estate of John Entsminger, by the terms of his will, was equitably converted into money at the date of his death—and, in our opinion, it was so converted—his children had no interest in the same as real estate, and they had no power to sell, convey, mortgage, or will the same. Therefore, in our judgment, Simon B. Kennedy took no interest in the real estate by virtue of the will of Rose M. Kennedy. Chick v. Ives, supra; In re Melcher (R. I.) 54 Atl. 379; In re Gardner (D. C.) 106 Fed. 670. Having determined to hold that by the terms of the will in question the real estate of John Entsminger was in equity converted into money at the date of his death, it therefore follows that the distribution, under the will, to his children, should be upon the theory that the donation in the first instance was made in money. Rumsey v. Durham, supra.

The law favors vesting of estates at the earliest possible moment, and where, in the construction of wills, there is doubt as to whether the testator intended that the estate given by the will should vest or be contingent, the estate should be held to be vested,

where it can be done consistently with the apparent intentions of the testator. This leaves us to the inquiry, what were the intentions of the testator? (1) To pay his debts; (2) give his wife all the remainder of his property during her natural life; (3) at the death of his wife, through an executor, convert the property then remaining into money; (4) dispose of the money. How? By first paying his daughter Emma \$500; second, by paying the just debts of his wife; third, paying for a monument, to cost not less than \$200; and fourth, by making distribution of the remainder to his children. The property to be distributed being money, he clearly indicates when the distribution is to take place, and to whom payable. Notice the language used: "Then after said amounts are paid whatever amount that may be left I will and bequeath that an equal division be made among all my children, share and share alike." The word "then" meaning at that time, and after the death of the widow, after sale of the property, after the payment of the obligations mentioned in the will, fixes the time when distribution or "division" shall take place and final disposition had. He says: "That an equal division be made among all my children, share and share alike." The word "children" may sometimes be used in such a sense and under such circumstances as to include grandchildren, but under no supposition imaginable to us could it be construed to include a son-in-law.

The appellee largely relies upon the case of *Rumsey v. Durham*, supra, for an affirmation of this case. In the *Rumsey* Case the will gave to the widow the use and benefit of the real and personal property for the support of herself and family, and nothing more. In the case at bar, from the language used in the will, testator intended to give the fee in the real estate and the title to the personal property absolutely and unconditionally to the wife during her natural life. In the *Rumsey* Case the will devises the use of the property to the wife for a certain purpose; that purpose not being alone for the widow's benefit, but for the benefit of his children as well. Therefore the children took an immediate vested interest upon the death of the testator. They were, by the terms of the will, entitled to some support from the real estate through their mother. In the case under consideration no such provision is made. We think there is a marked distinction between the two cases. While we are not to overlook the law as to vesting of estates, yet we must not be unmindful of the great cardinal principle in construing wills that the intention of the testator must govern, and he carried out, unless clearly inconsistent with some well-established rule of law. In the case at bar, construing the intention of the testator in connection with the law governing the construction of wills, we conclude that the children of John Entsminger took a conditional fee or inter-

est in the money at the death of testator, which was to become absolute upon the death of the life tenant. This construction of the will, in our opinion, will more nearly carry out the intention of the testator than any other to be placed upon it.

The death of Rose M. Kennedy, a child of testator, prior to the death of the life tenant, defeated her interest in her father's estate, and Simon B. Kennedy, claiming as the sole heir, legatee, or devisee of Rose M. Kennedy, took no interest, and is not entitled to participate in the distribution thereof.

In our opinion, the lower court erred in permitting the defendant Simon B. Kennedy to participate in the distribution of the estate of John Entsminger, and the judgment is reversed, with instructions to the lower court to restate its conclusions of law in accordance with this opinion.

(34 Ind. App. 128)

ROSHNIAKORSKI v. ROSHNIAKORSKI.
(No. 4,995.)

(Appellate Court of Indiana, Division No. 1.
Nov. 20, 1904.)

**DIVORCE—ACTION—RESIDENCE OF PLAINTIFF—
WITNESSES—QUALIFICATION—EVIDENCE
—SUFFICIENT—STATUTE.**

1. A wife brought an action for support against her husband, under Burns' Ann. St. 1901, §§ 6977, 6978, but no process was issued, or publication had, and the defendant did not appear, and was never in court. Thereafter a third paragraph of complaint was filed for divorce under section 1043, and later an amended complaint, setting out the same facts as stated in the third paragraph. To this amended complaint the husband appeared, and divorce was decreed the wife. When the complaint for support was filed plaintiff had not been a resident of the state long enough to entitle her to maintain a suit for divorce, but by the time the third paragraph of complaint was filed she had been a resident a sufficient time. *Held* that, as the actions for support and divorce are entirely separate and distinct, a contention that the complaint for divorce was prematurely filed is untenable.

2. Under Burns' Ann. St. 1901, § 1043, the bona fide residence of the plaintiff is required to be proved in a divorce proceeding by at least two witnesses who are resident freeholders and householders. In a divorce suit one of plaintiff's witnesses testified to plaintiff's residence for the statutory period and of his own residence in the county where the suit was pending, and stated that he was a householder, had a wife and family, and owned real estate "out there." Another witness testified likewise as to plaintiff's residence, as to the witness being a householder in the county, and as to his "lot" in comparing the size of some other person's lot. *Held* sufficient to qualify the witnesses under the statute.

Appeal from Circuit Court, St. Joseph County; Walter A. Funk, Judge.

Suit by Petronella Roshniakorski against Joseph Roshniakorski. From a judgment for plaintiff, defendant appeals. Affirmed.

Meyer & Drummond, for appellant. George D. Feldman, for appellee.

MYERS, J. It appears from the record in this case that on June 15, 1901, appellee filed in the St. Joseph circuit court her complaint against appellant, asking for support, as provided and authorized by sections 6977, 6978, Burns' Ann. St. 1901. No process was issued or publication had. Appellant did not appear or answer this complaint, and was never in court voluntarily or otherwise, for that purpose. On September 13, 1901, an additional, or what was designated as a "third paragraph of complaint," was filed by appellee, in which she averred residence in the state of Indiana and in St. Joseph county, as provided by section 1043, Burns' Ann. St. 1901; marriage of appellant and appellee; a living together as husband and wife; separation; that they had not lived or cohabited together as husband and wife after separation; stating name of appellee before marriage; acts of cruel and inhuman treatment of appellee by appellant; kind and value of property owned by appellant; and demanding a divorce, alimony, and to be allowed to assume her maiden name. On March 6, 1903, an amended complaint was filed by appellee against appellant, averring virtually the same facts as stated in said third paragraph, to which was attached and filed with the clerk of the court the affidavit of appellee as to residence, etc., as required by section 1043, Burns' Ann. St. 1901, in actions for divorce. To this amended petition or complaint appellant appeared and answered. The issue thus tendered was tried by the court, resulting in a finding and judgment for appellee. Appellant moved for a new trial, assigning as reasons therefor: (1) That the decision of the court is not sustained by sufficient evidence; (2) that the decision of the court is contrary to law. The motion was overruled, exception and appeal taken. The evidence is in the record.

The appellant insists (1) that the evidence does not establish the residence of appellee, as required by section 1043, Burns' Ann. St. 1901; (2) that the proof of residence of appellee in the state for two years, and in the county for six months immediately preceding the filing of the petition, was not made at the trial by two witnesses who were at the time resident freeholders and householders of the state.

The statute (section 1043, Burns' Ann. St. 1901) provides that: "Divorce may be decreed by the superior and circuit courts of this state, on petition filed by any person who, at the time of filing of such petition, is and shall have been a bona fide resident of the state for the last two years previous to the filing of the same, and a bona fide resident of the county at the time of, and for at least six months immediately preceding the filing of such petition; which bona fide residence shall be duly proven by such petitioner, to the satisfaction of the court trying the same, by at least two witnesses who are resident freeholders and householders of the

state." The burden was on appellee to make proof of her bona fide residence in the state for two years and a bona fide residence in the county for six months immediately preceding the filing of the petition by at least two freeholders and householders of the state, and until this was done the court had no jurisdiction to hear and determine this cause. *Powell v. Powell*, 53 Ind. 513; *Driver v. Driver*, 153 Ind. 88, 54 N. E. 389; *Cummins v. Cummins*, 30 Ind. App. 671, 86 N. E. 915. It appears from the evidence that appellee came to the state of Indiana on the 1st or 2d day of July, 1899, and on the same date to the county of St. Joseph, and there continuously resided until the trial of this cause in May, 1903. Therefore, if the complaint for divorce was filed June 15, 1901, as appellant contends, then the trial court had no jurisdiction. But, if not filed until September 13, 1901, the action was not prematurely brought, and appellant must fail as to this particular contention. Actions based upon sections 6977, 6978, Burns' Ann. St. 1901, and actions for divorce under our statute are entirely different and separate causes of action, and as we see the pleading in this case there was no attempt to file a petition for divorce prior to September 13, 1901.

As to the second contention of appellant, it appears that only two witnesses—Peter Kretzner and Valentine Krych—attempted to qualify and testify as to the residence of appellee. On this subject Peter Kretzner testified as follows: "Q. I will ask you whether you are a freeholder. A. I am a householder. Q. A freeholder? A. Yes, sir. Q. You own real estate? A. Yes, sir. Q. Where do you live? A. 1040 West Fisher street. Q. South Bend, Indiana? A. South Bend, Indiana. Q. In what county do you live? A. St. Joseph county. Q. What state? A. State of Indiana. Q. How long have you lived in St. Joseph county, state of Indiana? A. I have lived here it will be twenty-one years the 18th day of May, I think; I am pretty sure. Q. Now, you say you own real estate? A. Yes, sir. Q. I will ask you whether you know of property selling in the Sixth Ward, near your home—know of property sales there, people buying? A. Yes, sir. Q. You know of instances of that kind? A. Yes, sir. Q. Do you know what property is worth up in the Sixth Ward? A. Yes, sir." The witness, testifying as to the width of a certain lot, answered as follows: "Q. How many feet front has it? Do you know? A. I think sixty feet. I don't know exactly; fifty-five or sixty feet. It has quite a lot there. Q. Fifty-five or sixty? A. I don't know exactly, but it is a big lot. Q. As big as your lot? A. Bigger than mine. I have a small lot." Valentine Krych testified as follows: "Q. You may state your name. A. Valentine Krych. Q. Ask him where he lives. A. He is in this country now. Q. In what county? A. St. Joseph county. Q. State of Indiana? A. Yes, sir. Q. You are

a householder out there—you keep house, do you? A. Yes, sir. Q. You have a wife and family there? A. Yes, sir. Q. You own property out there, do you? A. Yes, sir. Q. How much property do you own? A. About sixty acres. Q. About sixty acres of real estate? A. Yes, sir. Q. You own it in your name? A. Yes, sir. Q. In St. Joseph county, state of Indiana? A. Six miles from here. Q. In what direction? A. South. Q. Ask him how long he has lived in St. Joseph county, Indiana. A. Thirteen years." Under our statute the satisfactory evidence required to show residence by petitioner in a divorce proceeding must be made "by at least two witnesses who are resident freeholders and householders of the state." In our opinion, witnesses Kretzner and Krych duly qualified as such witnesses. The record in this case shows that when these witnesses were giving their testimony at the trial of this cause they were at the city of South Bend; one residing in that city, the other in the country, and both in St. Joseph county, Ind. They were both householders, Krych owning 60 acres of real estate; and by a fair interpretation of his testimony by "out there" he meant the place of his residence, which was in Indiana, six miles south of the city of South Bend. Kretzner stated that he was a freeholder, and resided at 1040 West Fisher street, South Bend, Ind. He speaks of his lot, and the size of the same, evidently meaning the real estate where he resided. In the case of *Brown v. Brown*, 138 Ind. 257, 37 N. E. 142, where the witness testified to his residence at "Bainbridge, Monroe township," and that he was a freeholder and householder, the court said: "If we may presume that 'Bainbridge, Monroe township,' is in Indiana, this witness was one meeting the requirements of the statute."

Finding no error in the record, the judgment of the circuit court is affirmed.

(35 Ind. App. 684)

UNITED STATES BOARD & PAPER CO. v. MOORE. (No. 4,979.)*

(Appellate Court of Indiana, Division No. 2
Nov. 29, 1904.)

APPEAL—REVIEW OF EVIDENCE—WAIVER OF ERRORS—WATERS AND WATER COURSES—POLLUTION OF STREAM—ACTIONS BY RIPARIAN PROPRIETOR.

1. Questions presented by demurrer are waived where appellant, in his brief, fails to point out any objection to the pleading demurred to.

2. In a suit by a lower riparian proprietor to enjoin an upper proprietor from emptying refuse matter into the stream, and thereby polluting the water, it was not necessary for plaintiff to prove that the discharge of refuse matter was immediately from defendant's factory, but, so long as the water was polluted, it was immaterial whether the refuse was discharged directly into the river, or reached it through a ditch, flume, reservoir, or race.

3. Under Acts 1903, p. 341, c. 193, § 8, requiring appellate courts, on proper assignment of errors, to weigh the evidence in cases not triable by jury, and if the judgment appealed from is not fairly supported by, or is clearly against, the weight of the evidence, to award judgment according to the clear weight of the evidence, or remand the cause, with instructions to modify the judgment or grant a new trial, etc., it is only when the record makes it manifest that the judgment appealed from is not fairly supported by, or is clearly against, the weight of the evidence, that it can award judgment or take other action under the statute.

Appeal from Circuit Court, Rush County; Douglas Morris, Judge.

Action by Thomas B. Moore against the United States Board & Paper Company. From a judgment for plaintiff, defendant appeals. Affirmed.

John W. Kern and Smith, Cambern & Smith, for appellant. Hord & Adams and John D. Megee, for appellee.

WILEY, J. Appellee sued appellants in equity to enjoin them from emptying into Blue river (a natural water course) refuse matter from their strawboard works, and to recover damages for resulting injuries. His complaint was in one paragraph, to which a demurrer was overruled. Appellants answered by a general denial. The trial court made a general finding, denying injunctive relief, but gave appellee judgment for \$500 damages. Appellants' motions for a new trial were overruled, and by their assignment of error they ask us to review the action of the trial court in overruling said demurrers, and also in overruling their respective motions for a new trial.

In their brief, counsel for appellants have not pointed out any objection to the complaint, and hence, under the rule, waived the question presented by the demurrer.

The reasons assigned in the motions for a new trial are that the decision is not sustained by sufficient evidence and is contrary to law. Appellants rely solely for a reversal upon the insufficiency of the evidence, and, by a proper assignment of error, bring their appeal within the act of 1903, which requires the courts of appeal to weigh the evidence in all cases not triable by a jury.

Before taking up for consideration the question thus presented, it may be important to state the issue tendered by the pleadings. By his complaint, appellee avers that he is the owner and occupant of a farm consisting of 179 acres of land, and that he is engaged in general farming and stock raising; that Blue river (a natural water course) flows through Rush county, Ind., and passes along and over his said farm for a distance of one-half mile; that, prior to the grievances of which he complains, the waters of said stream were clear and reasonably pure and wholesome for drinking water for stock and for all other farming and domestic purposes; that the water in its natural state was a great convenience to appellee, and greatly

*1. See Appeal and Error, vol. 2, Cent. Dig. § 4254, 4255.

*Rehearing denied, 74 N. E. 1094.

enhanced the value of his farm; that the water in said river was well stocked with all game and other fishes native to said stream, and that he was accustomed to take fish therefrom for his family use, and that by reason thereof the value of his farm was greatly enhanced; that during all the time he has owned said farm there has been, and still is, situated thereon, a valuable flouring mill, which is operated by water conducted through a race, the water of which is supplied from said river; that said race extends over and along his farm for a distance of about one-half mile; that he had, at great cost, refitted said mill with necessary machinery, etc., of the latest patterns, for the manufacture of flour, meal, etc.; that he operated and still operates said mill as a custom mill, and that, prior to the grievances of which he complains, it was of great profit to him; that since 1891 appellants have operated, managed, and controlled a large mill or factory for the manufacture of paper board or strawboard, and other like products, and still continue to manufacture the same; that said mill is located at or near the town of Carthage, on the banks of said river, above appellee's farm; that, in the manufacture of said products, appellants used large quantities of water, straw, lime, etc., and have discharged and continue to discharge from said mill large quantities of waste water, and waste, refuse, straw, lime, and other substances, into such water course, at a point on the same above appellee's farm, and that the waters below said point where said refuse, etc., is discharged, and on appellee's farm, and about his said mill and race, are "thereby corrupted and polluted, and rendered foul, noxious, and unwholesome, and wholly unfit for stock water * * * and for any farm or domestic purposes whatever, and that all the fish in said water course below said point were and are thereby destroyed; that said waste and refuse matter so discharged into such water course was and is carried by the waters of said stream and deposited in the bed and on the banks of the same of the plaintiff's said farm, and in and about said mill and race, where the same decays, and becomes corrupt, noxious, and unwholesome; that, because of said pollution thereof, noxious, unwholesome, and offensive odors are emitted by the waters of said stream, and by foul and decaying waste matters so deposited on said land, * * * to the great annoyance and discomfort of the plaintiff and his said family, and whereby the plaintiff's use and enjoyment of his said property is greatly impaired, and the market and rental value of the same are greatly depreciated"; that, by reason of the grievances above stated, appellee's business in the operation of his said mill was greatly injured and destroyed, and that he is deprived of the benefits accruing to him therefrom; and all to his great damage, etc. It is further

averred that appellants will continue to discharge said refuse matter from their said factory into said stream, to appellee's irreparable damage, unless enjoined. The prayer of the complaint asks for injunctive relief and damages for the injuries sustained.

The statute authorizing appellate tribunals to weigh the evidence on appeal of any cases not triable by jury is as follows: "In all cases not now or hereafter triable by a jury, the Supreme and Appellate Courts shall, if required by the assignment of errors, carefully consider and weigh the evidence and admissions heard on the trial when the same is made to appear by a bill of exceptions setting forth all the evidence given in the cause, and if, on such appeal, it appears from all the evidence and admissions that the judgment appealed from is not fairly supported by, or is clearly against the weight of the evidence, it shall be the duty of such court to award judgment according to the clear weight of the evidence, and affirm the judgment or return said cause to the trial court with instructions to modify the judgment or to grant a new trial; or to enter such other judgment or decree as to such court of appeal may seem right and proper upon the whole case." Acts 1903, p. 341, c. 193, § 8. This is the first case, to our knowledge, which has reached the courts of appeal under this statute, where the sole question for decision rests upon the weight of the evidence, and that question properly presented by the assignment of errors. If, in such cases as we are now considering, the chancery practice of former days prevailed—of trying a case by deposition or other written evidence—appellate judges would have the same opportunity to weigh the evidence as the trial judge, but such is not the case here. We have to consider the oral testimony of witnesses, reduced to writing. We are confronted with a record of nearly 900 pages of typewritten evidence, and every word of it is oral. There is much evidence to sustain the material averments of the complaint, and equally as much, if not more in volume, against them.

It must be observed that the act of appellants, of which appellee complains, is that they are discharging from their factory into Blue river the refuse matter therefrom, and that thereby the waters of the river below the point of discharge are made foul, noxious, and impure, causing the damages and conditions detailed in the complaint. If, to sustain these material averments, it was necessary for appellee to prove that the discharge of said refuse matter was immediately from appellants' factory into the river, then there is a total failure of proof, for there is not a word of evidence to support it. Originally, from the date the factory went into operation, such refuse matter was discharged directly into the river, and this was continued until 1895, and since that time, ex-

cept on one occasion, by reason of an accident, all the refuse matter from the factory has been carried through an open ditch three or four hundred feet to a point near the river where it enters a flume 800 feet long, made of oak lumber, by which it is carried across the river and emptied into a reservoir which has an area of about 25 acres. In this reservoir is a dike or embankment so constructed as to force the incoming water around the edges of the pond, so there would be more opportunity for the settling of the matter in suspension in the fluid. It is nearly 200 rods around the reservoir, and the incoming water has to pass around that distance before it reaches the outlet. It then passes over or through an outlet about 12 feet wide, in a sheet about one-half an inch thick, into a waste bottom land, designated as a bayou. This bayou is caused by back water from a dam across the river. The waste water then passes through this bayou about three-quarters of a mile before it reaches a point of outlet above the dam. In ordinary stages of water, part of this waste passes over the dam, and part through appellee's mill race; and in dry times practically all of it passes through the race for a distance of about three-quarters of a mile to the mill, and thence into the river, 30 rods below.

It is earnestly contended by counsel for appellants that there is not a word of evidence in support of the allegation that the refuse matter from the strawboard works was discharged into the river, and hence there is a total failure of proof upon a material fact charged. There is no dispute as to the manner in which the refuse matter from the factory is disposed of, and, while there is no allegation that it was discharged directly into the river, yet it is averred that appellants "have discharged and are continuing to discharge * * * large quantities of waste water and waste refuse, straw, lime, and other substances, etc., into the river." The complaint might have been made more specific, if it had been required, as to the exact manner in which the stream was polluted; but if the evidence shows that it was polluted by the refuse matter from appellants' factory, after reaching the river, in the manner described, we are unable to see why there is a failure of proof on that point. If the water was thus polluted, it can make no difference whether the refuse matter was directly discharged into the river, or reached the river through the open ditch, the flume, the reservoir, the bayou, and the race, as disclosed by the evidence.

Counsel, in their brief, have given a résumé of the evidence, and after a careful examination of it as stated by them, and also after examining and considering much of the original evidence in detail, and exercising the right conferred upon us of weighing the evidence in so far as we can, we are unable to say "that the judgment appealed from is

not fairly supported by, or is clearly against, the weight of the evidence." It is only when this condition makes itself manifest to an appellate court by the record that it is authorized by the statute to "award judgment according to the clear weight of the evidence * * * or return said cause to the trial court with instructions to modify the judgment or to grant a new trial, or to enter such other judgment or decree as to such court of appeal may seem right or proper upon the whole case."

Upon consideration of the evidence, under our view of the statute, we cannot see our way clear to disturb the conclusion reached by the trial court. Judgment affirmed.

(34 Ind. App. 133)

CONRAD v. CLEVELAND, C., C. & ST. L. RY. CO. (No. 4,099.)

(Appellate Court of Indiana, Division No. 1.
Nov. 29, 1904.)

TRIAL—DISCRETION OF TRIAL COURT—ARGUMENT OF COUNSEL—INSTRUCTIONS—PRESUMPTION OF CORRECTNESS—MISUNDERSTANDING BY JURY—APPEAL—QUESTIONS PRESENTED.

1. In appellate courts all presumptions must be indulged in favor of the regularity and correctness of proceedings of the lower court, and its judgment must stand until error is affirmatively shown by the record.

2. Instructions must be construed as a whole, and if, taken together and reasonably construed, they present the law of the particular case with reasonable accuracy, it cannot be said that the jury were misled.

3. It is presumed that the jury understand instructions, and this presumption is not overcome by an affidavit of a party to the effect that he is informed and believes that a number of the jury were mistaken as to one of the instructions of the court, and understood a certain thing thereby.

4. Although Burns' Ann. St. 1901, § 545, gives the party having the burden of the issue the right to open and close the argument, and requires him to disclose in the opening all points relied on in the cause, yet questions pertaining to the argument of counsel and the order in which they shall speak are addressed to the discretion of the trial court, and an appellate court will not interfere except in extreme cases.

5. A defendant has no absolute right, by failing to argue a case to the jury, to preclude plaintiff from making a closing as well as an opening argument.

6. A judgment will not be reversed for the refusal of the court to permit plaintiff to make a closing argument to the jury, where defendant failed to make any argument after plaintiff's opening, and there was nothing to prevent the opening from being made as complete as possible, and there was nothing to show that the conclusion of the jury would have been different, had a closing argument been made.

7. Where the evidence is not in the record, questions addressed to its sufficiency to support the verdict, or answers to special interrogatories, and to the conflicting character of answers to interrogatories, and to the general verdict as contrary to law, are not open to review.

Appeal from Circuit Court, Boone County;
S. R. Artman, Judge.

¶ 5. See Trial, vol. 46, Cent. Dig. §§ 55, 2693.

Action by Edwin P. Conrad against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

P. H. Dutch, for appellant. John T. Dye and S. M. Ralston, for appellee.

MYERS, J. This was an action by appellant against appellee in the Boone circuit court for damages for the alleged negligence of appellee in the running of its railway locomotive engine, and train of cars attached thereto, upon and against appellant's horse, mule, wagon, double set of harness, and 15 grain sacks, all of the alleged value of \$387, and that by the negligent acts of appellee said horse and mule were killed, and said wagon and harness and sacks destroyed, all without any fault or negligence on the part of the appellant or his servant; that said accident occurred on the 7th day of August, 1900, at a street crossing in the town of Zionsville, in Boone county, Ind. It is alleged by appellant in the court below that appellee, in approaching said crossing, and when not less than 80 nor more than 100 rods from said crossing, omitted to sound the whistle on said locomotive engine three times, and negligently and unlawfully omitted to ring the bell attached to said engine continuously for not less than 80 nor more than 100 rods from said crossing, until said engine had fully passed said crossing; that by reason of said negligent and unlawful conduct of appellee's said servants in omitting to sound the whistle on appellee's said locomotive engine, and in omitting to ring the bell on appellee's said locomotive engine, and running appellee's said locomotive engine and train at a high and negligent rate of speed upon and over said crossing, and while said appellant's servant was in charge of said property and in the act of crossing said appellee's railroad track at said crossing, using due care to avoid injury, said property of appellant was destroyed; that, had appellee's servants in charge of its locomotive given the signal by sounding the whistle and ringing the bell on said locomotive when not less than 80 nor more than 100 rods from said crossing, and continuously rung the bell until its engine had fully passed said crossing, said appellant's servant could have heard such signal and avoided the collision, and avoided the injury complained of. The complaint is in two paragraphs, to which appellee filed an answer in general denial. Trial by jury. Finding and judgment for appellee. The errors assigned in this court are (1) the overruling of appellant's motion for a new trial; and (2) not permitting one of appellant's counsel to address the jury upon behalf of appellant in the closing argument. We will consider the errors assigned in the order presented by appellant:

In his motion for a new trial, appellant

proposes the following reasons why a new trial should be granted: "First. Because the jury misunderstood, and through mistake misconstrued, instruction No. 15 given by the court. Second. Because the jury, through inadvertence and mistake, understood the court to instruct the jury that if plaintiff's servant in charge of plaintiff's team did not stop plaintiff's team before driving upon the crossing, and look and listen for approaching trains to the crossing, plaintiff could not recover. Third. Because a number of the jury made a mistake as to what the court instructed the jury was the duty of plaintiff's servant in approaching the crossing when the injury occurred, in this: that said jurors understood the court to instruct the jury that, if the servant of plaintiff in charge of plaintiff's team did not stop plaintiff's team and look and listen for approaching trains before going on the crossing, plaintiff could not recover, which aforesaid reason will more fully appear in Exhibit A, herewith filed, and made part hereof. Fourth. Because the court erred in refusing to allow P. H. Dutch, one of plaintiff's counsel, to make a closing argument to the jury upon the part of plaintiff. Fifth. Because the court erred in refusing to permit P. H. Dutch, one of plaintiff's attorneys, to address the jury in behalf of plaintiff. Sixth. Because the general verdict of the jury is not supported by sufficient evidence. Seventh. Because the general verdict of the jury is contrary to law. Eighth. Because the answers of the jury to interrogatories are in conflict with each other. Ninth. Because answers of the jury to interrogatories numbered 15, 16, 19, 20, 24, 25, 26, 27, 28, 30, 33, 34, 41, 45 are not supported by sufficient evidence, and for the further reason that said answers show that the jury did not understand the import of either their answers to said interrogatories."

We will consider the first three reasons together. The appellant, in his argument, lays particular stress on instruction No. 15 submitted to the jury. Appellant does not contend that the instruction does not state the law correctly, nor that the wording of the instruction was such that it could not be easily and readily understood, or that the instruction was so framed that the jury might have been misled thereby, or that it was not applicable to the evidence. Instruction No. 15 is as follows: "A railroad crossing is a place of known danger, and the plaintiff's servants, if they knew of said crossing, were bound to approach the same upon the assumption that a train was liable to pass at any moment. To relieve the plaintiff from the imputation of negligence contributing to the injuries sued for in this action, his servants were bound to make vigilant use of their senses of sight and hearing, so far as they would avail them; and if their view or hearing were at the time, from any cause, obstructed, this made it all

the more necessary for them to use increased care and caution upon approaching the crossing. And if, because of the dangerous character of the crossing where the injuries occurred, it would have been the act of a reasonably careful and prudent man to have stopped and looked and listened for an approaching train before driving upon the crossing, and this said servants did not do, and if, by so doing, they could have seen or heard the train in time to have avoided the collision, then, although you may find that the defendant was negligent in operating its train, the plaintiff cannot recover." A number of other instructions were given to the jury by the court as to appellant's and appellee's rights, and the caution and care to be observed by each to prevent accidents at public crossings, all of which, as we must presume, were within the evidence and pertinent to this case. The evidence is not in the record. All presumptions must, by this court, be indulged in favor of the regularity and correctness of the proceedings of the lower court, and, until it is affirmatively made to appear by the record that error was committed by the trial court, the judgment must stand. *Campbell v. State*, 148 Ind. 527, 47 N. E. 221; *Ferguson et al. v. Hull et al.*, 136 Ind. 339, 36 N. E. 254; *Taylor, Guardian, v. Birely, Adm'r*, 130 Ind. 484, 30 N. E. 696; *Teagarden, Adm'r, v. Phillips*, 14 Ind. App. 27, 42 N. E. 549. Instructions must be construed as a whole, and if, taken together, and "fairly and reasonably construed," they present the law of the particular case to the jury with reasonable clearness and accuracy, it cannot be said they were misled. *Young et al. v. McFadden*, 125 Ind. 254, 25 N. E. 284; *Coble v. Eltzroth*, 125 Ind. 429, 25 N. E. 544; *Nave v. Flack*, 90 Ind. 205, 46 Am. Rep. 205. After a careful consideration of the instruction complained of by appellant, and construing it with all the other instructions in this case, we are unable to see anything ambiguous or uncertain in its meaning or purport, which could not be readily understood by any one of ordinary intelligence and comprehension. The presumption is and should be that the jury did understand the instruction, and for us to indulge any other presumption would lead to a field of speculation to which we cannot agree. The affidavit of appellant, filed with his motion as Exhibit A, whereby he says "that he is informed and believes that a number of the jury who tried the above-entitled cause were mistaken as to one of the instructions of the court; that said jurors understood that the court instructed the jury that, unless plaintiff's agent who was driving plaintiff's team stopped plaintiff's team before going upon the track, that plaintiff could not recover"—can add no support to ground 3. *Eaken et al. v. Thompson*, 4 Ind. App. 393, 30 N. E. 1114. We have carefully read the interrogatories and answers thereto, and we must conclude that they do

not support appellant's contention. But upon the other hand, the answers seem to be intelligent and entirely against appellant's theory.

We will next consider the fourth and fifth reasons assigned by appellant. These reasons appeal purely to the discretionary power of the court. It is true that the party having the burden of the issue shall have the right to open and close the argument, "but shall disclose in the opening all the points relied on in the cause." Section 545, Burns' Ann. St. 1901. In the Criminal Code the order is prescribed, and, being fixed, the court has no discretionary power. If the Legislature had intended to take away from the trial court all discretionary power relative to the argument by counsel in the trial of civil cases, a provision to that effect certainly would have been made. It appears from the bill of exceptions: That an agreement was had between counsel for the appellant and appellee that the instructions of the court might be used in the argument of the case to the jury. Upon the part of appellant, Ambrose Wilhoite, one of the attorneys for appellant, opened the argument to the jury "In an address of one hour and ten minutes, in which he reviewed all the evidence given on the trial, except the testimony of four witnesses, and failing to discuss the instructions of the court." That at the close of the argument of Wilhoite the attorney for the appellee "announced to the court that the jury might be instructed; that he would not argue upon the part of defendant; whereupon P. H. Dutch, attorney for plaintiff, requested and demanded that he be permitted to close the argument for plaintiff, which request and demand was refused by the court, and said Dutch was not permitted to make an argument to the jury, and no argument other than that made by said Wilhoite was permitted by the court to be made upon the part of plaintiff. That before the commencement of the argument of said cause to the jury there was no announcement or intimation upon the part of defendant's counsel that there would be no argument made in said cause to the jury upon the part of said defendant. That there was no misconduct on the part of plaintiff's counsel, for which the court refused the closing argument to be made, but said closing argument was refused by the court upon the ground that, as counsel for defendant waived making the argument upon the part of defendant, the plaintiff ought not to be allowed to make further argument, for the reason that the plaintiff, by counsel, had sufficiently argued said cause." It is certainly important, in the due administration of justice, that parties be not deprived of the full benefit of counsel in the presentation of their cause of action to the jury; nor do we think there is any absolute right in a defendant, by his failure to argue his case, to produce such a result. Every court is bound, in fairness, to prevent

such abuses; but, inasmuch as our Civil Code does not take away the discretionary power of the trial court, and he chooses to exercise that discretion, we think that this court should not interfere except in extreme cases. There is nothing in the record to show that there was anything to prevent the opening from being made as complete as possible. There is nothing except speculation to indicate that the conclusion of the jury, under any argument, would have been different. *Priddy v. Dodd*, 4 Ind. 84; *Pittsburgh, C. & St. L. R. Co. v. Martin*, 82 Ind. 476; *Baldwin et al. v. Burrows*, 95 Ind. 81; *Citizens' St. Ry. Co. v. Huffer*, 26 Ind. App. 575, 60 N. E. 316.

The evidence not being in the record, no question is presented by the fifth, sixth, seventh, eighth, and ninth reasons assigned.

Finding no error in the record, the judgment is affirmed.

(34 Ind. App. 119)

INDIANA NATURAL GAS & OIL CO. v. LEE. (No. 4,937.)

(Appellate Court of Indiana, Division No. 1. Nov. 29, 1904.)

QUIETING TITLE — PLEADING—SUFFICIENCY — LANDLORD AND TENANT—NONPAYMENT OF RENTS — ACTIONS — SUFFICIENCY OF COMPLAINT—GAS LEASES—BREACH BY LESSEE—MEASURE OF DAMAGES.

1. In an action for damages for failure to furnish gas for domestic purposes according to the terms of a gas lease, a complaint alleging that plaintiff had received no gas under the lease, and had been compelled to procure fuel and lights from other sources, and that the gas for fuel and lights which should have been furnished under the lease was of the value of \$100, averred sufficient facts for the determination of the measure of damages.

2. Where a lease provided that the rentals, when due, should be deposited in a certain bank, a deposit in the bank was a payment of rent under the lease, and an averment in a pleading that the rent was not paid included by implication a statement that it was not deposited in the bank.

3. In an action for rents, an averment that no rental payments have been made since a certain date must be construed to mean that no payments have been made to plaintiff, and not as negating payments to the original lessor, who was plaintiff's grantor.

4. Where a deed from a lessor was not placed on record, and the lessee knew nothing of the conveyance, the latter was not in default for paying rent to the original lessor.

5. Where an instrument is not the basis of the suit, a copy of it, which is made an exhibit, cannot be considered to aid the averments of the complaint.

6. In a suit to quiet title against a gas lease, a complaint alleging the execution of the lease and its assignment to defendant, who claimed some rights and privileges thereunder adverse to plaintiff's rights, and alleging that defendant had failed to pay rent and furnish gas as provided for in the lease, but failing to aver that rents were to be paid and gas furnished, and failing to state, except by way of recital, that the lease contained such provisions, did not negative defendant's claim of rights under the lease, and was insufficient to entitle plaintiff to have his title quieted against the same.

¶ 5. See Pleading, vol. 33, Cent. Dig. §§ 945, 947.

Appeal from Circuit Court, Grant County; H. J. Paulus, Judge.

Action by James W. Lee against the Indiana Natural Gas & Oil Company. From a judgment for plaintiff, defendant appeals. Reversed.

W. O. Johnson, Davis & Davis, and Blackledge, Shirley & Wolf, for appellant. A. R. Long, for appellee.

ROBINSON, P. J. Suit upon a gas lease to recover rentals, damages for failure to furnish gas for domestic purposes, and to cancel the lease and quiet title. The first paragraph of amended complaint avers: That on July 25, 1889, Joseph McGrew, being the owner of certain described land, leased to a firm named the privilege of drilling for gas and oil. Soon afterwards the firm assigned its rights as lessee to appellant. On January 6, 1900, appellee purchased the land from one Hinton, who was the grantee of McGrew, together with his rights under the lease. That appellant for some time did furnish gas under the terms of the lease. Failure to perform the agreement to furnish gas according to the terms of the lease since appellee purchased the land is averred, and that the gas to have been furnished for fuel and lights under the lease was of the value of \$100, for which sum judgment is asked. A copy of the lease is filed as an exhibit, and contains, among other provisions, the following: (1) The lessees agree to drill a well upon the premises within 12 months from date of the lease, or thereafter pay the lessor "a yearly rental of fifty-six dollars until said well is drilled. Such rentals when due shall be deposited in Fairmount Bank, at Fairmount, state of Indiana. Should second party fail to make such deposit or pay to first party on these premises or at present residence of first part the said rental when due as aforesaid, then this instrument shall be null and void." (2) If oil should be found, lessor was to receive one-eighth part thereof. (3) If gas should be found, lessor was to receive \$200 yearly for each well. (4) "First party shall have, free of expense, gas from the well or wells to use, at his own risk, to light and heat the dwelling now on said premises, with pipe to conduct the same to said dwelling free of cost." (9) "Second party agrees to furnish gas to first party for use at his premises on or before the 15th day of November."

This paragraph avers sufficient facts from which the measure of damages may be determined. It is averred that appellee had received no gas under the lease, and had been compelled to procure fuel and lights from other sources, and that the gas for fuel and lights which should have been furnished under the lease was of the value of \$100. See *Indiana Natural Gas, etc., Co v. Hinton*, 159 Ind. 393, 64 N. E. 224.

The second paragraph of complaint avers

the ownership of the land, the execution of the lease, its assignment to appellant, and the purchase of the land by appellee in the first paragraph; that the rents under the lease were paid to appellee's grantor to July 25, 1899, since which time no payments have been made thereon; that there is due and unpaid to appellee under the terms of the lease accrued rents from the 6th day of January, 1900, to July 25, 1900, in the sum of \$20. A copy of the lease is made an exhibit.

The third paragraph avers the ownership of the land, execution and transfer for the lease, makes a copy an exhibit, sets out some of the provisions of the lease, and avers that no gas has ever been furnished to appellee as provided in the lease, no rents have been paid to him, and because thereof, by the terms of the lease, the same has become null and void; that appellant refused to cancel and deliver up the lease to appellee, though it had been requested, and the same had been demanded by a written notice, a copy of which notice is made an exhibit. Cancellation of the lease is demanded, and the appointment of a commissioner to cancel the same. The written notice filed with this paragraph as an exhibit is dated August 24, 1900, and demands a surrender and release of record of the lease, describing the same.

The fourth paragraph avers appellee's ownership and possession of the land; the execution of the lease, a copy of which is made an exhibit the transfer of the lease; that appellant has failed and refused to furnish to him natural gas for fuel and lights as therein provided, and has failed and refused to pay appellee the rents therein stipulated, appellant knowing that appellee had purchased the land from a grantee of McGrew, January 6, 1900, together with all rights held by him under the lease; that appellant refuses to cancel the lease, "but claims to have and hold some rights and privileges therein and thereunder" which is adverse to appellee's rights and a cloud upon his title; and demands that his title be quieted. The original complaint was filed December 17, 1900.

Separate demurrers to each paragraph of complaint were overruled. Appellant answered in two paragraphs, to the second of which appellee replied in denial. Over appellant's motion for a new trial, judgment was rendered quieting title in appellee to the land involved, and that appellee recover of appellant damages in the sum of \$30 and costs. A motion to modify the judgment by striking therefrom the amount "found due for gas rentals or for gas" was overruled.

The second paragraph of complaint seeks to recover rent from the time appellee became the owner of the land, January 6, 1900, to the end of the rental year, July 25, 1900.

The paragraph avers that the rent was paid to appellee's grantor up to July 25, 1899. The lease provides that "a yearly rental of \$56 until" a well is drilled shall be paid by the lessee; "such rental, when due, shall be deposited in Fairmount Bank, at Fairmount, state of Indiana." Whether this rental is to be paid or deposited in the bank in advance is not stated in the lease. But it is averred that the rent was paid up to July 25, 1899, "since which time no payments have been made thereon." The lease does not provide that the rental shall be paid to the lessor, or deposited in the bank, but that such rental, when due, shall be deposited in the bank. A deposit in that bank by the lessor of a year's rent would be a payment under the lease. So that it seems the averment that the rent under the lease was not paid includes that it was not deposited in the bank. But it is not averred in this paragraph that appellee's deed, when he purchased the land, was placed on record, or that appellant had any notice of appellee's ownership of the land after January 6, 1900. The averment that since July 25, 1899, no rental payments have been made, must be held to mean that no payments have been made to appellee. We do not think the averment amounts to negating the fact that the rent may have been paid to some one else. Until appellant knew, or facts are stated showing it must have known, that appellee owned the land, he being the grantee of the lessor, it would not be in default for not paying the rent to him.

The fourth paragraph of complaint seeks to quiet title against the lease. A copy of the lease is made an exhibit, but, as the lease itself is not the basis of the suit, we cannot look to the exhibit to aid the averments of the complaint. The paragraph avers the execution of the lease, and its assignment to appellant; that appellant is claiming to have some rights and privileges under the lease which are adverse to appellee's rights and a cloud on his title. It is further averred that appellant has failed to pay the rent and furnish appellee gas for fuel and lights as provided for in the lease. No such provisions are set out in the pleading that rents were to be paid and gas furnished, nor is it stated, except by way of recital, that the lease contains such provisions. We must presume, as against the pleader, that the lease is still valid, and that rights under it are still in force, and we are not informed by the pleading but what there are good reasons for appellant's claim that it had some rights in the lease.

For the reasons given, we think the second and fourth paragraphs are insufficient, and that the separate demurrers to each of these paragraphs should have been sustained.

Judgment reversed.

FT. WAYNE TRUST CO. v. SIHLER. (No. 5,211.)

(Appellate Court of Indiana, Division No. 1. Nov. 29, 1904.)

HUSBAND—SURETYSHIP OF WIFE—ESTOPPEL—NOTES—MORTGAGE—CANCELLATION—JURISDICTION—STATUTES.

1. Under the direct provisions of Burns' Ann. St. 1901, § 6964, a contract of suretyship by a married woman is void as to her.

2. Notwithstanding Burns' Ann. St. 1901, § 6962, providing that a married woman shall be bound by an estoppel in pais like any other person, a married woman is entitled to cancellation of a note and mortgage of her property given by her to secure the debts of her husband, where the mortgagee knows that the wife is to receive no part of the consideration, and that the intent is to secure the debts of the husband, though the mortgage recites that the debt is hers, and she is required to sign an affidavit that the consideration is for her sole use, and also acknowledging herself estopped to claim otherwise than as recited in the affidavit.

3. When a note secured by mortgage is declared void, the mortgage lien ceases to be effective.

4. Where a resident married woman executes in Indiana, to residents of the state, a note payable therein, and mortgages her real property, located in another state, to secure payment of the note, but receives no consideration therefor, the purpose being to secure the debts of her husband, to the knowledge of the mortgagee, the courts of Indiana have jurisdiction of an action by her to cancel the note and mortgage and enjoin foreclosure instituted in the state where the property is located.

Appeal from Circuit Court, Whitley County; Joseph W. Adair, Judge.

Suit by Matilda J. Sihler against the Ft. Wayne Trust Company. From a judgment for plaintiff, defendant appeals. Transferred from the Supreme Court under Act March 12, 1901. Affirmed.

Vesey & Vesey and Barrett & Morris, for appellant. Olds & Doughman, for appellee.

ROBINSON, P. J. Suit by appellee to cancel a note and mortgage and to enjoin the assignment and transfer of the same. Appellant assigns error upon overruling its motion for a new trial and upon the conclusions of law upon the facts found. The facts are, substantially: Appellee is, and for 17 years has been, the wife of Frederick W. Sihler, and from 1896 until in July, 1902, she and her husband were bona fide residents of Ft. Wayne, Allen county, Ind. On January 18, 1902, Frederick W. Sihler owned stock in the Ft. Wayne Drug Company of the par value of \$10,000, Lamb Wire Fence Company stock of the value of \$500, and Prickley Ash Bitters stock of the par value of \$1,000, and at and prior to that date he was indebted to appellant between \$2,000 and \$3,000, for which indebtedness appellant held as collateral security \$3,500 par value of Sihler's stock in the drug company; that he was indebted to the Old National Bank of

Ft. Wayne in excess of \$6,000, for which indebtedness the bank held as collateral security \$6,500 par value of Sihler's stock in the drug company, and Lamb Wire Fence Company stock of the par value of \$500, and Prickley Ash Bitters stock of the par value of \$1,000; and was indebted to the Ft. Wayne Drug Company in excess of \$1,100. Henry C. Paul is now, and has been since several years prior to January, 1902, a stockholder and president of the appellant, and for two years last past has been a stockholder and president of the Ft. Wayne Drug Company, and vice president and a member of the auditing committee of the Old National Bank. At and prior to January 18, 1902, the stock of the Ft. Wayne Drug Company, including the stock held by Sihler and held as collateral security, was worth only 50 per cent. of the par value thereof. The stock held by appellant and the bank as collateral was not of sufficient value to make it good security for such debts, and the Ft. Wayne Drug Company had no security for the debt owing to it by Sihler on and prior to January 18, 1902, and at and prior to that date Sihler was insolvent. Henry C. Paul, above mentioned, knew, at and before the above date, the amount Sihler owed to appellant and to the bank, and the value of the securities they held, and knew that such security was insufficient, and also knew the amount that Sihler was indebted to the Ft. Wayne Drug Company, and that it had no security, and he further knew that Sihler was insolvent. For two years prior to January 18, 1902, Sihler had been secretary and general manager of the Ft. Wayne Drug Company at a salary of \$2,000 per year. At and prior to January 18, 1902, Henry C. Paul from time to time requested Sihler to pay \$1,100 of his indebtedness to the drug company, and \$1,000 each to the bank and to appellant, and insisted that the amounts be paid. The payment of such amounts would reduce Sihler's indebtedness to appellant and to the bank so as to make the collateral held by them sufficient security for the remaining indebtedness, and the payment of \$1,100 to the drug company would practically liquidate all of Sihler's indebtedness to it. On the 18th day of January, 1902, and for 10 years prior thereto, appellee owned lots 35 and 36, block 8, in Dundee Place Addition to Kansas City, in Jackson county, Mo., which she had received as gift from her father, Christian F. G. Meyer, a resident of Missouri. In December, 1901, Sihler informed Paul that he expected Meyer would advance \$3,000 that he could and would use in payment of his indebtedness to the drug company, the bank, and appellant; but none was sent. On and before January 18, 1902, Paul knew that appellee owned the above real estate, and that it was of greater value than \$3,100, and that it was her own individual property. On the above date, Paul, desirous of reducing Sihler's indebted-

¶ 1. See Husband and Wife, vol. 26, Cent. Dig. §§ 346-349.

ness to appellant, the bank, and the drug company, and knowing that Sihler was insolvent, and had no property or money with which to make a payment or to secure any portion of it, requested Sihler to procure his wife, appellee, to execute her note for \$3,100, payable to appellant, and to secure the same by mortgage on the Kansas City real estate, and that Sihler informed appellee that Paul said that, if she would execute her note, and secure it by mortgage, appellant would hold it as temporary security without recording, until Sihler could obtain money to pay the amount of such indebtedness, and that out of that sum he would pay \$1,000 to appellant, \$1,000 to the bank, and \$1,100 to the drug company; and that Sihler informed appellee of the request of Paul, and of his agreement to withhold the mortgage and not record it, and appellee upon that condition agreed to execute the note and mortgage; that thereupon Paul, being informed of appellee's consent to execute the note and mortgage, directed his attorneys to prepare the same for execution, and further directed them to secure appellee's signature to an affidavit that the money was borrowed on the mortgage for her sole use and benefit; that the note and mortgage were so drawn, and the mortgage signed by Frederick W. Sihler before any of the papers were presented to or signed by appellee. The note, mortgage, and affidavit were then taken by a notary public to appellee's residence, and were signed by her. The note, signed by appellee alone, was dated January 18, 1902, for \$3,100, payable to appellant on or before one year after date, with 6 per cent. interest, payable semiannually, negotiable, and payable at the Ft. Wayne Trust Company. The mortgage signed by appellee and her husband is on the real estate above mentioned, and is given to secure the payment of the note for \$3,100, and stipulates that for the purpose of inducing the mortgagee to make the loan thereby secured the mortgagors represent that their title is free from incumbrances, that the mortgagors, each for himself or herself, further represent that the mortgage is not made by Matilda J. Sihler as security, indorser, or guarantor of the debt or other obligation of her husband or any other person, and the mortgagors agree to pay the sum of money so secured. Appellee's affidavit states, among other things, that the money borrowed on the mortgage is for the sole and exclusive use and benefit of Matilda J. Sihler, and that the above statements are voluntarily made for the purpose of inducing appellant to loan her the sum of money represented by the bond and mortgage, and she further states that the bond and mortgage were by her voluntarily executed with full knowledge of the law and fact that she will be estopped from setting up any defense to the bond and mortgage by reason of the statements therein made; that after the execution of the note, mortgage, and affidavit

the notary advised Paul by telephone of the fact, who thereupon caused a check of appellant to be drawn on the Old National Bank, payable to the order of appellee, for \$3,100, and to be delivered to Frederick W. Sihler, and requested that Sihler procure the indorsement of his wife upon the same, and return it to appellant; that Sihler immediately went to his residence and procured appellee to write her name upon the back of the check, and returned with it to the office of appellant, and at the request of appellant's secretary also signed his own name upon the back of the check, and delivered it to the secretary, who delivered to Sihler two checks of the appellant—one for the sum of \$1,100, payable to the Ft. Wayne Drug Company, and one for \$1,000, payable to the Old National Bank; which sums were credited on Sihler's indebtedness to the bank and the drug company. Appellee received no consideration whatever for the note or mortgage, and executed them solely as security for the debt of her husband. At the time Paul requested the giving of the note and mortgage by appellee, and at the time they were executed, he and appellant knew that the note and mortgage were executed to pay the debts of appellee's husband, and that they were not given for money borrowed by appellee for her own use and benefit. The \$3,100 was applied in accordance with the agreement between Sihler and Paul, and was so applied before the actual delivery to appellant of the note, mortgage, and affidavit. Appellant is an Indiana corporation, with its principal office at the city of Ft. Wayne, in Allen county, Ind. No note or evidence of indebtedness or stock held as collateral was surrendered to Sihler or to the appellee by the appellant or by the bank or by any other person at the time of the execution of the note and mortgage. Appellant has answered and defended this case upon the theory that the note and mortgage were given for money borrowed of appellant by appellee for her sole use and benefit, and that they were not executed as security for the debt of her husband or any other person. Appellant and its officers knew at the time of the signing of the note and mortgage and when the money was paid out that the statement in the mortgage and affidavit to the effect that the debt was her debt, and that the note and mortgage were given for her sole use and benefit, and were not executed as security, indorser, or guarantor for the debt or obligation of her husband or any other person, were untrue. The note and mortgage were signed and delivered in Ft. Wayne, Allen county, Ind., and the note is payable at the office of appellant in the same place. Appellant knew, when it issued its check for \$3,100 to the appellee, that she would immediately indorse the same, and that it would be used to pay the \$1,000 to appellant, the \$1,000 to the bank, and \$1,100 to the drug company; and, know-

ing this fact, although in a position to have inquired what appellee was buying of her husband, or what security, if any, she was getting from her husband for such check, failed to make any inquiry of her upon that subject. The failure of appellant to talk with appellee touching such transaction, arose from the fact that appellant had reason to believe that such a talk would disclose the fact that she was executing the note and mortgage as security for her husband, and not otherwise. For many years appellee and Henry C. Paul, president of appellant company, had been intimate friends. Paul was a man of large business interests, and he knew appellee had great reliance in his integrity, and that she would sign any papers which Paul and appellee's husband might send to her. The mortgage upon the Kansas City real estate was executed to secure the note above mentioned, and not to secure any other or different debt. Appellant had the note and mortgage prepared so that they would show upon the face that it was appellee's debt and appellee's note which the mortgage secured, and it was not intended either upon its face, or by evidence, otherwise, that it should ever be shown that the mortgage was executed and accepted by appellant as securing the debt of the husband; and while the appellant knew that the money was borrowed from it for the husband's benefit, the appellant intended to put itself in a position to deny that fact. The affidavit was taken by appellant to be used as evidence to show that the debt was the debt of the appellee. At the time of the execution of the mortgage and prior thereto there was no contract between the parties as to the true purpose and intention of the note and mortgage. It was appellee's intention to execute the mortgage for her husband's debt, to be temporarily held by appellant, and it was the intention of appellant to put itself in a position where it could deny knowledge or means of knowledge of appellee's intention with reference to the execution of the mortgage. This suit was commenced on the 3d day of April, 1902. (The finding then sets out certain statutes of the state of Missouri which were in force on the 18th day of January, 1902.) The law of Missouri is that the signing of the name of the wife upon the back of a bank check payable to her order and delivering it to her husband is not a reducing of the wife's property to possession of the husband, and with her express consent passes no title to the husband. On the 8th day of February, 1902, appellee, her husband joining, sold and conveyed by deed of general warranty to her father, Christian F. G. Meyer, the real estate described in the mortgage in consideration of \$7,500, to be paid by her father to her. There was no agreement by which the father should pay the mortgage above set out, or that he should pay any sum whatever to appellant out of the consideration

which he agreed to pay for the real estate. After the commencement of this suit appellant commenced a suit in the circuit court of Jackson county, Mo., for the foreclosure of the mortgage in controversy, which suit is now pending, and appellee and her husband and Meyer are parties defendant thereto. On the 2d of March, 1903, after this suit was commenced, appellant sold and assigned the note and mortgage to the City Bank of Lima, Ohio; and such bank at the time of purchasing the same had full knowledge of all of the facts in reference to the execution thereof and of the pendency of the suit in relation thereto, and delivered the same to the possession of appellant, who brought the same into this court at the time of the trial, and they were offered and read in evidence. The law of Missouri is that the mortgage is simply collateral to the debt it is intended to secure, and, if there is no debt, there can be no valid mortgage; and, if the note secured by the mortgage is invalid, the mortgage is invalid. In the suit now being prosecuted in Missouri by appellant the complaint therein sets out the note, and avers that the mortgage was not made by appellee as security, indorser, or guarantor of the debt or other obligation of her husband or any other person whatever. The answer in that suit sets out the statute of Indiana that a married woman shall not enter into any contract of suretyship, whether as indorser, guarantor, or any other manner, and such contract as to her shall be void, and avers that the note and mortgage were void as to Matilda J. Sihler, and that she neither contracted for nor received in person or estate the consideration for the note. The reply in that suit sets out the affidavit above mentioned, and avers that thereby appellee is estopped from asserting or proving that the note and mortgage were for the purpose of entering into a contract of suretyship, and sets out the Indiana statute to the effect: "And she may in her own name, as if she were unmarried, at any time during coverture, sell, barter, exchange and convey her personal property, and she may also in like manner make any contracts with reference to the same, but she shall not enter into any executory contract to sell, convey or mortgage her real estate, nor shall she convey nor mortgage the same unless her husband join in the contract, conveyance or mortgage; provided, however, that she shall be bound by an estoppel in pais like any other person." In executing the note and mortgage the parties to this suit were proceeding with reference to the laws of the state of Indiana. The only debt ever pretended to be secured by the mortgage was the alleged, but void, debt of the appellee as above stated.

As conclusions of law the court stated that the note and mortgage are void, and that appellee was entitled to have them canceled; that they should remain on file in that court;

that appellant should be perpetually enjoined from assigning or transferring the note, or from further prosecuting the suit then pending in the state of Missouri, or from prosecuting any suit for the purpose of collecting the note or foreclosing the mortgage.

The statute (section 6964, Burns' Ann. St. 1901) provides that "a married woman shall not enter into any contract of suretyship, whether as indorser, guarantor, or in any other manner; and such contract, as to her, shall be void." The court found that appellee received no consideration whatever for the note or mortgage, and that she executed the same solely as security for the debt of her husband. But it is argued the mortgage contains a statement that the debt was hers, and that she also subscribed an affidavit that the debt secured by the mortgage was hers, and that by statute (section 6962, Burns' Ann. St. 1901) a married woman is bound by an estoppel in pais, like any other person. It is quite true that a married woman has no more right to mislead another by her conduct or representations than if she were sui juris. But she is not subject to an estoppel different from any other person. She, like other persons, is not permitted to gainsay representations which have induced another, relying in good faith upon such representations, to act. The estoppel, however, in any case, must be predicated upon tort, and not upon contract. Some element of fraud or misrepresentation must enter into her conduct. If appellant had relied upon her statements in the mortgage and affidavit that the debt secured by the mortgage was her debt, a different question would be presented from that presented by the finding. It is found as a fact that the president of appellant requested the husband of appellee to procure his wife to execute the note and mortgage, and, the wife having consented, the president of appellant directed his attorneys to prepare the note, mortgage, and affidavit which were afterwards signed by appellee. It is further found that at the time the officer of appellant requested the giving of the note and mortgage by appellee, and at the time the same were delivered to appellant, he and appellant knew that they were executed to pay the debts of appellee's husband, and that appellee would receive no part of the money; that they were not given for money borrowed by appellee for her own use; and that when the note and mortgage were signed and the money paid out appellant's officers knew that the statements in the mortgage and affidavit to the effect that the debt was her debt, and that the note and mortgage were given for her own use, and not as security for her husband, were untrue. In view of these findings it is not at all material that the note and mortgage were so drawn that it would appear upon their face that it was appellee's debt and appellee's note that the mortgage secured.

That part of the act of April 16, 1881,

72 N.E.—32

which is embraced in Burns' Ann. St. 1901, §§ 6960-6964, was intended to remove the wife's disabilities for her protection and for the protection of her property. The statute is in derogation of the common law, and manifestly the intention was to secure to married women the benefit of their contracts, and not to remove their disabilities so as to enable them to make, for the benefit of others, contracts from which neither they nor their property would be benefited. The inquiry in such a case, no matter what the form of the contract, is whether the wife is to receive or did receive, either in person or in benefit to her estate, the consideration upon which the contract rests. The lender may successfully claim that she is estopped by her statements in, and as a part of, the contract, when such statements caused him to believe that a state of facts exists which does not, or that the transaction is different from what in fact it really is. If he knows the nature of the transaction, knows that she is attempting to bind herself or her property for the benefit of another, he must know that she is attempting what she has not the legal capacity to do. And when the lender indirectly procures the wife to enter into a contract for the express purpose of raising money to pay the husband's debts, and participates in applying the money thus raised to the payment of the husband's debts, he is not in a position to claim that she is estopped from showing the true nature of the contract by any statement she may have made in the contract, no matter what the statements may have been. See *Vogel v. Leichner*, 102 Ind. 55, 1 N. E. 554; *Warey v. Forst*, 102 Ind. 205, 26 N. E. 87; *Cupp v. Campbell*, 103 Ind. 213, 2 N. E. 565; *Dudley v. Pigg*, 149 Ind. 363, 48 N. E. 642; *Vorels v. Nussbaum*, 131 Ind. 267, 31 N. E. 70, 16 L. R. A. 45; *Post v. Losey*, 111 Ind. 74, 12 N. E. 121, 60 Am. Rep. 677; *Boyd v. Radabaugh*, 150 Ind. 394, 50 N. E. 301; *Field v. Campbell* (No. 20,479, May Term) 72 N. E. 260; *Cole v. Temple*, 142 Ind. 498, 41 N. E. 942.

It is further argued that the court failed to find, although shown by the uncontradicted evidence, that by the law of Missouri a married woman has capacity to mortgage her real estate to secure the debts of her husband. Although the real estate mortgaged is in Missouri, yet from the note, mortgage, and affidavit we think it clearly appears that the parties contracted with reference to the law of Indiana. There is not only nothing to show that the parties had in view the law of any state other than Indiana, but the transaction shows an attempt was made to make a contract enforceable in this state. See *Hall v. Cordell*, 142 U. S. 116, 12 Sup. Ct. 154, 35 L. Ed. 956. The parties resided in this state, the papers were all executed in this state, the note is payable in this state, and an attempt was made to bind appellee as a married woman under the laws of this

state for the payment of the debt, and to estop her under the laws of this state from claiming that the consideration of the note was not for her separate use and benefit, but for the benefit of her husband. In *Bethell v. Bethell*, 54 Ind. 428, 23 Am. Rep. 650, the question was whether a deed executed in Indiana, between citizens thereof, containing no covenants whatever according to the law of Indiana, could be held, by virtue of the law of Missouri, where the land lies, to contain a covenant not running with the land, but broken as soon as entered into; and it was held that the law of Missouri, where the land was situated, could not extend into Indiana so as to incorporate covenants in the deed, and the law of the place of the contract governed the courts in determining whether or not the deed contained covenants of warranty or seisin. See, also, *Bethell v. Bethell*, 92 Ind. 318; *Monnett v. Turple*, 132 Ind. 482, 32 N. E. 328; *Dolman v. Cook*, 14 N. J. Eq. 56; *Andrews v. Torrey*, 14 N. J. Eq. 355; *Kennedy v. Knight*, 21 Wis. 345, 94 Am. Dec. 543. In the case at bar it clearly appears that the contract was in every sense an Indiana contract, and, as the controlling question is as to appellee's capacity to make the contract, it should be governed by the laws of Indiana. See *Evans v. Beaver*, 50 Ohio St. 190, 33 N. E. 643, 40 Am. St. Rep. 666; *Scudder v. National Bank*, 91 U. S. 406, 23 L. Ed. 245.

Moreover, although the mortgage contains a promise to pay the debt secured, it appears from the findings that the mortgage is only an incident to the principal contract, which is the note. It is found that the mortgage was executed to secure the note sued on, and not to secure any other or different debt or evidence of indebtedness, and it is further found that appellee executed the mortgage with the agreement that it was to be a temporary security, and that the mortgage was not to be recorded. The promise to pay contained in the mortgage is a subsequent promise to pay the note secured. Under the findings the note is void for want of capacity in appellee to execute it, and when the note is declared void the mortgage lien ceases to be effective. See *Sherman v. Sherman*, 3 Ind. 337; *Ledyard v. Chapin*, 6 Ind. 320; *Francis v. Porter*, 7 Ind. 213; *Fletcher v. Holmes*, 32 Ind. 497; *Hubbard v. Harrison*, 38 Ind. 323; *Gabbert v. Schwartz*, 69 Ind. 450; *Tate v. Fletcher*, 77 Ind. 102; *Bowman v. Mitchell*, 79 Ind. 84.

Counsel for appellant cite the case of *Cochran v. Benton*, 126 Ind. 58, 25 N. E. 870, where a husband and wife, residents of Kentucky, executed their joint note and a mortgage on the wife's lands situated in Indiana, and it is held to be a general rule that the power or capacity of a married woman to convey or incumber her separate real estate is to be determined by the law of the place where the property is situated. But in that case the court said that: "If it appears that

the contract, to secure the performance of which the mortgage was executed, or to which it was merely an incident, was expressly prohibited or declared void or illegal by the law of the place where it was executed and to be performed, we should have a different question, and one concerning which we intimate no opinion here." In the case at bar the findings show that appellee received no consideration whatever for the note; that she executed the note solely as security for the debt of her husband, and that the only purpose of the mortgage was to secure this note—that is, the contract, to secure the performance of which the mortgage was executed is expressly declared void by the law of the place where the contract was executed and to be performed. Nor do we think the case of *Nathan v. Lee*, 152 Ind. 232, 52 N. E. 987, 43 L. R. A. 820, cited by appellee, declares any different rule from that held in this case. In that case an Ohio corporation executed notes to certain Ohio creditors, and afterwards, becoming insolvent, mortgaged land in Indiana to secure their payment. The mortgages were executed according to the laws of Indiana, and recorded in the county where the land was located. Afterwards a receiver for the corporation was appointed by an Indiana court, and in a suit by the receiver in that court the Ohio creditors, having been made parties defendant, filed a cross-complaint to enforce their mortgage liens. It was held that as the power of the corporation, under the circumstances, to make the mortgages, and thus prefer such creditors over others, was not denied by the Ohio statutes, the validity of the mortgages was to be determined according to the law of Indiana, and that, the situs of the mortgaged premises being in Indiana, it was evident, under the circumstances, that the parties at the time of the execution of the mortgage must have contemplated their enforcement, if necessary, in the courts of this state. And the doctrine previously held was there approved that, "when a citizen of another state is once properly in court and accepted as a suitor, neither the law nor the court administering the law will admit any distinction between such a suitor and one who is a resident or a citizen of its own state." If the mortgage in the case at bar was incident to the note which was the principal contract, and the findings show this to be true, the trial court, having jurisdiction of the subject-matter and of the parties, had the power to declare the note void, and also to declare the mortgage void, and to decree their cancellation, and to enjoin appellant from attempting to enforce either the note or mortgage. When this action was commenced the trial court had jurisdiction of the case for all purposes necessary to an adjudication of the rights of the parties before it in and concerning the subject-matter in dispute, and this jurisdiction could not be ousted by a suit subsequently brought

in the court of another state. Upon a careful consideration of the record, we think the findings are sustained by the evidence.

Judgment affirmed.

(187 Mass. 120)

FLEMING v. MORRISON et al.

(Supreme Judicial Court of Massachusetts.
Essex. Dec. 15, 1904.)

WILLS — ANIMUS TESTANDI — EXECUTION — WITNESSES — FINDINGS — PAROL EVIDENCE.

1. A finding that, before testator and the person who drew his will parted when it was executed, testator told the scrivener that the instrument which had been signed as and for his last will, and declared by him to be such in the scrivener's presence, was a "fake, made for a purpose," was fatal to the validity of the will.

2. The effect of a finding that testator, before he left the scrivener who had prepared his will, stated to him that the will was a fake, and made for a purpose, was not obviated by the further finding that testator meant by this that he did not intend to complete the instrument by having it attested and subscribed by two other witnesses, and that the purpose referred to by him was to induce the female beneficiary to sleep with him.

3. Parol evidence is admissible to contradict the recitals of a will that it is a will; that it has been signed as such by the person named as the testator, and attested and subscribed by persons signing as witnesses.

4. Under Rev. Laws, c. 135, § 1, requiring a will to be attested and subscribed by at least three witnesses, where testator declared at the time one of the witnesses signed that the will was a fake, and made for a purpose, his subsequent acknowledgment of the instrument before two others, who signed as witnesses, was insufficient to establish the valid execution of the will.

Appeal from Supreme Judicial Court, Essex County; Loring, Judge.

Application by Mary Fleming for the probate of a will of Francis M. Butterfield, deceased, to which John R. Morrison and another filed objections. From a judgment sustaining a probate decree allowing the will, contestants appeal. Reversed.

The findings of the court were as follows:

"(1) I find that on or about May 18, 1901, Francis M. Butterfield called upon Sidney S. Goodrich, and requested him to draw up his will, leaving all his property to the Mary Fleming named in the instrument admitted to probate as the will of said Butterfield. Thereupon said Goodrich drew up the said instrument, said Butterfield signed it, and said Goodrich attested and subscribed said instrument as a witness to the signature of said Butterfield. Before Butterfield and Goodrich parted, Butterfield told Goodrich that this was a 'fake' will, made for a purpose.

"(2) I find by the evidence in this case that said Butterfield meant by this that he did not intend to complete the instrument by having it attested and subscribed by at least two other witnesses, and that the purpose referred to by him was to induce said Fleming to allow him (said Butterfield) to sleep with her. Afterwards said Butterfield de-

termined to complete the execution of his will, and for that purpose he produced the instrument before the other two attesting witnesses, Bryant and Cheney, told them it was his will, that the signature was his signature, and asked them to attest and subscribe it as witnesses. Goodrich, Bryant, and Cheney were each competent witnesses.

"(3) I find that the words appointing Mary Fleming 'as administrator' were written on the instrument after it was attested and subscribed by Bryant and Cheney.

"(4) I find as a fact that said Butterfield at neither time was so far under the influence of liquor as to impair his having a sound and disposing mind and memory.

"On these findings, I rule that the will was properly executed."

Hiram P. Harriman, Frank W. Sprague, 2d, and John F. Neal, for appellants. J. W. Berry, W. B. Murphy, and H. T. Lummus, for appellee.

LORING, J. All the rulings asked for at the hearing have been waived, and the only contention now insisted upon by the contestants is that, on the finding made at the hearing, the proponent of the will has failed to prove the necessary animus testandi. We are of the opinion that this contention must prevail. The finding that, before Butterfield and Goodrich "parted," Butterfield told Goodrich that the instrument which had been signed by Butterfield as and for his last will and testament, and declared by him to be such in the presence of Goodrich, and attested and subscribed by Goodrich as a witness, "was a fake, made for a purpose," is fatal to the proponent's case. This must be taken to mean that what had been done was a sham. This is not cured by the further finding that what Butterfield meant by this was "that he did not intend to complete the instrument by having it attested and subscribed by at least two other witnesses, and that the purpose referred to by him was to induce said Fleming to allow him (Butterfield) to sleep with her." This is not a finding that Butterfield intended to sign the instrument before Goodrich as and for his last will and testament, leaving the further execution to depend on future events. Much less is it a finding that Butterfield changed his mind after he had signed, and had had Goodrich attest and subscribe the instrument. The whole finding, taken together, amounts to a finding that Butterfield had not intended the transaction which had just taken place to be in fact what it imported to be; that is to say, a finding that when Butterfield signed the instrument, and asked Goodrich to attest and subscribe it as his will, he did not, in fact, then intend it to be his last will and testament, but intended to have Mary Fleming think that he had made a will in her favor to induce her to let him sleep with her.

We are of opinion that it is competent to

contradict by parol the solemn statements contained in an instrument that it is a will; that it has been signed as such by the person named as the testator, and attested and subscribed by persons signing as witnesses. *Lister v. Smith*, 3 Sw. & Tr. 282; *Nichols v. Nichols*, 2 Phill. 180; In the Goods of *Nosworthy*, 11 Jur. N. S. 570. For similar cases as to wills, see In the Goods of *Hunt*, L. R. 3 P. & D. 250, where it was held that it could be shown by parol that the instrument executed was executed by mistake, and *Hubbard v. Alexander*, 3 Ch. D. 738, where it was held that one of the two codicils duly executed was intended to be a duplicate. It was lately held by this court that a written agreement, duly executed, could be shown to have been delivered on a condition. *Elastic Tip Co. v. Graham*, 185 Mass. 597, 71 N. E. 117. And see the cases there cited. "The momentous consequences of permitting parol evidence thus to outweigh the sanction of a solemn act are obvious. It has a tendency to place all wills at the mercy of a parol story that the testator did not mean what he said," in the words of Sir J. P. Wilde in *Lister v. Smith*, 3 Sw. & Tr. 282, 288. In fact, that learned judge went so far as to say that it was so dangerous a kind of evidence, and that it was so difficult to impress on a jury "the enormous weight which attaches to the document itself as evidence of the animus with which it was made," that, although he was prepared in that case to act on the finding of the jury, he was "far from saying that the court will in all cases repudiate a testamentary paper simply because a jury can be induced to find that it was not intended to operate as such." We cannot accede to the argument of the proponent that a will is like a deed, where witnesses are required to the signature of the grantor. There it would be enough that the instrument is complete when delivered. But there is no delivery of a will. The punctum temporis in case of a will is when it is signed, or, having been previously signed, when the signature is acknowledged in the presence of three or more witnesses. And where that is done before each witness separately, as it may be done in this commonwealth (*Chase v. Kittredge*, 11 Allen, 49, 87 Am. Dec. 687), the animus testandi must exist when it is signed or acknowledged before, and attested and subscribed by, each of the necessary three witnesses. If this is not done, the statutory requirements have not been complied with. Assuming that the acknowledgment animus testandi of a signature not originally made with that animus is enough, the will in the case at bar would have been duly executed had *Butterfield* subsequently acknowledged the instrument before three in place of two additional witnesses. But he did not do so. The instrument, having been acknowledged and attested and subscribed by two witnesses only, is not a valid will, within Rev. Laws, c. 135, § 1.

It has not been argued that the want of the necessary animus testandi is not open under the terms of the first reason of appeal. Although the question here discussed was not raised at the hearing by the rulings requested by the contestants, it was considered by the presiding judge, and is presented by the ruling made on his finding. The case does not come within *Holbrook v. Young*, 108 Mass. 83, relied on by the proponent.

Decree to be entered reversing decree of probate court, and disallowing the instrument as the will of *Butterfield*.

(187 Mass. 118)

WELCH v. BOSTON ELEVATED RY. CO.

(Supreme Judicial Court of Massachusetts.
Suffolk. Dec. 9, 1904.)

CARRIERS — INJURIES TO PASSENGERS — NEGLIGENCE — EVIDENCE — SUFFICIENCY.

1. In an action for injuries received by a passenger on an elevated railroad train while passing between cars, evidence held insufficient to show any negligence on the part of defendant.

Exceptions from Superior Court, Suffolk County; Albert Mason, Judge.

Suit for personal injuries by Ellen B. Welch against the Boston Elevated Railway Company. A verdict was directed for defendant, and plaintiff excepted. Exceptions overruled.

The injuries were alleged to have been received by plaintiff on February 8, 1902, while a passenger on an elevated train of defendant. The plaintiff testified that she entered the Scollay Square Station for south-bound trains about 5 o'clock in the afternoon on February 8, 1902. She boarded the front platform of the last car of the train, and took a step or two in that car before she discovered that it was the smoking car. She then turned, and started across to the next car ahead, and while crossing between the cars her left leg went down in the space between the cars to her knee, and she fell, receiving the injuries complained of. There were several people ahead of her, and she did not see the space. She saw no guard or other employé of the defendant on either of the car platforms before she fell. The train was standing at the station on a curve which made the space between the cars wider than when the cars were on a straight rail. There was no other testimony as to the width of the space between the cars. On cross-examination the plaintiff testified that she did not look down to see how great a space there was between the cars as she was crossing. The plaintiff's testimony was corroborated by her daughter, who was with her, and there was no other testimony as to the happenings of the accident. At the close of the plaintiff's case the defendant requested the court to rule that upon this evidence the plaintiff was not entitled to recover. The court so ruled, and directed a verdict for the defendant.

Burns & Clark and J. F. Lynch, for plaintiff. Russell A. Sears and Hugh Bancroft, for defendant.

PER CURIAM. The testimony of the plaintiff and her daughter furnished no evidence of negligence on the part of the defendant. It is at least very questionable whether there was any evidence that the plaintiff was in the exercise of due care.

Exceptions overruled.

(179 N. Y. 459)

PEOPLE v. WIECHERS et al.

(Court of Appeals of New York. Nov. 29, 1904.)

CRIMINAL LAW—APPEAL—REVIEW—SUFFICIENCY OF INDICTMENT—DIRECTION TO ACQUIT.

1. On appeal in a criminal case to the Court of Appeals, appellant cannot, unless the offense is a capital one, attack an indictment which he did not demur to before trial or object to at the trial, or unless he has moved in arrest of judgment.

2. A motion that the jury be directed to acquit on the ground that the evidence does not warrant any conviction, and the crime charged has not been proven, does not raise the question that the indictment sets forth no crime, and an exception to the denial thereof is not available on appeal on the ground that the indictment was thereby questioned at the trial.

Cullen, C. J., and O'Brien, J., dissenting.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Anton J. Wiechers and another were convicted of conspiracy. From a judgment of the Appellate Division (87 N. Y. Supp. 897) affirming the judgment of the Trial Term, Wiechers appeals. Affirmed.

George Raines and M. Fillmore Brown, for appellant. Edward E. Coatsworth, Dist. Atty. (Frank A. Abbott, of counsel), for the People.

VANN, J. The defendants were jointly indicted for conspiracy, with intent to cheat and defraud, but after the indictment was moved for trial, and before a jury was called, the defendant Temple withdrew his plea of not guilty and interposed the plea of guilty. The trial then proceeded against the defendant Wiechers, and, when the jury found him guilty, a motion was made in his behalf for a new trial upon the ground that the verdict was against the weight of evidence, and that the court erred in its rulings relating to evidence. The motion was denied, and sentence of imprisonment for the period of nine months was imposed. No motion was made in arrest of judgment, and the only appeal taken to the Appellate Division was from the judgment of conviction, which was affirmed, one of the Justices not voting.

The evidence at the trial tended strongly to show that the defendant was guilty of the crime of conspiracy, and hence the judgment against him should be affirmed, unless

some error was committed by the trial court which affects a substantial right. Upon the record presented, with no motion made in arrest of judgment, we have nothing before us as a basis upon which to found error but the exceptions taken to the rulings of the court during the progress of the trial.

The defendant now seeks, through counsel who took no part in the trial, to attack the indictment upon the ground that the representations set forth therein do not refer to any existing fact capable of proof, but only to the belief of the defendants that they, or the mythical boy "Antonius," whom they personated, possessed certain magnetism, sufficient to cure all bodily afflictions. There was much evidence, however, tending to show that the defendants represented not only that they or the pretended boy could cure nearly all known diseases by their peculiar methods, but also that they had actually done so. There was no defect in the evidence, but it is strenuously contended that there was a defect in the indictment which entitles the defendant to a reversal of the judgment against him.

An indictment cannot be attacked upon appeal unless some foundation was laid therefor before final judgment was rendered. An accused person may take advantage of a defective indictment by demurring thereto before the trial, by objecting thereto during the trial, or by a motion in arrest of judgment made after the trial. The function of a demurrer, which was not resorted to by the defendant, is to defeat the indictment, without a trial, whenever it appears upon the face thereof that it is subject to one or more of five objections named in the statute. Code Cr. Proc. § 323. These objections can be taken only by demurrer, "except that the objection to the jurisdiction of the court over the subject of the indictment, or that the facts stated do not constitute a crime, may be taken at the trial, under the plea of not guilty, and in arrest of judgment." *Id.* § 331; *People v. Meakim*, 138 N. Y. 214, 30 N. E. 828. The statute does not provide how either of the two objections last named shall be taken at the trial, and hence the ordinary practice of raising the question by objection and exception necessarily applies. A motion in arrest of judgment is made after a plea of guilty, or after the trial has ended in a verdict of guilty, but no such motion was made in the case now before us. Code Cr. Proc. § 467. If a defendant, with all these chances open to him, omits to question the indictment before the trial, during the trial, or after the trial, and makes no objection to the form or sufficiency thereof until the argument of an appeal from the judgment of conviction, he cannot then be heard upon the subject. The indictment is the foundation for the prosecution of all serious crimes, and it may be challenged from the time of arraignment until final judgment has been pronounced; but it cannot be attacked for the

first time upon appeal, unless it is by an argument addressed to the discretion of the court hearing the appeal in the first instance, and that discretion does not belong to us except in capital cases.

Was any objection taken or question raised during the trial as to the indictment now before us? We find none in the record. No challenge to the indictment was in terms presented during the trial. No claim was made that it was defective in any way. No general objection was taken that evidence should not be received because the indictment did not charge a crime, and no specific objection that certain evidence was inadmissible because the indictment was defective in some respect. So far as appears, from the beginning to the end of the trial the indictment was not criticised or questioned in such a way that the trial court could know that an attack was made upon it. After the verdict was rendered, when a motion was made for a new trial, no claim was asserted that the indictment was bad for any reason.

The only way in which it is now claimed that any question as to the indictment was brought to the attention of the court was by the defendant's motion at the close of the evidence for the people, and again at the close of all the evidence. All that the record shows in relation to these motions is as follows: "The defendant Anton J. Wiechers requests the court to advise the jury to render a verdict of not guilty upon the ground that the evidence does not warrant a conviction; (2) upon the ground that the crime charged in the indictment has not been proven. Motion denied, and exception." These motions challenged the evidence, not the indictment, and there was evidence to justify a conviction for the crime which the indictment purported to set forth. There was no claim that the indictment did not warrant a conviction, but that, to use the words of counsel when making the motion, "the crime charged in the indictment has not been proven." Thus the motion, instead of challenging the indictment because no crime was set forth, distinctly recognized that a crime was charged therein. The motion was made upon specific grounds, which did not include or necessarily involve any objection to the indictment, and hence the trial court could not have understood that the indictment was questioned. It cannot be told from the record that any defect in the indictment was in the mind of counsel, or that he desired any ruling in relation thereto. The statute authorizes the objection that the facts stated in the indictment do not constitute a crime to be taken at the trial, but no such objection was taken during the trial under review. "If a party calls upon the trial court to make a ruling in his favor, he must specify with reasonable clearness the point that he desires considered and decided, in order to predicate error upon an exception to the ruling against him. An ex-

ception taken during the progress of a trial is a protest against the ruling of the court upon a question of law. It is designed as a warning for the protection of the court, so that it may reconsider its action, and for the protection of the opposing counsel, so that he may consent to a reversal of the ruling. Unless the question of law upon which a ruling is sought is so stated that it is or should be understood, an exception is of no avail, because the exception is to the ruling as made, and the ruling is upon the question as stated." *Sterrett v. Third National Bank*, 122 N. Y. 659, 662, 25 N. E. 913; *Code Cr. Proc.* § 455.

We cannot consider the questions relating to the indictment which were so ably argued before us, because they were not raised as authorized by statute or by the practice of the courts, and hence were, in effect, waived. *People v. Tower*, 135 N. Y. 457, 32 N. E. 145; *People v. Formosa*, 131 N. Y. 478, 481, 30 N. E. 492, 27 Am. St. Rep. 612. A practice act like the Code of Criminal Procedure would complicate rather than simplify the practice, if it were held that an indictment could be successfully attacked for the first time after judgment, and upon appeal, when the evidence was sufficient to warrant a conviction for the crime purporting to be charged, but which it is claimed was not sufficiently charged. Even if the indictment is not strong enough to withstand a direct attack in the manner provided by law, the judgment entered thereon would be good as a plea in bar to another prosecution for the offense which was at least colorably charged and was clearly proved. Both at common law and by statute a verdict cures such imperfections of form in an indictment as do not tend to prejudice substantial rights upon the merits. *Code Cr. Proc.* § 285; 1 *Bishop, Cr. Proc.* § 707a.

While the argument of the counsel for the appellant was substantially confined to the exceptions taken to the denial of the motions to advise an acquittal, we have read the record with care, and have considered every objection made and exception taken during the trial, but we find none that should disturb the verdict. The judgment, therefore, should be affirmed.

O'BRIEN, J. (dissenting). The question in this case is whether a conviction in a criminal case can be upheld in this court where it appears that the indictment does not charge any criminal offense. I assume that, after the examination and discussion of this case, no one will claim that the indictment charges a crime. If it did, there would obviously be no reason for discussing the question as to how and when such a defect can be raised. If this conviction is to be affirmed on the ground that the defendant omitted to raise any question in regard to the indictment, that is practically an admis-

sion that the indictment is bad. That being the real condition of the record in this case, there is nothing for us to consider except the question whether this court has jurisdiction to review the conviction in cases where the indictment is so defective that no crime is charged. I do not think that a judgment in a criminal case should be upheld in this court when it appears that the indictment does not charge a crime.

The judgment record proper in a criminal case contains no exceptions. A case or exceptions is not essential to the review of a judgment in a criminal case. It may be reviewed, as a civil case may, upon the record or judgment roll, which consists of the indictment, the plea, the minutes, the verdict, and judgment or sentence. Code Cr. Proc. § 485; 1 Bishop, Cr. Proc. §§ 1340-1350. Upon this record alone a person convicted of a crime may appeal and have the judgment reviewed without any case and exceptions, if he so elects. On such an appeal the court can deal only with errors or questions that appear on the face of the record. If it appears, upon an inspection of the record (that is, from the indictment), that the trial court had no jurisdiction, then the judgment will be reversed for that reason. If it appears that the judgment rendered is not supported by the verdict, it may be reversed for that reason; and, if it appears that no crime was charged in the indictment, it must follow that the verdict of guilty is no broader than the charge, and does not import any crime whatever, and consequently there is nothing to support the judgment. Whatever fundamental defects appear upon the face of the judgment rendered may be reviewed and corrected on appeal, but no other. Hence the presence of a case or bill of exceptions enlarges the scope of the review, but, of course, cannot limit the power to deal with any question that the court could deal with if the appeal was on the judgment record alone. Therefore, when it appears from the record, independent of any case or exceptions, that a person has been convicted of a crime when no crime was charged, then a plain legal error is disclosed by a mere inspection of the record, which any court may deal with, even of its own motion. If, for example, the record disclosed the fact that the accused had been indicted for assault and battery, but convicted of burglary, and sentenced accordingly, it does seem to me that this court ought not to look for some exception to raise the question. The question is raised by the record itself, which imports absolute verity; and it is only in a case where the error, if any, is not disclosed by the record, that a case and exceptions become necessary. It was always the law, and is the law still, that an appeal or a writ of error which brings up the judgment record is good for an error in the indictment, in the verdict, in the sentence, or any other part of the record, or

where the statute authorizing the punishment is repealed. In short, such an appeal, after sentence, raises all questions which would have sustained the motion in arrest of judgment. 1 Bishop, Cr. Proc. § 1368.

The present Code of Criminal Procedure has abolished the writ of error, and substituted in its place an appeal for a review of the judgment in a criminal case; hence upon such an appeal the defendant may raise any question that could be raised upon a writ of error, and it has always been the law that a defect of substance appearing in the indictment could be taken advantage of by writ of error. There is nothing in the present Code that in the least affects that rule. The present appeal is certainly broad enough to give to the defendant every advantage which he could have obtained formerly by a writ of error.

In *People v. Stockham*, 1 Parker, Cr. R. 424, it was said that, "in a case where the sufficiency of the indictment is not involved in some decision made or opinion advanced at the trial, the only mode of reaching a defect in the indictment is on a motion in arrest of judgment, or by a writ of error brought on the record of the judgment itself." In *People v. Johnson*, Id. 564, the case was brought before the court on a writ of error. Counsel for the defendant had raised an objection to the indictment at the trial. The court, in holding the indictment defective, said: "If any fact which is a material ingredient to constitute the crime is omitted in an indictment, such omission violates it, and the defendant may avail himself of such defense by demurrer, by writ of error, or on a motion in arrest of judgment." Citing Archbold's Cr. Pl. (5th Ed.) 42; Barbour's Cr. Law, 320; *Lee v. Clark*, 2 East, 333. Prior to the enactment of the present Code of Criminal Procedure, the Revised Statutes provided: "No assignment of errors or joinder in error shall be necessary upon any writ of error or certiorari issued pursuant to the foregoing provisions; but the court shall proceed upon the return thereto and render judgment upon the record before them." 2 Rev. St. p. 741, § 23. In *People v. Thompson*, 41 N. Y. 1, this court was asked to reverse the conviction of murder in the second degree upon the ground, among others, that the evidence did not warrant a conviction for that offense. In the opinion delivered by Judge Grover it is stated: "The counsel for the defendant insists that, although no exception was taken to the charge, yet, when the court can see that the accused has been convicted of a crime of which he was not legally guilty, it is its duty to reverse the judgment and order a new trial, or discharge him, as the case may require. This presents the question whether the supreme or this court, upon a writ of error, can review the conviction upon the merits, or whether such review is confined to questions of law arising upon exceptions taken upon the trial. That the latter

only can be considered is perfectly clear. The right of review upon writ of error in criminal cases was not given by the common law. It depends entirely upon the statute, and the courts possess the power only conferred by the statute. Section 23, 1 Rev. St. p. 736, gives the right to the accused of taking exceptions to the decision of the court upon the trial of indictments, and subsequent sections that of review upon error. These sections show that the right of review embraces only such decisions of the court as were excepted to, and errors that appear in the record." In *Fellinger v. People*, 15 Abb. Prac. 128, the defendant was indicted and convicted of burglary in the first degree, and the case was brought up on a writ of error. The indictment was attacked because it did not charge the crime of burglary in the first degree. The report of the case does not show that any objection to the indictment was taken on the trial. The court, however, reversed the conviction, and it was there said: "If any of the ingredients contained in the statutory definition are omitted, the indictment is fatally defective, and the defect is not cured by verdict. *Dedieu v. People*, 22 N. Y. 178. * * * It was urged, however, upon the argument, that these defects were cured by the verdict. No defect in substance can be so cured. It is only matters of form, not affecting the substantial rights of the prisoner, which can be disregarded after verdict." In *Gaffney v. People*, 50 N. Y. 416, 425, it is said: "The Revised Statutes authorize the review of a conviction and judgment in a criminal case upon a writ of error, which, by the well-settled doctrine of this court, only brings up the record and matters in the nature of a record, together with the bill of exceptions, if any, which has been settled in the case. * * * It is only legal errors which can be considered on writs of error—errors appearing in the record, or by exceptions taken upon the trial." The same doctrine is held in *Walsh v. People*, 88 N. Y. 458. When no crime is charged in the indictment, the court will, of its own motion, arrest judgment, even where the accused has pleaded guilty. *Com. v. Harsey*, 1 Mass. 137. The judgment in a criminal case will be reversed in a writ of error for any defect or error appearing on the face of the record. *Chitty, Cr. Law*, c. 18, pp. 744, 755. A writ of error always brought up for review any defect of substance appearing on the face of the indictment. *Archbold, Cr. Pr. & Pl.* (8th Ed.) pp. 354, 355. The same rule is laid down in *Wharton's Cr. Pl. & Pr.* §§ 770-783.

Of course, it was provided at an early date by statute, as it is now in the Code, that certain defects or irregularities are cured by verdict, but it was never held that the omission to charge a crime in the indictment is cured by verdict. Such a fundamental defect is fatal to a conviction, since it is only matters of form; not affecting the substantial

rights of the prisoner, that can be disregarded after verdict.

It is an elementary and fundamental principle in criminal jurisprudence that every material fact essential to the commission of a criminal offense must be distinctly alleged in the indictment. If the indictment fails to charge a crime, such fatal defect is not cured by intendment or any implication whatever. Unless a crime is charged, a verdict of guilty upon the indictment does not convict the defendant of any criminal offense. In such a case it is of no consequence that the evidence may prove or tend to prove some crime, since no one can then tell of what crime the party was convicted, and no court can properly pass sentence upon the accused, as punishments are only attached to specific crimes or offenses. It must be apparent, therefore, that an indictment so defective that it does not charge any crime is such a fundamental question that it can be raised at any time. Rulings at the trial with respect to the admission or rejection of evidence, the giving or refusing of instructions, motions for a new trial, or other matters or proceedings which are not a part of the record proper unless exceptions be taken to such rulings at the proper time, cannot be reviewed, save as embodied in a bill of exceptions. These are all matters of procedure. But the charge in the indictment is the very foundation of all procedure, and I think, where no crime is charged, the question can be raised at any time and in any court, although, as will be seen, it is not necessary to go as far as that in this case. When it appears that the trial court was without jurisdiction of the subject-matter, then such jurisdictional question may be raised for the first time in a court of review. The court will, in such cases, *ex mero motu*, take notice of such defect. *Hughes on Criminal Law & Procedure*, § 2847. In our Code the want of jurisdiction and the absence of a criminal charge are classed together and treated in precisely the same way, and, indeed, as matter of reason, it cannot be said that any court has jurisdiction to try a criminal case unless it appears that a crime is charged and embraced in the indictment.

When it appears that the indictment does not charge a crime, the defendant is not obliged to demur. He may take advantage of that defect at the trial, since our Code of Criminal Procedure expressly provides that an "objection to the jurisdiction of the court over the subject-matter of the indictment or that the offense stated did not constitute a crime may be taken at the trial under the plea of not guilty and in arrest of judgment." *Code Cr. Proc.* § 331. This statute does not prescribe the manner in which such an objection may be taken at the trial. No particular form of words is necessary. It is enough that the party accused has presented to the court the question in some form. In this case, at the close of the evidence in be-

half of the people and of the whole case, the defendant requested the court to direct his acquittal; and, without elaborating, that request was obviously broad enough to search the whole record to the very foundation of the case, namely, the charge in the indictment. If the indictment did not charge an offense, then manifestly he was entitled to have his motion granted. The trial court must be presumed to know whether any criminal offense was charged, just as it is presumed to know that the court has no jurisdiction. Both of these defects are reached in the same way and by the same motion, and both defects have always been treated in the same way in a court of review. It is entirely safe to say that no case can be found where the record disclosed the fact that no crime was stated in the indictment, and yet the conviction was upheld on the ground that the accused failed to bring the defect to the attention of the court at the trial, or for any other reason. When it is shown that no criminal charge has been made against the accused, the whole superstructure of the trial suffers a collapse, since there is no foundation upon which to procure a conviction or to impose a sentence. If a person should be accused by the grand jury in a general way of the crime of perjury, without stating to what things he had falsely sworn or how they were material, I venture to say that this court would not sustain a conviction based upon such a charge. This serves to illustrate the question involved in this appeal.

I have thus far considered the case on the assumption that no question was raised at the trial with respect to the indictment, but I think it was raised by the requests which the defendant made to the court to direct his acquittal. That was broad enough to comprehend a fatal defect in the indictment, since that defect could not have been supplied at the trial or the pleading amended; and the authorities in this court, as I think, go to that extent. In the case of *People v. Bennett*, 49 N. Y. 137, the only motion made by the defendant was to be discharged on the ground that the offense was not proven, and there was no question for the jury. This court properly remarked that there was no power at the trial to grant that motion; that there was no such thing in a criminal case as a nonsuit; that the verdict of the jury must be pronounced after the trial had been commenced, although that may be done under the advice or direction of the court. It was also held that the same strictness in the form of exceptions will not be enforced in criminal as in civil cases, but the court will look at the substance of the request. And in that case the court reviewed the evidence at the trial given in support of the charge. The request was that the accused be discharged and the case taken from the jury. In the case at bar the request was that the court direct an acquittal. The motion in each case was not based upon strictly accu-

fate grounds, but that does not preclude this court from reviewing the conviction, especially in a case where the defect is so fundamental as it appears to be in this case. In *People v. Ledwon*, 153 N. Y. 10, 48 N. E. 1048, the defendant requested the court to dismiss the indictment on the ground that the people had failed to make out a case or to show that any crime was committed. In that case the indictment was perfectly good, and the request to dismiss it was even more inaccurate than anything that appears in the record before us; but this court held again that, although the defendant had not made the proper motion, it was not necessary to be so specific as in civil cases, and the request was treated as, in substance, a request to direct an acquittal, or that the court instruct the jury, as matter of law, that the prisoner could not be convicted. In neither of the cases cited did this court suppose that the defendant had waived anything by making a wrong request. In both cases the court treated the requests as practically a motion by the defendant that the case was not one where a conviction could be had. Now, the reasons which the defendant in the case at bar presented to the court were just as broad and comprehensive as in either of the cases cited. It was, in substance, a request to the court to rule and decide that he could not be convicted, and, of course, no conviction could be had unless the indictment stated a crime. It was not necessary for the defendant's counsel to educate the court, step by step, as to fundamental defects in the record. He saved the question by making the request so broad that it reached the very foundation of the whole proceeding.

The judgment should be reversed, and the defendant discharged.

BARTLETT, MARTIN, and WERNER, JJ., concur with VANN, J. CULLEN, C. J., concurs with O'BRIEN, J.

Judgment of conviction affirmed.

(180 N. Y. 1)

PEOPLE v. BOOTMAN et al.

(Court of Appeals of New York. Dec. 6, 1904.)

GAME—CLOSE SEASON—POSSESSION OF IMPORTED GAME—POLICE POWER—EXTRA ALLOWANCE.

1. The forest, fish, and game law (Laws 1900, p. 22, c. 20), which went into effect February 19, 1900, and was in force May 22 and June 2, 1901, did not render it a penal offense to have in possession during the closed season game killed without the state and brought there during the open season, so that an action would not lie to recover penalties for violation of the statute, in having possession of imported game during the closed season of 1901.

2. It is within the police power of a state to make the possession of imported game unlawful, and such an act does not interfere with private property, there being no property in living wild animals; and only as the law permits their capture is there any property in such animals after they are caught or killed.

3. Where defendant had prepared for trial on the theory of the larger amount involved in the complaint, stipulation of plaintiff reducing the amount two days before trial is no ground for reducing the extra allowance to defendant on judgment in his favor.

Appeal from Supreme Court, Appellate Division, First Department.

Action by the people against Jacob B. Bootman and others. From a judgment of the Appellate Division affirming a judgment for defendant (88 N. Y. Supp. 887), and from an order of the Appellate Division affirming an order granting defendants an extra allowance, the state appeals. **Affirmed.**

See 81 N. Y. Supp. 195.

Frank S. Black and Henderson Peck, for appellant. Louis Marshall and Julius Offenhach, for respondents.

VANN, J. This action was brought to recover penalties to the amount of \$1,168,315 for alleged violations of the forest, fish, and game law, in that during the close season of 1901 the defendants had in their possession 7,560 grouse, 4,835 quail, 1,776 ducks, 8,848 plover, 7,108 snipe, 8,328 snow buntings, 1,008 reed birds, 7,607 sand pipers, 788 yellow legs, and 96 woodcock. Six out of the 19 counts of the complaint were disposed of by demurrer, which reduced the amount involved to about \$325,000 (40 Misc. Rep. 27, 81 N. Y. Supp. 195; 72 App. Div. 619, 76 N. Y. Supp. 1022; 173 N. Y. 622, 66 N. E. 1113); and this sum was reduced by concession to about \$9,960. The facts as settled by stipulation are as follows: Between May 22 and June 2, 1901, the defendants, as copartners, had in their possession at the city and county of New York 100 grouse, 100 quail, 96 woodcock, and 100 ducks, "being of the same grouse, quail, woodcock, and ducks mentioned and described in the first thirteen counts of the complaint." Said game birds were not killed in the state of New York, but in other states of the Union, where they were purchased by the defendants. They were brought into this state in the month of November, 1900, when it was lawful to possess them here, and the defendants kept them on storage in the state of New York until the commencement of this action. After their purchase by the defendants outside of the state, they "were exported from states in which they were purchased to and received by them in this state by means of transportation agencies engaged in interstate commerce, and in the original packages in which they were packed by the shippers thereof." It was further stipulated that they were of the fair market value of \$5,000, and that the action was duly brought on the order of the chief game protector of this state. Upon the trial said stipulation was read in evidence and both sides rested, whereupon the trial judge dismissed the complaint, and the plaintiff excepted. The Appellate Division, by a divid-

ed vote, affirmed the judgment entered accordingly, and the plaintiff appealed to this court.

The forest, fish, and game law, as in force when it is alleged that the penalties in question were incurred, became a law on the 19th of February, 1900. Laws 1900, p. 22, c. 20; Heydecker's Gen. Laws, p. 2500, c. 31. It is to some extent a revision, but chiefly a re-enactment, of the game law of 1892, and the fisheries, game, and forest law of 1895, as amended at various times. Laws 1892, p. 983, c. 488 (Laws 1895, p. 237, c. 395). So far as the questions presented by this appeal are concerned, it is the same in substance as the acts considered by the court in *People v. Buffalo Fish Company*, 164 N. Y. 93, 54 N. E. 84, where it was held that the fisheries, game, and forest law, as amended, applied only to such fish as were taken from the waters of this state, and not to those imported from a foreign country. This conclusion was based upon the ground that the Legislature did not intend by the general language used in a statute so highly penal in character to include fish caught outside of the state. While three judges dissented from that conclusion, and three others who sit in this case, but did not sit in that, might also have reached a different conclusion, had the subject been before them for judicial action, we all feel bound by the rule of stare decisis to recognize that decision as settling the meaning of the act then under consideration, so far as it was involved in the question at that time before the court. As the language used in that act in relation to fish does not differ in substance from the language used in the act now before us in relation to game, we are required by the same rule to hold that the Legislature, in enacting the forest, fish, and game law, as it stood when the defendants are alleged to have violated it, did not intend to make penal and criminal the possession in this state during the close season of game killed without the state and brought here during the open season.

It is claimed, however, that the passage by Congress of a statute known as the "Lacey Act" removed an obstacle which had previously prevented the application of our game laws to the possession of imported game, and that the operation and effect thereof were expanded accordingly. That act provides, in substance, that foreign game, when transported into any state, shall be subject to the laws of that state, enacted in the exercise of its police powers, to the same extent as if such game had been produced in such state, and shall not be exempt therefrom by reason of importation in original packages. Act May 25, 1900, c. 553, 31 Stat. 187 [U. S. Comp. St. 1901, p. 8181]. It became a law by the approval of the President on the 25th of May, 1900, nearly three months after the passage of the forest, fish, and game law. If the federal statute had been passed first

it would not be unreasonable to believe that the Legislature intended to so expand the meaning of our game laws as to forbid the possession of imported game during the close season. It was not passed, however, until after the enactment of the state law, and hence can have no effect upon its meaning as declared by this court in the Buffalo Fish Co. Case. The defendants had a right to act on that decision as a correct interpretation of the statute, and to purchase and possess the game in question at the time and in the manner admitted by the stipulation. A statute which not only imposes heavy penalties, but also makes a violation thereof a misdemeanor, should not receive a forced construction, but should be construed strictly, as required by the general rule governing the subject.

While the Legislature did not act in time to affect this action, it has since removed all doubt as to its present intention, and has thrown some light on its previous intention, by so amending the forest, fish, and game law as to provide that "wherever in this act the possession of fish or game, or the flesh of any animal, bird or fish, is prohibited, reference is had equally to such fish, game or flesh coming from without the state as to that taken within the state." Laws 1902, p. 487, c. 194. That amendment, when read in connection with the Lacy act and the decisions of the federal courts, removes from the region of discussion the questions considered in the Buffalo Fish Co. Case in relation to the application of the forest, fish, and game law to imported game, which was decided, and the effect of the commerce clause of the federal Constitution, which, although discussed, was not decided. *Matter of Rahrer*, 140 U. S. 545, 11 Sup. Ct. 865, 35 L. Ed. 572; *Vance v. Vandercook Co.*, 170 U. S. 438, 18 Sup. Ct. 674, 42 L. Ed. 1100.

It was held by a majority of the learned justices of the Appellate Division that the Legislature has no power to make the possession of imported game unlawful, as it would violate the provisions of our state Constitution relating to the protection of property. We do not assent to this proposition. For time out of mind, and in all jurisdictions, laws passed for the protection of fish and game have been regarded as sanctioned by the police power which belongs to every sovereign state. The game and the fish within the boundaries of the state belong to the people in their unorganized capacity, and may be taken by any citizen, without fee or license, at any time during the open season. It is to the interest of the state that neither should be wasted or destroyed, and that both should be carefully protected, specially during the breeding season. Without protection the fish and game will soon disappear, and the people thus be deprived of an important source of food supply, as well as a delightful recreation which promotes health and prolongs life.

The protection of game falls within the legitimate exercise of the police power, because it is directly connected with the public welfare, which is promoted by the preservation and injured by the destruction of so useful an article of food, free at the proper time to all the people of the state. Laws passed for this purpose do not interfere with private property, for there is no property in living wild animals, and only as the law permits their capture is there property in wild animals after they are caught or killed.

It was lately declared by the Supreme Court of the United States, when affirming a judgment of this court, that "the preservation of game and fish has always been treated as within the proper domain of the police power, and limiting the season within which birds and wild animals may be killed or exposed for sale, and prescribing the time and manner in which fish may be caught, have been repeatedly upheld by the courts. * * *

The taking and selling of certain kinds of fish and game at certain seasons of the year tend to the destruction of the privilege or right by the destruction consequent upon the unrestrained exercise of the right. This is regarded as injurious to the community, and therefore it is within the authority of the Legislature to impose restriction and limitation upon the time and manner of taking fish and game, considered valuable as articles of food or merchandise. For this purpose fish and game laws are enacted. The power to enact such laws has long been exercised, and so beneficially for the public that it ought not now to be called into question." *Lawton v. Steele*, 119 N. Y. 226, 23 N. E. 878, 7 L. R. A. 134, 16 Am. St. Rep. 813; *Id.*, 152 U. S. 183, 138, 14 Sup. Ct. 499, 38 L. Ed. 385, citing *State v. Roberts*, 59 N. H. 256, 47 Am. Rep. 199; *Commonwealth v. Chapin*, 5 Pick. 199, 16 Am. Dec. 386; *McCready v. Virginia*, 94 U. S. 391, 24 L. Ed. 248; *Vinton v. Welsh*, 9 Pick. 87, 92; *Commonwealth v. Essex Co.*, 13 Gray, 239, 248; *Phelps v. Racey*, 69 N. Y. 10, 19 Am. Rep. 140; *Holyoké Co. v. Lyman*, 15 Wall. 500, 21 L. Ed. 133; *Gentile v. State*, 29 Ind. 409; *State v. Lewis* (Ind. Sup.) 83 N. E. 1024, 20 L. R. A. 52. In a more recent case it was said by that high court: "From the earliest traditions the right to reduce animals *feræ naturæ* to possession has been subject to the control of the lawgiving power. * * * In most of the states laws have been passed for the protection and preservation of game. We have been referred to no case where the power to so legislate has been questioned, although the books contain cases involving controversies as to the meaning of some of the statutes. * * * The adjudicated cases recognizing the right of the states to control and regulate the common property in game are numerous. * * * "The wild game within a state belongs to the people in their collective, sovereign capacity. It is not the subject of private ownership, except in so far as the people may elect to make it so;

and they may, if they see fit, absolutely prohibit the taking of it, or traffic or commerce in it, if it is deemed necessary for the protection or preservation of the public good.' * * *

The right to preserve game flows from an undoubted existence in the state of a police power to that end, which may be none the less efficiently called into play because by doing so interstate commerce may be remotely and indirectly affected. Indeed, the source of the police power as to game birds flows from the duty of the state to preserve for its people a valuable food supply." *Geer v. Connecticut*, 161 U. S. 519, 16 Sup. Ct. 600, 40 L. Ed. 793.

The right to pass laws for the protection of game being conceded, as, in view of the authorities, it must be, the method of affording protection is necessarily within the discretion of the Legislature. It may provide a close season for the taking of game, and may prohibit the possession or sale of game during that season. It may close the game market throughout the state during the period of prohibition, in order to remove temptation from poachers and pot hunters, who are not apt to run the risk of taking game out of season if they cannot sell it. To do this effectively, it may be necessary to close the market as to game taken without the state, as well as within, for there are no marks by which birds killed in Michigan can be distinguished from those killed in New York. When enacting a game law the Legislature may provide for its ready enforcement, not simply by making the possession of game during the close season presumptive evidence of a violation of the statute, but it may go farther, and, in order to prevent evasion, fraud, and perjury, may prohibit the possession of game in this state during the close season, even if it was taken in another state and brought here during the open season. The action of Congress has taken away all questions of interstate commerce, so that the state can act with entire freedom, and can prevent the shipment of game into or out of its own territory; and, if game is imported, it can regulate or prohibit the sale thereof. Such provisions are warranted by the police power, and are not in conflict with either the state or federal Constitution. This appears from the authorities already cited, to which we add the following: *Smith v. Maryland*, 59 U. S. 71, 15 L. Ed. 269; *State v. Randolph*, 1 Mo. App. 15; *Haggerty v. I. M. & S. Co.*, 143 Mo. 238, 44 S. W. 1114, 40 L. R. A. 151, 65 Am. St. Rep. 647; *Roth v. State*, 51 Ohio St. 209, 37 N. E. 259, 46 Am. St. Rep. 566; *Magner v. People*, 97 Ill. 320; *Ex parte Maier*, 103 Cal. 476, 37 Pac. 402, 42 Am. St. Rep. 129; *Smith v. State*, 155 Ind. 611, 58 N. E. 1044, 51 L. R. A. 404; *State v. Rodman*, 58 Minn. 293, 59 N. W. 1098; *Commonwealth v. Savage*, 155 Mass. 278, 29 N. E. 468; *Organ v. State*, 56 Ark. 270, 19 S. W. 840; *Allen v. Wyckoff*, 48 N. J. Law, 90, 93, 2 Atl. 659, 57 Am. Rep. 548; *People*

v. Gerber, 92 Hun, 554, 36 N. Y. Supp. 720; *Association for Protection of Game v. Durham*, 51 N. Y. Super. Ct. 306.

While it is our duty to affirm the judgment of the Appellate Division, we have felt constrained to consider the constitutional question discussed by that learned court, lest the conclusion announced should be regarded as a precedent and result in evil. We do not affirm because, as held below, the statute would be unconstitutional if construed according to the claim of the plaintiff, but because it should be construed in accordance with our prior decision.

The order granting an additional allowance of \$2,000 should also be affirmed, because the court had power to make it, inasmuch as the action was difficult, owing to the number of statutes to be construed and authorities to be examined, and extraordinary, as it originally involved over \$1,000,000, and required unusual care in preparing for trial. While the demurrers reduced the amount claimed to about \$325,000, the stipulation making the final reduction is dated but two days before the trial began. An extra allowance is made to reimburse the successful party in a difficult and extraordinary case for the expense of the litigation, which depends to some extent upon the amount claimed. The plaintiffs could not allow the defendants to prepare for trial on the theory that a large sum was involved, and then subvert the power of the court to make an allowance accordingly by stipulating to reduce their demand after substantially all the preparation had been made. If this could be done two days before the trial, we do not see why it could not be done after the trial had commenced, and the entire preparation made. As the power to make the allowance existed, the amount thereof, subject to the limitation of the statute, which was not exceeded, was within the discretion of the courts below, and beyond our power to review.

The judgment and order should be affirmed, with costs.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, and WERNER, JJ. concur.

Judgment and order affirmed.

(179 N. Y. 486)

FARMERS' LOAN & TRUST CO. v. PEN-
DLETON.

(Court of Appeals of New York. Nov. 29,
1904.)

EXECUTRIX—ACCOUNTING—DECEASED TRUSTEE
—EVIDENCE.

1. In an action by a substituted trustee against the executrix of a deceased trustee for an accounting of the trust funds which may have come into her hands or the hands of her testator, where the evidence shows that she had

no knowledge of the trust fund, and no books or papers showing the proceedings of her testator as trustee, from which she could prepare any account, and there is no finding that she had received any part of the trust fund, or that the full amount thereof came into the hands of her testator, a judgment against her for the full amount of the trust fund cannot be sustained.

Appeal from Supreme Court, Appellate Division, First Department.

Action by the Farmers' Loan & Trust Company, substituted trustee under the will of William S. Pendleton, against Jennie F. Pendleton, executrix of John M. Pendleton, deceased, trustee under the will of William S. Pendleton, deceased. From a judgment of the Appellate Division (85 N. Y. Supp. 1180) affirming a judgment for plaintiff entered on report of referee (75 N. Y. Supp. 294), defendant appeals. Reversed.

The action was brought solely to obtain an accounting by the defendant as the executrix of John M. Pendleton, deceased, who was an executor and trustee under the will of his father, William S. Pendleton. William S. Pendleton died in the state of Florida before March 3, 1879, leaving a last will and testament, which on that day was admitted to probate at Boston, Mass. He left three sons, William H., John M., and George R. Pendleton. William and John were named as executors in their father's will, and duly qualified as such in Boston. George R. Pendleton was an incompetent person, who has died since the judgment in this action.

By his will William S. Pendleton gave and bequeathed to his executors the sum of \$16,000, to be invested in United States bonds or other good securities, to be held in trust "by my said executors for the use and benefit of my son George R. Pendleton," to pay the income thereof to George, and apply it to his use during his natural life, and provided that no part of said income should be paid by way of anticipation. At the death of his son George R. he directed that the principal should be paid over to the lawful issue of George, if he should leave any, and in default of such issue the principal should fall into and become a part of his residuary estate. He then gave his sons John M. and William H. the residue of his estate, appointed them as executors and trustees under the same, and gave them power to sell the securities held by them in trust, and to change the form of investments to other securities.

William H. died in the city of New York July 8, 1887. John M. died at New Brighton, Staten Island, August 18, 1900, leaving a will under which the defendant was appointed his executrix. Both William H. and John M. had been residents of this state for some years prior to their deaths. In December, 1900, an order was made by the Special Term appointing the plaintiff as a substituted trustee to execute the trust under the will of William S. Pendleton for the benefit of George R. The plaintiff, as such substitut-

ed trustee, commenced this action to obtain an accounting by the defendant as the executrix of John M. Pendleton, who was the surviving executor or trustee under the will of George R. Pendleton.

Upon the trial the plaintiff introduced in evidence the inventory of the estate of William S. Pendleton which was filed May 3, 1879, in probate proceedings in Massachusetts. This inventory discloses that the testator was possessed of personal property of the value of about \$24,000, including certain railroad bonds which were specifically bequeathed to Eliza M. Pendleton, leaving about \$19,000 which should have passed into the hands of the executors. The plaintiff also proved that five bonds of the St. Paul, Minneapolis & Manitoba Railway Company, of the value of \$5,000, with interest thereon, were found in the possession of the Union Trust Company to the credit of John M. and William H. Pendleton, trustees, and that these bonds were turned over to the plaintiff. It also introduced in evidence a mortgage for \$6,000, dated May 1, 1880, given by Eliza G. Robinson and another to John M. Pendleton and William H. Pendleton, as trustees of George R. Pendleton, under the last will and testament of William S. Pendleton. It was upon premises in New Brighton which had been conveyed to the mortgagor by William H. Pendleton individually, and was for the full amount of the purchase price. It was satisfied June 18, 1885, and the satisfaction was recorded February 20, 1901. The plaintiff also introduced in evidence a check dated December 29, 1885, on the Union Trust Company payable to the order of John M. Pendleton, for \$4,000, signed by John M. and William H. Pendleton as trustees, "fund of George R. Pendleton," together with two checks, dated June 1 and November 20, 1890, for \$142.50 each, to the order of John M. Pendleton; the former being signed by John M. Pendleton as surviving trustee; the latter by John M. Pendleton, surviving executor. The plaintiff likewise offered in evidence four checks, dated during the year 1887, aggregating \$627.05, signed by John M. Pendleton, on the Union Trust Company, and payable to the asylum in which George R. Pendleton was confined. The petition, signed by the defendant in proceedings for the appointment of the plaintiff as substituted trustee contained a statement that the Union Trust Company had acted as depositary for the fund in question since 1883 at the request of both trustees. The defendant denied any knowledge of the fund in question, or that any part of it ever came into her possession.

Upon this evidence the Special Term rendered a decision by which it held that the plaintiff, as substituted trustee, was entitled to an interlocutory judgment for an accounting by the defendant, as executrix of the will of John M. Pendleton, of the trust fund of \$16,000 created under the will of William S. Pendleton for the benefit of George R.

On May 13, 1902, an order was entered in pursuance of this decision appointing a referee to take and state the account of the defendant, and directing that, upon the coming in and confirmation of the report, a final judgment should be entered, fixing and determining the amount due the plaintiff by the defendant as executrix. In pursuance of this order the defendant rendered a statement in which she alleged that it was impossible for her to state such account, as she had no knowledge of the trust fund of the estate of William S. Pendleton. She included therein a schedule of payments made by John M. Pendleton for the benefit of George R. Pendleton, amounting to \$8,422.82, which was made up from vouchers and checks in her possession. The plaintiff objected to this account mainly on the ground that it did not show the amount of the trust fund received by John M. Pendleton. Upon the hearing before the referee the defendant again testified that no trust funds came into her possession, that she received about \$1,200 as executrix of her husband, and that there was real estate on Staten Island standing in his name.

The referee delivered his report, in which he stated, in substance, that he was unable to take and state an account, because the defendant denied any knowledge of the trust fund, and asserted that she had no books or papers of said John M. Pendleton, containing any records of his proceedings, from which such an account could be taken. He, however, submitted the several items of disbursements which the defendant had mentioned on the hearing before him. Both parties filed objections to this report. The court, however, confirmed it, and then gave judgment against the defendant as executrix for the sum of \$24,937.18, together with counsel fees and costs.

Jacob F. Miller, for appellant. Charles K. Beekman, for respondent.

MARTIN, J. (after stating the facts). The unanimous affirmance by the Appellate Division of the judgment entered in this case has eliminated from our consideration several important and interesting questions which were presented upon the argument and by the briefs of counsel. The facts, so far as they were found by the trial court, must be regarded as conclusively established, and cannot be reviewed here. Assuming those facts, the important question is whether they justify the judgment.

Upon the trial before the court, which resulted merely in an interlocutory judgment directing an accounting by the defendant, the findings were probably sufficient to justify that judgment, which determined nothing beyond the liability of the defendant to account. 1 *Cyclopedia Law & Procedure*, p. 413. But the more serious question is whether there were any findings or evidence which justified a final judgment for \$24,937.18. It seems quite impossible to find in the record

any findings of fact or evidence to sustain the conclusion that the defendant, in her representative capacity or otherwise, was liable for the amount with which she has been charged. Although there was evidence that at some time her testator had been in possession of a portion of the estate of William S. Pendleton as executor or trustee, and that he paid out various sums for the care and support of George R. Pendleton, yet there was no finding or proof which would show that the plaintiff was entitled to recover the amount of the final judgment awarded. The only findings of fact contained in the record related to and bore upon the issue whether the plaintiff was entitled to an interlocutory judgment requiring the defendant to render an account for such funds as she or her testator had received from the estate of William S. Pendleton, which were bequeathed to the trustees named in the will, and of which George R. Pendleton was given the use during his life. The court found facts upon that issue alone, and the matter of the accounting was then referred to a referee to take proof thereon and report to the court. A hearing was had, and the referee reported that he was unable to take and state the account, for the reason that the defendant was unable to render an account, as she had no knowledge of any such trust fund, and had no books or papers of her testator containing any record of his proceedings from which any such account could be prepared. Upon this report, with no further proof as to the amount received by the defendant or her testator, the plaintiff applied for a confirmation thereof, and for final judgment against the defendant, which was granted. Thus the report of the referee to the effect that the defendant was unable to make and state an account was passed upon and confirmed by the court.

The hearing before the referee on the attempted accounting in this case, so far as it proceeded, disclosed that none of the fund to which it related was in the hands of the defendant or in the hands of her testator at the time of his death, or at least none which she could identify, and hence she was unable to state the account. In such an action both parties are deemed actors when the cause is before the court or referee on its merits. *Story's Equity Jurisprudence*, § 522; *Van Santvoord's Equity Practice*, p. 161; 1 *Cyclopedia of Law & Procedure*, 434.

The contestants were required to show by competent proof the amount of the estate in the hands of the decedent as executor or trustee thereof, and his representative upon an accounting was chargeable only for the amount thus found to have been in his hands. *Matter of Ryalls*, 74 Hun, 205, 26 N. Y. Supp. 815; *Matter of Ryalls*, 80 Hun, 459, 30 N. Y. Supp. 455. The defendant being unable to state the account so far as it related to any portion of the trust fund that came into the hands of her testator, if any, the plaintiff

before it was entitled to a final judgment for any sum, was required to show not only that a portion of the fund came into the hands of the defendant's testator, but also to show the amount; and the court could properly charge the defendant only with that amount, as in no case will a trustee be held for more than he receives, if he is in no fault and has committed no breach of the trust. 2 Perry on Trusts, § 847; *Staats v. Bergen*, 30 N. J. Law, 131. The learned judge to whom the application for judgment was made said: "If defendant fails for any reason in accounting, plaintiff must endeavor to fix the sum actually due from information within its possession or ascertainable with due diligence;" thus plainly indicating that to his mind the proof as to the amount of the fund in the hands of the defendant, or that came into the hands of her testator, was uncertain, and that that amount should be more clearly established to entitle the defendant to a final judgment for the amount claimed, and for which the judgment was awarded. Yet, notwithstanding these views of the court, a judgment was entered by the plaintiff for the full amount of the trust fund mentioned in the will of William S. Pendleton, with 6 per cent. interest from 1879, without furnishing any further proof to establish the amount which had reached the hands of the defendant's testator, and for which alone the defendant should be held liable as such executrix. We fail to find in the record any finding of fact by the court, or any evidence which would justify a finding, that the defendant had received any portion of the trust fund, or that the full amount of such fund ever came into the hands of her testator. Under the will of William S. Pendleton, there were two executors or trustees, and it appears that a portion of the fund in question was in the hands of the co-trustee with defendant's testator, for which the latter would not be liable, unless the fund subsequently came into his hands, or it was dissipated with his consent or by reason of his negligence. *Croft v. Williams*, 88 N. Y. 384; *Bruen v. Gillet*, 115 N. Y. 10, 21 N. E. 676, 4 L. R. A. 529, 12 Am. St. Rep. 764.

Under the circumstances of this case, and in view of the fact that the defendant was a mere representative of her testator, who left no books or papers from which an account could be made, and consequently she was unable to state such account, we think the burden of tracing the trust fund into the hands of the defendant or her testator rested upon the plaintiff, and that until such proof was furnished, or finding made, the plaintiff was not entitled to enter a judgment for the full amount of the trust fund, with 6 per cent. interest. Nor do we think that it can be presumed from the evidence in this case that the defendant's testator was ever in possession of the entire fund, so as to make the defendant, as his executrix, liable therefor. The principle involved in

Matter of Hicks, 170 N. Y. 193, 63 N. E. 276, seems applicable in this case. That was a proceeding before the surrogate to compel an executor of a general guardian to pay over an amount due to his ward in preference to other creditors, without proof that the assets of the decedent in the hands of his executor were a part of, or derived from, the trust fund. It was there said that a presumption that the trust funds were in the hands of the executor could not be indulged in, in the absence of any finding or evidence to that effect, in favor of the claim of his ward. So here, we think no presumption can be indulged in to the effect that the entire trust estate came into the hands of the defendant's testator, so as to compel the defendant to account therefor. So far as it was shown that the defendant's testator received a part of the trust estate, his estate was liable. But before the plaintiff can sustain this judgment, or recover the amount thereof, it must be proved and found that the whole trust fund came into his hands, or such facts must be established as would fairly permit the plain deduction that he received all of such fund. We think no such evidence was given, and no such finding made by the trial court, and consequently no sufficient basis for the judgment awarded was established. Mere proof that 20 years since a portion of this fund was held jointly by the trustees, with no proof of any settlement in or order by the probate court, or of a transfer of said fund to them as trustees, was insufficient to establish possession of the entire estate in the defendant's testator as such trustee.

The character of this action should be kept in mind. It is purely an action for an accounting, and nothing else. Therefore the plaintiff was entitled only to the relief appropriate to such an action. It was not an action for breach of trust or for *devastavit*. The defendant was called upon to account for the trust fund created by the will of William S. Pendleton for the benefit of George R. Pendleton. So far as that fund was proved to have been in the hands of the defendant's testator at his death, she is required to account, so far as possible. If, however, she has no knowledge of any such fund, and no books or papers from which she can acquire it, she cannot be required to state an account. Or, in other words, she is not required to do an impossible thing. Therefore, when the referee made his report, to the effect that the account could not be stated upon the proof introduced before him, it was clear that other and further proof was required. The court might have referred the case back to the referee to take such further proof as the plaintiff might furnish as to the amount of the fund, if any, which came into the hands of the defendant, or which came into the hands of her testator. It might also have taken that proof, but nothing of the kind was done. Nor did the court awarding the final

judgment make any findings whatever, and there was no proof nor findings which could have formed a proper basis for the judgment entered. Even if it be held that that court could act upon the evidence previously taken before another judge as a basis for the interlocutory judgment, it was insufficient, as it entirely failed to show that the whole amount of such fund ever came into the hands of the defendant's testator. Nor was there sufficient proof in the case to uphold a legitimate presumption to that effect. While there may have been sufficient proof to justify a judgment for a smaller amount, we think there was none that would justify the judgment actually entered.

The judgment should be reversed and a new trial granted, with costs to abide the event.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, VANN, and WERNER, JJ., concur.

Judgment reversed, etc.

(179 N. Y. 455)

In re TIFFANY.

(Court of Appeals of New York. Nov. 29, 1904.)

MUNICIPAL CORPORATIONS—CIVIL SERVICES—VETERANS—POLICE—EXPIRATION OF TERM.

1. Laws 1899, p. 809, c. 370, § 21, providing that no veteran holding a position by appointment or employment in state, city, county, or town shall be removed, except for incompetency or misconduct, on stated charges, does not prevent an office from becoming vacant by operation of law, through the expiration of the term fixed by statute; and, where a city charter provides that the term of policemen shall be for one year, a veteran who had been appointed a policeman, and whose term has expired under the charter, is not entitled to mandamus to compel his reappointment on the ground that he had been removed in violation of the civil service act.

Appeal from Supreme Court, Appellate Division, Fourth Department.

In the matter of the application of Chapin Tiffany for writ of mandamus against the mayor and common council of the city of Jamestown. From an order of the Appellate Division (84 N. Y. Supp. 1148) affirming a judgment of the Special Term denying the writ, relator appeals. Affirmed.

In March, 1896, the relator, a veteran of the Civil War, passed the civil service examination for the position of policeman in the city of Jamestown, and soon after he was appointed special policeman by the mayor and common council. By successive appointments, made annually, he continued to fill that office until July 3, 1899, when he was appointed a regular patrolman to fill a vacancy caused by resignation. He was reappointed to that position for several terms, and the last appointment, dated April 7, 1902, stated that "the term for which said

regular policemen are appointed will expire with the Monday following the annual city election to be held in the year 1903." In due time after the spring election in 1903 he applied for reappointment, but was not appointed, because he failed to pass the physical examination made by physicians selected by the municipal civil service commission. The commissioners having certified that he was physically incompetent to perform the duties of the office in question. Napoleon Neustrom, one of the three eligible applicants duly certified by the commission, was appointed to the position for the ensuing year. In September, 1903, the relator moved at Special Term for a writ of mandamus commanding the mayor and common council to declare void the appointment of said Neustrom, and to reinstate the relator. The order denying the motion having been unanimously affirmed by the Appellate Division, the relator appealed to this court.

H. J. Swift and Parton Swift, for appellant. James L. Weeks, for respondent.

PER CURIAM. The question presented by this appeal is whether that part of the charter of the city of Jamestown, passed in 1886, which fixed the terms of policemen at one year, was repealed by the civil service law passed in 1899 (Laws 1886, p. 123, c. 84, tit. 2, § 2; Laws 1899, pp. 809, 813, c. 370, §§ 21, 29). There was no express repeal, but it is claimed that section 21 of the civil service law is so inconsistent with section 2 of title 2 of the city charter that the latter was repealed by implication. Section 21 provides, in substance, that no veteran of our wars, holding a position by appointment or employment in state, city, county, town, or village, "shall be removed from such position or employment, except for incompetency or misconduct shown after a hearing, upon due notice, upon stated charges and with the right of such employee or appointee to a review by a writ of certiorari." Section 2 of title 2 of the charter provides that the term of office of policemen in the city of Jamestown shall be one year.

The repeal of a statute by implication is not favored by law, for, when the Legislature intends to repeal an act, it usually says so expressly, as it did when enacting the civil service law, by which 17 statutes were repealed by express mention. Section 29. When, however, two statutes are so hostile that both cannot stand, or the later covers the entire ground of the earlier, or is obviously intended as a substitute therefor, the last enactment of necessity governs, for it is presumed to express the last intention of the lawmakers. In order to have this effect, the repugnancy must be so palpable that, upon reading the two acts together, it is obvious, without the aid of elaborate argument, that both could not have been intended to remain in force at the same time. If, by any fair construction, whether strict

or liberal, a reasonable field of operation can be found for both acts, that construction should be adopted. In other words, if the old and the new law, by any reasonable interpretation, can stand together, there is no repeal by implication. "This rule has peculiar force in the case of laws of special and local application, which are never to be deemed to be repealed by general legislation, except upon the most unequivocal manifestation of intent to that effect." Cooley's Const. Lim. (5th Ed.) 183; Black's Interpretation of Laws, 112; Sutherland on Statutory Construction, 179; Sedgwick on Statutory Construction, 95; Smith's Commentaries, §79; 26 Am. & Eng. Encyc. 715.

The civil service law is a general act that applies to the entire state, while the charter of the city of Jamestown is a local act which applies only to the territory embraced within the corporate limits of that city. The former does not cover the entire ground of the latter, nor was it intended as a substitute therefor. There is no necessary inconsistency between the two, for they can be read together, and an appropriate field of operation assigned to each. The civil service act was not intended to prevent an office from becoming vacant by operation of law through the expiration of the term fixed by statute. When his term expires the officer is not removed, for removal requires affirmative action. The aim of the statute was to protect the incumbents of those positions which previously had been of indefinite tenure, and hence subject to arbitrary removal by the appointing power. The Legislature did not intend to reach out to every city and village in the state and repeal that part of the charter which gave a definite term to certain offices filled by appointment. Its primary object was to make merit and fitness, as ascertained by competitive examination, the basis of appointment to office, and to protect the appointee to an office with no fixed term from removal without cause shown after an opportunity to be heard. Hence the charter in question, which provides that the term of office of the "street commissioner, firewarden, poundmaster, sealer of weights and measures, constables, game constables, chief of police and policemen," shall be one year, is not so inconsistent with the later act, having the object already pointed out, that both cannot stand together. No repeal was intended, because both statutes can be harmonized and each enforced without conflict with the other. A fair and reasonable construction removes all repugnancy, and leaves both in operation as the Legislature is presumed to have intended. Any other construction would be far-reaching in its effect, for it would make permanent many offices in counties, cities, towns, and villages which have been generally treated as having fixed terms, and have been filled accordingly. A practical construction put upon a statute by the

officers called upon to carry it into effect, if generally acquiesced in for a considerable period of time, is strong evidence of the real meaning of the law. Black on Interpretation of Laws, 220.

We think that the relator was not removed from office, but that his term as fixed by law expired, and the proper authorities had the right to appoint a successor, who thereupon held the position with the right and tenure formerly enjoyed by himself.

The order appealed from should be affirmed, with costs.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, VANN, and WEBER, JJ., concur.

Order affirmed.

(779 N. Y. 433)

GRIFFIN v. INTERURBAN ST. RY. CO.

SCUDDER v. SAME.

(Court of Appeals of New York. Nov. 29, 1904.)

STREET RAILROADS—TRANSFERS—RECOVERY OF PENALTIES.

1. Laws 1890, p. 1106, c. 565, § 78, as amended by Laws 1892, p. 1398, c. 676, provides that any railroad corporation may contract with any other for the use of their respective roads, and if such contract shall be a lease, certain formalities are to be observed in its execution. Section 104 (page 1114) provides for transfers from one road to another upon payment of a single fare. Held, that the latter section applies to surface lines leased by one or more corporations to another, and operated by the lessee, so as to render the lessee liable where transfers are tendered and refused for the penalties provided for their refusal.

2. The penalties provided for on refusal of transfer on payment of a single fare from one to another of leased surface railroads, under Laws 1890, p. 1082, c. 565, as amended by Laws 1892, pp. 1398, 1406, c. 676, §§ 78, 104, are not cumulative, and the bringing of an action for one penalty is a waiver of all previous penalties incurred.

Appeals from Supreme Court, Appellate Division, First Department.

Actions by William Griffin against the Interurban Street Railway Company and by Frank S. Scudder against the same. From judgments of the Appellate Division (89 N. Y. Supp. 1106) affirming a judgment of the Appellate Term affirming a judgment in favor of plaintiffs, defendant appeals. Modified.

Paul D. Cravath, Charles F. Brown, Joseph P. Cotton, Jr., and Henry A. Robinson, for appellant. Harcourt Bull, for respondents.

BARTLETT, J. These actions were brought to recover penalties alleged to have been incurred by reason of defendant's refusal to transfer the plaintiffs, while passengers on its railway system, from one of its lines to another, as required by law. In the Griffin case the plaintiff seeks to recover

\$200, for four penalties of \$50 each. The plaintiff is in the piano business, and engaged in tuning, repairing, and regulating pianos, which employment requires him to go to New Jersey almost every day in the year. In June and July, 1903, he resided on Lenox avenue, in the city of New York, near 134th street. In going to New Jersey he took the Lenox Avenue Line and transferred to the 125th Street Crosstown Line. In coming from New Jersey he took the 125th Street Crosstown Line and transferred to the Lenox Avenue Line. On each of said four occasions plaintiff paid to the conductor the single fare of five cents, requesting at the same time that a transfer be given him for the second line. On each occasion the transfer was refused, and plaintiff was compelled to pay a second fare of five cents, after having stated all the facts to the conductor. These trips, so taken by the plaintiff, were in the prosecution of his business. In the Scudder case the plaintiff seeks to recover \$250, or five penalties of \$50 each. In this case the lines involved are the 125th Street and Amsterdam Avenue Lines. Plaintiff is a minister of the Gospel. In June and July, 1903, he resided at the corner of 117th street and Amsterdam avenue. On June 29, June 30, and July 1, 1903, he made five continuous trips in the cars operated by the defendant on Amsterdam avenue and on 125th street, in the borough of Manhattan, in the city of New York. On each of said trips he made payment of the single fare, and demanded that a transfer should be given to the plaintiff for the second line. In each case the transfer was refused, and in each case the plaintiff was compelled to pay a second fare of five cents, after having stated all the facts to the conductor. The plaintiff was not riding for the purpose of obtaining a cause of action against the company, but in the prosecution of his profession.

There are two leases, under the provisions of which the defendant company was operating the lines of a street surface railroad on 125th street, Lenox avenue, and Amsterdam avenue, over which plaintiffs, Griffin and Scudder, made their continuous trips. One of these is the lease from the Third Avenue Railroad Company to the Metropolitan Street Railway Company, made in April, 1900; the other is the lease from the Metropolitan Street Railway Company to the Interurban Street Railway Company, the defendant, made in April, 1902. The only street surface railroad owned by the defendant is a line of railroad at Mt. Vernon, wholly outside the city of New York.

The first and important question involved in these cases is whether present section 104 of the railroad law (Laws 1892, p. 1406, c. 676) was intended by the Legislature to apply to the case of a lease by one railroad of the lines of another. This question has been litigated in the courts below in a number of cases, and the judges, with nearly a unani-

mous vote, have decided that section 104 of the railroad law covers the case of a lease by one company to another. These litigations have resulted in a number of well-considered opinions expressing the majority view, and it would be unnecessary at this time to restate the arguments that are there so ably set forth, were it not for the fact that the learned Appellate Division handed down no prevailing opinions save a reference to its decisions in other cases. It therefore seems proper that a brief reference should be made to the statutory argument. In 1839 the Legislature passed an act "authorizing railroad companies to contract with each other." Laws 1839, p. 195, c. 218. This act contained a single section, reading as follows: "It shall be lawful hereafter for any railroad corporation to contract with any other railroad corporation for the use of their respective roads, and thereafter to use the same in such manner as may be prescribed in such contract. But nothing in this act contained shall authorize the road of any railroad corporation, to be used by any other railroad corporation, in a manner inconsistent with the provisions of the charter of the corporation whose railroad is to be used under such contract." Inasmuch as the general railroad law of 1850 (Laws 1850, p. 211, c. 140) did not in terms authorize the leasing of one railroad to another, it was a mooted question whether such power existed. In *Woodruff v. Erie Railway Co.*, 93 N. Y. 609, 616, this court said, referring to the act of 1839: "This act has never been repealed, and has been held by this court to confer power upon railroad corporations, not only to acquire, but also to transfer to other railroad corporations, by lease, the exclusive right to use and enjoy the property and privileges of the lessor in such contract. *Fisher v. N. Y. C. & H. R. R. Co.*, 46 N. Y. 644; *People v. Albany & Vt. R. R. Co.*, 77 N. Y. 232; *Troy & B. R. Co. v. B., H. T. & W. Ry. Co.*, 86 N. Y. 107." This case was decided in November, 1883. It will be observed that from 1839 to 1883, continuously, the power to lease existed. In 1884 the Legislature passed an act "to provide for the construction, extension, maintenance and operation of street surface railroads and branches thereof in cities, towns and villages." Laws 1884, pp. 309, 314, c. 252. Section 15 of this act reads as follows: "It shall be lawful for any street surface railroad company or companies to lease, or to transfer its or their right, subject to all its or their obligations in respect thereof, to run upon or to use any portion of its or their railroad tracks to any other street surface railroad company authorized to run upon such route, upon such terms as may be agreed upon by a majority of the respective boards of directors thereof," etc. In 1885 the Legislature passed an act "authorizing street surface railroad companies to contract with each other, and providing for a proper system of transfer of passengers." Laws

1885, p. 525, c. 305. The material portions of the above act are as follows: "Section 1. It shall be lawful hereafter for any street surface railroad company, or any corporation owning or operating a street surface railroad or railroad route, to contract with any other such company or corporation for the use of their respective roads or routes or any portion thereof, subject to the provisions, restrictions and conditions hereinafter stated, and thereafter to use or to permit the use of the same in such manner as may be prescribed in such contract." (Remainder of section not material.) "Sec. 2. The directors of the companies may enter into such a lease or contract under the corporate seal of such company, such lease or agreement prescribing the terms and conditions thereof." Section 3 provides for lease or agreement to be submitted to vote of stockholders, vote to be taken by ballot, lease to be filed and recorded. "Sec. 4. Each and every company entering into any contract under the power conferred by this act shall carry or permit any other party to such contract to carry between any two points on the railroads or portions thereof embraced within such contract, any passenger desiring to make one continuous trip between such points for one single fare not higher than the fare lawfully chargeable by either of such companies for an adult passenger; and each and every such company shall, upon demand and without extra charge, give to each passenger paying one single fare a transfer entitling such passenger to one continuous trip to any point or any portion of any railroad embraced within such contract, to the end that the public convenience may be promoted by the operation of the railroads embraced within such contract to the extent of their inclusion therein substantially as a single railroad with a single rate of fare. For every refusal to comply with the requirements of this section the company so refusing, and having contracted as aforesaid, shall forfeit to the aggrieved party the sum of fifty dollars, which may be recovered in any court of competent jurisdiction. This act shall not apply to cities having less than eight hundred thousand population." Section 5 repealed all acts and parts of acts inconsistent with the provisions of this act. In 1889 the Legislature passed an act to amend chapter 305, p. 525, of the Laws of 1885 (Laws 1889, p. 730, c. 532). This amendment related to section 3 of the act, and permitted it to stand, adding thereto provisions authorizing the abandonment of part of a route, and providing therefor in detail. On May 1, 1891, the railroad law went into effect. Chapter 565, p. 1082, Laws 1890. The law of 1889 was substantially embraced in section 78 of the new revision (Laws 1893, p. 907, c. 433), while the provision of the railroad law of 1890 against the leasing of parallel lines was continued and made general by section 80, p. 1107. The first section of the act of 1885 was con-

tinued as section 103 (page 1114); the third section as section 104; while the fourth section, establishing the public right of free transfer, was continued substantially in section 105.

In 1892 the Legislature passed an act "to amend the Railroad Law." Laws 1892, p. 1382, c. 676. The changes made in this revision seem to have resulted in confusion and misunderstanding in judicial opinions and in the briefs of counsel. The limitation referring to cities of 800,000 population or over was stricken out. Sections 103 and 104, which provided, respectively, that corporations may lease or contract with each other for use of road and for the submission of such contract to the vote of stockholders, were repealed, and substantially consolidated with section 78, which reads as follows (Laws 1893, p. 907, c. 433, § 2, amending section 78): "Any railroad corporation or any corporation owning or operating any railroad or railroad route within this state, may contract with any other such corporation for the use of their respective roads or routes, or any part thereof, and thereafter use the same in such manner and for such time as may be prescribed in such contract. Such contract may provide for the exchange or guarantee of the stock and bonds of either of such corporations by the other and shall be executed by the contracting corporations under the corporate seal of each corporation, and if such contract shall be a lease of any such road and for a longer period than one year, such contract shall not be binding or valid unless approved by the votes of stockholders owning at least two-thirds of the stock of each corporation which is represented and voted upon in person or by proxy at a meeting called separately for that purpose upon a notice stating the time, place and object of the meeting, served at least thirty days previously upon each stockholder personally, or mailed to him at his post-office address, and also published at least once a week, for four weeks successively, in some newspaper printed in the city, town or county where such corporation has its principal office, and there shall be indorsed upon the contract the certificate of the secretaries of the respective corporations under the seals thereof, to the effect that the same has been approved by such votes of the stockholders, and the contract shall be executed in duplicate and filed in the offices where the certificates of incorporation of the contracting corporations are filed. The road of a corporation cannot be used under any such contract in a manner inconsistent with the provisions of law applicable to its use by the corporation owning the same at the time of the execution of the contract. Such contract shall be executed by the corporations, parties thereto, and proved and acknowledged in such manner as to entitle the same to be recorded in the office of the clerk or register of each county through or into which the

road so to be used shall run. Nothing in this section shall apply to any lease in existence prior to May 1, 1891." The new section 103 was introduced, dealing with the abandonment of part of route, which is not material at this time. Old section 105 (section 4, Laws 1885, p. 526, c. 805, already quoted), which dealt with the subject of contracting corporations to carry passengers for one fare, and fixing a penalty for a violation of that duty, was moved up, and re-numbered section 104, with slight verbal changes, and reads as follows: "Every such corporation entering into such contract shall carry or permit any other party thereto to carry between any two points on the railroads or portions thereof embraced in such contract any passenger desiring to make one continuous trip between such points for one single fare, not higher than the fare lawfully chargeable by either of such corporations for an adult passenger. Every such corporation shall upon demand, and without extra charge, give to each passenger paying one single fare a transfer, entitling such passenger to one continuous trip to any point or portion of any railroad embraced in such contract, to the end that the public convenience may be promoted by the operation of the railroads embraced in such contract substantially as a single railroad with a single rate of fare. For every refusal to comply with the requirements of this section the corporation so refusing shall forfeit fifty dollars to the aggrieved party. The provisions of this section shall only apply to railroads wholly within the limits of any one incorporated city or village."

It is quite manifest from this review of the legislation bearing on the controversy that present section 104 of the railroad law covers leases duly executed between street surface railroad companies, and particularly the leases now under review. It is obvious, in the language of present section 104, "every such corporation entering into such contract," etc., that the word "such," in that connection, refers to "any railroad corporation or any corporation owning or operating any railroad or railroad route within this state," which is the language of section 78 as amended. It is claimed in this connection by the appellants that section 78 of the railroad law can only mean the roads or routes which the corporations respectively own, and does not apply to a corporation organized for the purpose of operating the lines of other railroad companies under lease. Section 78 in express terms refers to any railroad corporation—"or any corporation owning or operating" any railroad or railroad route within this state may contract, etc. No argument seems necessary in view of the positive provisions of the railroad law. Sections 78 and 104 must be read together. In some of the cases in the lower courts, in construing section 104 in regard to the liability of companies under lease to grant transfers to pas-

sengers, the meaning of the words in that connection, "to the end that the public convenience may be promoted by the operation of railroads embraced in such contract substantially as a single railroad with a single rate of fare," have been construed as a legislative intimation that certain transfers might be demanded that would not be required in seeking to promote the public convenience. In the cases before us this language establishes the propriety of the transfers demanded. We are of opinion that the transfer in each case was improperly refused, and the defendant incurred the penalty provided by section 104 of the railroad law.

There is a second question in these cases that was not orally argued, but is discussed in the briefs of counsel, which is as follows: Can a plaintiff, seeking to recover penalties under section 104 of the railroad law, join in his complaint more than one penalty? The provision of section 104 of the railroad law, relating to this subject, reads as follows: "For every refusal to comply with the requirements of this section, the corporation so refusing shall forfeit fifty dollars to the aggrieved party." It is no doubt the rule, to be deduced from the decisions of this court, that no action for cumulative penalties is permissible unless it is clear from the language of the act inflicting the penalty that it was the intention of the Legislature to provide a penalty for each and every violation of the statute. In *People v. New York Central R. R. Co.*, 13 N. Y. 78, this court allowed cumulative penalties under section 39 of the general railroad act of 1850 for sundry omissions to ring a bell or sound a steam whistle on engines upon approaching and crossing a highway. The statute in that case contained the words "for every neglect." In *Suydam v. Smith*, 52 N. Y. 383, cumulative penalties were allowed where a statute contained the words "for each offense." In that case Judge Rapallo (page 388) distinguished the case of *Fisher v. N. Y. O. & H. R. R. Co.*, 46 N. Y. 644, pointing out that the act there construed did not contain words indicating that the Legislature intended to permit a recovery for each offense. In *Sturgis v. Spofford*, 45 N. Y. 446, a cumulative recovery was disallowed, the legislative intent not appearing in the language of the statute. In *Grover v. Morris*, 73 N. Y. 473, a cumulative recovery was permitted. The offense was the sale of tickets in an illegal lottery. Each sale of a ticket was visited with a penalty, and it was held that it was proper to unite in a single action claims to recover back moneys paid on several separate purchases. Cumulative recoveries have not been permitted in two recent decisions in this court, where the legislative intention was not to be found in the statute under construction. *Jones v. Rochester Gas & Electric Co.*, 168 N. Y. 65, 60 N. E. 1044; *Cox v. Paul*, 175 N. Y. 328, 67 N. E. 586.

Referring once more to the language of section 104 of the railroad law imposing the penalty, we find the single sentence in which it is contained opening with the words, "For every refusal to comply." It is quite obvious that the legislative intention to permit the recovery of cumulative penalties for refusals of the defendant to comply with the provisions of the railroad law in regard to the transfer of passengers is as clearly manifested as in any of the cases cited. Notwithstanding this fact, a majority of my brethren are of opinion that, while the rule for the recovery of cumulative penalties, as already adverted to, is firmly established by the earlier decisions of this court, yet the changed conditions in the modern life in our great cities render its modification imperative. There have been presented at the bar of this court civil and criminal cases where the aggregate penalties sought to be recovered have amounted to enormous and well-nigh appalling sums by reason of plaintiffs permitting a long period to elapse before beginning actions. Actions of this nature have become highly speculative, and present a phase of litigation that ought not to be encouraged. The court is of opinion that, if cumulative recoveries are to be permitted, the Legislature should state its intention in so many words; that a more definite form of statement be substituted for the words hitherto deemed sufficient. We intend no reflection upon the plaintiffs in the cases now under consideration, but are dealing with a great abuse which demands immediate correction. A sound public policy requires that only one penalty should be recovered in a single action, and that the institution of an action for a penalty is to be regarded as a waiver of all previous penalties incurred.

It follows that, in each of the actions before us, the judgment should be modified and reduced so as to permit a recovery for one penalty only, without costs to either party.

CULLEN, C. J., and HAIGHT, MARTIN, VANN, and WERNER, JJ., concur. GRAY, J., not sitting.

Judgment accordingly.

(179 N. Y. 450)

O'REILLY v. BROOKLYN HEIGHTS R. CO.
(Court of Appeals of New York. Nov. 20, 1904.)

SURFACE RAILROADS—LEASED LINES—TRANSFERS.

1. Where a street surface railroad is operated under the railroad law (Laws 1890, p. 1082, c. 565, as amended by Laws 1892, p. 1382, c. 676), and leases other roads which intersect with its own road, the lessee must, under section 104, c. 676, p. 1406, Laws 1892, carry any passenger desiring to make one continuous trip to any portion of any railroad embraced in such contract for a single fare.

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Luke O'Reilly against the Brooklyn Heights Railroad Company. From a judgment of the Appellate Division (89 N. Y. Supp. 41) affirming a judgment for plaintiff, defendant appeals. Affirmed.

Charles A. Collin, William F. Sheehan, and John L. Wells, for appellant. Louis Ehrenberg, for respondent.

PER CURIAM. The plaintiff was a passenger upon the Vanderbilt Avenue Line of the Nassau Electric Railroad Company, and had paid his fare of five cents. He demanded a transfer ticket over the Brooklyn City Railroad Company's line from its intersection with the Vanderbilt Avenue Line, in the city of Brooklyn, which was refused, and this action was brought to recover the penalty given by the statute therefor. The history of the legislation upon the subject and the construction of the various enactments pertaining thereto are covered by our opinion in the case of Griffin v. Interurban Street Railway Company, 179 N. Y. 438, 72 N. E. 513. That opinion covers all of the points involved herein, with one exception. It is now contended on behalf of the appellant that the Brooklyn City Railroad Company, over which the plaintiff demanded a transfer, was not a railroad "embraced in such contract" of the defendant company, within the meaning of section 104 of the railroad law (Laws 1890, p. 1114, c. 565, as amended by Laws 1892, p. 1406, c. 676). The defendant, the Brooklyn Heights Railroad Company, was operating the Brooklyn City Railroad and the Vanderbilt Avenue Line of the Nassau Electric Railroad Company under two separate leases, one executed in 1893 and the other in 1900. The statute provides that: "Every such corporation entering into such contract shall carry or permit any other party thereto to carry between any two points on the railroads or portions thereof embraced in such contract any passenger desiring to make one continuous trip between such points for one single fare, not higher than the fare lawfully chargeable by either of such corporations for an adult passenger. Every such corporation shall upon demand, and without extra charge, give to each passenger paying one single fare a transfer, entitling such passenger to one continuous trip to any point or portion of any railroad embraced in such contract, to the end that the public convenience may be promoted by the operation of the railroads embraced in such contract substantially as a single railroad with a single rate of fare." It is contended that the railroad lines of the Nassau Electric Railroad Company are not embraced in the lease made by the Brooklyn City Railroad Company to the defendant, and that the Brooklyn City Railroad Lines are not embraced in the lease made by the electric railroad company to the defendant, and there-

fore there is no obligation on the part of the defendant to grant transfers from one of those lines to the other. In order to determine this question, we think it important to first consider the nature of the obligation of the defendant company, arising under the statute, upon its executing the lease of the Brooklyn City Railroad Company. It will be observed that the language of the statute is that "every such corporation entering into such contract shall carry," etc. The obligation to carry, therefore, arises from the entering into the contract. The defendant company was the lessee, and entered into the contract with the lessor, thereby undertaking to operate the roads of the lessor company. When a street surface railroad company, engaged in the operation of a railroad under the statute, leases another railroad, and commences to operate the same, which roads intersect each other, the evident purpose of the act was that they should be deemed "embraced" in the contract, and that passengers should be transferred from one road onto the other so as to entitle "such passenger to one continuous trip to any point or portion of any railroad embraced in such contract, to the end that the public convenience may be promoted by the operation of the railroads embraced in such contract substantially as a single railroad with a single rate of fare." We think, therefore, that a fair and reasonable construction of the statute is that the lessee railroad, in taking a lease of another railroad, undertakes to transfer passengers from its own line to that of the leased line, and vice versa. If we are correct in this construction, it would then follow that when the defendant company subsequently leased the Vanderbilt Avenue Line of the Nassau Electric Railroad Company it undertook to transfer passengers from the Vanderbilt Avenue Line over its own road, and thence, by its former lease, to transfer passengers over the Brooklyn City Lines, and vice versa. In other words, the roads leased by the defendant company in effect became the roads of that company operated by it, and when it leased other roads and commenced their operation the obligation was to transfer passengers over all of the roads operated by it for a single fare.

The judgment should be affirmed, with costs.

CULLEN, C. J., and BARTLETT, HAIGHT, MARTIN, VANN, and WERNER, JJ., concur. GRAY, J., not sitting.

Judgment affirmed.

(180 N. Y. 12)

COOPER v. NEW YORK, O. & W. RY. CO.
(Court of Appeals of New York. Dec. 6, 1904.)

NEW TRIAL—DIRECTING VERDICT—EXCEPTIONS.

1. Failure of plaintiff to object and except to the submission of specific questions to the jury as to the freedom of plaintiff's intestate from

negligence, and as to the negligence of defendant and the damage, is not cured by an exception to the direction of a general verdict; and, in the absence of any other exception, a judgment on a verdict for defendant must be affirmed.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Emma M. Cooper, administratrix of Judson M. Cooper, against the New York, Ontario & Western Railway Company. From an order of the Appellate Division (82 N. Y. Supp. 98) reversing a judgment for defendant, and an order denying a new trial, defendant appeals. Reversed.

Lewis E. Carr, Udelle Bartlett, and P. W. Cullinan, for appellant. Frank C. Sargent and James Gallagher, for respondent.

BARTLETT, J. The plaintiff seeks in this action, as administratrix, to recover damages caused by the death of her husband by reason of the negligence of the defendant. The deceased was a fireman on a freight engine of the defendant company, and was instantly killed in a collision. The details of the accident are immaterial on this appeal. This case has been twice tried. The first trial came on before Mr. Justice Wright and a jury in 1897, and resulted in a verdict of \$15,000 for plaintiff. The judgment entered thereon was reversed by the Appellate Division. 49 N. Y. Supp. 481. The second trial was had before Mr. Justice Scripture and a jury in April, 1902. At the close of the plaintiff's case the defendant moved for a nonsuit, and the court reserved its decision until after the jury returned a special verdict upon three questions submitted by the court, to wit: (1) Was the plaintiff's intestate free from negligence contributing to his death? (2) Was the defendant guilty of negligence which was the direct cause of the injury to the deceased? (3) What are the damages? The jury answered the first and second questions in the negative; answer to the third question was unnecessary. Thereupon the court directed a general verdict for the defendant, and dismissed the complaint. The plaintiff appealed, and the Appellate Division reversed the judgment and order denying motion for new trial, and a new trial was ordered. From that order this appeal is taken.

The order states that the reversal is "upon questions of law only; the facts having been examined, and no error found therein." The plaintiff moved to amend this order by striking out the words above quoted, which motion was granted. Subsequently the defendant moved for a reargument of the motion to amend the order, and the words so stricken out were restored, so that the order now reads as originally made. The plaintiff neither objected nor excepted to the submission of the three questions to the jury. The only objection and exception she did interpose was to the direction of a general verdict. This appeal is taken under section

190 of the Code of Civil Procedure, subd. 1, which reads: "Appeals may be taken as of right to said court [Court of Appeals] * * * from orders granting new trials on exceptions, where the appellants stipulate that upon affirmance, judgment absolute shall be rendered against them." The stipulation was given herein. Section 994 of the Code provides when and how exceptions may be taken after close of trial by court or referee, and section 995 reads as follows: "In any other case, an exception must be taken, at the time when the ruling is made, unless it is taken to the charge given to the jury; in which case, it must be taken before the jury have rendered their verdict. It must, at the time when it is taken, be reduced to writing by the exceptant, or entered in the minutes." As the plaintiff neither objected nor excepted to the submission of the three specific questions to the jury, she acquiesced in that mode of disposing of the case, so far as the jury were concerned. The objection and exception to the direction of a general verdict based on the jury's answers to the first and second questions, that the plaintiff's intestate was not free from negligence contributing to his death, and that the defendant was not guilty of negligence which was the direct cause of injury to the deceased, does not enable the plaintiff to attack these findings. There are no exceptions to the charge of the trial judge that survive these findings of the jury standing in the record unchallenged.

The learned Appellate Division having stated in its order that the judgment and order appealed from were reversed upon questions of law only, we are confined in our review to errors of law to which exceptions were duly taken. Code Civ. Proc. § 1337; *Vollkommer v. Cody*, 177 N. Y. 124, 127, 69 N. E. 277.

We find no error of law sustaining the order of the Appellate Division reversing the judgment dismissing the complaint upon the merits, and the order denying plaintiff's motion for a new trial, and therefore reverse the same, and affirm the said judgment and order of the Trial Term, with costs to the defendant in all the courts.

CULLEN, C. J., and GRAY, O'BRIEN, HAIGHT, and VANN, JJ., concur. WERNER, J., absent.

Order reversed, etc.

(179 N. Y. 501)

In re TRACY et al.

(Court of Appeals of New York. Nov. 29, 1904.)

TRANSFER TAX—TRUST ESTATES—PAYMENT FROM PRINCIPAL—ANNUITIES—RESIDUARY FUND—WILLS—DEVISE—CONSTRUCTION.

1. The transfer taxes imposed upon trust estates and estates for life and in remainder created by will are, under Laws 1896, p. 874, c.

908, § 230, as amended by Laws 1899, p. 100, c. 76, and Laws 1900, p. 1438, c. 658, to be paid from the principal of such trusts and life estates.

2. In fixing the transfer tax on annuities created by will, the probable duration of the annuitant's life should, under Laws 1896, p. 874, c. 908, § 230, be ascertained by the rule of mortality employed by the Superintendent of Insurance in ascertaining the value of policies of life insurance and annuities, and on the value so determined the transfer tax becomes payable forthwith out of the principal set aside for creating the annuity.

3. Where a fund out of the principal of which the transfer tax is to be paid is the residuary estate of the testator, the tax paid on the annuity is to be returned to the residuary fund by deducting from each annual payment of the annuity the proportionate part of such tax to be ascertained by dividing the amount of the tax paid by the number of years the annuity will probably continue.

4. Testator gave to his servant an annuity to be paid out of his residuary estate, provided the servant remained with and served his daughter as faithfully as he had served testator, and directed that, if he left the service of his daughter, the annuity should cease. *Held*, that as the annuity was based on the long services of the annuitant, and was distinct from the matter of wages, which, under the will, were to be paid by the executor if he remained in the service of testator's daughter, it was error to deduct the amount thereof from his services.

5. Testator directed his executors to pay taxes assessed on real estate devised to his daughter for life, and that the premises should be kept in repair, and the insurance paid from his estate. There was no language in the will charging such expenditures on his personal property. *Held*, that the charges should be paid out of the residuary estate, and an order of the surrogate directing them to be paid from the income of the personal property was erroneous.

Appeal from Supreme Court, Appellate Division, Fourth Department.

In the matter of the accounting of William G. Tracy and others, executors and trustees under the will of George N. Kennedy, deceased. From an order of the Appellate Division affirming a decree of the Surrogate's Court settling the accounts of the executors, and sustaining objections of the Syracuse University and others (83 N. Y. Supp. 1049), the executors appeal. Reversed.

James G. Tracy, for appellants. John W. Church, for respondent Syracuse University. Oliver D. Burden, special guardian, for respondent Eunice Standart.

BARTLETT, J. The executors and trustees under the last will and testament of George N. Kennedy, deceased, attack the decree of the Surrogate's Court of Onondaga county, entered upon the judicial settlement of their accounts, in three particulars, to wit: (1) Wherein it adjudges that the taxes on life estates created by the will assessed under the state transfer tax law and the United States war revenue tax law should be deducted from the income and rents, to which each of said life tenants were respectively entitled, before any part of the same should be paid to them; (2) wherein it is adjudged that out of the income of the personal property of the deceased now in

the hands of said executors they pay to James Rohm the sum of \$350 for and on account of his annuity from the death of the testator up to the 4th day of November, 1902, from which shall be deducted the state tax of \$146.34, and that said annuity be paid by deducting the same from the wages of said Rohm, paid to him by said executors, amounting to \$65 a month; (3) wherein it is adjudged that the taxes, repairs, and insurance upon the residence No. 601 West Genesee street, in the city of Syracuse, paid by the executors up to December 1, 1902, shall be charged against and paid out of the income of the personal property of the deceased.

The will is lengthy, containing numerous provisions, but its general scheme can be briefly stated. The entire property, real and personal, after the payment of debts and legacies, is converted into trust estates for the benefit of life tenants and remaindermen; all of the latter being contingent, depending upon the status at the death of the life tenant, except the defendant the Syracuse University, which takes its estate in remainder upon the death of Elizabeth K. Freeman, a daughter of the testator. In the second subdivision of the will the testator provides in part as follows: "First, out of my estate remaining I give and devise to [naming the executors and trustees] eighty thousand dollars as a trust estate and in trust for my daughter, Jessie B. Kennedy, to collect and receive the rents, issues and profits arising therefrom and to pay the same over to the said Jessie B. and disburse the same for her support and maintenance during her natural life. In providing for the corpus of this estate I direct that same shall be the first charge upon my estate and shall be made up from such securities as I shall leave of my estate as are of the most intrinsic value and such as yield the largest rate of interest or pay the largest dividend, to the end that said trust estate shall yield the beneficiary, said Jessie B., the largest income for her support and maintenance. * * * The trust estate above provided for I make the first lien and charge upon my whole estate, both real and personal, and is to be first provided for out of my said estate in the first instance." In this connection the testator expresses the wish that his daughter Jessie B. should not marry. In the event, however, that she marries, and dies leaving lawful issue, the sum of \$30,000 of the corpus of the trust fund is to be divided equally between said issue. In the event of her dying without lawful issue, the corpus of the trust is to be added to the residuary estate. In the twenty-second subdivision of the will the residue of the estate is given and devised to the trustees in trust to collect and receive the rents, issues, and profits, and pay one-half thereof over to said Jessie B. semi-annually for her support and maintenance

life, or so long as she remains un-

married; upon her marriage or death, one half of said residuary estate to be paid to certain persons named, or to their respective children, if any have died. The rents, income, and profits from the other half of the residuary estate are payable one-third to the testator's daughter Elizabeth K. Freeman, one-third to the children of Dr. Nathan R. Tefft living at the time of testator's death, for and during the life of his daughter Elizabeth K. Freeman, and, if all of the children die before the last named, the third of the income is to be added to the corpus of the trust estate during the life of said Elizabeth K. Freeman. The remaining third of the income is directed to be paid over to Margaret D. Kennedy and her daughter Louise Green equally during the life of said Elizabeth K. Freeman. If either Margaret or Louise shall die before Elizabeth K. Freeman, the survivor takes and receives the whole third of the income. The testator stated in this connection: "The last foregoing provision in behalf of said Margaret D. and Louise is made as an additional inducement for them and each of them to kindly nurture and properly care for and protect the interests and promote the welfare and happiness of my daughter, said Jessie B. Kennedy."

Upon the death of Elizabeth K. Freeman the testator disposes of this half of the residuary estate in three equal parts. Two of these thirds are to be paid to certain individuals named, or to their issue in case they do not survive. The remaining third, after the death of said Elizabeth K. Freeman, is to be paid to the defendant the Syracuse University. It will thus be observed that all of the remainders are contingent, except the one passing to the defendant the Syracuse University, as above stated. In subdivision 3 of the will the testator provided as follows: "I give to my said daughter, Jessie B., the use of my dwelling house or homestead, including the stable on the corner of Genesee and Plum streets, in the City of Syracuse, for and during her natural life, provided she shall desire or it shall be thought for her interest by my said executors to occupy the same as a dwelling house for herself and those whom she may select to occupy the same with her as her home." In this connection the testator further provides, in subdivision 24, as follows: "During the time my said daughter, Jessie B., shall occupy my dwelling house as hereinbefore provided, I direct my said executors to pay all taxes which for any purpose may be levied thereon, and that they also keep the premises in repair at the cost of and from my estate, as well also that they pay any insurance thereon." Subdivision 16 reads as follows: "I give to my faithful servant, James Rohm, an annuity of three hundred dollars to be paid to him semi-annually out of my estate for and during his natural life, provided that he remain

with and serve my said daughter, Jessie B., as faithfully as for years he has served me. If for any reason he shall leave the service of said Jessie during her lifetime such annuity shall cease; so long as he shall remain in the service of Jessie I direct that he be paid by my executors a reasonable compensation for his services in addition to said sum." It was manifestly the primary idea of the testator, in creating the testamentary scheme here disclosed, to provide for his daughter Jessie B. The reason for testator's great solicitude for her is expressed in subdivision 7 of the will as follows: "My daughter, Jessie B., is greatly afflicted, being blind; her future care and happiness is the source of great anxiety to me and I would guard her as far as possible from the contingencies of life, which in her case may be more serious because of her great infirmity. To secure to her, as far as possible, her enjoyment of life, I enjoin upon the said Margaret D. Kennedy and the said Louise Green that they each look over and protect the said Jessie B. in all reasonable ways against ills which she may encounter in her life and thereby secure to her as much happiness as is vouchsafed to any of us in this world." In the previous subdivisions of the will the testator had given to said Margaret D. Kennedy and Louise Green the sum of \$30,000 each, and, as above pointed out, they received one-third of the rents, issues, and profits of one-half of the residuary estate during the life of testator's daughter Elizabeth K. Freeman.

The testator died September 7, 1901, and consequently the state transfer tax law as it existed after the amendments of 1899 and 1900 is applicable to this case. These amendments are sought to supply what were deemed omissions in the transfer tax law as it then stood, as some of the courts had decided that the transfer tax on life estates was payable out of income, and no tax could be imposed on contingent remainders. *Matter of Johnson*, 6 Dem. Sur. 146; *Matter of Roosevelt*, 143 N. Y. 120, 38 N. E. 281, 25 L. R. A. 695. The present appeal is controlled by the transfer tax law (Laws 1896, p. 874, c. 908, § 230) as amended by chapter 76, p. 100, of the Laws of 1899, and chapter 658, p. 1488, of the Laws of 1900. The material portions of section 230 read as follows: "Whenever a transfer of property is made, upon which there is, or in any contingency there may be, a tax imposed, such property shall be appraised at its clear market value immediately upon such transfer, or as soon thereafter as practicable. The value of every future or limited estate, income, interest or annuity dependent upon any life or lives in being, shall be determined by the rule, method and standard of mortality and value employed by the Superintendent of Insurance in ascertaining the value of policies of life insurance and annuities for the determination of liabilities

of life insurance companies, except that the rate of interest for making such computation shall be five per centum per annum. * * * When property is transferred in trust or otherwise, and the rights, interests or estates of the transferees are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged, a tax shall be imposed upon said transfer at the highest rate which, on the happenings of any of the said contingencies or conditions, would be possible under the provisions of this article, and such tax so imposed shall be due and payable forthwith by the executors or trustees out of the property transferred." It thus appears that whenever a transfer of property is made, upon which there is, or by any contingency there may be, a tax imposed, the property is to be properly appraised at its clear market value, and the transfer tax is due and payable forthwith out of the property transferred. In *Matter of Vanderbilt*, 172 N. Y. 69, 64 N. E. 782, this court construed section 230 of the transfer tax law as affecting the payment of the tax upon contingent remainders, and held that the tax was payable forthwith out of the property transferred. Judge Haught, writing for the court, said: "It seems to me clear that the Legislature by this amendment intended to change the law upon the subject, and to make the transfer tax upon property transferred in trust payable forthwith. The tax is not required to be paid by the conditional transferee, for by the provision of the statute it is 'to be paid out of the property transferred.' So that whoever may ultimately take the property takes that which remains after the payment of the tax." As our decision in *Matter of Vanderbilt*, supra, dealt only with a contingent remainder, this case, technically speaking, is not strictly in point, but the principle announced therein is necessarily involved in life estates created by trusts.

In the case at bar it is the duty of the executors and trustees to ascertain the value of the respective life estates and estates in remainder in the manner pointed out by section 230, and, having done this, they should compute the transfer tax, and pay the same forthwith out of the property transferred. The result is that the life tenant loses during the continuance of his estate the interest upon the corpus of the trust so paid out, and eventually the remainderman receives his estate diminished by the amount of said payment. Whether this mode of taxation works out exact justice as between the life tenant and the remainderman is a question with which the court is not concerned. As we read the statute, the legislative intention is clear that the transfer tax shall be paid out of the corpus of the trust estates, and not out of the income. It therefore follows that the transfer taxes imposed upon the estates for life and in remainder created by the

\$80,000 trust under which testator's daughter Jessie B. is the life tenant are payable out of the principal of that trust; also that the transfer taxes imposed upon the estates for life and in remainder in the various trusts carved out of the residuary estate are payable from the principal of said trusts, respectively.

We will now consider the second provision of the decree from which appeal is taken, in reference to the annuity of \$300 for the benefit of James Rohm, payable semiannually. Annuities are expressly referred to by section 230, as already quoted. The manner in which this annuity is dealt with in the decree of the learned surrogate is unsupported by the statute. The probable duration of the annuitant's life should be ascertained in the manner pointed out by section 230, which is under the rule, method, and standard of mortality and value employed by the Superintendent of Insurance in ascertaining the value of policies of life insurance and annuities, etc. This fact being ascertained, the amount of the transfer tax is computed thereon, and becomes forthwith payable out of the fund set aside for creating the annuity. (In this case it happens to be the residuary estate.) The method of returning to the residuary estate the tax so paid by the trustees is as follows: Take for illustration an annuitant whose probable duration of life is 10 years. The trustees would deduct from each annual payment as made one-tenth of the tax, and restore it to the residuary estate. In the case at bar the death of the annuitant was suggested on the argument as having taken place since that of the testator. Any portion of the transfer tax not restored to the estate by the process indicated at the time of the annuitant's death would be a loss which the residuary estate must sustain. The payment of the annuity by deducting the same from the wages of said Rohm, paid to him by said executors, amounting to \$65 a month, as provided in the surrogate's decree, is wholly irregular. The annuity was based on the long and faithful services of the annuitant, and is entirely distinct from the matter of wages which were to be paid him by the executors if he remained in the service of the daughter Jessie B.

This brings us to the consideration of the remaining question—as to whether the amount paid for taxes, repairs, and insurance upon the residence, No. 601 West Genesee street, in the city of Syracuse, is properly chargeable upon the income of the personal property of the deceased. In this connection subdivisions 3 and 24 of the will must be read together. The latter subdivision provides: "During the time my said daughter, Jessie B., shall occupy my dwelling house as hereinbefore provided, I direct my said executors to pay all taxes which for any purpose may be levied thereon, and that they also keep the premises in repair at the cost

of and from my estate, as well also that they pay any insurance thereon." The testator here indicates the clear intention of making these various disbursements a charge upon his estate, and there is no language indicating that the executors and trustees were to pay the same out of the income of his personal property, as provided in the surrogate's decree. It is undoubtedly the general rule that the life tenant must pay taxes, insurance, and ordinary repairs, but, when the testator manifests the contrary intention, it will govern. *Clarke v. Clarke*, 145 N. Y. 476, 40 N. E. 220. The estate that the testator referred to, in view of the other provisions of his will, is the residuary fund. We are of opinion that these disbursements from time to time are payable out of the corpus of the estate.

It follows that the order of the Appellate Division should be reversed, with costs to the appellants in all the courts, to be paid out of the estate, and that the decree of the surrogate should be reversed and modified as to the three provisions involved in this appeal, and, as so modified, affirmed, and the proceeding is remitted to the Surrogate's Court, to be amended so as to conform to the views of the court as expressed in the opinion of BARTLETT, J.

CULLEN, C. J., and GRAY, O'BRIEN, HAIGHT, VANN, and WERNER, JJ., concur.

Judgment accordingly.

(179 N. Y. 496)

In re CITY OF NEW YORK.

In re DORSETT.

(Court of Appeals of New York. Nov. 29, 1904.)

EMINENT DOMAIN—AWARD—DAMAGES—INTEREST.

1. Laws 1897, p. 907, c. 665, authorizing the extension of Riverside Drive, provided that title to land taken should vest in the city on a certain date, and the value thereof should be determined by commissioners of estimate and become payable on confirmation by the court. *Held*, that an award for land taken, in which interest from the date title vested to the date of the report of commissioners was added to the amount of the value of the land, as damages, so that interest computed on the aggregate amount to the date of confirmation would include interest on interest, in excess of the liability of the city, was erroneous, and the city cannot be compelled by mandamus to pay such excess of interest, since the claimant is entitled only to interest on the value of the land to the time of payment.

Haigh and Werner, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, First Department.

Application by Ella L. Dorsett for a peremptory writ of mandamus against Edward M. Grout, as comptroller of the city of New York, and in the matter of the application of the city of New York relative to acquiring title to real estate for Riverside Drive.

From an order of the Appellate Division (87 N. Y. Supp. 308) reversing an order of the Special Term denying the writ, the comptroller and the city of New York appeal. Modified.

John J. Delany, Corp. Counsel (Theodore Connolly, John P. Dunn, and Thomas C. Blake, of counsel), for appellant. James A. Deering, for respondent.

O'BRIEN, J. The relator applied to the court for a peremptory mandamus directing the comptroller of the city of New York to pay to her the sum of \$225.48, as additional interest claimed by her to be due on an award made in her behalf in a proceeding to acquire lands for the Riverside Drive and Parkway. The court at Special Term denied the application, but upon appeal the order was reversed and the application granted.

The proceeding in which the award was made was for the purpose of acquiring title to certain lands of the relator for the improvement above mentioned, and was had pursuant to a special act of the Legislature known as chapter 665, p. 907, Laws 1897. That act provided for the appointment of commissioners to report the value of the land required. One-half of the expense of acquiring the land was to be assessed upon the property benefited, and the balance was to be borne by the city. It is admitted that the city, under the terms of the statute, became vested with title to the land on September 22, 1900, and the commissioners were required to determine the value of the land upon that day. The statute provided that this value so ascertained by the commissioners should be paid to the respective owners, with interest from the day when title vested. The commissioners did report that the value of certain parcels of land owned by the relator amounted on the day aforesaid to \$11,500. They, however, computed separately the interest due on this sum from the date on which title vested in the city to the date of their report, which was November 29, 1902, at \$1,508.41, and stated that they included this interest in their report. So the aggregate sum awarded to the relator for her lands amounted at the date of the report to \$13,008.41.

The controversy presented by this appeal arises from the fact that at the date of the report the interest computed by the commissioners was added to the damages, making the aggregate above mentioned; and the relator claims that interest on this amount should be paid to her from the date of the report to the time of payment, thus including in her demand interest upon interest from the time of the filing of the report. The report of the commissioners was confirmed on April 17, 1903, and on April 23d following the relator made a written demand of the comptroller, requesting the payment of \$13,008.41, together with interest from November 29, 1902, the date of the commissioners' report.

On July 17, 1903, the comptroller paid to the relator the total of the damages included in the report, and interest thereon to the date of the report, amounting to the gross sum already stated; and he paid to her an additional amount of \$264.50 as simple interest on the value of the land, fixed at \$11,500, computed from November 29, 1902, the date of the report, to July 17, 1903, the date of the entry of the order confirming the report; amounting in all to \$13,272.91. The relator claims that interest should have been computed on the gross sum contained in the report; that is, that the interest and the damages should be combined as of that day, and thus a new principal formed for the computation of interest.

We think that this method of computation enlarges the liability of the city under the terms of the statute. It will be seen by section 6 that two things are provided for, and the controversy in this case arises over uniting two different and distinct things at a certain stage, and thereafter treating them as one and the same thing. The two things referred to are, first, the value of the land; and, secondly, the interest thereon. The duty of the commissioners was simply to ascertain and report the value of the land. They had nothing to do with the question of interest, since the statute took care of that by declaring that it should be computed from a certain date; and, although the commissioners reported the value of the land and the interest as separate items, it did not change the situation. The amount found as the value of the land continued to draw interest, but not so with the item of over \$1,500 which represented the interest on that value. The two things are entirely separate and distinct from each other, and they should not be confused or consolidated. The relator's claim consists of the value of her land, with interest thereon computed to the date of payment. But she is not entitled to demand interest upon interest from the date of the report. The city is bound to pay to her the value of the land and the interest thereon down to the time that that obligation is discharged, but the demand for extra interest, which was the only ground of her application for the writ of mandamus, cannot be sustained.

We do not think that the relator's right to interest upon the principal of the award, or, in other words, the value of the land, was suspended in consequence of her demand for more than she was entitled to. The demand was good as a demand for what was justly due her, and the fact that she conceived herself entitled to more than the statute gives her, and made a demand accordingly, does not place her in a worse position after the demand than she occupied before. The interest still ran upon the sum fixed as the value of the land, but it did not run upon the sum which the commissioners reported as the interest on that value down to the

date of their report. As already observed, they were not required to report the interest, since that was determined, not by anything contained in their report, but by the terms of the statute, which declared that the sum awarded as the value of the land, together with interest from the date when the title vested in the city, became due and payable by the city immediately upon the confirmation of the commissioners' report. The relator supposed she was entitled to interest upon the interest reported by the commissioners, but in this claim we think she was mistaken. It did not affect her right to interest upon the value of her land down to the time of payment, since that was a statutory right which was not waived or lost by reason of the erroneous demand.

The order of the Appellate Division should be modified by awarding to the relator the balance of simple interest on the value of the land taken, as reported by the commissioners, from the date of vesting of title in the city to the date of payment, and, as thus modified, affirmed, without costs to either party.

CULLEN, C. J., and GRAY, BARTLETT, and VANN, JJ., concur. HAIGHT and WERNER, JJ., dissent.

Ordered accordingly.

(180 N. Y. 24)

PEOPLE ex rel. TURNER v. KELSEY, State Comptroller.

(Court of Appeals of New York. Dec. 6, 1904.)

TAXATION—SALE—NOTICE TO REDEEM—FOREST PRESERVE—OCCUPANT.

1. Laws 1900, p. 62, c. 20, § 220, gives to the Commission of the Forest Preserve the care and control of the forest preserve, and by its wardens, foresters, and protectors it actually occupies the preserve, so that it is an occupant within the meaning of Laws 1896, p. 842, c. 908, § 134, requiring that, where land shall be sold for taxes, notice shall be given to the occupant to redeem before a deed is given.

Appeal from Supreme Court, Appellate Division, Third Department.

Certiorari by the people of the state of New York, on the relation of Ernest A. Turner, against Otto Kelsey, as Comptroller of the State of New York. From an order of the Appellate Division (89 N. Y. Supp. 416) reversing a determination of defendant granting an application by the state for the redemption of certain lands bid in by the relator on a sale for the nonpayment of taxes, and denying the application of relator for a tax deed, defendant appeals. Reversed.

John Cunneen, Atty. Gen. (William H. Wood, on the brief), for appellant. George N. Ostrander, for respondent.

HAIGHT, J. The relator became a purchaser of a large tract of land in the For-

est Preserve upon a sale made by the Comptroller of the State in December, 1900. At the time of such sale the title to the land was in dispute between the state and individuals, but subsequently the controversy was adjusted, and the individuals claiming to be owners executed and delivered to the people of the state a quitclaim deed, but specifically stating therein that it was subject to all taxes upon the land and tax sales thereof. It thus became the duty of the state, through its proper officers or agents, to redeem the land so sold to the relator within the time required by law, but through some oversight on the part of such officers or agents no redemption had been made of the parcel here in controversy prior to the demand for a deed from the Comptroller by the relator. Subsequently, and in October, 1903, the Forest Commission made application to the Comptroller to be allowed to redeem in behalf of the people, on the ground that the relator had neglected to serve the notice required to be served upon occupants, pursuant to section 134 of the Tax Law (Laws 1896, p. 842, c. 908). The Comptroller permitted such redemption under the objections of the relator. The question brought up for review is as to whether the Forest Commission was the occupant of the lands in question, so as to be entitled to the notice provided for by the statute.

As we have seen, the lands in question are a part of the Forest Preserve owned by the state, but subject to the payment of the taxes theretofore levied upon the lands, and for the redemption of those upon which there had been sales. Under the Constitution (article 7, § 7) "the lands of the state, now owned or hereafter acquired, constituting the Forest Preserve as now fixed by law * * * shall not be leased, sold or exchanged, or be taken by any corporation, public or private." Whether the Comptroller, under this provision of the Constitution, had the power to execute and deliver to this relator a conveyance of the lands in question, or whether the relator can avail himself of the oversight or neglect of duty of the officers of the state to redeem, are questions which we shall not now consider or determine. This case differs from that of *Wells v. Johnston*, 171 N. Y. 324, 63 N. E. 1095, and we prefer to rest our decision upon questions that were not involved in that case. We have referred to the provisions of the Constitution for the purpose of showing that these lands are forever reserved for the Forest Preserve, and that no power exists on the part of the Legislature or of any officer or department of the state to dispose of, or in any manner deprive the people of their title to, the lands. Not only are these lands brought within the protecting power of the Constitution, but that of the Legislature as well. Various statutes have been enacted by which the police power is extended over this territory. It is made a public

park, placed under the care, control, and supervision of a commission, and watched and guarded by wardens, foresters, and game protectors, who actually reside upon the preserve, and who may arrest violators of the statute, in cases specified, without warrant.

The statute requiring notice to be given to "occupants" has been careful to define the term as meaning "a person who has lawfully entered upon the lands so occupied and is in possession of the same to the exclusion of every other person," and the term "occupancy" as meaning "the actual, lawful and exclusive use and possession of such lands and premises by such an occupant." The Commission of the Forest Preserve, under section 220 of the Forest, Fish, and Game Law (chapter 20, p. 62, Laws 1900), is given the care, control, and supervision of the Forest Preserve. Care, control, and supervision include the right of possession, and the Commission, through its wardens, foresters, and protectors, actually occupy the preserve. In considering these statutes, this court, in the case of *People v. Turner*, 145 N. Y. 451, 40 N. E. 400, has held that the Forest Commission, as the representative of the state, has the actual possession of the lands embraced in the Forest Preserve. This view was approved in the more recent case of *People ex rel. Forest Comm. v. Campbell*, 152 N. Y. 51, 46 N. E. 176. We think, therefore, that the statute, as heretofore construed by us, constitutes the Commission an occupant within the meaning of the statute, and entitled it to a notice to redeem.

The order of the Appellate Division should be reversed, and that of the Comptroller affirmed, with costs in all courts.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, VANN, and WERNER, JJ., concur.

Order reversed, etc.

(180 N. Y. 16)

PEOPLE ex rel. S. COHN & CO. v. MILLER,
State Comptroller.

(Court of Appeals of New York. Dec. 6, 1904.)

CORPORATIONS — FRANCHISE TAX — PREFERRED STOCK — ESTOPPEL.

1. Where the construction of instruments purporting to be certificates of the preferred stock of a corporation is a debatable one, the corporation, in the face of the declaration in its articles of association that money represented by these certificates constitutes a part of the capital stock of the corporation, is estopped from asserting to the contrary in a proceeding to determine its liability to the franchise tax.

Appeal from Supreme Court, Appellate Division, Third Department.

Certiorari by the people of the state of New York, on the relation of S. Cohn & Co., against Nathan L. Miller, as Comptroller of the state of New York. From an order of the Appellate Division (88 N. Y. Supp. 197)

which modified and confirmed a determination of defendant imposing a franchise tax on relator, he appeals. Affirmed.

The certificate of relator's incorporation reads, in part, as follows:

"Certificate of Incorporation of S. Cohn & Co.

"State of New York, County of New York —ss.: We, the undersigned, all being persons of full age, and at least two-thirds of us being citizens of the United States, and at least one of us a resident of the State of New York, desiring to form a stock corporation pursuant to the provisions of the Business Corporation Laws of the State of New York, do hereby make, sign, acknowledge and file this certificate for the said purposes as follows: * * *

"Third. The amount of the capital stock of the said corporation is one hundred and fifty thousand dollars (\$150,000), of which one hundred thousand dollars shall be preferred debenture stock, being obligations of the company as to dividends and capital and entitled to cumulative dividends at the rate of six per cent. (6%) per annum; and the remaining fifty thousand dollars (\$50,000) shall consist of common stock.

"Fourth. That the number of shares of which the said capital stock shall consist is one thousand five hundred (1,500) of the par value of one hundred dollars (\$100) each, and the amount of capital with which said corporation shall begin business is fifty thousand dollars (\$50,000). * * *

"Sixth. Its duration is to be perpetual.

* * *

"In Witness Whereof," etc.

The relator's certificate of preferred stock, so called, reads:

"No. 50.

Shares.

"S. Cohn & Co.

"Capital Stock, \$150,000.

"Par Value, \$100 Each.

"This is to certify that is the owner of preferred debenture shares of the capital stock of S. Cohn & Co., transferable only on the books of the company by the holder thereof in person or by attorneys on surrender of this certificate. Said preferred debenture stock shall entitle the holder thereof to receive out of the net earnings, and the company shall be bound to pay, a fixed yearly cumulative dividend of six per centum, but no more, payable semiannually, before any dividend shall be set apart or paid on the common stock. The holders of this preferred stock shall, in case of the liquidation or dissolution of the company, be entitled to be paid in full, both the principal of their preferred debenture shares and the accrued dividends charged, before any amount shall be paid to the holders of the common stock.

"Be it further known, that for value received the company hereby agrees to pay to the registered holder of this certificate the par value of dollars, the face value there-

of, in gold coin of the United States of America, of the present weight and fineness, or its equivalent, on the first day of July, one thousand nine hundred and twelve. All payments of dividends and principal will be made by the company at its office, No. 11 Maiden Lane, New York City.

"Be it further known, that the terms and conditions governing the payment of this certificate and the payment of dividends hereon are endorsed on the back hereof and are hereby expressly made a part of this certificate, as much so as if they were fully written on the face hereof.

"In Witness Whereof, the said company has caused its corporate seal to be fixed hereto and this certificate to be signed by its president and treasurer."

The further material facts are stated in the opinion.

Eugene G. Kremer, for appellant. John Cunneen, Atty. Gen. (William H. Wood, on the brief), for respondent.

BARTLETT, J. (after stating the facts). The Comptroller assessed the franchise tax on the alleged capital stock of the relator of \$150,000 for the year ending October 31, 1902. Thereafter application was duly made for a rehearing, which was granted, and after which the Comptroller refused to revise his original assessment. Thereupon a writ of certiorari was duly issued to review the action of the Comptroller, which resulted in an order of the Appellate Division affirming the determination of the Comptroller, with a modification as to the rate of the tax, which is unimportant on this appeal.

The relator has insisted throughout these proceedings that it was entitled to deduct the sum of \$265,000 of liabilities, which includes the \$100,000 of alleged preferred stock. It also claimed that the greater part of its capital stock was not employed within the state of New York.

As the affirmance by the Appellate Division was unanimous, only a single question of law remains to be examined on this appeal, to wit, was the relator entitled to deduct the sum of \$100,000, the total amount of its preferred stock, as a debt?

This record discloses a very remarkable state of affairs. The relator includes its preferred stock as capital in its report to the Comptroller, and its president, testifying in the certiorari proceeding, insists that this amount represents an indebtedness and is in no sense stock. In its report to the Comptroller in December, 1902, the relator stated as follows: Number of shares of stock issued, 1,500; amount paid into the treasury of the company on each share, \$100; amount of capital stock paid in good will, \$150,000; capital stock employed in New York state, all. The president of the relator, testifying in the certiorari proceeding, stated that the total stock issued and outstanding was \$50,000, and that the alleged certificates of pre-

ferred stock were not shares of stock. He was asked this question: "Was any part of your capital stock issued for good will? A. None whatever." He also swore that very little of the stock was employed in the state of New York. We have quoted from this report to the Comptroller and contrasted it with this testimony of the president of the relator, in order to emphasize the anomalous situation existing in this proceeding.

The legal question is presented whether the laws of the state of New York permit the organization of a corporation in a manner calculated to mislead the general public as to the amount of its capital stock and its total indebtedness. The stock corporation law (chapter 564, p. 1066, Laws 1890, § 40, as amended by Laws 1892, p. 1834, c. 688, and Laws 1901, p. 961, c. 354) provides: "The stock of every stock corporation shall be represented by certificates prepared by the directors and signed by the president or vice-president and secretary or treasurer and sealed with the seal of the corporation, and shall be transferable in the manner prescribed in this chapter and in the by-laws. No share shall be transferable until all previous calls thereon shall have been fully paid in." Section 47 reads in part as follows: "Preferred and Common Stock. Every domestic stock corporation may issue preferred stock and common stock and different classes of preferred stock, if the certificate of incorporation so provides, or by the consent of the holders of record of two-thirds of the capital stock, given at a meeting called for that purpose, upon notice such as is required for the annual meeting of the corporation." The remainder of this section regulates the proceedings of this meeting of stockholders, and also provides as follows: "And the corporation may, upon the written request of the holders of any preferred stock, by a two-thirds vote of its directors, exchange the same for common stock, and issue certificates for common stock therefor, upon such valuation as may have been agreed upon in the certificate of organization of such corporation, or the issue of such preferred stock, or share for share, but the total amount of such capital stock shall not be increased thereby." This last quotation indicates very clearly the nature of preferred stock as understood by the Legislature. It is manifest that it assumed, as must be the fact, that preferred stock represented a contribution of capital, precisely the same as common stock, differing only as to the preferred right of the holder to share in dividends or interest. The business corporations law (chapter 691, p. 2042, Laws 1892) provides: "Sec. 3. Restrictions upon Commencement of Business. No such corporation shall incur any debts until the amount of capital specified in its certificate of incorporation, as the amount of capital with which it will begin business, shall have been paid in in money or property." Section 5 provides in part as follows: "Pay-

ment of Capital Stock. One-half of the capital stock of every such corporation shall be paid in within one year from its incorporation, or the corporation shall be dissolved, and the directors, within thirty days after such payment shall make a certificate of the fact of such payment," etc. These provisions of the various statutes relating to the stock of corporations indicate very clearly that the amount of capital stock paid in, and certificate therefor issued, is intended for the information of the general public as to the financial condition of a corporation, and that its shares necessarily represented money or property contributed for the conduct of its business. If a corporation may organize with a capital of \$150,000, as alleged in its annual report to the Comptroller and on the face of its certificate of preferred stock, leading the general public to believe that the total amount of its certificates represents capital contributed for the conduct of its business, when in fact two-thirds of the amount, instead of representing what its name indicates, is in fact a debt, pure and simple, there is no safety in dealing with corporations. The permission to issue preferred stock is practically allowing the stockholders to divide the profits of the business in such manner as they may see fit. It is the usual practice to allow a certain dividend on the preferred stock, the holder having no right to vote; also to defer payment of dividends on the common stock until the claims of the preferred shareholders are satisfied. It is assumed, as matter of course, that the total amount of stock, preferred and common, represents an actual contribution of capital paid in, either in money, or in property at a legal valuation. The certificate of preferred stock in the case at bar states in its heading that the capital stock of the relator is \$150,000. Nevertheless we find in the body of the certificate, and in the terms and conditions indorsed thereon, that the holder of the preferred stock, in case of liquidation, is to be paid in full before the holders of common stock receive anything, and the company agrees not to create any lien superior to the lien of the certificate. It is also provided: "Be it further known, that for value received, the company hereby agrees to pay to the registered holder of this certificate the par value of dollars, the face value thereof, in gold coin of the United States of America, of the present weight and fineness, or its equivalent, on the first day of July, one thousand nine hundred and twelve." This instrument is called "preferred debenture shares of the capital stock." The word "debenture," as defined, means "a writing acknowledging a debt." When, therefore, a certificate is declared to be a preferred debenture share of capital stock, it presents a legal contradiction; a debenture being the acknowledgment of a debt, and a share of stock representing a contribution of capital to a corporate business equal to the

amount of its face value, either in money or in property.

We are of opinion that if these certificates are to be deemed solely obligations for the payment of money, and to constitute the holders thereof creditors of the corporation on an equality with other creditors, they are not stock certificates, as they represent no contribution of capital as such. But it is, to say the least, very doubtful if such is the legal import of the certificates. In form and terms, each certifies that the holder thereof is the owner of a certain number of preferred "debenture shares of the capital stock of S. Cohn & Company * * * said preferred debenture stock shall entitle the holder thereof to receive out of the net earnings" certain specified payments. It may be argued, in the face of this explicit declaration that the holder is the owner of stock, and of the plain and clear proposition of law that the corporation cannot be a debtor to a stockholder for the amount of his contribution to capital stock, that the promise to pay dividends and principal at a specified time should be construed to be merely a contract between the stockholders as to the respective rights of the holders of different kinds of stock to share in the property as between themselves. We do not feel inclined to decide this question in a litigation to which none of the holders of preferred stock is a party, or in a condition to assert his rights. We do hold, however, that, the question of the construction of the instrument being clearly a debatable one, the relator should, in the face of the declaration in the articles of association that the money represented by these certificates constitutes a part of the capital stock of the corporation, be estopped from asserting to the contrary in a proceeding to determine their liability to the franchise tax.

The order appealed from should be affirmed, with costs.

CULLEN, C. J., and GRAY, O'BRIEN, HAIGHT, and VANN, JJ., concur. WERNER, J., absent.

Order affirmed.

(34 Ind. App. 163)

ESPENLAUB et al. v. ELLIS. (No. 4,909.)
(Appellate Court of Indiana, Division No. 2.
Nov. 29, 1904.)

MASTER AND SERVANT—INJURIES TO SERVANT—FACTORY ACT—PLEADING—NEGLIGENCE—FAILURE TO GUARD MACHINERY—CONTRIBUTORY NEGLIGENCE—EVIDENCE—EXPERT TESTIMONY.

1. In an action for injuries to a servant caused by the master's negligent act in leaving a saw unguarded, contrary to the provisions of the factory act (Acts 1899, p. 231, c. 142; Burns' Ann. St. 1901, § 7087i et seq.), that plaintiff slipped on the floor, and thereby caught his hand in the unguarded machinery, did not relieve defendant from liability, or render his negligent act in leaving the machinery unguarded any less the proximate cause of the injury.

2. In an action for injuries to a servant, charged to have been occasioned by the master's failure to properly guard dangerous machinery as required by the factory act (Acts 1899, p. 231, c. 142; Burns' Ann. St. 1901, § 7087i et seq.), it is not necessary for plaintiff to allege that he had no knowledge of the unguarded condition of the machinery, or of the danger he encountered, or that he could not, in the exercise of ordinary care, have had knowledge of such condition.

3. In an action for injuries to a servant caused by the master's failure to guard dangerous machinery as required by the factory act (Acts 1899, p. 231, c. 142; Burns' Ann. St. 1901, § 7087i et seq.), a charge that plaintiff's right to recover damages was governed wholly by rules of common law relating to actions for negligence was properly refused, in that the jury might have inferred therefrom that the act made no change in the right to recover for personal injuries.

4. Requests covered by instructions given may be refused.

5. In an action for injuries to a servant, a charge, in the language of section 9 of the factory act (Acts 1899, p. 234, c. 142; Burns' Ann. St. 1901, § 7087i et seq.), that all saws in any manufacturing establishment shall be properly guarded, and that no person shall remove any safeguard attached to any such saw while the same is in use, unless for the purpose of immediately making repairs, and all safeguards shall be promptly replaced, is proper.

6. In an action for injuries to a servant, the modification of a charge that plaintiff was not without fault, if he might have avoided the injuries by the exercise of any reasonable care, by adding thereto a statement that plaintiff could not recover if he was in any respect guilty of a want of that degree of care which could be reasonably expected of ordinarily careful men, was not prejudicial to defendant.

7. Under the factory act (Acts 1899, p. 231, c. 142; Burns' Ann. St. 1901, § 7087i et seq.), requiring machinery to be properly guarded, a master was liable for injuries to a servant caused by the disobedience by a fellow servant of orders requiring him to use a guard, where such disobedience was known to the superintendent, and the disobedient servant was nevertheless continued in the master's employ.

8. In an action for injuries to a servant, an expert witness, testifying to the practicability of using a guard on the machinery, which, unguarded, caused the accident, was properly precluded from stating "what the judgment of competent workmen is as to the practicability of using a guard" over such machinery.

9. In an action for injuries to a servant, sustained by slipping on the floor and striking a rip saw which was left unguarded in violation of the factory act (Acts 1899, p. 231, c. 142; Burns' Ann. St. 1901, § 7087i et seq.), evidence held not to show plaintiff guilty of contributory negligence, as a matter of law.

Appeal from Superior Court, Vanderburgh County; John H. Foster, Judge.

Action by Morris Ellis, a minor, against Charles H. Espenlaub and others. From a judgment for plaintiff, defendants appeal. Affirmed.

J. E. Iglehart, Edwin Taylor, and James M. Winters, for appellants. G. V. Mengles and Frank Monfort, for appellee.

COMSTOCK, C. J. The complaint in this action charges that on November 19, 1902, having been employed three or four weeks prior thereto to do all kinds of general work in and about the planing mill of appellants,

while in the proper discharge of his duty, the plaintiff was directed by an employé of appellants to go to a certain table in the mill, on which a rip saw was located and in full operation, and bring from said table to said employé a hand planer which was lying close to the rip saw; that he went as directed, and, on reaching out with his left hand for the planer, he slipped on the floor and lost his balance, and, falling, his left hand struck the top of the saw, and he was thereby injured; that said saw was open, exposed, and without guard and protection, contrary to the provisions of the law in Indiana; that the unguarded saw was dangerous for the employés of the mill who were required to work with or about it; that it could have been guarded at small cost without interfering with the proper use thereof; and that the failure to guard the saw as provided by law was negligence which caused the injury complained of. A demurrer for want of facts to the complaint was overruled. Issues were joined by an answer in general denial. A trial was had the December term, 1902, of the court, but the jury failed to agree. The case was again tried at the March term, 1903, resulting in a verdict and judgment for the appellee in the sum of \$3,000. At the close of all the evidence, appellants moved the court, in writing, to instruct the jury to return a verdict in their favor, which motion was denied. The evidence being closed, appellants moved that the jury be permitted to inspect, in the charge of the sheriff, the premises involved in the action. This motion was denied. Appellants' motion for a new trial was overruled.

Appellants assign and rely upon as error the action of the court, first, in overruling the demurrer to the complaint; second, in overruling the motion to permit inspection of the premises; third, in refusing to peremptorily instruct the jury to return a verdict for the appellants; fourth, in overruling the motion for a new trial.

It is contended that the proximate cause of the injury as stated in the complaint was because appellee "slipped on the floor, which caused him to lose his balance and fall," causing him to strike the saw with his left hand; that for this appellants were not liable, and no facts are stated upon which to predicate the proposition that the slipping was due to any negligence of appellants; that therefore the complaint is insufficient. The fact that some other cause operates with the negligence charged against defendants does not relieve the negligent party from liability. The efficient cause is the proximate cause. *Reid v. Evansville, etc., Co.*, 10 Ind. App. 385, 35 N. E. 703, 53 Am. St. Rep. 391; *Louisville, etc., Co. v. Nolan*, 135 Ind. 60, 34 N. E. 710; *Pennsylvania, etc., Co. v. Congdon*, 134 Ind. 226, 33 N. E. 795, 39 Am. St. Rep. 251; *Knouff v. City of Logansport*, 26 Ind. App. 205, 59 N. E. 347, 84

Am. St. Rep. 292; *City of Mt. Vernon v. Hoehn*, 22 Ind. App. 288, 58 N. E. 654, and cases cited; *Windeler v. Rush County Fair Ass'n*, 27 Ind. App. 97, 59 N. E. 209, 60 N. E. 954; *Alexandria, etc., Co. v. Irish*, 16 Ind. App. 546, 44 N. E. 680. The direct averment is that the injury was caused by the negligence of appellants, and certainly no facts are stated inconsistent with the proposition that the neglect of the specific statutory duty charged was the efficient cause of appellee's injury.

It is further contended that the complaint is bad because of the failure to allege that appellee had no knowledge of the unguarded condition of the saw or of the danger he encountered, or that he could not, in the exercise of ordinary care, have had knowledge of such alleged condition. The action is founded upon the failure of appellants to comply with the Acts of 1899 (page 231, c. 142, *Burns' Ann. St. 1901*, § 70871 et seq.)—to properly guard machinery. Such averment in an action for injuries occasioned by breach of a specific statutory duty to guard dangerous machinery is not necessary. *Monteith v. Kokomo, etc., Co.*, 159 Ind. 162, 64 N. E. 610, 58 L. R. A. 944; *Davis Coal Co. v. Pollard*, 158 Ind. 618, 62 N. E. 492, 92 Am. St. Rep. 319; *Buehner Chair Co. v. Feulner*, 28 Ind. App. 479, 63 N. E. 239; *American Car & Foundry Co. v. Clark* (Ind. App.) 70 N. E. 828. Demurrer to the complaint was properly overruled.

Appellants, by instruction 1, refused by the court, asked that the jury be told that the statute of this state commonly called the "Factory Act" did not in express terms give a right of recovery for injuries received under a violation of the act, but that the common-law rule relating to negligence prevailed, and that contributory negligence on the part of appellee would prevent a recovery. The refusal to give this instruction is one of the causes for a new trial. The concluding sentence of said instruction reads: "Such right to recover damages, if any there be, is governed wholly by the rules of common law relating to actions to recover damages for alleged negligence." The jury might reasonably have inferred from the foregoing sentence that the act made no change in the right to recover for personal injuries. Such inference would have been an erroneous one.

Instructions 2 to 17, refused, in effect stated that, if appellee was guilty of negligence contributing to his injury, he could not recover. These instructions were fully covered by instructions "r" as modified, "a," 2, "n," "o," "p," "r," and "s." Such refusals were not, therefore, error.

Exception was taken to instruction "m" given by the court. The instruction reads as follows: "It is provided by statute in this state that all saws in any manufacturing establishment shall be properly guarded, and no person shall remove or make ineffective

any safeguard around or attached to any such saw while the same is in use, unless for the purpose of immediately making repairs thereto, and all safeguards shall be promptly replaced." Section 9 of the Acts of 1899 (page 234, c. 142) provides that "all vats, pans, saws, planers, cogs, gearing, belting, shafting, set screws, and machinery of every description therein shall be properly guarded." There was no error in giving said instruction. *Monteith v. Kokomo, etc., Co.*, supra; *Buehner Chair Co. v. Feulner*, supra.

The complaint is made that the court modified instruction 4 requested by appellants. Said instruction, as requested, read as follows: "In law, the plaintiff, *Morris Ellis*, was not without fault, if it appears from the evidence that by the exercise of any care or caution which was, under the circumstances, reasonable, practicable, and available, he might have avoided the injuries charged." As modified and given, the instruction reads: "The plaintiff cannot recover in this action if he was in any respect guilty of a want of that degree of care and diligence which could reasonably be expected of ordinarily careful and prudent men, and the want of such care contributed to cause the injuries complained of. In law, he was not without fault if it appears from the evidence that by the exercise of any care or caution which was, under the circumstances, reasonable, practicable, and available, he might have avoided the injuries charged. If the jury find from the evidence that the plaintiff in this case, by looking and exercising reasonable care and caution, could have avoided the injuries which he claims to have sustained, and if you further find that he did not so look and did not so exercise reasonable care and caution at the time and place mentioned in the complaint, and by reason thereof was injured, he cannot recover in this action, and your verdict should be for the defendant." The modification told the jury that plaintiff could not recover if he was guilty of a want of that degree, etc. Taking the instruction as a whole, the appellants could not have been harmed by the modification.

Attention is called by appellants to instruction "k," given by the court of its own motion as a modification of instruction 24 requested by appellants. By instruction "k" the jury was told that if appellants had provided a suitable guard for the saw, and if the employé who was using the saw immediately before the accident removed the guard from the saw, and neither of the appellants had notice of the removal at the time of the accident, then, in such case, appellee could not recover. It is urged that the modification is of importance in relation to the evidence and the action of the court in refusing a new trial and the peremptory instruction, requested; that the evidence shows that a suitable guard had been provided; that the employé whose duty it was to

use the saw and guard had removed it, and that neither of the appellants knew at the time of the injury that the guard had been removed; that therefore the injury to appellee was occasioned by the negligence of a fellow servant, for which there can be no recovery against the master. The modification referred to is not pointed out, but the instruction as given is not unfavorable to the appellants. Engelbrecht, who was in charge of the saw and guard, testified that when the accident occurred he had been away "a half minute, getting some instructions on some other stuff"; that when he left the saw for any length of time he was supposed to throw it out of action, but, when he left the saw and was to return in a minute, he was not to throw it out of action. Appellant C. W. Johann testified that one of his orders was that when an employé left the saw for four or five minutes he was to stop it, but if he was gone but a half minute the order did not apply, so that the condition under which the saw, by order, was to be stopped, did not exist at the time of the accident. It is in evidence that a guard had been provided for the saw, and the employé instructed to use it. Engelbrecht testified that he could not use it all the time, because of its interference with his work, and of the dangers connected with its use. It appears, also, that said Johann was superintendent in charge of the room and machine where appellee received his injury, and that he knew that Engelbrecht generally disobeyed his orders in the use of the guard; that Engelbrecht was continued in the employ of appellants. They thus acquiesced in the violation of the statute, and became responsible for the injuries resulting therefrom. Appellants had a positive duty to perform. They permitted their employé to neglect it. There was abundant evidence that a rip saw, such as caused appellee's injury, could have been guarded without interfering with the operation of the same.

R. A. Reitz, a witness for appellants, was asked the following: "Q. What is the instrument I now show you? A. That is the guard we have used on our rip saw down there. Q. If you know what the judgment of competent workmen is as to the practicability of using a guard over a rip saw, you may state what it is?" An objection to this question was sustained. The witness had testified as an expert, and as to his own experience and judgment of the practicability of using a guard. The question called for his opinion of the opinion of others, and the objection was properly sustained.

It is earnestly insisted that appellee was guilty of contributory negligence, and that therefore the peremptory instruction requested should have been given to the jury. The appellee testified that he was employed by appellants to do anything he was told to do. Had been working for appellants about three weeks when he received his injury. Mr.

Johann, one of the appellants, was foreman in the room in which appellee worked. Was injured on the 19th day of November, 1902. Had been helping Mr. Mann at the sticker, which was about 30 feet from the rip saw table, just before he received his injury. Mr. Mann told him to go to the rip saw table and get the hand planer. Had seen the planer the day before on the upper end of the rip saw table. Immediately after he was told to get the planer he went down the main gangway to the passageway, turned down to the saw table, and looked for it, and did not see it on the table, and thought somebody had knocked it off; looked under the table, and did not see it; looked back on the table, and saw it by the saw, between the edge of the table and the saw—about 10 inches from the saw towards the main gangway. The main gangway ran north and south, and the passageway past the saw ran east and west. He put out his left hand to get the planer, and his foot slipped, and his left hand struck the saw, which took off all the fingers and the thumb of the left hand. There was nothing over the saw at the time his hand came in contact with it. The saw projected above the table about 2½ inches. While working for appellants he was around where the saw was every day. There was no guard around the table at any time. The floor was slippery. When his foot slipped on the floor and his hand struck the saw, it turned him halfway round, in a stooping position, and he caught the table with his right hand. He did not get the planer in his hand. His left hand was in advance of the saw, when his foot slipped, about 12 inches. The saw was about 14 or 15 inches from the edge of the table, and the planer was about 10 to 12 inches in front, and a little back of the saw. He did not have the planer in his hand, did not pick it up and drag it along the table, did not drop it on the floor, and did not stoop to pick it up. He frequently worked around the saw, helping Mr. Engelbrecht, and saw the saw in operation. It was in operation every day. He had gone past the saw about 3 feet before he saw the planer. The saw was between him and the planer when he first saw the planer. In looking for the planer, his eyes were directed toward the saw, or the other end of the table, because he had seen it there the day before. After going past the saw he looked under the table, thinking the planer might have been knocked off, and, not finding it, he turned around and looked back over the table, and saw the planer near the saw, and that was the first time he had seen the planer that day. When he turned round his left side was next to the rip saw. He then walked up the passageway until he came opposite the saw. When he was told to get the planer he was told that it was on the rip saw table, but it was not pointed out to him. The planer was 6 or 7 inches long. There is some conflict in the testimony as to the attitude and movement of appellee imme-

diately after the accident occurred. Appellee alone saw and testified to the accident. Upon his testimony the court would not have been justified in giving the peremptory instruction requested.

The point is made by appellee that the record is incomplete because it does not contain all the evidence, and that therefore questions raised by the motion for a new trial cannot be considered.

It appears from the record that appellants violated the provisions of the statute requiring the guarding of machinery, and that neglect of that duty caused appellee's injury. Whether appellee was guilty of negligence contributing to his injury was properly submitted to the jury under instructions which fairly presented the questions at issue.

We have considered the questions discussed, and find no error for which the judgment should be reversed. Judgment affirmed.

CITY OF VINCENNES v. SPEES. (No. 4,712.)¹

(Appellate Court of Indiana, Division No. 2.
Nov. 29, 1904.)

MUNICIPAL CORPORATIONS—DEFECTIVE STREETS—LIABILITY TO PEDESTRIAN—DEFECTS NEAR SIDEWALK—ERECTION OF BARRIERS—MEASURE OF CARE REQUIRED—PLEADING—DEMURRERS—TRIAL—SPECIAL INTERROGATORIES—EFFECT—BILLS OF EXCEPTIONS—INCORPORATION OF EVIDENCE.

1. Where there was a motion asking that the complaint be made more specific, and the record showed that the motion was acted upon and an amended complaint filed, but failed to show that any motion to make the amended complaint more specific was ever filed, the motion addressed to the original complaint presented no question for review.

2. A demurrer filed after the filing of an amended complaint is sufficient as a demurrer to the amended complaint, though it purports to be addressed to the original complaint.

3. A demurrer on the ground that the complaint does not state facts sufficient to constitute a "good" cause of action, thus following the language of the statute except for the insertion of the word "good," is a sufficient demurrer, and that word will be treated as surplusage.

4. In an action against a city for injuries to a pedestrian, an allegation that defendant permitted a large stone to remain "along the sidewalk at the edge thereof" is not the equivalent of an allegation that the stone was in or upon the sidewalk, and the complaint can be upheld, as stating a cause of action, only on the theory that the stone was such a dangerous obstruction, and so near the sidewalk, that it was the duty of the city to erect a suitable barrier.

5. The lighting of streets of a city is a governmental function, for the failure to perform which the city is not liable to an injured pedestrian.

6. Cities are not insurers of the safety of their streets and alleys, but are required only to make them reasonably safe, and to keep them in a reasonably safe condition for persons traveling in the usual modes by day and by night, and exercising ordinary care.

7. While, ordinarily, fences or barriers are not required along highways to prevent travelers from straying out of their limits, yet where there are excavations or other dangerous defects or obstructions close to the way the city is required to take proper precautions to warn travelers of the danger, and is guilty of negligence if it fails to do so.

8. It is the duty of a municipality to remove or guard against an obstruction to the public highway, where it has been placed there by a third person, as much as if it had been placed there by itself.

9. A large stone, unguarded, placed at the edge of a sidewalk, which, to the knowledge of the city, has been there for a long time, unprotected by guards or warnings, is a defect for which the city is liable to a pedestrian who, passing along the sidewalk in the dark, and in the exercise of ordinary care and prudence, is injured by running against the same.

10. In an action against a city for injuries to a pedestrian, an answer to an interrogatory, stating that, if plaintiff had been attentive, she would have known that she was off the sidewalk, when taken in connection with another answer to the effect that plaintiff could have fallen over the defect without first having walked off the sidewalk, together with the fact that the interrogatory assumed what was not established by answer to any other interrogatory, viz., that plaintiff was entirely off the sidewalk, did not establish contributory negligence in the face of a general verdict for plaintiff.

11. Under Acts 1903, p. 338, c. 193, § 7, providing that, if an original bill of exceptions is incorporated into the transcript, it shall be considered as a part of the transcript, the same as if copied therein by the clerk, whether the original bill or copy be specified in the præcipe or otherwise directed to be incorporated into the transcript, an original bill of exceptions, shown by the record to have been incorporated in the transcript, upon request of defendant, brings the evidence into the record.

Appeal from Circuit Court, Gibson County;
O. M. Welborn, Judge.

Action by Julia M. Spees against the city of Vincennes. From a judgment for plaintiff, defendant appeals. Affirmed.

John Wilhelm, L. C. Embree, and Luther Benson, for appellant. W. A. Cullop, G. W. Shaw, W. E. Stilwell, and Henry Kister, for appellee.

WILEY, J. This action originated in the Knox circuit court, and was venued to the court below, where it was tried. Appellee was plaintiff, and sued appellant to recover damages alleged to have resulted from its negligence. The amended complaint is in a single paragraph, to which a demurrer for want of facts was addressed and overruled. Appellant's motion to require appellee to make her complaint more specific was also overruled. Trial by jury, resulting in a verdict in favor of appellee. Appellant's motion for a new trial was overruled, and judgment pronounced upon the verdict. The several rulings referred to are assigned as errors.

In her amended complaint the appellee avers that on the 9th day of October, 1899, while passing along Seventh street, near Barnett street, in the city of Vincennes, she was injured as follows: "That the defendant on said date, and for a long time prior

¹ 5. See *Municipal Corporations*, vol. 38, Cent. Dig. § 1554.

² Superseded by opinion, 74 N. E. 277.

thereto, carelessly and negligently permitted and suffered a large stone, unguarded and unprotected, to remain along the sidewalk at the edge thereof on said Seventh street, near Barnett street, and that the same was suffered and permitted to so remain there by the defendant without any guards, danger lights, or any other means of notifying persons of its presence who were passing along said street in the nighttime. That said plaintiff on said date, and in the nighttime, when it was very dark, was passing along the sidewalk on said Seventh street in a careful and prudent manner, while the night was very dark; and while so passing along she was unable to see or discover the said obstruction aforesaid on account of the want of guard lights on said street, and danger lights to warn passengers thereon and persons using said street, of the presence of said obstruction. Plaintiff says while she was passing along said street in a careful and prudent manner, without any negligence on her part, she ran against said obstruction, and was violently thrown to the ground, so that she was maimed, bruised, wounded, and lacerated, and suffered great pain of body and mind; that she ran against the same because of the defendant's negligence aforesaid in not having said street lighted, not having danger signals to show where said obstruction was, and not having the same guarded so that persons using the sidewalk could avoid a collision with said obstruction; that the same was permitted, on account of the negligence of the defendant, to remain at the edge of the said sidewalk, so that persons using the same in the nighttime, as was the plaintiff on this occasion, were likely to run against the same, and be injured on account thereof; and that the plaintiff so sustained her injury all on account of the negligence of the defendant, and without any fault or negligence on her part." It is further charged in the complaint that by virtue of an ordinance of said city appellant should have had said street lighted by lights which were provided for said purpose; but that on the occasion of her accident the same were not lighted, and that appellant had no danger signal placed at said stone, or guard of any kind, to warn persons of the presence of the same and to avoid collision with it. The complaint then describes minutely the injuries sustained by appellee, and concludes as follows: "That all of said injuries were inflicted on account of the negligence of the defendant aforesaid, which said defendant had permitted and suffered said stone to remain at the edge of its sidewalk, and so near thereto that persons were likely to collide with the same, who were using said sidewalk, and that the defendant was well aware of its maintenance, or could have been by the exercise of diligence on its part; but that the plaintiff had no knowledge whatever of its presence or existence, and was unaware of its being so situated, and

had no knowledge of its existence whatever."

The first question discussed by counsel is presented by the action of the court in overruling appellant's motion to make the complaint more specific. The motion and the ruling thereon are brought into the record by a bill of exceptions. The case was tried upon the issue joined by the answer to the amended complaint, and the record does not show that any motion to make the amended complaint more specific was ever filed. There is a motion in the record, addressed to the complaint, asking that it be made more specific, which motion was filed on May 14, 1900. On May 17th following, the record shows that the motion was sustained in part and overruled in part, and that thereupon, on the same date, the appellee filed her amended complaint. So far as the record shows, no motion to make the amended complaint more specific was ever filed, and therefore the motion that is in the record does not present any question for decision. On the 21st of May, 1900, the appellant addressed a demurrer to the amended complaint upon two grounds: (1) That there was a defect of parties defendant, in that the Citizens' Light Company of Vincennes was a necessary party, and should have been joined; (2) that "the complaint does not state facts sufficient to constitute a good cause of action." This demurrer was overruled. There is no merit in the first ground of demurrer, for there is no showing of any character that the Citizens' Light Company was a necessary party. It is urged on behalf of counsel for appellee that the second ground of demurrer is not well taken, and does not present any question for review, because it is not in harmony with the provision of the statute. They urge that the averment that "the complaint does not state facts sufficient to constitute a good cause of action" is not equivalent to the averment that it "does not state sufficient facts to constitute a cause of action." Technically, so far as the demurrer itself is concerned, it does not show upon its face that it was addressed to the amended complaint, but, as it was filed subsequently to the filing of the amended complaint, we think it is sufficient. The objection urged to the form of the demurrer is highly technical, and not well taken. If a demurrer uses language equivalent to that of the statute, it is sufficient. *Leach v. Adams*, 21 Ind. App. 547, 52 N. E. 813; *Ross v. Menefee*, 125 Ind. 432, 25 N. E. 545. Here the demurrer is within the rule stated. The exact language of the statute is employed, and the word "good," as used, will not destroy the force of the pleading, but will be treated as surplusage.

Under the averments of the complaint it cannot be said that the stone described was in or upon the sidewalk, and hence in that sense was not an obstruction. The words "along" and "edge," referring to the sidewalk, are relative terms, and do not, with

any definiteness, describe the location of the stone. The words used, and the connection in which they are used, will not bear the construction that they convey the thought that the stone was in or upon the sidewalk. Of this we are clear. If the complaint is sufficient to withstand the demurrer, it must be upon the ground that the stone was such a dangerous obstruction, and in such close proximity to the sidewalk, that it was the duty of the city, in the exercise of reasonable care, and for the protection of travelers, to erect a suitable barrier, so that its dangers might be avoided. Negligence cannot be imputed to a city for failure to light its streets, for that is a governmental function, and for such failure it is not liable. *City of Vincennes v. Thuis*, 28 Ind. App. 523, 63 N. E. 315, and authorities there cited. Cities are not insurers of the safety of their streets and alleys. They have performed the full measure of their required duty in this regard when they have made them reasonably safe, and kept them in a reasonably safe condition for persons traveling in the usual modes by day and by night, and while such travelers are exercising ordinary care. *Elliot, Roads and Streets*, § 615; *City of Indianapolis v. Cook*, 99 Ind. 10; *Town of Knightstown v. Musgrove*, 116 Ind. 121, 18 N. E. 452, 9 Am. St. Rep. 827; *Gosport v. Evans*, 112 Ind. 133, 13 N. E. 256, 2 Am. St. Rep. 164. This duty extends not only to the traveled way of streets and alleys, but to adjacent conditions. Ordinarily, fences or barriers are not required along highways to prevent travelers from straying out of their limits; but if there are excavations or other dangerous defects or obstructions close to the way the city or local authorities are required to erect barriers or take other proper precautions to warn travelers of the danger. *Elliott, Roads and Streets*, § 618; *Woods v. Groten*, 111 Mass. 357; *Halpin v. City of Kansas*, 76 Mo. 335; *City of Delphi v. Lowery*, 74 Ind. 520, 39 Am. Rep. 98; *City of Portland v. Taylor*, 125 Ind. 522, 25 N. E. 459; *Higgins v. City of Boston*, 148 Mass. 484, 20 N. E. 105. Another rule, which seems to be well fortified by the authorities, is that wherever railings or barriers are necessary for the safety of travelers it is negligence in the municipality in failing to construct and maintain them. *Elliott, Roads and Streets*, § 618; *Orme v. Richmond*, 79 Va. 86; *Olson v. Chippewa Falls*, 71 Wis. 558, 37 N. W. 575; *Borough of Pittston v. Hart*, 89 Pa. 389. The rules above stated are applicable whether the city caused the obstruction or whether it was caused by a third person. It is as much the duty of the municipality to cause the removal of an obstruction to the public highway, or to guard against it, where it has been placed there by a third person, as it is if placed there by itself. If the obstruction is at the margin of the traveled way, it must not be such as to be either a trap or a snare. Thus it has been held that a hitch-

ing post near the traveled way was an obstruction for which the city was liable (*Arey v. City of Newton*, 148 Mass. 598, 20 N. E. 327, 12 Am. St. Rep. 604); also a wall too low for a barrier (*Hinckley v. Somerset*, 145 Mass. 826, 14 N. E. 166); also a post at the corner to protect a shade tree (*City of Wellington v. Gregson*, 81 Kan. 99, 1 Pac. 253, 47 Am. Rep. 482). In the case of *Davis v. Hill*, 41 N. H. 329, the court said: "It seems entirely clear upon the authorities that the want of a sufficient railing, barrier, and protection to prevent travelers passing upon a highway from running into some dangerous excavations or pond, or against a wall, stones, or other dangerous obstruction, without the limits of the road, or in the general direction of the travel thereon, may properly be alleged as a defect in the highway itself." In the case of *Higert v. City of Greencastle*, 43 Ind. 574, at page 597, the Supreme Court quote approvingly the paragraph just quoted from *Davis v. Hill*, supra. See, also, *Willey v. Portsmouth*, 35 N. H. 303; *Cogswell v. Lexington*, 4 Cush. 307; *Hayden v. Attleborough*, 7 Gray, 338; *Jones v. Waltham*, 4 Cush. 299, 50 Am. Dec. 783; *Palmer v. Andover*, 2 Cush. 600. In the case of *Bunch v. Edenton*, 90 N. C. 431, it was said: "The side of the street is a material part of it, and must be kept free from danger, however the same may arise, as well as other portions of the street. Pits and other dangerous places immediately adjoining it, and near to it, make it perilous, and such places are nuisances. When these are permitted to exist, and the streets are not properly protected against them, the latter are not in reasonable repair." In the case of the *City of Aurora v. Colshire*, 55 Ind. 485, the city was held liable for an injury resulting to the appellee by falling over a wall erected on private property. In that case the city was held liable for its failure in not having guarded the dangerous condition by a railing. In the case of the *City of Delphi v. Lowery*, supra, it was held that, where there is a dangerous place in or near the usual traveled part of the street of the city, the municipal authorities must use ordinary care to protect persons who make lawful use of such street in a reasonably prudent manner from injury; and such duty is not fully discharged by making the traveled part of the street safe, but such measures as ordinary prudence requires must be taken to prevent persons using ordinary care from falling into dangerous places along the sides, or in close proximity thereto. In the case of *Drew v. Town of Sutton*, 55 Vt. 586, 45 Am. Rep. 644, the court said: "If a railing is lacking where one is necessary to the safety of travelers, the traveled way itself is thereby rendered unsafe and out of repair. And it makes no difference whether this necessity for a railing is created by the condition of things within the limits of the way or without the limits, but in dangerous

proximity to the way. In either case the question is, does the safety of the traveler require a railing? Is the road reasonably safe and sufficient without any?" There are many other cases that might be cited which are in line with those to which we have referred, but we do not deem it necessary to do so. The complaint describes the obstruction over which appellee fell as a "large stone"; that it was unguarded and unprotected; that it was "along the sidewalk at the edge thereof"; that she was passing along the sidewalk, using ordinary care and prudence; that it was dark, and she could not see; that she did not know the stone was there; that appellant had suffered it to remain there for a "long time prior" to the accident; that appellant knew of its maintenance or could have known of it by the exercise of diligence; and that, by reason of said obstruction and want of guards or warnings, she was injured. Under the authorities cited, the complaint states a cause of action, and the demurrer was properly overruled.

With their general verdict the jury found specially by answering interrogatories submitted to them. Counsel for appellant urge that their motion for judgment on the answers to the interrogatories notwithstanding the general verdict should have been sustained upon the theory that they show that appellee was guilty of contributory negligence. The answers show that the stone over which appellee fell was placed at the corner of Barnett and Seventh streets by the son of the person owning the abutting lot to mark the corner of the lot; that it was not "wholly within the boundaries of private property"; that grass had grown up about the stone; that the ground in the adjacent lot, at and around the place where the stone was located, was not sufficiently higher than the sidewalk next to it to be noticeable to one stepping from the sidewalk upon it; the sidewalk upon which appellee was walking was graveled and leveled. The following interrogatories and answers we quote in full: "(10) If the plaintiff had been attentive, would she have known, by the difference in elevation between the sidewalk and the ground in the lot, at and around the stone in question, that she was off the walk? Ans. Yes. (11) Could plaintiff have struck her left foot against the stone in question, and fallen over the same, without first having walked off of the sidewalk upon the adjacent lot? Ans. Yes." There are a number of other facts disclosed, but, as they do not bear upon appellee's conduct, it is unnecessary to set them out. There is but one interrogatory and answer that touches upon the question of appellee's contributory negligence, and that is the tenth, and, when analyzed and considered in connection with the eleventh, we do not think they establish such negligence in the face of the general verdict. The tenth interrogatory assumes a fact that was not established by an answer

to any other interrogatory, and that is that at the time of appellee's injury she was entirely off the sidewalk. The answer to the interrogatory immediately following discloses the fact that she could have struck her left foot against the stone and fallen without first having walked off the sidewalk on the lot. We do not think the answers to interrogatories establish contributory negligence on the part of appellee.

Counsel for appellee take the position that the questions presented by the motion for a new trial cannot be considered, for they depend upon the evidence, and that the evidence is not in the record, "for the reason that the original bill of exceptions is dependent upon a præcipe, and no præcipe is certified with the transcript." Section 7 of the act approved March 9, 1903 (Acts 1903, p. 338, c. 193), provides that "in case an original bill of exceptions shall be incorporated into the transcript * * * on appeal, * * * such original bill of exceptions shall in any case constitute and be considered as a part of such transcript, the same as if copied therein by the clerk, whether such original bill or a copy thereof be specified in the præcipe, or otherwise directed to be incorporated into such transcript." The record shows that the original bill of exceptions was incorporated in the transcript "upon request of defendant." This is sufficient, and brings the evidence into the record.

Objection is made to certain of the instructions given, and counsel have discussed them at some length. Considering the instructions as a whole, we have reached the conclusion that they fairly and correctly state the law applicable to the facts disclosed by the evidence. Upon any material fact the evidence fully supports the verdict.

Judgment affirmed.

(37 Ind. App. 177)

OLOW et al. v. BROWN et al. (No. 5,206)*
(Appellate Court of Indiana, Division No. 1.
Nov. 29, 1904.)

FRAUDULENT CONVEYANCES—RELATIONSHIP OF PARTIES—INDEBTEDNESS TO WIFE AND CHILDREN—POSTNUPTIAL AGREEMENT—VACATION—CONSIDERATION—PREFERENCE—DEEDS—MORTGAGES—PLEADING—ISSUES.

1. Where, in an action to set aside a deed to a daughter as fraudulent, the daughter answered by general denial, and by a separate paragraph alleged that the deed was executed to secure a debt owing to her by her father, and for no other purpose, as against complainants, it was not outside the issues for the court to find that the conveyance was executed to secure a valid debt, and was a prior lien, though such answer contained no prayer for the foreclosure of such lien.

2. Where a father executed a deed of certain land to his daughter as security for a bona fide pre-existing debt, such conveyance was not fraudulent as against the father's creditors, and constituted a prior lien on the land.

3. An irrevocable marriage union cannot form a valuable consideration for a post-nuptial settlement or conveyance.

*Rehearing denied March 10, 1905.

4. Where an antenuptial contract between husband and wife provided that the parties mutually agreed to renounce any and all rights of inheritance which each might have by reason of the marriage in the property of the other, and that, if the affianced wife should survive her affianced husband, on his death she should be paid the sum of \$10,000 in consideration of her waiver of all interest in his estate, the wife's subsequent consent to the abrogation of such contract as an inducement to the execution of a postnuptial conveyance to her by her husband constituted a sufficient consideration for such conveyance, as against the husband's creditors.

5. A husband's obligation to pay his wife \$10,000 in case she survived him, as provided by an antenuptial contract, though a contingent liability, is one which may be preferred by the husband in failing circumstances.

Appeal from Circuit Court, Montgomery County; J. M. Robb, Special Judge.

Action by James B. Clow and others against John S. Brown and others. From a decree in favor of plaintiffs for less than the relief demanded, they appeal. Transferred from the Supreme Court. Affirmed.

E. C. Snyder and Kennedy & Kennedy, for appellants. Crane & McCabe, for appellees.

BLACK, J. The appellants brought suit against the appellees, John S. Brown, Mary V. Brown, and Fannie B. Coddington, upon a judgment rendered by the circuit court of Clinton county January 9, 1900, in favor of the appellants against the appellee John S. Brown, and to set aside, as fraudulent as against his creditors, certain conveyances of real estate situated in Montgomery county to the other appellees, and a mortgage of real estate in that county to the appellee Mary V. Brown; such conveyances and mortgage having been executed by the appellee John S. Brown September 9, 1899. Issues having been formed, the cause was tried by the court, and a special finding was rendered. The court's conclusions of law are questioned here. The court stated the facts substantially as follows: In 1854 John S. Brown was a married man; his wife being the daughter of John T. Blair, who in that year conveyed to John S. Brown certain real estate in the town of Crawfordsville for the consideration of \$1,200, of which the sum of \$200 was paid by the grantee to the grantor, and the remainder of the amount of the consideration was treated by the grantor as an advancement to his daughter, wife of the grantee. Afterward this property was by the grantee exchanged for certain real estate in Crawfordsville, which for convenience we will designate as Tract A, for which Brown, in addition to the property so received from his father-in-law, gave the sum of \$500, taking the title to Tract A in his own name. He occupied it, as he did the real estate which he so exchanged for it, as his own property, and he never expressly agreed to pay said sum of \$1,000 either to his wife or to his father-in-law. Afterward Mrs.

Blair, the mother of Brown's wife, died intestate at Montgomery county, and he became the administrator of her estate; and as such he in 1879 made his final settlement of the estate, in which it was shown that there was due to his wife, daughter of the decedent, as an heir of the intestate and distributee of the estate, \$1,275, for which sum she executed to her husband her receipt, and he at the time executed to her his promissory note for that sum, with interest at the rate of 8 per cent. per annum. Afterward, in September, 1882, she was stricken with fatal illness, at which time he and she had two children; one being the appellee Fannie B. Coddington, the other being a son, James Brown. In view of her probable death, and for the purpose of dividing her property between these children, she requested her husband to execute to the children his notes for the sum so due her from him, and pursuant to this request he executed his note to the appellee Fannie B. Coddington for \$750, and his note to the son for the same amount; the sum of the two notes being the amount then due as principal and interest upon the note which theretofore he had so executed to his wife, in satisfaction of which the two notes were given. Afterward the mother of these two children, wife of appellee John S. Brown, died intestate, and no administration was had of her estate. Thereafter the appellees John S. Brown and Mary V. Brown (then Mary Vance), in contemplation of their marriage, entered into a written contract, signed and sealed by them, respectively, in duplicate, December 17, 1886, the body of which contract was as follows: "This article of agreement by and between John S. Brown and Mary V. Vance, both of the city of Crawfordsville, State of Indiana, witnesseth, that the said parties now having in contemplation a marriage with each other, do hereby agree as follows: Said parties do hereby mutually agree to renounce and waive, and they do hereby renounce and waive, any and all rights of inheritance each may have under the law of the State of Indiana by reason of said proposed marriage, to the property of the other; and it is further agreed that in case said Mary D. Vance shall survive said John S. Brown, that upon his death she shall be paid the sum of ten thousand dollars in cash out of the estate of said Brown, this sum to be paid in consideration of her waiver in the estate of said Brown as above set forth." At the time of the making of this contract, Mary D. Vance was in good health and in the fortieth year of her age, and John S. Brown was in good health and was 63 years old. He was then in prosperous circumstances, and was worth from forty to sixty thousand dollars. He was the owner of real estate of the probable value of \$30,000, and the court found that the contract was a just and reasonable provision for his wife in his circumstances at

¶ 5. See *Fraudulent Conveyances*, vol. 24, Cent. Dig. § 242.

that time. Afterward, pursuant to the contract, the parties thereto were duly married December 21, 1888. Subsequent to this marriage, and long prior to September 9, 1899, John S. Brown had incurred a liability to the appellants for a statutory penalty growing out of his relations with the Crawfordsville Waterworks Company, as a director thereof, and he and others had been sued by the appellants on account of such liability, and the action had been pending in the courts of Montgomery and Clinton counties since August, 1889; and the proceedings finally culminated in a judgment duly rendered by the Clinton circuit court against John S. Brown and the estate of Robert B. F. Pierce for \$6,203.82, January 9, 1900. At that time the estate of Pierce was insolvent, and at no time has it had assets out of which any part of the judgment could be collected, which judgment is still in full force and wholly unpaid. James Brown died intestate, leaving as his sole heirs at law his father, John S. Brown, and his sister, Fannie B. Coddington, and John S. Brown settled up the decedent's estate without an administrator. After payment of the liabilities of the estate, there remained in his hands, belonging to the estate, \$500, one half of which was due John S. Brown, and the other half to Fannie B. Coddington. The amount thus due to the latter was never paid to her, but remained in the hands of John S. Brown, without any demand being made for it by her prior to the execution of the deed hereinafter mentioned, from John S. Brown to Fannie B. Coddington. September 9, 1899, he was the owner in fee simple of certain real estate in Montgomery county, described in the finding, being lots 17 and 20 in a certain addition to Crawfordsville, which were of the value of \$3,200 and subject to a mortgage lien amounting to \$1,953.57; also a tract, which we will for brevity designate as Tract B, worth \$2,800, and subject to a mortgage lien of \$151; also Tract A, above mentioned, worth \$10,000, and a portion thereof described, which may be designated as the west part of Tract A, was subject to a mortgage in favor of a bank named for \$3,800, which bank also held as security for such debt a mortgage on another tract of land in that city, which John S. Brown then owned, known as the "Cooper Shop Property," of the value of \$3,200, and subject to no other incumbrance. The bank also held as collateral security for the same debt an insurance policy on the life of John S. Brown for \$4,000, which was also pledged to the bank to secure the payment of all sums advanced or that might be advanced by it in payment of premiums on the policy and any other debt that Brown might then owe the bank, which had then paid premiums amounting to \$1,348; and it was necessary, in order to keep the policy alive, to pay as premiums annually \$288. Brown being then 76 years of age. Said real

estate was also incumbered by a mortgage executed by Brown to Crane & Anderson to secure a debt of \$618. Brown also owned in fee simple lot 5 in a certain addition to that city, of the value of \$1,400, subject to a mortgage lien of \$761.58; and he was and still is the owner in fee simple of other real estate in that city of the value of \$2,000, subject to valid liens amounting to \$900. He also owned personal property of the value of \$300, and was and is a householder of this state. He had no other property subject to execution, and has not since had sufficient property subject to execution to pay his debts, and he has been insolvent at all times since that date. He was then justly and legally indebted to his daughter, the appellee Fannie B. Coddington, in the sum of \$1,918.50. For the purpose of securing to her the payment thereof, and at the same time placing the property hereinafter mentioned beyond the reach of the appellants on execution or other legal process to satisfy their demands against him, in case they should recover judgment against him in the then pending litigation, Brown executed to his said daughter the deed mentioned in the complaint herein, by which he conveyed to her, for the expressed consideration of \$1,875, Tract A and lot 5, above mentioned. At the time of the execution of this deed, and for several years prior thereto, Fannie B. Coddington lived in the state of Nebraska, and she had no notice or knowledge of her father's financial condition. The deed was drawn up and signed and acknowledged in Crawfordsville, Ind., without consulting with Fannie B. Coddington, and without request from her, and was transmitted by Brown through the mails to her at Kearney, Neb. It was received by her as security for the payment of the sum due her from her father. Brown continued to use, occupy, and control the property after the execution of the deed as he had done before. The deed was returned by Fannie B. Coddington to her father with direction to have it put of record, and it was duly recorded in the recorder's office of Montgomery county October 19, 1899. John S. Brown, September 9, 1899, executed to his wife, the appellee Mary V. Brown, a deed of conveyance for lots 17 and 20 and Tract B, above mentioned, and a mortgage on the eastern and greater portion, described, of Tract A. This mortgage was given to indemnify the mortgagee from the payment of a balance of \$155.30 to a bank named, and secured by mortgage on the property that day conveyed by Brown to his wife, and also to secure and indemnify her against the payment of a debt of \$1,500, and interest thereon, secured by mortgage in favor of one Thomas on the property so conveyed to her. The conveyance and mortgage were so executed by John S. Brown, and were accepted by Mary V. Brown "in lieu and in satisfaction of" the antenuptial contract above mentioned.

and were so executed by John S. Brown in view of the fact of his insolvency, and with full knowledge of both parties thereto of his financial condition at the time. The court found that there was due Fannie B. Coddington, upon the indebtedness of her father to her, which it was intended to secure by his said deed to her, \$2,328.70, and that there was due the appellants on their judgment \$7,425.

The court stated as conclusions of law (1) that the deed and mortgage executed by John S. Brown to Mary V. Brown are valid and effectual to convey to her the title of the premises described in the deed, and to indemnify her against the liabilities described in the mortgage, free from the demands of the appellants or other creditors of John S. Brown; (2) that the deed executed by John S. Brown to Fannie B. Coddington is void and ineffectual in conveying the title to the premises therein described to her, as against the demands of the appellants as creditors of John S. Brown, but that she, under that deed, is entitled to hold a lien upon the premises, as against such demands, for \$2,323.50, with interest from the date of the special finding; (3) that the appellants are entitled to have the premises described in the deed of John S. Brown to Fannie B. Coddington, and such other real estate as John S. Brown owned, subject to execution, sold to pay and satisfy their debt, freed and discharged from any claims thereon of Mary V. Brown as the wife of John S. Brown, but subject to all prior valid liens existing against the same.

It is claimed on behalf of the appellants, with reference to the appellee Fannie B. Coddington, that as the answers filed by her were answers in bar of the action, and as she filed no cross-complaint and asked no affirmative relief, the finding that she held a lien upon the real estate conveyed to her was outside the issues made by the pleadings, and should be disregarded. The complaint charged that the conveyance to Fannie B. Coddington was fraudulently made without any valuable consideration, and that she at the time knew that it was made without valuable consideration and for the purpose of enabling John S. Brown to cheat, delay, and defraud his creditors, and especially the appellants. The separate answer of Fannie B. Coddington was in two paragraphs, the first being the general denial. In the second paragraph she admitted that September 9, 1899, John S. Brown was the owner of real estate described (being that described in his deed of conveyance to her of that date), and that on that day he and his wife executed a deed conveying it to Fannie B. Coddington; and it was alleged that this deed was executed to her by him on account of an indebtedness then due and owing by him to her; that he was indebted to her on account of moneys then due and owing by him to her, and the conveyance was made

by him to her for the purpose of securing her in the payment of such debt, and for no other purpose; and she denied that it was executed by him for the purpose of defrauding, hindering, or delaying the creditors, including the appellants, and alleged that it was executed in good faith and for the purpose of securing the payment of said debt. The second paragraph did not contain an express statement that it was pleaded as a defense in part. It was the separate answer of Fannie B. Coddington alone, and as such it was sought thereby to defend against so much of the cause of action stated in the complaint as affected her interest in the real estate created by the conveyance to her, attacked by the complaint as having been executed to defraud the creditors of the grantor. It denied that the conveyance was executed for such purpose, and showed its true character—that it was a deed of conveyance executed as a security for the payment of a pre-existing bona fide debt, and therefore a mortgage given by way of preference of a creditor. It did not contain a prayer for the foreclosure of the mortgage lien, but it asserted, in effect, the existence of such lien. It did not seek to present any reason why the real estate should not be subjected to sale as the property of the grantor for the payment of the judgment of the appellants, but it stated facts which, if true, as they were found to be by the court, should require that such sale be made subject to the mortgage lien. The complaint treated the deed to Fannie B. Coddington as one whereby it was intended to convey the absolute title, and sought to set it aside as fraudulent, so that the real estate might be subjected to the payment of the judgment, free from all claims based upon that deed of conveyance. The answer opposed such demand of the appellants by showing that the deed of conveyance created a bona fide mortgage lien, and, while not controverting the right of appellants to have the real estate subjected by sale to the payment of the judgment, showed that the appellee Coddington, the defendant separately answering, had a superior mortgage lien. This defendant had no interest in disputing generally the right of the appellants to have the real estate sold upon their judgment. She was only interested in asserting and protecting her lien, and her second paragraph of answer, the sufficiency of which has not been questioned here, appears to have been treated as having been pleaded for such purpose, and it would seem to be but justice to all the parties that it should be so treated in this court.

As against the appellants, seeking to set aside the conveyance as one made and accepted to hinder, delay, and defraud the creditors of the grantor, it was not outside the issues, and beyond the province of the court trying them, to find that the conveyance was executed as a security for a debt, and, because of this and the other facts

found, constituted, as against the appellants, a lien upon the real estate. The court did not, in its conclusions of law, declare that the grantee was entitled to a foreclosure of her lien. It held that the appellants were entitled to have the land sold subject to the lien. This was all they were entitled to as against the appellee Fannie B. Coddington. They had not established their claim that the deed was invalid because of fraud against creditors. It was proper for the court to find and declare the true character of the conveyance as a security for a debt, constituting a lien on the real estate. If the conveyance was executed as a security for a bona fide demand—as a preference of a pre-existing debt not voidable for fraud against creditors—this, we think, was a sufficient reason why, under the answer of general denial, the appellants should not recover greater relief than that given them as against Fannie B. Coddington.

There is somewhat greater difficulty in determining the question in relation to the postnuptial conveyance and mortgage from Brown to his wife. It is contended on behalf of the appellants that the antenuptial contract between them was so framed that it did not make Brown the debtor of his wife, and that they could not, as against the appellants, make a postnuptial settlement of that contract, except in accordance with the terms of the contract itself. If it were necessary to refer to the marriage itself as the consideration for the postnuptial conveyance and mortgage, it is plain that the conveyance and mortgage must be regarded as voluntary. The irrevocable marriage union could not constitute a valuable consideration for a subsequent agreement of the parties thereto. But if the execution of the conveyance and mortgage may be regarded as having a valuable consideration other than the marriage, and as being a preference of a pre-existing debt of the husband to the wife, then, under the facts shown by the court's finding, the conveyance and mortgage must be upheld against the attack of the husband's creditors. In *Reade v. Livingston*, 3 Johns. Ch. 481, 487, 8 Am. Dec. 520, it was said: "The settlement was a voluntary one. There was no portion advanced by or on behalf of the wife, nor was it founded on any antenuptial contract duly ascertained, or on any other valuable consideration." The chancellor thus indicates what is necessary to support a postnuptial settlement. A postnuptial settlement, if not shown to be made pursuant to and in compliance with a valid antenuptial agreement therefor, must, as against existing creditors, be regarded as voluntary, unless founded upon a valuable consideration other than the marriage. See *Reade v. Livingston*, supra; *Lavender v. Blackstone*, 2 Lev. 146. In *Saunders v. Ferrill*, 23 N. C. 97, 102, it was said: "Valid antenuptial contracts will undoubtedly support a settlement after mar-

riage in conformity to them. There are both a moral and an equitable obligation, which render the articles a good consideration for the settlement. But without such articles a postnuptial settlement is voluntary and void under St. 13 Eliz. (see 1 Rev. St. c. 50, § 1), as has long been settled. So it necessarily must be when by the settlement the husband secures to the wife or issue of the marriage more than by the articles he engaged." See *Maguire v. Nicholson*, Beatty, 592. In *Magniac v. Thompson*, 7 Pet. 348, 392, 8 L. Ed. 709, it was said by Story, J.: "Nothing can be clearer, both upon principle and authority, than the doctrine that to make an antenuptial settlement void, as a fraud upon creditors, it is necessary that both parties should concur in, or have cognizance of, the intended fraud. * * * Marriage, in contemplation of law, is not only a valuable consideration to support such a settlement, but is a consideration of the highest value, and, from motives of the soundest policy, is upheld with a steady resolution. The husband and wife, parties to such a contract, are therefore deemed, in the highest sense, purchasers for a valuable consideration." A wife may, under such articles, become a creditor of her husband, upon his undertaking therein to make an investment of money in her behalf, and a delivery of notes in part performance of the articles was upheld against other creditors of the husband. *Id.* In *Read v. Worthington*, 9 Bosw. 617, 628, it was said that "there is no principle which puts a contingent liability beyond the possibility of being protected." In *Rider v. Kidder*, 10 Vesey, Jr. (Sumner) 360, under a covenant, upon marriage, by the husband, with the trustees, in case his wife should survive him, to pay her a sum of money, it was held that she was a creditor, within the statute of Elizabeth against fraudulent conveyances, as against a fraudulent conveyance made by him to a third person, in a suit to set aside the fraudulent conveyance, brought after his death by his widow as executrix. In *Blow v. Maynard*, 2 Leigh, 29, Carr, J., gave the subject of postnuptial settlements an examination, citing a number of cases, and said that the giving up an interest in the settlor's estate will support such a settlement. "The cases," he said, "also show that not only the relinquishment by the wife of a certain and fixed interest in her husband's estate, but also of a contingent interest, will support a postnuptial settlement, where there is no badge of fraud, as the giving up her interest in a bond, though contingent. 1 Eq. Ca. Abr. 19; 2 Ves. 16. So, likewise releasing her jointure or dower. Pre. in Cha. 113; 2 Lev. 70, 147; 2 Vern. 220." In *Cottle v. Fripp*, 2 Vernon, 220, a husband had settled a jointure issuing out of certain real estate on his wife. Later the wife joined the husband in a sale of that real estate, "and in consideration thereof, and,

in lieu of her jointure," the husband gave a certain bond in her favor, which was upheld as against a subsequent creditor of the husband. In *Scott v. Bell*, 2 Lev. 70, a wife joined in an alienation of her jointure, and had another made the same day. It was held that the new settlement was not voluntary. It was said by Hale and the court that the second settlement was not void as to a subsequent lease made by the husband, "for, the old settlement being destroyed and the new one made the same day, an agreement by him to make the new settlement, in consideration the wife would pass the fine and bar the old settlement, shall be intended, and the consideration shall extend to all the uses of the new settlement, for it shall not be presumed that the wife would have parted with her estate by the old settlement unless the baron would make the same provision for her and her issue by the new." In that case the lands in the new settlement were said to be almost of double value to those in the first settlement, yet by direction of the court the jury gave their verdict sustaining the new settlement. In *Ward v. Shallet*, 2 Ves. 16, a wife had a contingent interest under a bond given by her husband on the marriage. She agreed to part with that interest upon her husband making another settlement upon her. It was said by the Lord Chancellor that the parting with her contingent interest under the bond was a clear consideration, that a contingent interest may be a consideration as well as a certain interest, and that the wife, insisting on the benefit of it, was barred from any claim under the bond.

By the terms of the antenuptial contract, Brown and his prospective wife, in contemplation of their marriage, renounced and waived all the rights of inheritance of either of them under the law by reason of the marriage, and agreed that, if the wife should survive the husband, she upon his death should be paid \$10,000 in cash out of his estate in consideration of her said waiver in his estate. The conveyance and mortgage were executed by the husband and accepted by the wife "in lieu and in satisfaction of the antenuptial contract." They were not executed pursuant to the antenuptial contract, or by way of carrying into effect any contract made in consideration of the marriage; nor can the marriage be regarded as entering into the consideration for the conveyance and mortgage. Under our modern statutory system, the husband and wife could contract with each other without the intervention of a trustee. By the postnuptial settlement, if valid, the antenuptial contract was abrogated in consideration of the new settlement, and all the rights and obligations of the parties, respectively, created by the earlier contract, were set aside. The husband was freed from any obligation under that contract for the payment of money to the wife out of his estate, and was restor-

ed to any rights in her property renounced and waived thereunder, while her renunciation and waiver therein of rights of inheritance by virtue of the marriage were also abrogated, for the new settlement was in lieu of the old contract and in satisfaction of it, and not merely of the contingent promise therein. It does not appear what property, if any, the wife owned, other than that obtained in the postnuptial settlement. The property which she thus acquired, and any other real estate owned by her, or of which she might afterward become seised, would be held by her subject to the rights of a husband in the property of his wife under the law. If any advantage of value was lost by the wife or gained by the husband through the abrogation of the old contract, it cannot be said that there was not a valuable consideration for the new contract. While a contingent indebtedness, or obligation to pay upon a contingency, is not for some purposes to be regarded as a present debt, yet, under the authorities, such a contingent liability as is here involved may be preferred by the debtor in failing circumstances. We have no means of determining that the consideration for the conveyance and mortgage was so grossly inadequate as to invalidate them at the suit of creditors.

We do not find any substantial ground of complaint on the part of the appellants against the conclusions of law.

Judgment affirmed.

CHICAGO & E. R. CO. v. LAIN.¹ (No. 5,033.)
(Appellate Court of Indiana, Division No. 1.
Nov. 29, 1904.)

INJURIES TO EMPLOYÉ—SUFFICIENCY OF COMPLAINT—NEGATIVE CONTRIBUTORY NEGLIGENCE—FELLOW SERVANTS—REVIEW—SUFFICIENCY OF BRIEF.

1. Burns' Ann. St. 1901, § 7083, provides that every railroad or other private corporation shall be liable for personal injuries suffered by any employé where the injury resulted from the negligence of any person whose order the injured employé was bound to perform (subdivision 2), or (subdivision 4) where such injury resulted from the negligence of a person in charge of any locomotive, etc., or any co-employé, such co-employé at the time acting in the place or performing the duty of the corporation. *Held*, that if, in stating the cause of action under subdivision 2, the complaint should incidentally state facts constituting also a cause of action under subdivision 4, the complaint would not thereby be rendered insufficient on demurrer.

2. In an action by an employé for personal injuries under the employers' liability act (Burns' Ann. St. 1901, § 7083), it is not necessary for the complaint to negative contributory negligence on the part of plaintiff, since Acts 1899, p. 58, c. 41 (Burns' Ann. St. 1901, § 359a), relieves plaintiff in such cases from the obligation to plead or prove want of such negligence.

3. A complaint under Burns' Ann. St. 1901, § 7083, making a railroad company liable to an employé for injuries resulting from the negligence of any person in the service of the company having charge of any locomotive, etc., is not rendered insufficient by failure to confine

¹ Reversed on rehearing, 79 N. E. 547. Superseded by opinion in Supreme Court, 83 N. E. 632.

the negligence alleged to a single employé in charge of the locomotive.

4. Misconduct of counsel in the use of improper language in the argument to the jury will not be reviewed where the language objected to is not set out in the brief, as required by Appellate Court Rule 22 (55 N. E. v.).

5. Instructions will not be reviewed where appellant does not set out in his brief any of the instructions, or a concise statement thereof, as required by Appellate Court Rule 22 (55 N. E. v.).

6. Where appellant failed to set out in his brief the instruction sought to be reviewed, or a concise statement thereof, as required by Appellate Court Rule 22 (55 N. E. v.), he cannot supply the omission in his reply brief.

7. Alleged misconduct of the jury in rendering the verdict, supported by affidavits, cannot be reviewed in the absence of the substance of the affidavits in the brief.

Appeal from Circuit Court, Fulton County; J. C. Nye, Special Judge.

Action for personal injuries by Henry LeRoy Lain against the Chicago & Erie Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

W. A. Johnson, Holman & Stephenson, Henry Steis, and O. C. Campbell, for appellant. Isaiah Conner, Geo. Burson, Simon Bybee, and F. M. Trissal, for appellee.

BLACK, J. The appellee brought his action against the appellant for the recovery of damages for a personal injury, the complaint consisting of five paragraphs. The appellee withdrew the third and fifth paragraphs, and the demurrer of the appellant to each of the other paragraphs for want of sufficient facts was overruled.

In the first paragraph, after preliminary averments, it was alleged: That the appellee was an employé of the appellant in the operation of its railroad, and engaged to do the work of a day laborer as one of the crew of appellant's yard and bridge men. That November 24, 1900, while so engaged in the appellant's service, and in the exercise of due care and diligence, the appellee received and suffered personal injuries which were occasioned by and resulted from the negligence of one Harvey Eggleston, a foreman of the appellant, who had employed the appellee, and to whose orders and directions he was bound to conform and did conform. That he received the injuries while performing the act and duty for the appellant that he was directed by the foreman to perform, and by the negligent acts and in the place and in the manner following: That at the town of Huntington, Huntington county, Ind., the appellant then had a switch yard connected with and forming part of its railroad, to and into which switch yard there extended a number of switch tracks from the appellant's main tracks, the switch tracks then being in use, among other purposes and places, for loading and unloading bridge timber, lumber, ties, and other materials; and the appellee was then directed by said foreman to go to the end of one of the freight cars used in hauling bridge timbers, standing

on one of the switch tracks, and push it to another place on the track on which it was standing, and in an opposite direction from appellant's main track; and while so engaged in pushing said car, and in a position where he could not and did not see what was occurring behind him, and where, on account of the noise made by the car he was pushing and other noises and confusion in said yard, he could not and did not hear the approach of a detached car moving toward his back, said foreman, who then and there had charge and supervision of said yards, switch tracks, and cars at that point, and authority to direct other employés of the appellant as to the movement of cars on said switch track, negligently and carelessly and without any warning to the appellee, and without the placing or sending out of any flag or signal, and without giving any signals to warn the persons in charge of the switching engine not to come upon the track where the appellee was at his work, or to slacken the speed and move slowly and cautiously upon said track, and without warning them that the appellee was at the place to which he had been directed to go, directed and permitted the locomotive engine belonging to the appellant and operated by its agents and servants to come upon said switch track at a careless rate of speed with a car attached, and allowed the men in charge thereof to carelessly detach said car from the engine, and, without any notice or warning to the appellee, to force said detached car to run with rapidity and force upon said switch track and against and upon the appellee, striking him in the back, and by its weight crushing him between it and the car he was pushing, etc.—describing his injuries and stating his damages, etc.

In the second paragraph, after introductory matter, it was alleged that the appellee's injuries were caused by the negligence of other persons in the service of the appellant, who had charge of the locomotive engine. In describing the acts of negligence on the part of the persons in charge of the appellant's locomotive engine so causing said injuries, it was alleged that upon its switch tracks the appellant ran a certain locomotive engine called a "switching engine" for the purpose of placing in and removing cars from the yards, which were used by the appellant as a place for loading and unloading bridge timbers, etc., upon and from a platform built for that purpose along the side tracks, at which work of loading and unloading bridge timbers the appellee and his co-employés were engaged; that when the appellee, on, etc., under the orders and immediate directions of the appellant's foreman, was so engaged, and was doing the particular act of pushing a freight car to a place of safety to be unloaded, the persons in charge of said locomotive engine, being the employés of the appellant, negligently and carelessly, and without giving any signal,

notice, or warning that they intended to do so, ran the same at a reckless and high rate of speed, with a freight car attached, in and upon said switch track where the appellee was so engaged at the work aforesaid, and negligently and carelessly disconnected said freight car therefrom, leaving it to run at rapid speed and with great force upon said track to the place where the appellee was at work, and in such a position that his back was in the direction from which said car was running, and while he was in a position where, by reason of a curve in the track, and because of his inability to see or hear of its approach, carelessly and negligently caused said car to run with great force against other cars upon the track immediately behind the appellee, which forced said other cars to run against the appellee, crushing him between such moving cars and the one he was assisting to move, whereby, etc.—describing his injuries and stating his damages. It was shown that the appellee's injuries were received and suffered while engaged in his work as an employé of the appellant, and while in the exercise of due care and diligence; and that because of the curve in said tracks, and because of the platform along the side thereof, and because of the piles of timber and material on said platform, the appellee could not see and did not hear the approach of such car, and did not know and was not informed that it was contemplated by the appellant at the time to shunt cars upon said side track.

In the fourth paragraph the work in which the appellee was engaged was more particularly described, and, besides the general allegation that the appellee's injuries were caused by the negligence of other persons in the service of the appellant who had charge of the locomotive engine, as thereafter described, it was stated that the engineer and conductor or persons in charge of the locomotive or switching engine, being the employés of the appellant, negligently and carelessly, and without giving any signal, notice, or warning that they intended to do so, ran the engine with a freight car attached, at a great and unusual rate of speed, in and upon the switch track, etc. In other respects the fourth paragraph was like the second.

It was the manifest purpose of the pleader to frame a complaint under the second and fourth clauses of the first section of the employers' liability act (section 7083, Burns' Ann. St. 1901), which provides that every railroad or other corporation, except municipal, operating in this state, shall be liable for damages for personal injury suffered by any employé while in its service, the employé so injured being in the exercise of due care and diligence in certain cases; the second being as follows: "Where such injury resulted from the negligence of any person in the service of such corporation, to whose order or direction the injured employé, at the time of the injury, was bound to

conform, and did conform." The fourth case is as follows: "Where such injury was caused by the negligence of any person in the service of such corporation who has charge of any signal, telegraph office, switch yard, shop, round house, locomotive engine or train upon a railroad, or where such injury was caused by the negligence of any person, co-employé or fellow servant engaged in the same common service in any of the several departments of the service of any such corporation, the said person, co-employé or fellow servant, at the time acting in the place, and performing the duty of the corporation in that behalf, and the person so injured, obeying or conforming to the order of some superior at the time of such injury, having authority to direct; but nothing herein shall be construed to abridge the liability of the corporation under existing laws." It was manifestly the purpose of the pleader in the first paragraph to proceed under the second clause of the first section of the statute, and in the second and fourth paragraphs to proceed under the first subdivision or classification of cases in the fourth clause of that section. In the first paragraph the person in the service of the appellant to whose orders and directions it was alleged the appellee was bound to conform and did conform is called a foreman, and, after stating his special direction to the appellee, and showing how he conformed to it, the pleader, in setting forth the negligence of the foreman, whereby the injury was occasioned, refers to him as having charge and supervision of the switch yards, switch tracks, and cars at that point, and authority to direct other employés, etc.; yet we think that in determining the nature of the cause of action, and for that purpose seeking a consistent single theory, it may be concluded that the first paragraph proceeds under the second clause, rather than under the fourth clause of the statute, and that the charge of negligence of the person having charge of the switch yard is made by way of showing the negligence of the person in the service of the corporation to whose order or direction the appellee at the time of the injury was bound to conform and did conform. In the first paragraph it seems to have been intended to show not merely that the appellee, while in the performance of his duty as an employé, was injured through the negligence of the person having charge of the switch yard, but that, while conforming to an order to which he was bound to conform, the appellee was injured through the negligence of the person who gave the order, whose negligence consisted in directing and permitting the locomotive engine to proceed and to cause the injury through his failure to perform his duties as an employé. If, in stating a cause of action under the second clause, the pleading should state facts incidentally constituting also a cause of action under the fourth clause, the pleading

would not thereby be rendered insufficient on demurrer. The gist of all the paragraphs was the personal injury of the appellee through negligence of employés of the appellant, who at common law, and before the enactment of the employers' liability statute, would be regarded as his fellow servants, whose negligence in question he had assumed. His right of recovery is based upon the statute, and in the action under the statute he cannot be regarded as having assumed the risk of the particular negligent acts or omissions of such other employés whereby the injury was caused; otherwise the statute would be of no avail. If, in such a complaint, based upon the provisions of the statutes under which either of these paragraphs proceeds, it should be made to appear that in the occurrence of the injury the plaintiff knowingly encountered apparent danger, there might be occasion for the application of the maxim, "*Volenti non fit injuria*," or for holding that under the facts pleaded it affirmatively appeared that the plaintiff was not without contributory negligence barring his right of action; but such a case is not presented by either of these paragraphs. The place into which the appellee entered was not dangerous but for the negligence which occurred after he entered, and while he was engaged in the performance of his appointed task, he being ignorant of the facts which created the risk of danger. In actions under the employers' liability statute it has not been necessary to expressly negative contributory negligence since the enactment of the statute of 1899 relieving the plaintiff in such cases from obligation to plead or prove want of contributory negligence. Acts 1899, p. 58, c. 41; section 359a, Burns' Ann. St. 1901; Pittsburg, etc., R. Co. v. Light-helmer (Ind. Sup.) 71 N. E. 218; Pittsburg, etc., R. Co. v. Collins (Ind. Sup.) 71 N. E. 661. See, also, upon the question as to the sufficiency of the complaint, Louisville, etc., R. Co. v. Wagner, 153 Ind. 420, 53 N. E. 927; Indianapolis Gas Co. v. Shumack, 23 Ind. App. 87, 54 N. E. 414; Chicago, etc., R. Co. v. Richards, 28 Ind. App. 46, 61 N. E. 18; Terre Haute, etc., R. Co. v. Rittenhouse, 28 Ind. App. 633, 62 N. E. 295; Cleveland, etc., R. Co. v. Scott, 29 Ind. App. 519, 64 N. E. 896; Indianapolis, etc., R. Co. v. Houlihan, 157 Ind. 494, 60 N. E. 943, 54 L. R. A. 787; Thacker v. Chicago, etc., R. Co., 159 Ind. 82, 64 N. E. 605, 59 L. R. A. 792; Consumers' Paper Co. v. Eyer, 160 Ind. 424, 66 N. E. 994; American Rolling Mill Co. v. Hullinger, 161 Ind. 673, 67 N. E. 986, 69 N. E. 460; Indiana Manufacturing Co. v. Buskirk, 32 Ind. App. 414, 68 N. E. 925; Baltimore, etc., R. Co. v. Hunsucker (Ind. App.) 70 N. E. 556; Republic, etc., Co. v. Berkes (Ind. Sup.) 70 N. E. 815.

The objection that the second and fourth paragraphs of the complaint failed to confine the negligence charged to a single employé in charge of the engine did not render these

paragraphs insufficient. The use of the singular number in the statute did not render it inapplicable if the engine was in charge of more than one person and the injury was attributable to the negligence of more than one of them.

The appellant's motion for a new trial was overruled. We do not find occasion for disturbing the verdict because of insufficiency of the evidence, or on the ground of the court's refusal to direct a verdict for the appellant. In the portion of the brief for the appellant purporting by its heading to be a statement of so much of the record as presents the errors relied upon, under the subdivision relating to the overruling of the motion for a new trial, reference is made to two of the causes in that motion by their numbers, with the statement that they "cover the rulings of the court with respect to misconduct of attorneys" (mentioning two surnames), with a reference to a certain page and lines of the record and a certain bill of exceptions. Under the heading of "Propositions or Points" it is said that said two assigned causes for a new trial relate to misconduct of appellee's two attorneys, giving their surnames, "in their respective arguments to the jury." We do not find in the brief any statement showing the alleged misconduct of the attorneys, or of either of them. In the argument appended to the brief there is reference to the same subject, but there is no showing here of the objectionable language or conduct of one of the attorneys. As to the other, some language used by him in argument is quoted, which apparently was spoken in response to matter in the preceding speech of one of the attorneys for the appellant. If we look to the argument appended to the brief, it would seem that attorneys on both sides indulged in some scarcely warrantable latitude of expression, but the matter is not there presented with sufficient definiteness and clearness to enable us to say there was reversible error on the part of the appellee. Rule 22 of this court (55 N. E. v) requires that the "brief" of the appellant shall contain a concise statement of so much of the record as fully presents every error and exception relied on. In the same rule it is required that following this "statement" the brief shall contain, under a separate heading of each error relied on, separately numbered "propositions or points," stated concisely and without argument or elaboration, together with the authorities relied on in support of them. Rule 24 (55 N. E. vi) provides that the brief of any party may be followed by an "argument" in support of such brief, which shall be distinct therefrom, but which shall be bound with the same; and that the argument shall be confined to discussion and elaboration of the "points" contained in the brief. Every error and exception relied on must be fully presented by a concise statement of matter in the record. It is manifest that

the brief of the appellant does not present any question as to misconduct of attorneys in argument. Counsel for appellant have not complied with the rule just mentioned in their attempt to obtain a review of the instructions, for they have failed to set out in the brief any of the instructions, or to make a concise statement of the purport thereof. *Cleveland, etc., R. Co. v. Stewart*, 161 Ind. 242, 68 N. E. 170; *Perry, etc., Co. v. Wilson*, 160 Ind. 435, 67 N. E. 183. An attempt to rectify this defect in the appellant's original brief has been made by copying the instructions in the reply brief. This is not admissible. The appellee was authorized to treat the objections relating to the instructions as waived, and in his brief he revokes rule 22, *supra*. Under rule 21 the appellee has no right to file any supplemental or additional brief, and it would be manifestly improper to permit the appellant in his reply brief to supply matter raising questions waived in his original brief.

Under the heading of "Statement of so Much of the Record as Presents the Errors Relied on," in the appellant's brief, in the portion thereof purporting to set forth the causes in the motion for a new trial, it is indicated that cause 35 "relates to the misconduct of the jury in returning a 'quotient' verdict, supported by the affidavit of" two persons named, references being made to the places in the record where the "assignment" and the affidavit may be found. Under the head of "Propositions or Points" it is said (probably with reference to this cause in the motion for a new trial) that the thirty-third ground for a new trial asserts misconduct of the jury in returning a quotient verdict, and that chance or quotient verdicts are universally condemned; citing authorities. Thus the brief wholly fails to set forth the affidavit, or to state the substance thereof, and in the "argument" appended to the brief there is no showing of the contents of the affidavit to adequately inform this court upon the subject. Looking to the brief of the appellee, we do not find therein any statement sufficiently supplying information on this matter. With such inadequacy of presentation we cannot go into the question without ignoring the rules of this court, to the enforcement of which all parties before us are entitled, and to the observance of which we are bound as we are bound by other rules of law. In *Perry, etc., Co. v. Wilson*, 160 Ind. 435, 67 N. E. 183, it is said that when the rule of court in question "is properly complied with, all the questions presented by the assignment of errors can be determined by an examination of the briefs." The matters to be decided should be set forth in the brief of the appellant with such fullness, definiteness, and clearness that the court may clearly apprehend the questions to be decided from a perusal of the statement.

Judgment affirmed.

(163 Ind. 560)

RICH GROVE TP., PULASKI COUNTY,
et al. v. EMMETT et al. (No. 20,470.)

(Supreme Court of Indiana. Nov. 29, 1904.)

APPEAL—NECESSARY PARTIES—DRAINAGE PROCEEDINGS.

1. In a vacation appeal all parties against whom judgment was rendered must be made co-appellants in the Supreme Court, or the appeal will be dismissed for want of jurisdiction.

2. Burns' Ann. St. 1901, § 648, provides that on the death of any party to a judgment before appeal is taken an appeal may be taken by and notice served upon the persons in whose favor and against whom the action might have been revived if death had occurred before judgment. Section 272 provides that no action shall abate by the death of the party, but the court may allow the same to be commenced by or against the decedent's representative or successor in interest. In proceedings under the circuit court drainage law to charge real estate belonging to defendants with the cost of the construction of a ditch, one of the defendants died after judgment and before the appeal was taken, and his administrator was made a party appellant. *Held* error; that the real estate descended to the heirs, and they should have been made appellants, and served with notice of appeal, as required by Burns' Ann. St. 1901, § 647, and, this not having been done, the appeal will be dismissed.

Appeal from Circuit Court, Pulaski County; T. F. Palmer, Special Judge.

Proceedings by John E. Emmett and others against Rich Grove township, Pulaski county, and others, for the construction of a ditch under the circuit court drainage law. From the judgment rendered, defendants appeal. Dismissed.

H. A. Steis, for appellants. W. W. Borders and Burson & Burson, for appellees.

MONKS, J. Appellees commenced this proceeding August 6, 1902, in the court below, for the construction of a ditch under what is known as the "Circuit Court Drainage Law." After the drainage commissioners filed their report, and within the time allowed by law, Robert J. Geddis and others, against whose lands benefits were assessed, each filed separate remonstrances alleging the fifth, seventh and eighth causes of remonstrance provided in section 5625, Burns' Ann. St. 1901. A trial of said cause resulted in a finding modifying and equalizing the benefits assessed by the drainage commissioners, and against each of the remonstrants for the eighth statutory cause, and a judgment establishing the proposed work, approving the assessment of benefits as made by the drainage commissioners as equalized and modified by the court. After the rendition of the judgment in said cause, and before the appeal was taken, Robert J. Geddis died, and one Charles E. Russell was appointed administrator of his estate. In the assignment of errors Charles E. Russell, as such administrator, has been made a party appellant, and has assigned errors. The heirs of said Geddis have not been made parties

to this appeal. This being a vacation appeal, it is well settled that all parties against whom judgment was rendered must be made co-appellants in this court or the appeal will be dismissed, for the reason that in such case we have no jurisdiction to determine the case on its merits. *Haymaker v. Schneck*, 160 Ind. 443, 446, 447, 67 N. E. 181, and cases cited; *McKee v. Root*, 153 Ind. 314, 54 N. E. 802, and cases cited; *Mellott v. Messmore*, 158 Ind. 297, 299, 63 N. E. 451; *Brown v. Sullivan*, 158 Ind. 224, 63 N. E. 302, and cases cited. Section 648, Burns' Ann. St. 1901 (section 636, Rev. St. 1881; section 636, Horner's Ann. St. 1901), provides that "in case of the death of any or all the parties to a judgment before an appeal is taken, an appeal may be taken by, and notice of an appeal served upon, the persons in whose favor and against whom the action might have been revived, if death had occurred before judgment." Section 272, Burns' Ann. St. 1901 (section 271, Rev. St. 1881; section 271, Horner's Ann. St. 1901), provides that: "No action shall abate by the death or disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of the death or disability of a party, the court, on motion or supplemental complaint at any time within one year, or on supplemental complaint afterward, may allow the action to be continued by or against his representative or successor in interest. In case of any other transfer of interest, the action shall be continued in the name of the original party; or the court may allow the person to whom the transfer is made to be substituted in the action." It is evident that, if said Robert J. Geddis had died before the rendition of the judgment in the court below, his heirs would have been the successors in interest of the deceased, and necessary parties to said proceeding, under section 272 (271), supra. 1 Cyc. of Law & Proc. pp. 93-96; *Benoit v. Schneider*, 39 Ind. 591; *Vail v. Lindsay*, 67 Ind. 528. This proceeding was one in rem to charge the real estate of said Geddis with a part of the cost of the construction of said ditch. Said real estate descended to his heirs, and they were necessary parties in any proceeding to enforce a lien thereon, or to charge the same with the cost of constructing any public drain under the statute. It is clear, therefore, under section 648 (636), supra, that the heirs of said Robert J. Geddis were necessary parties on appeal, and should have been made co-appellants in this appeal, and served with notice, as required in section 647, Burns' Ann. St. 1901 (section 635, Horner's Ann. St. 1901). *Elliott's Trial Proc.* § 168; *Ewbank's Manual*, §§ 145, 166; *Vail v. Lindsay*, 67 Ind. 528; *Benoit v. Schneider*, 39 Ind. 591. As this has not been done, we have no jurisdiction over the heirs of said Geddis, to whom his real estate descended, and cannot determine this appeal upon its

merits. The appeal must therefore be dismissed. *Haymaker v. Schneck*, supra; *McKee v. Root*, supra; *Mellott v. Messmore*, supra; *Brown v. Sullivan*, supra.

Appeal dismissed.

(163 Ind. 512)

JOURDAN v. CITY OF EVANSVILLE
(No. 20,310.)

(Supreme Court of Indiana. Nov. 29, 1904.)

INTOXICATING LIQUORS—STATUTES AUTHORIZING LICENSE—CONSTITUTIONAL LAW.

1. Burns' Ann. St. 1901, § 3927, giving a city power to require a license to sell intoxicating liquors within four miles of its corporate limits, does not contravene Const. art. 1, § 21, providing that no man's property shall be taken without just compensation.

2. The right to sell intoxicating liquors is not one of the privileges and immunities of citizens which Const. U. S. Amend. 14, forbids the states to abridge, or which Const. Ind. art. 1, § 23, prohibits the Legislature from granting to any citizen, which on the same terms shall not equally belong to all citizens; so that said provisions are not contravened by Burns' Ann. St. 1901, § 3927, giving a city power to require a license to sell intoxicating liquors within four miles of its corporate limits.

Appeal from Circuit Court, Vanderburgh County; L. O. Rasch, Judge.

Action by the city of Evansville against Fred L. Jourdan. From a judgment for plaintiff, defendant appeals. Affirmed.

El. J. Crenshaw, for appellant. A. W. Funkhouser, for appellee.

MONKS, J. This action was commenced in the police court of the city of Evansville against appellant to recover a penalty for the violation of an ordinance of the city requiring a license to retail intoxicating liquors within four miles of the corporate limits. A trial of said cause resulted in a finding and judgment in favor of appellee. From this judgment appellant appealed to the court below, where he was again convicted.

The statute authorizing appellee to pass the ordinance under which appellant was convicted reads as follows: "3927. General Power of Council. The common council shall have power to enact ordinances for the following purposes: * * * To license, tax and regulate the selling or giving away of any spirituous, vinous or malt liquors, and to tax, license and regulate places * * * where such liquors, or either of them, are to be used on the premises when given away, sold, stored or manufactured; but such license shall not exceed the amount provided for by the laws of this State for other interests thereof. For the purposes of this section, jurisdiction is given such city for four miles from its corporate limits." Section 3927, Burns' Ann. St. 1901. Appellant insists that said section is in conflict with the fourteenth amendment to the Constitution of the United States, and with sections 21 and 23 of article 1 of the Constitution of this state. These are the only questions pre-

sented by this appeal. The validity of such a statute is not an open question in this state. In *Lutz v. City of Crawfordsville*, 109 Ind. 466, 10 N. E. 411, the appellant was convicted on a charge of violating an ordinance requiring a license to retail intoxicating liquors within two miles of the limits of the city of Crawfordsville, and it was held that the Legislature had the power to designate the limits over which the jurisdiction of the municipal corporations shall extend, and that its judgment upon the question is conclusive on the courts. The court said (pages 470, 471, 109 Ind., pages 413, 414, 10 N. E.): "The Legislature has power to determine what the territorial jurisdiction of the political subdivisions of the state shall be. Judge Dillon says: 'With the exception of certain constitutional limitations presently to be noticed, the power of the Legislature over such corporations is supreme and transcendent. It may erect, change, divide, or even abolish them at pleasure, as it deems the public good to require.' 1 Dillon on Municipal Corporations (3d Ed.) § 54. It is certainly within the power of the Legislature to declare that no unlicensed dramshop shall be kept within a designated number of feet of the corporate limits; otherwise all that need be done to evade the law would be to keep a foot or two beyond the corporate boundaries. If the Legislature has any power at all to designate the limitations over which the jurisdiction of a municipal corporation shall extend, then, necessarily, the subject must be within its discretion, and, if this be so, its judgment upon the question must be conclusive." "Limitations upon the legislative power are to be sought for in the Constitution, and, if not found there, they do not exist. *Eastman v. State*, 100 Ind. 278, 10 N. E. 97, 58 Am. Rep. 400; *Robinson v. Schenck*, 102 Ind. 307, 1 N. E. 698; *Hedderich v. State*, 101 Ind. 504, 1 N. E. 47, 51 Am. Rep. 768. There is nothing in the Constitution prohibiting the Legislature from fixing the jurisdiction of municipal corporations, and the judiciary cannot supplant the judgment of the Legislature with its own. * * * The power to exact a license is a police power vested in the sovereign, and may be delegated to the instrumentality of government, such as municipal corporations are. The purpose of exacting a license is to limit and regulate the business, for, if licenses were not required, all persons might, under the rules of the common law, freely engage in the business; but by imposing a restriction in the form of a license the traffic is regulated and limited. The principle upon which the power rests is a very ancient one, and is the same as that which for hundreds of years has sustained the right to restrict the business of hawking and peddling by exacting licenses." In *Emerich v. City of Indianapolis*, 118 Ind. 279, 20 N. E. 795, the same question was involved, and the court said (page 280, 118 Ind., page 795, 20 N. E.):

72 N.E.—35

"The Legislature has the power, as was demonstrated in *Lutz v. City of Crawfordsville*, 109 Ind. 466, 10 N. E. 411, to determine over what territory the jurisdiction of a municipal corporation shall extend. * * * The law in exacting a license fee does not grant a privilege that did not before exist, but, on the contrary, lays a special tax upon a pursuit which, but for the statute, might be followed without paying any special tax. There is therefore no just reason for affirming that a person who can secure no benefit from the municipal government should be exempt from the special tax imposed upon those engaged in the business of selling liquor." See, also, *Robb v. City of Indianapolis*, 88 Ind. 49. It has been held in other states that the Legislatures thereof have the power to delegate to municipal corporations the right to exercise police power beyond and within a prescribed distance of the municipal limits. 20 Am. & Eng. Ency. of Law (2d Ed.) p. 1148; *Board, etc., of Falmouth v. Watson*, 5 Bush (Ky.) 660; *Flack v. Fry, Mayor*, 82 W. Va. 364, 9 S. E. 240; *Van Hook v. City of Selma*, 70 Ala. 361, 45 Am. Rep. 85; *Chicago, etc., Co. v. Chicago*, 82 Ill. 221, 30 Am. Rep. 545; *State v. Franklin*, 40 Kan. 410, 19 Pac. 801. The power to regulate the liquor traffic is found in the police power of the state, and it should be remembered, in considering all statutes on that subject, that no one possesses an inalienable or constitutional right to keep a saloon for the sale of intoxicating liquors. "To sell intoxicating liquors at retail is not a natural right to pursue an ordinary calling." *Black on Intoxicating Liquors*, § 48; *Boomershine v. Uline*, 159 Ind. 500, 503, 65 N. E. 513; *State v. Gerhardt*, 145 Ind. 489, 462, 44 N. E. 469, 33 L. R. A. 313; *Sherlock v. Stuart*, 96 Mich. 193, 55 N. W. 845, 21 L. R. A. 580; *Cooley, Const. Lim.* (7th Ed.) pp. 845-851. Neither is the right to sell intoxicating liquors one of the privileges and immunities of citizens of the United States which the fourteenth amendment of the Constitution of the United States forbids the states to abridge. *Bartemeyer v. Iowa*, 85 U. S. 129, 21 L. Ed. 929; *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205; *Crowley v. Christensen*, 137 U. S. 86, 11 Sup. Ct. 13, 34 L. Ed. 620; *Giozza v. Tiernan*, 148 U. S. 657, 13 Sup. Ct. 721, 37 L. Ed. 599; *Town of Farmville v. Walker*, 101 Va. 323, 43 S. E. 558, 61 L. R. A. 125; *Danville v. Hatcher*, 101 Va. 522, 526-531, 44 S. E. 723, and cases cited; *Cooley, Const. Lim.* (7th Ed.) pp. 845-851. In the case of *Giozza v. Tiernan*, supra, involving the constitutionality of the laws regulating the sale of liquors in Texas, Mr. Chief Justice Fuller (page 661, 148 U. S., page 723, 13 Sup. Ct., 37 L. Ed. 599) said: "But it is contended that the act conflicts with the provisions of the fourteenth amendment that 'no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' The privileges and immunities of citizens of the United States are privileges and immunities arising out of the nature and essential character of the national government, and granted or secured by the Constitution of the United States, and the right to sell intoxicating liquors is not one of the rights growing out of such citizenship. *Bartemeyer v. Iowa*, 85 U. S. 129, 21 L. Ed. 929. The amendment [14] does not take from the states their powers of police that were reserved at the time the original Constitution was adopted. Undoubtedly it forbids any arbitrary deprivation of life, liberty, or property, and secures equal protection to all under like circumstances in the enjoyment of their rights; but it was not designed to interfere with the power of the state to protect the lives, liberty, and property of its citizens, and to promote their health, morals, education, and good order." In *Crowley v. Christensen*, supra, the Supreme Court of the United States, by Mr. Justice Field (page 91, 137 U. S., page 15, 11 Sup. Ct., 34 L. Ed. 620), said: "The sale of such liquors in this way has heretofore been at all times, by the courts of every state, considered as the proper subject of legislative regulation. * * * It is a question of public expediency and public morality, and not of federal law. The police power of the state is fully competent to regulate the business—to mitigate its evils or to suppress it entirely. There is no inherent right in a citizen to thus sell intoxicating liquors by retail. It is not a privilege of a citizen of the state or of a citizen of the United States. * * * The manner and extent of regulation rest in the discretion of the governing authority. * * * It is a matter of legislative will only. As in many other cases, the officers may not always exercise the power conferred upon them with wisdom or justice to the parties affected. But that is a matter which does not affect the authority of the state, or one which can be brought under the cognizance of the courts of the United States." In *City of Danville v. Hatcher*, supra, the court (page 527, 101 Va., page 724, 44 S. E.) said: "It is there said: 'That the regulation of the sale of intoxicating liquors is within the police power of the state is established, if not literally, by all the cases where the subject has been considered; certainly by an overwhelming array of authority.' It has been repeatedly decided that the subject is wholly within the power of the Legislature, and that the traffic is not one of the privileges or immunities of citizenship guaranteed and protected by the United States Constitution or the fourteenth amendment thereto. It may be entirely prohibited; and its regulation, when permitted, is absolutely within the discretion

of the several states. These principles are sustained by the Supreme Court of the United States in a long line of decisions, rendered both before and after the adoption of the fourteenth amendment. *Bartemeyer v. Iowa*, 85 U. S. 129, 21 L. Ed. 929; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. Ed. 989; *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205; *Kidd v. Pearson*, 128 U. S. 1, 9 Sup. Ct. 6, 32 L. Ed. 346; *Huckless v. Childrey*, 135 U. S. 662, 10 Sup. Ct. 972, 34 L. Ed. 304; *Crowley v. Christensen*, 137 U. S. 86, 11 Sup. Ct. 13, 34 L. Ed. 620; *Gloza v. Tiernan*, 148 U. S. 657, 13 Sup. Ct. 721, 37 L. Ed. 599." It is evident that the statute involved in this case is not in conflict with either the state or federal Constitution.

The judgment of the court below is therefore affirmed.

(163 Ind. 543)

RENNERT v. SHIRK et al. (No. 20,426.)
(Supreme Court of Indiana. Nov. 29, 1904.)

QUIETING TITLE—COMPLAINT—ADVERSE POSSESSION—CLAIM OF RIGHT—EVIDENCE—MISTAKE—ACTS AND STATEMENTS AFTER VESTING OF TITLE.

1. It being enough for the complaint in an action to quiet title to allege that complainant is the owner of the land, it is immaterial, where this is done, whether the further allegations concerning possession are a sufficient statement of title by prescription.

2. That possession is under a claim of right, so as to give title by prescription, may be shown by the exercise of acts of ownership, without any declaration.

3. One may acquire title by adverse possession to land adjoining his lot, though he takes and holds possession of it under a mistake as to the location of the boundary.

4. One does not lose title acquired by adverse possession where, after possession for the necessary time, he states that he does not claim the land, and offers to buy it, and his possession ceases to be exclusive.

Appeal from Circuit Court, Miami County; J. N. Tillett, Judge.

Action by Mary H. Rennert against Milton Shirk and others. From an adverse judgment, complainant appeals. Transferred from the Appellate Court under section 1337u, Burns' Ann. St. 1901. Affirmed.

John T. Armitage and W. E. Mowbray, for appellant. Mitchell, McClintic & Antrim, for appellees.

MONKS, J. Appellant brought this action against appellees to quiet the title to lot No. 82 in the original plat of the city of Peru. Appellees Milton and Elbert W. Shirk and Alice S. Edwards filed a cross-complaint to quiet title in themselves to a part of said lot 82. Appellant's demurrer for want of facts to said cross-complaint was overruled. A trial of said cause resulted in a finding, and over a motion for a new trial, a judgment, in favor of the cross-complainants, quieting their title to the part of lot 82 described therein.

The errors assigned and not waived call

in question the action of the court in overruling appellant's demurrer to the cross-complaint and appellant's motion for a new trial. It is alleged in the cross-complaint that cross-complainants are the owners in fee simple of the following real estate in Miami county, in the state of Indiana (describing the part of said lot 82 in controversy); "that said cross-defendant, Mary H. Rennert, is claiming some right, title, or interest in and to said real estate adverse to the interest of said cross-complainants, the nature of which is to them unknown, but which is unfounded and without right, and casts a cloud upon their title thereto. Cross-complainants further say that for more than twenty (20) years, to wit, for sixty (60) years, last part, they and their immediate and remote grantors have been in open, notorious, continuous, and adverse possession of said real estate as against cross-defendant, Mary H. Rennert, and all the world, claiming title thereto."

Appellant insists that said cross-complaint is insufficient "because it is not alleged in terms, or the equivalent thereof, that the possession of the cross-complainants and those under whom they claim title was actual and exclusive; that the allegation that the possession was adverse is a mere conclusion, and not the statement of a fact." In an action to quiet title, under our statutes, the pleading, to be sufficient, must allege that the pleader is the owner of the real estate described therein, or a certain interest therein, and that the defendant in the action or cross-action claims an interest therein, and that such claim is adverse to the title asserted in said pleading, or that the same is unfounded and a cloud upon such title. *Weaver v. Apple*, 147 Ind. 304, 305, 48 N. E. 642; *Rausch v. Trustees*, 107 Ind. 1-3, 8 N. E. 25, and cases cited; *Johnson v. Taylor*, 106 Ind. 89, 90-92, 5 N. E. 732, and cases cited; *Mitchell v. Bain*, 142 Ind. 604, 606, 607, 42 N. E. 230; *Brown v. Cox*, 158 Ind. 364-366, 63 N. E. 568, and cases cited; *Seymour Water Co. v. City of Seymour* (Ind. Sup.) 70 N. E. 514-516. All these essential facts were alleged in the cross-complaint, and it is therefore sufficient.

It is not necessary to decide whether or not the allegations in said cross-complaint concerning the possession are sufficient to give title by prescription, for the reason that said pleading is good without considering said allegations; and, even if they are not sufficient to give title, they do not in any way overcome or destroy the other allegations thereof.

The motion for a new trial assigned two causes therefor: (1) The insufficiency of the evidence to sustain the finding; (2) that the finding is contrary to law.

The finding in favor of the cross-complainants and against appellant was made upon the ground that said cross-complainants held title to the real estate in controversy by ad-

verse possession. To be adverse, possession must be actual, open, and notorious, exclusive, continuous, and under a claim of right; that is, an intention to claim adversely. *Worthley v. Burbanks*, 146 Ind. 534, 539, 45 N. E. 779. Appellant insists that appellees failed to show title by adverse possession, because there was no evidence that their possession and the possession of those under whom they hold and claim the part of lot 82 in controversy was "under a claim of right." We may therefore assume that the evidence established all the other essential elements of title by prescription, and proceed to consider the question mentioned.

Evidence was given in the cause showing that lots 81 and 82 in the original plat of the city of Peru are adjacent to each other, lot 82 being west of lot 81. Prior to 1842 the owner of lot 81 built a frame dwelling house on the west side of said lot, which extended 26 inches over and upon said lot 82, where it remained until the time of the trial of this cause in 1903. The part of said lot 82 occupied by said dwelling house was a strip 26 inches wide, commencing at the north or front end of said lot 82 on the east side thereof, and extending back from the street south 38 feet—the real estate claimed in the cross-complaint. The owners of said lot 81, either in person or by their tenants, have lived in the said dwelling house, and had actual, exclusive, and continuous possession of the real estate in controversy, from the time said house was built, for a period of more than 40 years, and have during that period, and until the time of the commencement of this action in 1902, repaired said property, rented it, collected the rents, offered to sell and convey, and have sold and conveyed the same, by the description of lot 81, and exercised acts of ownership in regard to the same, disregarding the claims of others, asking permission from no one, and using the property as a part of said lot 81 and as their own. This sufficiently shows that the possession of the part of lot 82 in controversy was under a claim of right.

It is not necessary that appellees and those through whom they claim, or any of them, ever made oral declaration of such "claim of right." It may be inferred from the manner of the occupancy. The same, as well as all the other essential elements of adverse possession, may be shown by positive acts of ownership inconsistent with the title and possession of the true owner of the real estate in controversy, such as erecting, repairing, and occupying buildings on said real estate, leasing the same and collecting the rents, selling and conveying, and offering to sell and convey, said property as improved. 1 Am. & Eng. Ency. of Law (2d Ed.) 888-890; 1 Cyc. Law & Proc. 998-1000; 2 Pin-grey on Real Property, §§ 1163, 1164; Tiedeman on Real Prop. (2d Ed.) §§ 697, 699, pp. 661, 662; 3 Washburn on Real Prop. (6th Ed.) §§ 1936, 1976; 3 Kerr on Real Prop. §

2273, pp. 2295-2297; 2 Tiffany's Mod. Law of Real Prop. § 441; 7 Ballard's Law of Real Prop. pp. 18-20; 8 Ballard's Law of Real Prop. § 27, pp. 23, 24; Wood on Limitations (3d Ed.) p. 577; Angell on Limitations (6th Ed.) 400, 401; Sedgwick & Wait on Trial of Title to Land (2d Ed.) § 758; Watson v. Gregg, 10 Watts (Pa.) 289, 295, 36 Am. Dec. 176; Rung v. Shoneberger, 2 Watts (Pa.) 23, 27, 26 Am. Dec. 95, 101; French v. Pearce, 8 Conn. 439, 21 Am. Dec. 680; Bryan v. Atwater, 5 Day (Conn.) 181, 5 Am. Dec. 136; Kennebec Purchase v. Laborea, 2 Greenl. (Me.) 273, 11 Am. Dec. 79; Allen v. Allen, 58 Wis. 202, 206-209, 16 N. W. 610; Meyer v. Hope, 101 Wis. 123, 125-130, 77 N. W. 720; Bishop v. Bleyer, 105 Wis. 330, 332, 333, 81 N. W. 413; Pitman v. Hill, 117 Wis. 318, 322, 823, 94 N. W. 40; Gilman v. Brown, 115 Wis. 1, 5, 6, 91 N. W. 227; Bennett v. Clemence, 6 Allen (Mass.) 10, 18, 19; Stedman v. Smith, 8 El. & Bl. 1; Village of Glencoe v. Wadsworth, 48 Minn. 402, 51 N. W. 377; Dean v. Goddard, 55 Minn. 290, 297-299, 56 N. W. 1060; Rowland v. Williams, 23 Or. 515, 521, 522, 32 Pac. 402; Willamette, etc., Co. v. Hendrix, 28 Or. 485, 497, 42 Pac. 514, 52 Am. St. Rep. 800; Liddon v. Hodnett, 22 Fla. 442, 466; Grim v. Murphy, 110 Ill. 271; Dyer v. Eldridge, 136 Ind. 654, 658-660, 36 N. E. 522, and cases cited; Brown v. Anderson, 90 Ind. 93, 98, 99; Nowlin v. Whipple, 120 Ind. 596, 598, 22 N. E. 669, 6 L. R. A. 159, and cases cited; Mitchell v. Bain, 142 Ind. 604, 607, 608, 42 N. E. 230, and cases cited; Pittsburgh, etc., Ry. Co. v. Stickley, 155 Ind. 812, 58 N. E. 192; Cutsinger v. Ballard, 115 Ind. 93, 97, 17 N. E. 206, and cases cited.

It is said in Dyer v. Eldridge, *supra* (page 659, 136 Ind., page 524, 36 N. E.): "Exercising that dominion over the thing used, taking that use and profit it is capable of yielding in its present condition, such acts being so repeated as to show that they are done in the character of owner, and not of an occasional trespasser, constitute adverse possession. Baum v. Currituck, etc., Club, 96 N. C. 310, 2 S. E. 673, 675, 676. * * * The correct doctrine is declared in La Frombois v. Jackson, 8 Cow. 588, 603, 18 Am. Dec. 463, as follows: 'The actual possession and improvement of the premises as owners are accustomed to possess and improve their estate, without any payment of rent, recognition of a title in another, or disavowal of a title in himself, will, in the absence of all other evidence, be sufficient to raise a presumption of his entry and holding as absolute owner, and, unless rebutted by other evidence, will establish the fact of claim of title.' The court further said: 'Every possession, then, is adverse, and entitled to the peaceful and benignant operation and protecting safeguard of the statute, which is not in subservience to the title of another, either by a direct acknowledgment of some kind, or an open or tacit disavowal of right on the

part of the occupant; and it is in the latter case only that the law adjudges the possession of one to the benefit of another.' " It is said in Sedgwick & Wait on Trial of Title of Land, § 758: "The adverse intention of the tenant, in the absence of proof of his own admissions to the contrary, or other proof that his possession was only permissive, or in fact without hostile intent, may be generally evidenced by the character of his possession and acts of ownership. If these are sufficiently definite, open, and exclusive, it will be presumed that they are done with the intent to appropriate the land. By such acts, it is said, the party proclaims to the public that he asserts an exclusive ownership over the land. Brumagin v. Bradshaw, 89 Cal. 46. Thus it is said that an assertion of such intention other than by acts is unnecessary, and that the mere fact of possession would, in general, indicate that the possession was adverse. Johnson v. Goram, 38 Conn. 522." 1 Am. & Eng. Ency. of Law (2d Ed.) pp. 889, 890, says: "But where one is shown to have been in possession of land for the period of limitation apparently as owner, and such possession is not explained or otherwise accounted for, it will be presumed to have been adverse; but this presumption may be rebutted by proof that the possession was, in its origin, not adverse, but permissive." This statement of the law is sustained by the following authorities: 3 Kerr on Real Prop. pp. 2206, 2297; 2 Pingrey on Real Prop. §§ 1163, 1164; Tiedeman on Real Prop. (2d Ed.) § 699, pp. 661, 662; Meyer v. Hope, 101 Wis. 123, 125-130, 77 N. W. 720; Bishop v. Bleyer, 105 Wis. 330, 332, 333, 81 N. W. 413; Rowland v. Williams, 23 Or. 515, 521, 522, 32 Pac. 402; Willamette, etc., Co. v. Hendrix, 28 Or. 485, 491, 42 Pac. 514, 42 Am. St. Rep. 800; Rung v. Shoneberger, 2 Watts (Pa.) 23, 27, 26 Am. Dec. 95, 101; Watson v. Gregg, 10 Watts (Pa.) 289, 295, 36 Am. Dec. 176, 178. In Wood on Limitations (3d Ed.) p. 577, the rule is stated thus: "It is the intention to claim title which makes the possession adverse, but this intention must be evinced and effectuated by the manner of occupancy; and neither a mere claim of title without occupancy, nor a mere occupancy without an intent to claim title, are sufficient. 'It is not the possession alone,' says Thompson, J., 'but that it is accompanied with the claim of the fee, which by construction of law is deemed prima facie evidence of such an estate.' The intention need not be expressed, but may be inferred from the manner of occupancy." It is said in 3 Washburn on Real Property (6th Ed.) § 1976: "But though the occupancy may be explained so as to do away with the effect otherwise to be ascribed to it, it must be done by the party seeking to disturb the effect of the 20-years possession. Doe on the Demise of Draper v. Lawley, per Denman, C. J., 13 Q. B. 854, 66 E. C. L. Rep. 953." In Meyer v. Hope, 101 Wis. 123, 130, 77 N. W. 721, the court said: "By the same process

of establishing disputed facts from those known, continuous, exclusive, open, notorious possession of land for twenty years, unexplained as to its commencement or otherwise, being known, we infer therefrom that there was a hostile entry as to all the world, with the intent to hold the land against all comers, and that such situation characterized the possession down to the end of the statutory period requisite to title by prescription." In *Bishop v. Bleyer*, 105 Wis. 330, 81 N. W. 414, the court (pages 332, 333, 105 Wis., page 414, 81 N. W.) said: "The rule has frequently been asserted that unexplained occupancy, continued for twenty years, raises the presumption that such occupancy was under claim of right and adverse. *Carmody v. Mulrooney*, 87 Wis. 552, 58 N. W. 1109; *Wilkins v. Nicolai*, 99 Wis. 178, 74 N. W. 103; *Wollman v. Ruehle*, 104 Wis. 603, 80 N. W. 919; *Wollman v. Ruehle*, 100 Wis. 31, 75 N. W. 425; *Meyer v. Hope*, 101 Wis. 123, 77 N. W. 720. Such possession, when established, is conclusive as to the nature of the possession, unless rebutted or explained away by some satisfactory evidence. * * * It is true in the present case that, when the plaintiff made proof of paper title covering the disputed tract, the burden was then imposed upon the defendant to show his possession, and that it had been open, notorious, and continued for twenty years. When that is done, as stated in *Meyer v. Hope*, 'it overcomes the presumption previously existing in favor of the true owner, and a presumption arises from the facts, in favor of the occupant, that his occupancy was characterized by all the other elements requisite to adverse possession; i. e., that it began by the requisite entry, claiming title, to set the statute of limitations on the subject running, and so continued down to the end of the statutory period.' This presumption, of course, may be rebutted by showing that the possession was under lease, contract, or permission of some kind, and not hostile to the original owner. But unless so rebutted or explained away, such possession, so long continued, with the requisites mentioned, makes title absolute."

Appellant insists, however, that, if one takes and holds possession of real estate under a mistake as to where the true boundary line is, such possession cannot ripen into a title. In this state, when an owner of land, by mistake as to the boundary line of his land, takes actual, visible, and exclusive possession of another's land, and holds it as his own continuously for the statutory period of 20 years, he thereby acquires the title as against the real owner. The possession is regarded as adverse, without reference to the fact that it is based on mistake; it being *prima facie* sufficient that actual, visible, and exclusive possession is taken under a claim of right. *Dyer v. Eldridge*, 136 Ind. 654, 36 N. E. 522; *Richwine v. The Presbyterian Church of Noblesville*, 135 Ind. 80, 90,

91, 34 N. E. 787; *Riggs v. Riley*, 118 Ind. 208, 213, 15 N. E. 253; *Brown v. Anderson*, 90 Ind. 93, 98, 99; *Pittsburgh, etc., R. Co. v. Stickley*, 155 Ind. 312, 58 N. E. 192; *Palmer v. Dosch*, 148 Ind. 10, 12-14, 47 N. E. 176; *Webb v. Rhodes*, 28 Ind. App. 393, 61 N. E. 735. See, also, *Abbott v. Abbott*, 51 Me. 575, 584; *Erek v. Church*, 87 Tenn. 575, 11 S. W. 794, 4 L. R. A. 641, and note; *Hightower v. Smith*, 15 Tenn. 500; *French v. Pearce*, 8 Conn. 439, 21 Am. Dec. 690, 3 Gray's Cases, 76; *Carney v. Hennessey*, 74 Conn. 107, 49 Atl. 910, 53 L. R. A. 699; *Yetzer v. Thoman*, 17 Ohio St. 130, 91 Am. Dec. 122; *Brown v. McKinney*, 9 Watts (Pa.) 565, 36 Am. Dec. 139; *Metcalfe v. McCutchen*, 60 Miss. 145; *Harn v. Smith*, 79 Tex. 310, 313, 314, 15 S. W. 240, 23 Am. St. Rep. 340; *Burnell v. Maloney*, 39 Vt. 579, 94 Am. Dec. 358; *Crary v. Goodman*, 22 N. Y. 170, 175; *Texas v. Pfug*, 24 Neb. 666, 39 N. W. 839, 8 Am. St. Rep. 231; *Levy v. Yerga*, 25 Neb. 764, 41 N. W. 773, 13 Am. St. Rep. 525; *Seymour v. Creswell*, 18 Fla. 29, 35, 36; *Seymour, Sabin & Co. v. Carli*, 31 Minn. 81, 16 N. W. 495; *Ramsey v. Glenn*, 45 Minn. 401, 48 N. W. 322, 22 Am. St. Rep. 736; *Jordan v. Riley*, 178 Mass. 524, 60 N. E. 7; *Bond v. O'Gara*, 177 Mass. 139, 58 N. E. 275, 83 Am. St. Rep. 265; *Greene v. Anglemire*, 77 Mich. 168, 43 N. W. 772; *Bowers v. Ledgerwood*, 25 Wash. 14, 64 Pac. 936; *Grim v. Murphy*, 110 Ill. 271; *Schneider v. Botsch*, 90 Ill. 577; *Rowland v. Williams*, 23 Or. 515, 32 Pac. 402; 1 Am. & Eng. Ency. of Law (2d Ed.) pp. 791, 792.

In *Brown v. Anderson*, supra, the evidence showed that for a long time there had been a dispute as to the location of a division line between the lands owned by the parties; that for more than 20 years there had been a fence standing between the lands occupied by the parties to said action, and by parties through whom they claimed; and that the plaintiff and those under whom he claimed title had cultivated and used the land on the side occupied by them, including the land in controversy, up to the line of said fence, as their own, continuously and uninterruptedly, for more than 20 years. The court, under such facts, held (pages 98, 99) that such occupancy gave title to the plaintiff, the appellee in said appeal, by prescription, and that the fact that said fence was not on the correct or true line made no difference. In *Pittsburgh, etc., R. Co. v. Stickley*, supra, it was shown that appellee (the plaintiff below) and her grantors built and maintained a fence on what they believed to be the true line of a lot which included a strip of land belonging to appellant (the defendant below), and built a house with reference to such fence, and occupied the same for 25 years, treating the fence as the true boundary line; and this court held that the evidence supported the finding that appellee and her grantors claimed to own the land to the fence constructed by them, and that such possession for the statutory pe-

riod gave said appellee title in fee simple.

It appears from the evidence that Elbert H. Shirk became the owner of said lot 81, and took possession of the same, including the real estate in controversy, after September 19, 1874, and that at some time between that date and July, 1880, he said to a witness who testified on behalf of appellant that he did not claim the real estate in dispute. The evidence in the cause shows that from the time said Shirk became the owner of said lot 81 until his death, in 1886, he occupied and used said lot, including the real estate in dispute, and the dwelling house thereon, in all respects as his own; that he rented it, collected the rents, and offered to sell and convey the same. This presented a question of fact for the court below to determine, and, under this state of the evidence, if necessary to sustain the judgment, we would presume that the court below found that said Shirk's possession of the real estate in dispute was adverse and under a claim of right. Waiving this question, however, said statement was made by Shirk long after the time the evidence in the cause authorized the court to find that the title to the real estate in controversy had vested in the owner of said lot 81, which vesting of title was before said Shirk became the owner thereof. Under such circumstances, the statement, if made, would not operate to defeat his title, nor the title of those who claim under him, nor convey to the then owner of lot 82 any new title, or renew the former title to the part of said lot in dispute. *Riggs v. Riley*, 113 Ind. 208, 213, 214, 15 N. E. 253; *School Dist., etc., v. Benson*, 31 Me. 381, 52 Am. Dec. 618; *Austin v. Bailey*, 37 Vt. 219, 86 Am. Dec. 703, 706; *Hodges v. Eddy*, 41 Vt. 488, 98 Am. Dec. 612; *Parham v. Dedman*, 66 Ark. 26, 48 S. W. 673; 1 Ency. of Ev. p. 701; *Cyc. Law & Proc.* 1013, 1014. This is true for the reason that when a title is acquired by adverse possession it is in fee simple, and continues until conveyed by the one holding such title, or until lost by adverse possession of 20 years. *Riggs v. Riley*, 113 Ind. 208, 213, 214, 15 N. E. 253; *Roots v. Beck*, 109 Ind. 472, 474, 475, 9 N. E. 698; *Cannon v. Stockmon*, 36 Cal. 535, 540-542, 95 Am. Dec. 205, 207, 208.

Another witness testified that some time between 1880, when appellant became the owner of the paper title to lot 82, and 1886, said Elbert H. Shirk offered to buy the real estate in dispute from her. This offer was made long after the time the court below was justified by the evidence in finding that the statute had run and the title became absolute in the owner of lot 81, and could not, therefore, affect the title of the cross-complainants, who claim under said Shirk. *Meyer v. Hope*, 101 Wis. 123, 128, 77 N. W. 720; *Tobey v. Secor*, 60 Wis. 310, 19 N. W. 353; *McLane v. Canales* (Tex. Civ. App.) 25 S. W. 29; *Pacific, etc., Co. v. Stroup*, 63 Cal. 150, 153, 154; *Cannon v. Stockmon*, 36 Cal.

535, 538, 539, 95 Am. Dec. 205; *Furlong v. Coonley*, 72 Cal. 322, 14 Pac. 12; *Chapin v. Hunt*, 40 Mich. 595; *Walbrunn v. Ballen*, 68 Mo. 164; 3 *Washburn on Real Prop.* (6th Ed.) § 1970. What would have been the effect of such offer if made before the statute had run, we need not determine.

In 1886 appellant erected a brick dwelling house on lot 82, with the eaves projecting several inches over the frame dwelling house on the real estate in dispute; and it is claimed by appellant that thereafter the possession of the real estate in controversy by the owner of lot 81 was not exclusive. Whether said projecting eaves gave appellant any possession of the real estate in dispute, we need not determine, for the reason that it had not continued 20 years when this suit was commenced. See, however, *Buswell on Limitations & Adverse Possession*, p. 347, and note 2. But conceding, without deciding, that thereafter the possession of the real estate by the owner of lot 81 was not exclusive, as contended by appellant, it is sufficient answer to say that when said brick house was built the statute had already run in favor of the owners of lot 81, and their title thereto was not affected thereby, under the rule already stated.

After considering all the evidence, we are satisfied that the same fully sustains the finding and judgment of the court below. Judgment affirmed.

(163 Ind. 529)

NEW KANAWHA COAL & MINING CO. v. WRIGHT et al. (No. 20,410.)

(Supreme Court of Indiana. Nov. 29, 1904.)

REAL ESTATE AGENTS—COMPENSATION—QUANTUM MERUIT—HARMLESS ERROR.

1. A complaint alleged that plaintiffs were employed to take charge of defendant's real estate as agents to rent the same and collect the rents; that they performed their part of the contract by procuring responsible tenants for the property; that defendant revoked their contract of agency without compensating them for their services. *Held* that, treating the action as on the quantum meruit for services on the contract performed by plaintiffs, the complaint was sufficient.

2. Error in sustaining a demurrer to a proper pleading is harmless where evidence admissible under the pleadings was admitted on the trial.

3. The contract under which plaintiffs took charge of defendant's property as agents, and rented the same, provided that, as compensation, they should have a percentage of the rents collected, and also provided for revocation of the agency at any time by defendant. *Held*, that on a revocation of the agency after plaintiffs had rented the property, and before any rent had been collected or was due, defendant was liable for reasonable compensation for the services rendered, though defendant did not violate the contract by revoking the agency.

Appeal from Circuit Court, Vigo County; James E. Plety, Judge.

Action by Don Wright and another against the New Kanawha Coal & Mining Company. From a judgment for plaintiffs, defendant appeals. Transferred from the Appellate Court

under Act March 13, 1901 (Acts 1901, p. 590, c. 259; Burns' Ann. St. 1901, § 1337u). Affirmed.

C. A. Royse, for appellant. S. K. Duvall, for appellees.

DOWLING, C. J. The complaint in this case alleged that the appellant, the New Kanawha Coal & Mining Company, being the owner and having the control of property in Vigo county, Ind., in October, 1900, entered into an agreement with the appellees, Don Wright and Sanders Arthur, by the terms of which the appellees were to take charge of the said property, rent the same, collect the rents, pay themselves for their services out of said rents, and account to the appellant for the balance of the moneys so collected; that on March 2, 1901, acting under the said agreement, the appellees rented all the real estate of the appellant, consisting of 219 acres of land in said county, with the dwellings thereon, to one Meneely, a responsible tenant, for the term of five years, for an annual rental of \$350; that soon after appellees had rented said land to Meneely, to wit, on March 18, 1901, and after the approval and delivery of the lease by the appellant, and before appellees could collect any of the rents under said lease, the appellant, without giving the appellees any compensation for their said services, revoked their authority to act as its agents; that, if the appellees had been permitted by the appellant to collect the rents accruing under the said lease as provided in said agreement, they would have been entitled to \$250, which would have been a reasonable charge for their services; that the appellant is indebted to them in that amount, etc.

The overruling of a demurrer to the complaint for want of facts is the first error assigned. Treating this as an action upon the quantum meruit for services performed by real estate agents under an agreement alleged to have been fully performed by them, the complaint is probably sufficient. *Shilling v. Templeton*, 66 Ind. 585; *Jenney Electric Co. v. Branham*, 145 Ind. 314, 316, 41 N. E. 448, 33 L. R. A. 395; *Board v. Gibson*, 158 Ind. 471, 483, 63 N. E. 982.

The first paragraph of the answer was a general denial, and the second a special plea to the effect that the services mentioned in the complaint were performed under an agreement in writing made by the parties October 11, 1900, and that the appellant performed all the conditions of said agreement on its part. A copy of the writing referred to was filed with the answer as an exhibit. This contract stated that the appellant had appointed Wright & Arthur its agents in Vigo county, Ind., with authority to act for that company in caring for its real estate and buildings in Nevins township, in said county, the renting of the houses and farm, and the collection of rents due and to become due, and the eviction by legal process

of tenants in arrears for rent and trespassers upon the real estate, but that no lease of the farm was to be made without approval of the company, or without the reservation of all rights in the coal, shale, and clay for brick and tile. It further provided that for their services Wright & Arthur were to receive 25 per cent. of the rents collected from the buildings, and 10 per cent. of the rents collected from the farm. The company expressly reserved the right to revoke the authority of Wright & Arthur to act as its agents. Other stipulations were contained in the contract, but they have no bearing upon this case, and need not be further noticed.

A demurrer to the second paragraph of the answer was sustained, but the error, if any, was harmless, as the plaintiffs properly gave the writing in evidence on the trial. *Kerstetter v. Raymond*, 10 Ind. 199, 204, 205; *Brown v. Perry*, 14 Ind. 32.

The cause was submitted to the court for trial, and, at the request of the defendant, a special finding of facts was made, and conclusions of law were stated thereon. The court found that on October 6, 1900, the defendant was, and ever since had been, a corporation doing business and owning and controlling property in Vigo county, Ind.; that on said day, the plaintiffs and defendant entered into the contract in writing hereinbefore mentioned; that as such agents the plaintiffs procured one Meneely, a responsible person, as tenant of defendant's real estate for a term of five years, upon terms satisfactory to the defendant; that the defendant accepted the services of the plaintiffs, and received Meneely as its tenant on the terms obtained by the plaintiffs; that by said written agreement plaintiffs were to collect the rents of defendant's lands, and to take their compensation out of such rents; that the defendant, by the terms of the contract, had the right to revoke it at any time; that on March 18, 1901, before the commencement of this action, and before the plaintiffs had an opportunity to collect pay for their services in the manner provided for, the agreement was revoked by the defendant.

The first and second conclusions were statements of abstract rules of law, and require no notice. The third conclusion of law was that the appellees, Wright & Arthur, ought to recover from the defendant company for their services \$175. Exceptions to the several conclusions of law were duly reserved.

The appellees had rendered valuable services to the appellant under the agreement, and, so far as they were permitted by the defendant to do so, they had fully performed the conditions of their contract. By its express terms, the appellant had the right to revoke the appointment of the appellees as its agents, and in exercising this right it acted in pursuance of the contract, and not in violation of it. But the right to revoke

the appointment of the appellees did not include the power to deprive them of their reasonable compensation for services performed by them under the agreement before the revocation of their authority, the benefit of which was received by the appellant. By this exercise of its election to terminate the employment of the appellees before any rents were collected by them out of which they could obtain compensation, the appellant prevented the appellees from fully executing the contract, and deprived them of the benefit of its provisions in their favor. It cannot be denied that the finding of a tenant of the appellant's lands for a term of five years at an annual rental of \$350 was a benefit to the appellant. The contract fixed the compensation of the appellees, as the agents of the appellant, at 25 per cent. of the rents collected from the dwellings, and 10 per cent. of those collected from the tenants of the farm. While the appellant had the right to terminate the contract at any time, yet, after it had received benefits from the services of the appellees, it could not by revoking their appointment escape liability for a reasonable compensation for any work they might have done before such revocation of their authority. No action could be maintained by the appellees on the contract, for the reason that no breach had taken place. But they had the right to sue for the value of the services rendered, of which the appellant had received the benefit, and in that action they not only had the right to introduce the written agreement, but they were bound to do so. *Kerstetter v. Raymond*, 10 Ind. 199, supra; 1 Greenl. § 87; *Shilling v. Templeton*, 68 Ind. 585. The third conclusion of law was correct. Evidence of the value of the work or services was competent and necessary. The proof sustains the finding of facts.

Judgment affirmed.

LAKE ERIE & W. R. CO. v. McFALL (No. 20,437.)¹

(Supreme Court of Indiana. Nov. 29, 1904.)

RAILROADS—DESTRUCTION OF PROPERTY—NEGLIGENCE—INSUFFICIENT SPARK ARRESTERS—PLEADINGS—ANSWERS TO INTERROGATORIES—INSTRUCTIONS—APPEAL—ASSIGNMENTS OF ERRORS—HARMLESS ERROR.

1. A complaint alleging that defendant was operating a railroad through a village in which there were a large number of wooden buildings in close proximity to the track, and on a day when a strong wind was blowing, and it had been unusually dry for a long time, carelessly, negligently, and wrongfully failed to use sufficient spark arresters or other proper appliances to prevent the emission of sparks from its locomotives, and negligently ran the trains at such a high speed that the engines threw out unusually large and dangerous sparks, which set fire to plaintiff's barn, when considered on appeal after a trial in which the issue of negligence was correctly submitted to the jury, sufficiently alleged negligence in respect to the operation of the locomotive, and in permitting fire to escape and destroy plaintiff's barn.

¹ Superseded by opinion, 76 N. E. 400.

2. In an action against a railroad for the destruction of property by fire, a complaint alleging that defendant negligently and carelessly failed to exercise a degree of care proportionate to the increased danger in operating its locomotive, but negligently so operated it at such a high rate of speed as to cause it to throw out dangerous sparks, sufficiently alleged negligence in respect to the operation of the locomotive.

3. On a motion for judgment on answers to interrogatories, the evidence is not to be considered.

4. In an action against a railroad for the destruction of property by fire, where the jury answered in the affirmative a special interrogatory as to whether there was any defect in the construction of the engine or spark arrester, a further answer, in response to a question as to what that defect was, that it was a defect in the spark arrester, was sufficiently specific.

5. Where defendant was not entitled to judgment on the answers to special interrogatories, the refusal of the court to require the answer to a certain interrogatory to be made more specific was harmless.

6. In an action against a railroad for the destruction of property by fire, a charge that if plaintiff's barn was set on fire by sparks carried by the wind against the same, and such sparks were thrown from defendant's engine on account of a defective spark arrester, it would make no difference how the engine was being run as to speed or amount of steam, did not mislead the jury, where in other instructions the court charged with great explicitness that plaintiff must show negligence to authorize a finding in her favor, and the jury, in answer to special interrogatories, found the existence of negligence.

7. Error in the giving and refusal of instructions is waived, where neither their language nor a succinct statement thereof has been set out in appellant's brief.

8. The Supreme Court will not, on assignments of grounds for a new trial which cover merely the sufficiency or legal effect of the evidence, consider answers to interrogatories.

9. Where it was a time of drought, and a locomotive was throwing sparks of larger size and for a greater distance than it would have done if it had had a sufficient spark arrester, which fact the engineer might have discovered from the flying sparks, but nevertheless ran at a high speed with the draft of the locomotive open and its exhaust unusually loud, it was his duty to shut off steam in passing a point in a village at which a barn containing wide cracks through which sparks might enter, and towards which there was a high wind blowing, stood near the right of way.

Appeal from Circuit Court, Hamilton County; W. S. Christian, Special Judge.

Action by Melissa McFall against the Lake Erie & Western Railroad Company. From a judgment for plaintiff, defendant appeals. Transferred from the Appellate Court under Burns' Ann. St. 1901, § 1837u. Affirmed.

John B. Cockrum and Shirts & Fertig, for appellant. Dan Waugh, Gifford & Nash, and Kane & Kane, for appellee.

GILLET, J. Suit by appellee against appellant to recover damages for alleged negligence in permitting sparks to escape from its locomotive and fall upon the barn of appellee, whereby the barn was set on fire and destroyed. The complaint was in three paragraphs, to each of which a demurrer was overruled. There was an answer in

general denial. The jury found in favor of appellee on each paragraph of her complaint, and answered certain special interrogatories propounded by appellant. The latter moved for judgment on the answers to interrogatories, and subsequently filed a motion for a new trial. Each of these motions was overruled, and judgment was rendered for appellee upon the verdict. We shall discuss the questions which the record presents in their order.

It is claimed by counsel for appellant that none of said paragraphs contains a sufficient charge of negligence. The first paragraph charges that on April 25, 1902, defendant was operating a line of railroad running east and west through the village of Hobbs, in Tipton county, Ind.; that there was in said village on said day, and for a long time prior thereto there had been, a large number of wooden buildings, consisting of houses, stables, and other structures, standing on either side of defendant's track and in close proximity thereto, and, among others, that there was a barn or stable owned by plaintiff, of the value of \$150, situated about 100 feet north of said track; that on said day there was a wind blowing from the south or southwest across defendant's track, and in the direction of plaintiff's barn or stable; that it was at that time, and it had been for a long time prior thereto, unusually dry, making said building highly inflammable and easily set on fire by sparks or coals of fire; that on said day defendant, in running its locomotives and trains of cars over its tracks, carelessly, negligently, and wrongfully failed and omitted to use safe and sufficient spark arresters or other proper appliances to prevent the emission of sparks and fire from said locomotives, and negligently, carelessly, and wrongfully ran and operated said locomotives and trains of cars at such a high and unnecessary head or amount of steam and draft, thereby causing said locomotives to emit and throw out unusually large and dangerous sparks and coals of fire, which said sparks and coals of fire defendant negligently and carelessly suffered and permitted to be so emitted, thrown, carried, and spread by said wind off of its right of way and to, upon, and against plaintiff's barn or stable, igniting and setting the same on fire, whereby the same was, without any negligence or carelessness on her part, burned and destroyed, to her damage, etc. The paragraph further alleges matter of excuse for failing to set out what mechanism and construction of spark arrester could or should have been used.

The second paragraph, after alleging the general situation and the condition of drought, as in the first paragraph, and alleging that said conditions were known to the employees of defendant before they had reached or attempted to pass through said village, contains the following: "Yet notwithstanding all of which, said defendant,

its agents and employees so engaged in operating and running one of its locomotives and passenger train of cars attached thereto over its track through said town in the afternoon of said day, negligently and carelessly failed and omitted to exercise that degree of care and caution in operating and running said locomotive and train of cars through said village on said day proportionate to the increased danger and risk of setting fire to said building from sparks and coals of fire thrown from said locomotive in running through said village, but negligently and carelessly and wrongfully so ran and operated said locomotive and train of cars through said village at such a high rate of speed and excessive head and amount of steam, unnecessarily overtaxing the power of said locomotive, thereby causing it to emit and throw out unusually large and dangerous sparks and coals of fire, which the defendant, its agents and employees, negligently and carelessly so suffered and permitted to be so emitted and thrown out and carried by said wind off of the defendant's right of way to and against the said barn or stable of the plaintiff, thereby igniting and setting the same on fire, and completely burning it up and destroying it, without any carelessness or negligence on the part of the plaintiff. That the plaintiff, for the want of sufficient knowledge, is unable to set out the facts constituting the negligence of the defendant more specifically than as herein set out."

The third paragraph is substantially the same as the second in respect to the allegations of preliminary facts, but its allegations concerning negligence are: "That said defendant negligently and carelessly failed and omitted to exercise that degree of care and caution proportionate to the increased risk and hazard on account of the conditions above stated, but carelessly and negligently ran one of its passenger trains in the afternoon of said day over its said track through said town at an unusual and excessive rate of speed; that by reason of which unusual and excessive rate of speed, and excessive pressure of steam in said locomotive, great and unusual quantities of dangerous sparks and coals of fire were emitted and thrown from said engine, which said defendant carelessly and negligently suffered and permitted to be so emitted and thrown and carried and spread by said wind so blowing off of the defendant's right of way, and into and against the plaintiff's barn or stable, igniting and setting the same on fire, whereby the same was burned up and totally destroyed, without any carelessness or negligence on the part of the plaintiff."

It is clear that the first paragraph of the complaint contained a sufficient charge of negligence in respect to the operation of the locomotive. It is also our opinion that, considering the entire allegation relative to the spark arrester, the paragraph mentioned con-

tained a sufficient charge of negligence in permitting fire to escape to and destroy appellee's barn. Chicago, etc., R. Co. v. Kreig, 22 Ind. App. 393, 53 N. E. 1033. "Safe" and "sufficient" are relative terms when applied to a spark-arresting device, and the word "prevent" was evidently used by the pleader in the sense of to hinder, check, or retard. The record discloses that the question was fully laid before the jury as to whether the spark arrester in the locomotive which set the fire was of standard pattern and in good order, and it further appears that the jury was correctly instructed as to the measure of appellant's duty in that respect. The pleading, therefore, comes to us so thoroughly impressed with the theory which the trial stamped upon it that we do not feel at liberty to assume that it was the purpose of the pleader in effect to treat appellant as an insurer with respect to the sufficiency of the appliance. In other words, it is a case where the construction suggested by us above must be given the pleading, to the end that the theory of the parties below and of the trial court shall be the accepted theory here.

As to the second paragraph, we think it plain that it contained a sufficient charge of negligence in respect to the operation of the locomotive. It is not to be forgotten that, in a case where the facts alleged disclose a duty, the charge of negligence takes on a technical significance, and that a very general averment relative to what was negligently done or omitted will ordinarily be a sufficient averment of negligence as against a demurrer.

We need not determine whether the third paragraph is sufficient. As above stated, the verdict is shown to rest on each paragraph, and the first and second paragraphs afford a sufficient foundation for a finding in appellee's favor.

We deem it unnecessary to give space to set out in full the findings of the jury in response to the special interrogatories submitted. On a motion for judgment on answers to interrogatories, the evidence is not to be considered, and it cannot be said, considering the double charge of negligence in the first paragraph, that facts might not have been shown under the issues which would have warranted a verdict for appellee on that paragraph, notwithstanding the facts found by the jury. As to the verdict on the second paragraph, we deem it clear that there was no inconsistency between the verdict and the answers to the interrogatories.

The twenty-sixth and twenty-seventh interrogatories propounded to the jury, and the answers returned to said interrogatories, were as follows: "(26) Was said fire caused by reason of any defect in the construction or design of the engine or spark arrester therein? Ans. Yes, (27) If you answer the last question in the affirmative, state what said defect was. Ans. Yes, by defect in spark arrester." The jury, as other answers

to interrogatories and the evidence indicate, in its effort to reconcile the testimony introduced by appellant, that said appliance was in good order at the time that the locomotive started on its westward trip, with the testimony that it was spreading fire between the city of Elwood and the city of Tipton, which are situate on either side of the village of Hobbs, adopted the theory that the spark arrester was out of repair from the time of leaving Elwood. The jury also found that although the trainmen might have discovered, by the exercise of due care, the fact that sparks were escaping, so as to have prevented the fire complained of, yet it was not practicable to make an examination of the appliance while the locomotive was fired up. The spark arrester was not offered in evidence, and there was no direct testimony as to its condition after the locomotive started on said trip. In these circumstances we think that the trial court did not err in refusing to require the jury to make a more specific and definite answer to the twenty-seventh interrogatory. Taking the facts which the jury found to exist, it is evident that it was purely a matter of conjecture as to the precise nature of the defect in the spark arrester during the time that the locomotive was running between Elwood and Tipton. The answer was as certain as appellant was entitled to under the facts. McDoel v. Gill, 23 Ind. App. 95, 53 N. E. 956.

The answer to the twenty-fifth interrogatory, when construed in connection with the eighteenth interrogatory and the findings above indicated, makes it tolerably clear in what respect, in the jury's opinion, the conductor "failed to use sufficient caution under existing circumstances." But the matter just referred to is really, in view of the findings, an excrescence upon the case, and, whatever answer the jury might have made concerning the conductor, appellant would not have been entitled to judgment on the answers to interrogatories. Therefore the refusal of the court to require the answer to the eighteenth interrogatory to be made more specific and definite was in any event harmless.

Instruction No. 18, given by the court to the jury, was as follows: "If you believe from all of the evidence in the case that the plaintiff's barn or stable was set on fire and destroyed by sparks or coals of fire that were carried by the wind to and against the same, and that such sparks and coals were thrown and emitted from the defendant's engine on account of the defective and insufficient spark arrester used on or with such engine, in such case it would make no difference as to the manner in which said engine was being run as to speed or amount of steam." Appellant's counsel complain of this instruction because it omits the element of negligence. It will be observed that the instruction did not charge that appellee was entitled to recover without proof of negligence.

The second instruction stated the gist of the first paragraph of the complaint, and charged the jury that, "In order to find for the plaintiff under this paragraph, you must be able to find by a preponderance of the evidence that the proximate cause of the fire was the alleged negligent operation of the engine, or the alleged negligent failure to use safe and sufficient spark arresters to prevent the emission of fire from the engine." The fifth instruction given to the jury was as follows: "The duty of the defendant to provide screens and contrivances to prevent the emission of sparks or spread of fire was limited to such contrivances as had already been tested and put in use, and it was not required to use every possible contrivance or means which scientific discussion might recommend for such purposes. It was required only to use reasonable care, and to avail itself of the best mechanical contrivances in known practical use. If, therefore, you find that the defendant's locomotive was provided with the best known spark arrester in practical use, and with the most approved mechanical devices for preventing the spread of fire, no negligence can be attributed to the defendant by reason of the condition of said locomotive, if such contrivances and devices were in proper repair, although the evidence may show that said locomotive emitted dangerous sparks of fire." The sixth instruction which the court gave to the jury was in the following words: "As negligence is the gist of the action, the burden is on the plaintiff to prove the negligence charged. And although it shall appear from the evidence that the plaintiff's property was set on fire by a spark from the defendant's locomotive, this of itself does not justify the inference that the defendant was negligent in causing or suffering the spark to be so emitted." The eighth instruction which the court gave reads thus: "A railroad company must exercise reasonable care to provide the most effective contrivances in known use to prevent escape of sparks and coals, but it is not an insurer of their completeness or perfection." The second, fifth, sixth, and eighth instructions were given by the court at the request of appellant. The fourteenth instruction was in the following words: "Neither is it necessary for the plaintiff to recover for her to prove by direct testimony the particular act or acts of negligence charged in the complaint which caused the damage complained of. It will be sufficient on this point if it is shown by all of the facts and circumstances in the case." The eighteenth instruction does not meet with our approval, but we have concluded, since it did not necessarily create the inference that negligence was not an element which was requisite to appellee's recovery, and as the court had charged with great explicitness that she must make out a case of negligence as charged to authorize a finding in her favor, and judging of the matter in the light

of the facts found specially in answer to interrogatories, that the jury was not misled by said instruction.

Appellant's counsel complain of the giving and refusal of certain other instructions, but, as neither their language nor a succinct statement thereof has been set out in appellant's brief, we are constrained to hold that all questions relative to said instructions are waived. *Penn Mutual Life Ins. Co. v. Norcross* (at last term) 72 N. E. 132; *Cleveland, etc., R. Co. v. Stewart*, 161 Ind. 242, 68 N. E. 170; *Pittsburgh R. Co. v. Wilson*, 161 Ind. 701, 66 N. E. 899; *Perry, etc., Co. v. Willson*, 160 Ind. 435, 67 N. E. 183; *McElwaine-Richards Co. v. Wall*, 159 Ind. 557, 65 N. E. 576.

There was expert evidence showing that a locomotive with a standard spark arrester properly adjusted would not throw sparks of the size and for the distance that the locomotive was shown to have thrown them on the trip in question, and, notwithstanding the conclusion of the jury that the spark arrester was in good order when the locomotive started westward, there was room for the opposite inference from the circumstances of the case. Appellant's counsel argue that the evidence is insufficient, on the assumption that the answers to interrogatories serve the purpose of excluding the hypothesis that negligence existed with reference to providing a sufficient spark arrester. The rule in this court is that, on assignments of grounds for a new trial which question merely the sufficiency or legal effect of the evidence, the court will not consider answers to interrogatories. *Chicago, etc., R. Co. v. Kennington*, 123 Ind. 409, 24 N. E. 137; *Staser v. Hogan*, 120 Ind. 207, 21 N. E. 911, 22 N. E. 990; *Ohio & Mississippi R. Co. v. Selby*, 47 Ind. 471, 17 Am. Rep. 719; *Sievers v. Peters Box, etc., Co.*, 151 Ind. 642, 50 N. E. 877, 52 N. E. 899. But even upon the hypothesis of the correctness of the jury's answers to interrogatories, we think that the case was made out. Appellant itself was charged in the first paragraph of the complaint with negligently failing and omitting to use a proper appliance to prevent the emission of sparks, and also with negligently and carelessly running the locomotive with a high and unnecessary amount of steam and draft, thereby causing it to emit and throw out large and dangerous sparks and coals of fire. Whatever may be the right of a railway company to operate its trains at such speed as it sees fit, where it has a proper and sufficient equipment, yet in this case, where the evidence shows that it was a time of drought, that the locomotive was throwing sparks of larger size and for a greater distance than it would have done if it had had a sufficient spark arrester, that the engineer might have discovered the fact from the flying sparks, that the locomotive was running at a high speed and with its draft open, that the exhaust was unusually loud, that the barn of appellee stood near

the right of way and contained wide cracks through which sparks might enter, and that there was a high wind blowing from the right of way in the direction of the barn, we think that it was the duty of the engineer, as the jury specially found, to shut off steam in passing that point.

Judgment affirmed.

(184 Ind. 252)

CURRENT et al. v. LUTHER et al. (No. 20,403.)*

(Supreme Court of Indiana. Nov. 29, 1904.)

ELECTIONS—CONDUCT—PREPARATION OF BALLOTS.

1. Burns' Ann. St. 1901, § 5341, requires the question of township appropriations in aid of the construction of railroads to be submitted to popular vote; section 5343 provides that the vote shall be conducted in the manner provided by law for general elections; section 6214 creates a board of election commissioners, and enjoins upon it the duty of preparing and distributing ballots for the election of officers to be voted for in the county, other than those to be elected by all voters of the state; section 6258 provides that, where local questions are submitted to the electors of a district, the board of election commissioners of the county including the district shall cause a brief statement of the question presented to be printed on the ballot, and the words "Yes" and "No" to be printed under the same; section 6260 provides that, when a township holds an election at a time other than the time of a general election, the election shall be held in conformity with the act relative to general elections, and local officers shall perform the same duties as in case of general elections. *Held*, that ballots used in a special township election on the question of railroad aid appropriations must be printed and delivered to the proper officers by the election commissioners, as prescribed by the statute relative to elections, and the preparing and distributing of ballots by persons other than the officers prescribed by law, and the use of such unauthorized ballots, render the election void.

2. Provisions of law in regard to the preparation and distribution of ballots by designated officers are mandatory, and must be strictly obeyed.

Appeal from Circuit Court, Henry County; J. W. Headington, Special Judge.

Proceedings by William J. B. Luther and others to procure an appropriation to aid the Cincinnati, Richmond & Muncie Railroad Company in the construction of a railroad through Stony Creek township, in which Henry L. Current and others filed remonstrances. From a judgment ordering the appropriation to be made, the remonstrators appeal. Transferred from the Appellate Court under Burns' Ann. St. 1901, § 1337u. Reversed.

Forkner & Forkner, for appellants. Robbins & Starr and Wm. A. Brown, for appellees.

JORDAN, C. J. At the June term, 1900, 25 freeholders and over, under section 5340, Burns' Ann. St. 1901 (section 4045, Horner's Ann. St. 1901), petitioned the board of commissioners of Henry county, Ind., for an ap-

propriation of \$8,000 to be made by Stony Creek township, in said county, to aid the Cincinnati, Richmond & Muncie Railroad Company in the construction of a railroad through that township. The board of commissioners, after considering the petition, ordered that after giving the notice prescribed by section 5342, Burns' Ann. St. 1901, an election be held on June 14, 1900, at which election the question in respect to the appropriation be submitted to the qualified voters of that township. An election was held at said time, which resulted in the greatest number of votes cast at said election being in favor of the appropriation; the majority in favor thereof being nine. Appellants appeared before the board of commissioners and filed a written remonstrance whereby they assailed the sufficiency of the petition, and challenged and contested the validity of the election held as aforesaid. It is alleged in the remonstrance that said election as held on June 14, 1900, is illegal and void for numerous reasons, among which are the following, as specified and set forth in paragraph 3 of the remonstrance, under specification "e"; said reasons being substantially as follows: The printed ballots used and cast at the election held under the order of the board of commissioners on said day were not prepared and caused to be printed by the election commissioners of said county, but, on the contrary, they were prepared by other persons without any authority of law, and in violation of the statute. It is charged that there were election commissioners at said time, duly appointed and qualified, who were ready and willing to act in procuring the ballots for said election, but the agents and attorney of the railroad company in question caused said ballots to be printed in a county other than Henry county, under their own dictation and control, and then caused said ballots, when so printed, to be transmitted by their own agent to one of the petitioners herein, who secretly kept them in his office, without any notice being given to the election officers; that he retained them in his office until the morning of the day of the election before he delivered them to the inspector of said election, although said inspector had called for said ballots before that morning. It is charged that the action of the aforesaid parties in regard to preparing, printing, and holding the possession of the ballots was had in violation of law, and for the purpose of gaining an advantage thereby. By other specifications in the third paragraph it is charged that voters were bribed to vote at said election in favor of said railroad appropriation. The board of commissioners, upon hearing the matters and things set forth in the petition and remonstrance, granted the prayer of the petition, and ordered that the appropriation be made, and accordingly levied a tax upon the taxable property of the township to create a fund for that purpose. The remonstrators appealed to the Henry circuit court,

*Rehearing denied February 18, 1906.

wherein a demurrer was filed by appellees to the remonstrance, and to the several paragraphs and specifications thereof. It was sustained as to some, and overruled as to others. The cause was put at issue by a general denial filed in reply by appellees. Trial by jury; verdict in favor of appellees; judgment thereon granting the prayer of the petition, and ordering that the appropriation and levy be made accordingly. From this judgment, appellants prosecute this appeal.

Counsel for appellants insist with much force and reason that the lower court erred in sustaining the demurrer to specification "e" of the third paragraph of the remonstrance. This specification, as hereinbefore stated, discloses that the ballots used by the voters in voting at the election in question were not officially prepared, or, in other words, they were not caused to be printed, kept, and delivered to the proper officers by the election commissioners as prescribed by the statute relative to elections. Section 5343, Burns' Ann. St. 1901, the same being section 4 of the statute authorizing public aid to railroads, provides that "the whole voting, taking and certifying shall be conducted as nearly as may be in the manner provided by law for conducting the voting and certifying of the votes at the general election for state and county officers." Turning to our general election law, we find that section 6258, Burns' Ann. St. 1901, provides: "Whenever any constitutional amendment or other question is required by law to be submitted to popular vote, if all the electors of the state are entitled to vote on such question, the State Board of Election Commissioners shall cause a brief statement of the same to be printed on the state ballots, and the words 'Yes' and 'No' under the same, so that the elector may indicate his preference by stamping [marking] at the place designated in front of either word. If the question is required by law to be voted on by the electors of any district or division of the state, the board or boards of election commissioners of the county or counties including or included in such division or district, shall cause similar provision to be made on the local ballots. In case any elector shall not indicate his preference by stamping [marking] in front of either word, the ballot as to such question shall be void and shall not be counted." Section 64 of the election statute, being section 6260, Burns' Ann. St. 1901, is as follows: "When any township or county holds an election at a time other than the time of a general election, such election shall be held in conformity with the provisions of this act, and all county and local officers who are required to perform any duties in connection with the general election shall perform the same duties in connection with such special or local election, subject to the same provisions and penalties herein prescribed in case of general elections." By section 6214, Burns' Ann. St. 1901, a board of election commissioners is

created, and the duty enjoined upon it to prepare and distribute ballots for the election of officers to be voted for in such county, other than those to be elected by all of the voters of the state. By section 6263, Burns' Ann. St. 1901, being section 67 of the original act, all laws or parts of laws inconsistent with the provisions of the act are repealed *pro tanto*. The general election law of the state of Illinois contains provisions similar to those embraced in section 6258, *supra*, relative to voting upon constitutional amendments and other public measures. In *County of Union v. Ussery*, 147 Ill. 204, 35 N. E. 618, the question was presented as to whether an election held by the voters of a county to determine whether domestic animals should be permitted to run at large must conform to the provisions of the general election law. The court held in that appeal that the election in question was irregular and void for the reason that it did not conform to the requirements of the statute pertaining to the holding of general elections. In *State ex rel. v. Seibert*, 116 Mo. 415, 22 S. W. 732, the court held that the Australian ballot law of Missouri was applicable to and controlled in elections held by towns to determine the question of issuing bonds, and must be followed; otherwise the election would be invalid. To the same effect is the holding of the court in *Gaston v. Lamkin*, 115 Mo. 20, 21 S. W. 1100.

The question of making an appropriation by a township in this state in aid of the construction of a railroad is one which, under the provisions of section 5841, Burns' Ann. St. 1901, is required to be submitted to the popular vote of the particular township, and therefore clearly comes within the provisions of section 6258, *supra*; and such election must be conducted in accordance with the provisions of the general election law, so far as the same can be made practicable. Our statute governing elections was enacted in the interest of reform and purity of the ballot, and the entire scheme of the law contemplates and requires that in conducting elections thereunder, except as may be otherwise provided, an official ballot, and none other, must be used by the voters in casting their votes. Such ballots are required to be prepared and distributed by the officials therein prescribed. The provisions of the law in regard to the preparation and distribution of ballots by the officers designated are clearly mandatory, and must be strictly obeyed. *Parvin v. Wimberg*, 130 Ind. 561, 30 N. E. 790, 15 L. R. A. 775, 30 Am. St. Rep. 254; *Conaty v. Gardner*, 75 Conn. 48, 52 Atl. 416; *County of Union v. Ussery*, 147 Ill. 204, 35 N. E. 618; *Attorney General ex rel. v. McQuade*, 94 Mich. 439, 53 N. W. 944. Of course, in an election similar to or like the one here involved, where, under the particular circumstances, there are provisions of our Australian ballot law which are plainly impracticable, exceptions may become necessary, and

may in such cases be made. *Strebin v. Lavengood* (Ind. Sup.) 71 N. E. 494. If no board of election commissioners existed in Henry county when it became necessary to prepare the ballots for the election herein in controversy, under the circumstances, it became the duty of the clerk of the circuit court to appoint two members of such board to serve in connection with the clerk in preparing and distributing the ballots for the use of the voters at the election as the law exacts.

The petition presented to the board of commissioners is called in question by counsel for appellant. It may be said, however, that it conforms to the provisions of the statute, and is clearly sufficient.

We do not deem it necessary to express an opinion upon other questions argued, for appellants' counsel concede that the cardinal question presented is as to whether the preparation and distribution of the ballots by persons other than by the officers prescribed by law renders the election invalid and void. We are clearly of the opinion that by the use of the unauthorized ballots, as shown by the averments of specification "e" of paragraph 3 of the remonstrance, the election in controversy is invalid and voidable, and should be set aside in this proceeding.

The judgment is accordingly reversed, and the cause remanded to the lower court for further proceedings consistent with this opinion.

(164 Ind. 360)

CHICAGO, I. & L. RY. CO. v. WOODWARD.
(No. 20,418.)¹

(Supreme Court of Indiana. Nov. 29, 1904.)

CARRIERS—SHIPMENTS OF LIVE STOCK—CONNECTING CARRIERS—LIABILITY OF INITIAL CARRIER—BURDEN OF PROOF—DAMAGES.

1. Where property is delivered to a carrier to be transported to a point beyond its line, the failure of the shipper to designate the particular line by which the property shall be forwarded authorizes the carrier to select any usual or reasonably direct route after reaching the terminus of its own line.

2. In the absence of a special contract, where it is necessary for a carrier to deliver the shipment to another carrier before the point of destination is reached, the liability of the first carrier ceases when it has safely carried and delivered the shipment to the second without unreasonable delay.

3. In the absence of statutory or charter disability, a common carrier may contract for the safe carriage and delivery of property at a destination beyond its own line, and render itself liable for loss, injury, or delay on the line of another carrier, over which a part of the transportation is performed.

4. In an action against an initial carrier for damage to cattle in the hands of the connecting carrier, where the jury specially found that it was not all of defendant's contract to safely carry and deliver the cattle to the connecting carrier, it would be presumed, in support of a general verdict for plaintiff, that the further part of defendant's contract was to safely carry and deliver to the consignees.

5. In an action against an initial carrier for damage to cattle in the hands of a connecting carrier, where the special findings were silent

concerning the condition of the cattle when they arrived at their destination, and concerning their treatment while in the custody of the connecting carrier, but stated that the cattle were in good condition when delivered to the connecting carrier, it would be presumed, in aid of a general verdict for plaintiff, that the loss and injuries resulted to the cattle while in the hands of the connecting carrier.

6. A common carrier is liable for any loss or injury, to property intrusted to him for transportation unless it is able to show that the loss or injury was caused by the act of God or the public enemy, or that it resulted from the inherent nature of the thing itself, and, in case of cattle, from the natural disposition and exertions of the animals themselves.

7. Where cattle were delivered to a carrier without any limitation of its common-law liability, and without the shipper assuming any of the hazards of shipment, or being required or permitted to accompany and care for the cattle, and it is shown that the cattle were delivered at their destination in an injured condition, the burden is on the carrier to prove that the cause of injury was one for which it is not liable.

8. Where cattle were delivered by a carrier in a condition which rendered them unsalable for food, expenses incurred by plaintiff in restoring them so as to make them marketable, which redounded to the benefit of defendant by enhancing the price of the animals, were proper elements of plaintiff's damage.

Appeal from Circuit Court, Clinton County; Joseph Claybaugh, Judge.

Action by Hal Woodward against the Chicago, Indianapolis & Louisville Railway Company. From a judgment for plaintiff, defendant appeals. Transferred from the Appellate Court, under Burns' Ann. St. 1901, § 1337u. Affirmed.

E. C. Field, H. R. Kurrie and Guenther & Clark, for appellant. J. C. Farber and B. F. Ratchiff, for appellee.

HADLEY, J. Appellee sued appellant to recover damages for failure to transport and deliver live stock at place of destination in a safe and sound condition. South Raub is a village situate 12 miles south of Lafayette. Appellant owns and operates a railroad running through Raub and Lafayette, and thence in a northerly direction to Monon, 40 miles north of Lafayette, where it intersects appellant's other railroad, running from Chicago in a southeasterly direction to Indianapolis; appellant thus having a continuous railroad from Raub to Indianapolis. The Big Four has a railroad running direct from Lafayette to Indianapolis, and the distance from Raub to Indianapolis via Lafayette and the Big Four is 70 miles shorter than via Monon and appellant's continuous track, and requires four hours' less time by freight train to make the journey. On July 4, 1901, appellee, by his agent, William Neaville, loaded 39 fat steers, in a sound and good condition, into two of appellant's cars at Raub, and, as alleged in the complaint, under an agreement that the cattle were to be safely transported to Indianapolis, and delivered to Neaville, Elliott & Johnson in a good and

¹ 6. See *Carriers*, vol. 9, Cent. Dig. §§ 923, 929.

² Rehearing denied, 73 N. E. 810.

sound condition for market on July 5th. The cattle arrived at their destination about 6 o'clock the following morning, July 5th. Only 38 animals were delivered to the consignees, and these were in an enfeebled and bruised condition, which rendered them unfit for market. It required until July 8th, or three days of rest, feed, and care, to render them fit for market, and then the market had declined, and the animals become reduced in weight, all to the plaintiff's damage, etc. Under appellant's general denial, there was a judgment for appellee for \$293. So far as the record discloses, the shipping contract was in parol. There was no direction by the shipper as to the route of shipment, and no limitation of the carrier's common-law liability.

The first claim of appellant's counsel is that the company should have had judgment upon the answers to certain interrogatories propounded to the jury, notwithstanding the general verdict in favor of appellee. The special findings relied upon by appellant as entitling it to the judgment are these: Neaville gave the only shipping directions, which were that the cattle were consigned to Neaville, Elliott & Johnson, at Indianapolis, Ind. At the time Neaville was advised by appellant's agent that the cattle were to go from Lafayette via the Big Four. From Lafayette via the Big Four was the ordinary and usual route for the shipment of live stock from Raub to Indianapolis. The cattle were loaded about 9 a. m., and carried north on the first train after loading, which arrived at Lafayette on time. The cattle were carried in the first train that left Lafayette for Indianapolis after they were loaded, which train was late, and left Lafayette at 4:30 p. m. There was no other route by which the cattle could have been forwarded by which they could have reached Indianapolis earlier than they did. None of the injuries complained of were inflicted before the cattle were delivered to the Big Four, and their value was not reduced by anything that happened to them before their delivery to the Big Four. The appellant was left free to select the route by which the cattle should be forwarded from Lafayette to Indianapolis. Appellant's own line to Indianapolis via Monon was a much longer, indirect, and unusual route for the shipment of live stock from Raub to Indianapolis. To carry the cattle safely and without unavoidable delay to Lafayette, and there deliver them to the Big Four, was not all of the agreement on the part of appellant. There were no special findings concerning the vicissitudes of the cattle while in the hands of the Big Four. The contention of appellant rests on the theory that its carrier's liability existed only during the transportation of the cattle over its own road from Raub to Lafayette, and their delivery to the Big Four at the latter place. If this contention is sustained, appellant was entitled to judgment in its favor, for it is

clear from the special findings that the cattle had suffered no injury or depreciation in value from shipment when turned over to the Big Four at Lafayette. We concede the rule of the common law to be that, in cases where property is delivered to a carrier to be transported to a point beyond the initial carrier's line, the failure of the shipper to designate in the contract of shipment the particular line by which the property shall be forwarded is held to fully authorize the first carrier to select any usual or reasonably direct and safe route after reaching the terminus or usual point of departure from his own line. *Snow v. Railway Company*, 109 Ind. 422-425, 9 N. E. 702. Moreover, in the absence of a special contract, where it is thus necessary for a carrier to deliver the shipment to another before the point of destination is reached, the liability of the first carrier ceases when it has safely carried and delivered to the second without unreasonable delay. *U. S. Express Co. v. Rush*, 24 Ind. 403; *Railroad Co. v. Morton*, 61 Ind. 539, 573, 28 Am. Rep. 682; *Railroad Co. v. Condon*, 10 Ind. App. 536, 38 N. E. 71; *Railroad Co. v. Dickson*, 31 Ind. App. 451, 67 N. E. 538, and authorities collated. Under the facts of this case, appellant was doubtless justified in forwarding the cattle from Lafayette via the Big Four. But this does not meet the question before us for decision. The complaint proceeds upon the theory that appellant undertook by special agreement to safely carry and deliver the cattle at Indianapolis in a good and sound condition, and was left at liberty to choose for itself the route by which it would reach the destination. The power of appellant to make such a contract is no longer within the limit of reasonable controversy. The overwhelming weight of authority now holds to the doctrine that, in the absence of statutory or charter disability, a common carrier may contract for the safe carriage and delivery of property at a destination beyond its own line, and render itself liable for loss, injury, or delay on the line of another carrier, over which a part of the transportation is performed. In such instance the second becomes the agent of the first carrier. *Cummins v. Dayton, etc., Co.*, 9 Am. & Eng. R. R. Cas. Ind. 36. See large number of cases collated in 6 Cyc. 481, and 6 Am. & Eng. Enc. 631. Under the averments of the complaint, it was competent for appellee to prove that appellant by the shipping contract affirmatively undertook safely to carry and deliver the cattle to the consignees at Indianapolis. If he succeeded in making such proof, it was sufficient to charge appellant with any loss or damage to the cattle whether it accrued while in the care and custody of appellant, or in the care and custody of the Big Four, its chosen agent. The jury specially found that it was not all of appellant's contract to safely carry and deliver the animals to the Big Four at Lafayette, and we must presume, in support of the gen-

eral verdict, that the further part of appellant's contract was to safely carry and deliver to the consignees at Indianapolis, as alleged in the complaint. And since the special findings are silent concerning the condition of the cattle when they arrived at Indianapolis, and concerning their treatment and freedom from loss or injury while in the care and custody of the Big Four, we must further presume, in aid of the general verdict, that the loss and injuries complained of, and found by the jury to exist, resulted to the animals while in the hands of the latter company. *City of South Bend v. Turner*, 156 Ind. 418, 423, 60 N. E. 271, 54 L. R. A. 398, 83 Am. St. Rep. 200; *Wright v. Railroad Co.*, 160 Ind. 589, 66 N. E. 454. The court did not err in overruling appellant's motion for judgment on the answers to interrogatories.

Appellant further complains of the giving of instructions numbered 1, 2, and 4, requested by the plaintiff. The matter assailed in the two first is, in substance, that the burden was on the plaintiff to show by a preponderance of the evidence that the cattle were delivered to the consignees at Indianapolis in a bad and injured condition; and if it was thus shown by the evidence that there were 39 head delivered to the defendant by the plaintiff, as averred, and they were in a good, sound condition when delivered, and that there was unreasonable delay in the transportation of the same, and that the cattle were delivered at Indianapolis in an injured condition, then, to avoid liability, it became incumbent upon the defendant to show by a preponderance of evidence a reasonable excuse for any such delay and injuries, and for any shortage in the number received. Appellant's counsel concede that these instructions properly stated the rule relating to inanimate or dead freight lost or injured by a carrier in its transportation, but they insist that it does not apply to live stock, which is possessed with inherent power and propensities to injure itself and each other when confined and in a state of frenzy in a moving freight car. According to the well-established rule, a common carrier is liable for any loss or injury to property intrusted to him for transportation, unless he is able to show that the loss or injury was caused by the act of God or the public enemy, or that it resulted from the inherent nature of the thing itself, as by the natural decay of fruits, vegetables, ice, fresh meats, and other perishable property, and the like. And it is equally well established that railroad companies are common carriers of live stock, with the same imposed duties and responsibilities that exist at common law relative to the carriage of goods, except that they are not to be held liable for losses and injuries resulting from the natural disposition and exertions of the animals themselves. In short, it may be said generally that a carrier, when free

from negligence, is liable for no loss or injury from causes over which he had no control. 6 Cyc. 381, and authorities cited. But the question is, since it is shown that the cattle were delivered at their destination reduced in number and in an injured condition, which party has the burden of establishing the cause of injury—the shipper or the carrier? It will be remembered that appellant received the cattle for transportation without any limitation of its common-law liability, and without the shipper assuming any of the hazards of shipment. Appellant thereby incurred the general obligation of the common carrier to safely carry. The loss and injuries suffered might have happened from the natural propensities of the animals, and without fault on the part of the carrier, or they might have happened from accident or from the negligence of the carrier. Under the shipping arrangement, neither the shipper nor his agent was required or permitted to accompany and care for the cattle. The shipper had not equal means of knowledge with the carrier as to the cause of injury. There is therefore in such a case strong reason and almost universal precedence for laying upon the carrier the onus of bringing the cause of injury within one of the excusatory exceptions recognized by law. *Lindsley v. Railroad Co.*, 36 Minn. 539, 33 N. W. 7, 1 Am. St. Rep. 692; *McCoy v. Railroad Co.*, 44 Iowa, 424; *Railroad Co. v. Durkin*, 78 Ill. 395; *Evans v. Railroad Co.*, 111 Mass. 142, 15 Am. Rep. 19; *Dow v. Packet Co.*, 84 Me. 490, 24 Atl. 945; *Railroad Co. v. Wynn*, 88 Tenn. 320, 14 S. W. 311; *Kinnick v. Railroad Co.*, 69 Iowa, 685, 29 S. W. 772; 5 Am. & Eng. Ency. 469; 6 Cyc. 383. The cases cited by appellant are not authorities in a case like this. And in cases where special contracts are made limiting the carriers' liability, or stipulating that the shipper shall accompany the stock, and the like, a different rule generally prevails. The court did not err in giving the first and second instructions requested by the plaintiff.

By No. 4 of the instructions complained of, the jury were told that in estimating the plaintiff's loss and damage, if any were shown, they should take in consideration all items of expense in keeping, feeding, and caring for the cattle while being put in a fit condition for market, and of shrinkage and depreciation, if any shown, in their market value. Appellant claims that the true measure of plaintiff's damages was the difference in the market value at the place of destination, upon arrival, less the freight. This is a strange argument for appellant to make, in view of the fact that it was clearly shown that the cattle were on the day of their arrival at Indianapolis, from exhaustion, in an unsalable condition for food. To have been tested by the market for condemned animals would have proven disastrous to the defendant. But by being treated as food animals, or rather as pos-

sessing the elements of recuperation and restoration to food animals, which could be attained and the same made marketable in a short time and at small expense, and which, as the evidence shows, was accomplished within three days, and at an expense of \$25 or \$30, and the cattle then sold for beef at a price within a small fraction per pound of the price brought by animals of the same class on the day of arrival—makes it very clear that the instruction was beneficial to the defendant. Having received the benefit of the sale of the animals for food, no question can be made that the expenses incurred in their preparation and their consequent shrinkage were proper elements of plaintiff's damage. The *Caledonia*, 157 U. S. 124-139, 15 Sup. Ct. 537, 39 L. Ed. 644.

We find no error in the record. Judgment affirmed

(163 Ind. 534)

TOLEDO, ST. L. & W. R. CO. v. FENSTERMAKER. (No. 20,418.)

(Supreme Court of Indiana. Nov. 20, 1904.)

RAILROADS — FIRES—NEGLIGENCE—BURDEN OF PROOF—EVIDENCE AS TO DAMAGES—INSTRUCTIONS.

1. In an action against a railroad company for damages from fire alleged to have been caused by sparks from defendant's locomotives, where it is shown that there was no fire on the premises before, and no probable cause for the fire except the locomotive; that the wind was blowing from the railroad to the place where the fire started; and that the fire started soon after the locomotive passed—a conclusion that the fire was communicated by the locomotive is justified.

2. In an action against a railroad company for damages from fire, where the negligence alleged was in using insufficient or defective spark arresters, plaintiff has the burden of proving such negligence.

3. Where the complaint in an action against a railroad company alleged the burning over of a meadow and a timber lot on plaintiff's farm by fire from a locomotive, in determining the amount of damages it was proper to ask a witness the value of the farm before the fire and immediately thereafter.

4. In an action against a railroad company for negligently setting fire, it was proper to instruct the jury that it should take into consideration the opportunity of the several witnesses for knowing the things about which they testified, their demeanor while testifying, their interest or otherwise in the result, the probability of their several statements, and, from all the circumstances, determine on which side of the case is the preponderance of evidence.

5. Error in giving an instruction is not available to appellant where he requested an instruction involving the same question.

Appeal from Superior Court, Grant County; B. F. Harness, Judge.

Action by George Fenstermaker against the Toledo, St. Louis & Western Railroad Company. From a judgment for plaintiff, defendant appeals. Transferred from the Appellate Court under Burns' Ann. St. 1901, § 1337u. Affirmed.

Guenther & Clark, for appellant. John A. Kersey, for appellee.

72 N.E.—30

HADLEY, J. Suit and recovery by appellee for fire damages. There were two fires—one on October 8, 1901, and one on April 22, 1902. There are two paragraphs of complaint—one based on the October and the other on the April fire—and each is predicated on the alleged negligence of appellant in using on its locomotives a defective and insufficient spark-arresting device. The only assignment is the overruling of appellant's motion for a new trial. The grounds of the motion are the insufficiency of the evidence, the admission of improper evidence, and the giving and refusing of certain instructions.

It was in proof that the plaintiff's property was destroyed by fire as follows: His meadow on October 8th, and his wood and timber lot, known as the "sugar camp," on April 22d; both of these lots lying north and adjoining appellant's right of way, which at that place runs east and west. On October 8th, about noon, in a very dry time, and within five minutes after a freight train went west on appellant's railroad, a fire was discovered in the dry grass of the meadow, beginning about two feet north of the right of way. There was at the time a brisk wind blowing towards the northwest, and the fire developed and spread so rapidly that it burned over two-thirds of the field, and consumed twenty rods of rail fence, before it could be brought under control. On April 22, about 1 p. m., in an equally dry time, and within five minutes after a passenger train went west, a fire broke out in the southwest corner of appellee's sugar camp. There was a strong wind blowing from the southwest to the northeast. The surface of the sugar camp was covered with dry grass, weeds, leaves, and brush. The fire went rapidly and violently ahead of the wind, mounting into the tops of some of the trees, and reached and consumed a log dwelling house and all its contents, and destroyed about all the trees in the lot. Before the passage of the trains there was no fire at either place, nor in the vicinity, and had not been for an indefinite period, except that in a field of another owner, on the south side of the railroad, the northeast corner of which, but for the right of way, would have cornered with the southwest corner of appellee's sugar camp, a plowman a few minutes before the passage of the train and the origin of the fire, at a point somewhere about twenty rods west of the sugar-camp corner, had fired and burned two piles of cornstalks that had been bunched in harrowing down the stalks. There was positive testimony of two witnesses that no fire escaped from the burning stalks. There was no direct proof in either instance that fire escaped from the passing locomotives and ignited the grass on appellee's land. Aside from the locomotives, the evidence discloses no known actual or probable cause of either one of the fires. On the other hand, appellant produced tes-

timony that all its locomotives were equipped with a device that was in common use on the railroads in the country, and which was the best and most-approved device known for arresting sparks, and which was in good condition on each of the locomotives at the time of the fires.

Appellant's counsel argue that, to recover, appellee must prove (1) that the fire which ignited the grass on appellee's premises came from the locomotives; and (2) that it escaped because of the defective or insufficient condition of the spark arrester.

1. With respect to the first proposition, it is contended by appellant that there was no evidence that the grass at either time was ignited by sparks from the locomotives. Courts have seldom gone so far as to hold it essential for a plaintiff to prove by direct and positive evidence that the fire complained of escaped from a locomotive. Such fires usually occur in broad daylight, when flying sparks are not plainly visible, and in many cases it would be manifestly unfair and unreasonable to give judgment against a plaintiff because he failed to produce a witness who saw the fire escape from the locomotive and fall upon the combustible matter. This and the other courts of the country generally have recognized the juster rule that where it is shown that there was no fire on the premises before, and no probable cause for the fire except the locomotive; that the wind was blowing from the road to the grass; and that the fire broke out soon after the engine passed—these things are circumstances sufficient to justify the conclusion that the fire was communicated by the train. *Railroad Co. v. Ind. Horseshoe Co.*, 154 Ind. 322, 56 N. E. 766, and cases collected on page 333, 154 Ind., page 769, 56 N. E. Under the rule the evidence fully warrants the finding that the fires complained of were set by appellant's passing trains. But, second, is it sufficiently shown that the fire escaped from appellant's engine through the company's negligence? The law recognizes the right of a railroad company to employ fire for the production of steam in the operation of its road, and, while the company is required to observe a high degree of care to prevent the escape of fire, yet when it has adopted and maintains, in good repair and condition, the device generally recognized and used by railroads as the best and most approved for the suppression of fire, it has done all the law requires of it; and if the engine equipped with such device is properly handled, and fire escapes notwithstanding such precautions, it must be regarded as an accident for which the railroad company is not liable. In the case at bar the complaint charges that the fires resulted from the negligence of appellant in using insufficient spark arresters. The burden is upon the plaintiff to prove the negligence charged. *Railroad Co. v. Hixon*, 110 Ind. 225, 11 N. E. 285; *Railroad Co. v. Ostrander*, 116 Ind. 239, 263, 15

N. E. 227, 19 N. E. 110. But like the escape of fire, negligence may be established by circumstantial as well as by direct evidence, or by both. On behalf of the defendant there was testimony by two employes to the effect that they inspected the locomotives said to have communicated the fires, on the morning of the fires, before going out, and also upon the following morning, and at all times found the spark arrester in each in good condition—"good as new," said one witness. The testimony of these two witnesses was given 18 months after the alleged inspections. Two railroad officials, introduced by appellant as expert witnesses, testified that a locomotive properly equipped with such a spark arrester as had been shown to be on the engines in controversy, in good condition and properly operated, will not throw out sparks that can be carried through the atmosphere 64 feet and ignite combustible substances. A third, in answer to the same question, answered that he did not know. There was other testimony relating to the same subjects, and from all of it the jury found as a fact, in answer to an interrogatory propounded to them by the court, "that the spark arrester in the engine that started the fire on October 8th and April 22d was not in good repair at the time of the fire." If it was a fact that the spark-arresting device, when in good condition and properly operated, would prevent the escape of fire in such quantity as could be borne 64 feet and set fire to the grass—and it was shown that fire did escape and ignite the grass that distance from the road—the escape of the fire would be very powerful evidence that the device was in bad or an insufficient condition. At all events, we think it sufficient to justify the jury in finding the negligence alleged in the complaint established.

2. Appellee alleges in one paragraph of the complaint that he is the owner of certain specifically described real estate; that appellant's railroad traverses it; that on October 8th there was on said tract a clover field of the value of \$100, and a fence of the value of \$50, which on said day were destroyed by fire through the negligence of appellant, and the destruction of said property was to the appellee's damage of \$150. In another paragraph containing the same general averments, it was added that on April 22d there were growing on the described premises 1,000 sugar, oak, beech, and other trees, of the value of \$1,000, which were destroyed, etc., and by the destruction of which the plaintiff was damaged \$1,000, for which he asks judgment. On the subject of damages the court permitted a witness, over the objections of appellant, to answer the following question: "State what that farm was worth immediately before that fire?" The witness answered that the farm was worth \$80 or \$90 per acre before the fire, and immediately after the fire

\$1,000 less. The ground of objection was that the damages claimed are to the sugar camp, and that no such special damages are alleged to have accrued from a destruction of the trees as will enable appellee to prove damages to the farm generally. We do not see the force of appellant's objection. It was perfectly proper to allege and prove the elements of damage to the farm as a farm; that it had growing on it, as a source of wood and timber supply to the farm, wood and timber trees, which were destroyed. The fact that the value of the timber was alleged did not change the character of the proof, nor make the averment a claim for damages to the wood and timber lot, as distinguished from the whole tract as a farm. There was no effort to prove the value of the timber. The destruction of the growing trees and clover was an injury to the freehold, and there was no error in allowing the witness to answer the question.

3. Appellant complains of the giving of instructions numbered 1, 2, 3, 9, 10, 14, 17, and 18. By No. 1 the court directs the jury that it should take into consideration the opportunities of the several witnesses for knowing the things about which they testify, their conduct and demeanor while testifying, their interest or lack of interest, if any shown, in the result of the suit, the probability or improbability of their several statements, in view of all the other evidence, facts, and circumstances proved on the trial, and from all these circumstances determine upon which side of the case is the weight or preponderance of the evidence. Nos. 2 and 3 were to the same effect, and all fully sustained by *Fifer v. Ritter*, 159 Ind. 11, 64 N. E. 463, and *Strebin v. Lavengood* (Ind. Sup.) 71 N. E. 494. No. 9 is to the effect that if it is found that the fires were set by means of sparks which escaped from the engines, and were blown a distance of 60 or 70 feet into the clover and grove of the plaintiff, such fact might be properly considered in determining whether the spark arresters were in proper condition. Even if improper, under the state of the evidence, the giving of this instruction does not constitute reversible error. No. 10 is objected to because not pertinent to the evidence. There was evidence introduced to which the instruction would have been applicable, but for some reason it was subsequently withdrawn. If it was error to give this instruction, the error is not available to appellant, because the court repeated the same charge, in substance, in No. 8 given as requested by appellant. We have carefully examined Nos. 14, 17, and 18, and compared them with the whole body of the instructions, and we find that each correctly stated the principle involved, and, taken as a whole, the instructions were quite as favorable to appellant as it had the right to ask. The court refused to give instructions 1 and 4 requested by the defendant. The first directed the jury

to return its verdict for the defendant. This was correctly refused. The fourth was in these words: "You are instructed that the burden of proof is upon the plaintiff to prove all the material allegations of one or more paragraphs of his complaint by a fair preponderance of the evidence. In this case, if the evidence is evenly balanced or preponderates in favor of the defendant on any material allegation, then your verdict should be for the defendant as to that paragraph of the complaint containing an allegation in support of which the evidence is evenly balanced, or on which the preponderance is in favor of the defendant." This the court modified and gave as follows: "You are instructed that the burden of proof is upon the plaintiff to prove all the material allegations of one or more paragraphs of his complaint by a fair preponderance of the evidence. In this case, if the evidence is evenly balanced or preponderates in favor of the defendant on any material allegation, then your verdict should be for the defendant as to such allegation." In the fourth instruction given as requested by the plaintiff, the court had previously directed the jury that the plaintiff, in order to recover on any paragraph of his complaint, must prove all the material averments of such paragraph by a preponderance of the evidence. In the first clause of the instruction as modified, the court restated the same thing, and the language in the latter clause to the effect that, if the evidence was evenly balanced or preponderated in favor of the defendant on any material allegation, their verdict should be for the defendant as to such allegation, could not have misled them. Under the clear and repeated statements of the court, the jury could not have misunderstood that a finding for the defendant on a material allegation was equivalent to a finding for it on the paragraph of complaint embracing such allegation.

We find no error. Judgment affirmed

(163 Ind. 555)

GRIFFITHS v. STATE. (No. 20,465.)

(Supreme Court of Indiana. Nov. 29, 1904.)

LARCENY — RAILROAD CARS — OWNERSHIP — EVIDENCE — EXTRAJUDICIAL CONFESSIONS — CORPUS DELICTI — INSTRUCTIONS — APPEAL — REVERSAL.

1. In a prosecution for larceny of clothing from a railway car, the ownership was laid in "the Lake Shore & Michigan Southern Railway Company." An employé of the shipper testified that the box containing the clothing was shipped on "the Lake Shore & Michigan Southern Railway," and other witnesses, describing themselves as employés of "the Lake Shore & Michigan Southern," testified to facts showing the larceny from a car referred to as being at the time in the "Lake Shore Yards." Held, that the terms used by the witnesses in referring to the railroad being familiar appellations, and there being a striking similarity between all of them and the name of the railroad as alleged, it was competent for the jury to infer

that the company alleged was the bailee from whose custody the goods were stolen.

2. While an extrajudicial confession by defendant is not sufficient to make out the corpus delicti, it may be considered with other corroborative evidence in determining whether the fact of the commission of the crime charged has been established.

3. In a prosecution for larceny of clothing from a railroad car, the ownership was laid in the railway company, and several witnesses testified to the larceny from the car, which was broken open in the railroad yards. Defendant confessed to a special agent of the company that he committed the larceny "up there in the yard," and on the trial did not testify or call a witness. *Held*, that the jury were warranted in finding the averment of ownership proved.

4. Where defendant's conviction was plainly right on the evidence, the appellate court was prohibited by Burns' Ann. St. 1901, § 1964, from reversing the same by reason of an erroneous instruction contained in the record.

Appeal from Circuit Court, Elkhart County; W. J. Davis, Special Judge.

John Griffiths was convicted of larceny, and he appeals. *Affirmed*.

Dodge & Dodge, for appellant. C. W. Miller, Atty. Gen., W. B. Hile, W. C. Geake, C. C. Hadley, and L. G. Rothschild, for the State.

GILLETT, J. Appellant was charged by affidavit and information with the larceny of one coat and three vests. The ownership was laid in the Lake Shore & Michigan Southern Railway Company. There was a verdict of guilty, and, over a motion for a new trial, appellant was sentenced to imprisonment in the Indiana Reformatory, and was also fined and disfranchised.

It is claimed by appellant's counsel that there was no evidence of ownership as charged, and it is therefore urged that the court should have given a peremptory instruction, which was tendered by appellant, to return a verdict of not guilty. It appears from the evidence that on December 28, 1903, the firm of Hart, Schaffner & Marx shipped a box containing one coat and three vests, with other clothing, from their factory in Rochester, N. Y., to their wholesale house in Chicago, Ill. The goods were shipped in a car marked "N. Y. & C., 14,051." On the night of January 4, 1904, this car was broken open in the railroad yards at Elkhart, Ind., while en route to Chicago, and the articles of clothing particularly mentioned above were stolen from the box in said car. In addition to the evidence stated, an employé of Hart, Schaffner & Marx testified that the box of clothing was shipped on "the Lake Shore & Michigan Southern Railway." Witnesses who described themselves as employés of "the Lake Shore & Michigan Southern" testified to facts showing a larceny of a coat and three vests from said box while it was in said car; and, in their testimony, said witnesses referred to the car as being at that time in the "Lake Shore Yards." A witness (Henry C. Lards) described himself at the outset of his testimony as a "special agent for the Lake Shore

& Michigan Southern Railway Company."

It appears from his evidence that about 10 days after the larceny he was detailed to look into the circumstances of the theft, and to endeavor to ascertain the identity of the perpetrator. After prosecuting inquiries at Elkhart, Lards caused the arrest of appellant, and it appears without contradiction that the latter confessed to the larceny of a coat and three vests from a car "up there in the yard." On his direct examination the witness testified that prior to the time the clothing was stolen it was in the "custody of the Lake Shore & Michigan Southern Railway Company." On cross-examination the witness was asked this question: "Now, Mr. Lards, you spoke of that coat and vests. You don't know whether they were in the possession of the Lake Shore Railway, or not, do you, excepting what the defendant told you?" The witness answered: "Why, what the defendant and Hart, Schaffner & Marx told me." The question and answer last mentioned evidently referred to what the witness had testified to in his direct examination relative to the custody of the goods. Appellant did not call a witness. There was nothing to modify or even to restrain such inferences as the jury might have been warranted in drawing from the testimony upon the question of ownership. As to all other points the evidence was ample and uncontradicted. It being evident that the terms used by the witnesses, other than Lards, in referring to the railroad, were used as familiar appellations, and as there is a striking similarity between all of such references and the name "The Lake Shore & Michigan Southern Railway Company," which the evidence shows to have been an existing corporation or company, we are of opinion that it was competent for the jury to infer that it was the bailee from whose custody the goods were stolen. See *Evansville, etc., R. Co. v. Snapp*, 61 Ind. 303; *Evansville, etc., R. Co. v. Smith*, 65 Ind. 92; *Wabash Ry. Co. v. Forshee*, 77 Ind. 158; *Cincinnati, etc., R. Co. v. McDougall*, 108 Ind. 179, 8 N. E. 571.

We have thus far laid no stress, in dealing with the question as to the effect of the evidence, on the confession of appellant. If it were competent for the jury to make use of the self-dis-serving statement which the evidence shows that he made to the witness Lards relative to the company's custody of the goods, there could be no question as to the evidence warranting a conviction. We are mindful of the rule that the extrajudicial confession of a defendant is not alone sufficient to make out the corpus delicti, and that, as applied to a prosecution for larceny, it is required that there must be proof of the commission of the particular larceny charged. We deny, however, that such is the operation of the rule that the confession of the defendant cannot in any case be used to accelerate the force of inferences concern-

ing the fact of ownership, or that his confession cannot be considered, along with proper corroborative evidence, in determining whether the fact of the commission of the crime charged has been made out. Concerning the doctrine as to the corpus delicti, Prof. Greenleaf says: "It is obvious that on this point no precise rule can be laid down, except that the evidence 'ought to be strong and cogent,' and that innocence should be presumed until the case is proved against the prisoner in all its material circumstances beyond any reasonable doubt." 8 Ev. § 80. Mr. Bishop states the doctrine thus: "Extrajudicial confessions, alone and uncorroborated, are, by abundant authority and with little dissent, deemed inadequate to establish the corpus delicti. Yet slight corroboration may suffice. And perhaps the confessions alone will, if made before a magistrate. On the whole, the doctrine is that the entire case, keeping distinctly in mind the corpus delicti, must be proved beyond a reasonable doubt. And special care should, by the general accord of the courts, whatever we deem of the reason, be given to this part of the case. In reason, no part should be neglected, and to open any other door to a wrongful conviction is the same evil doing as to open this one. Such is the substance of the doctrine, but some judges spin it out a little more finely." 1 New Cr. Proc. §§ 1058, 1059. In 12 Cyc. 484, it is stated that "the corroborative evidence need not be such as would be required to convict the accused independently of the confession." See, also, 1 Elliott on Ev. § 292; McCulloch v. State, 48 Ind. 109; Selfert v. State, 160 Ind. 484, 67 N. E. 100, 98 Am. St. Rep. 340. We think that the rule concerning the corpus delicti is largely one of caution, and that, where the corroborating circumstances so far supplement the confession as to make it clear that the crime charged was committed, a conviction should not be overthrown for the want of evidence.

In considering the evidence concerning the ownership of the clothing, the fact is not to be forgotten that appellant had authority to cross-examine the witnesses called by the state, and that he had the right to the compulsory process of the court to procure the attendance of witnesses. Although an ultimate fact may rest only upon slight evidence offered by the party having the burden of proof, yet, if the opposite party has it in his power readily to show the truth, but omits to do so, why may not the jury treat the point as not within the range of the dispute? In such a case we regard it as proper to consider the absence of any opposing evidence. Com. v. Webster, 5 Cush. 205, 52 Am. Dec. 711; Frazier v. State, 135 Ind. 38, 34 N. E. 817. Of course, appellant was not to be subjected to any adverse inference from his failure to testify, but in other respects it was proper to regard him as an ordinary party. Coupling the con-

fession of appellant with the other evidence relative to the fact of the ownership in the railroad company charged to have been the owner in the affidavit and information, and considering the entire lack of opposing evidence, we think that it may be said that the jury was not only warranted in finding the averment concerning ownership proved, but, indeed, that any other finding would have been wholly unjustifiable.

Complaint is made as to the giving of certain instructions. While in some particulars there appears to be a basis for verbal criticism of said instructions, yet, considering the charge as a whole, we are of opinion that the jury was not misled. Furthermore the result was plainly right upon the evidence, and in such a case, even if there were an erroneous instruction exhibited by the record, we should not be authorized to reverse. Section 1904, Burns' Ann. St. 1901.

Judgment affirmed.

(164 Ind. 447)

FUDGE v. MARQUELL (No. 20,397).¹

(Supreme Court of Indiana. Nov. 29, 1904.)

BILLS AND NOTES—MATERIAL ALTERATION—BONA FIDE PURCHASERS—PLEADING—NON EST FACTUM—BURDEN OF PROOF—INSTRUCTIONS.

1. In an action on a note, evidence held sufficient to sustain a verdict for defendant.

2. In reviewing the sufficiency of the evidence to sustain a judgment, the appellate court only considers that which is most favorable to the prevailing party, and, if it is sufficient in all material respects, the judgment will be sustained, though the preponderance of the evidence may apparently be in favor of the losing party.

3. Where an issue of non est factum had been on file in an action on a note some three months before the trial of the cause, plaintiff was not entitled to a new trial on the ground of surprise, consisting of defendant's evidence that he did not execute the note in controversy, under Burns' Ann. St. 1901, § 568, providing that a new trial may be granted for "surprise which ordinary prudence could not have guarded against."

4. Plaintiff's schedules of personal property filed with the township assessor, and verified by her affidavit, which contained no statement of her ownership of the note sued on, was admissible to support an allegation that she did not own the note at the time such schedules were made.

5. Where the jury found that plaintiff was the bona fide holder and owner of a note sued on, the admission of tax schedules executed by her, containing no disclosure of such note, was harmless, even if erroneous.

6. Where the execution of a note sued on was denied under oath, the burden was on the plaintiff throughout the trial to establish the execution of the note by a preponderance of the evidence.

7. In an action on a note, the burden of proof of a defense of subsequent material alteration is on the defendant.

8. Where defendant denied executing the note sued on, but admitted signing a note for a different amount, and payable to a different payee, an instruction that if defendant executed the note in suit, and at the time of its ex-

¹ 7. See *Alteration of Instruments*, vol. 2, Cent. Dig. § 240.

² Rehearing denied, 73 N. E. 895.

execution it called for \$700, but thereafter, without defendant's consent, it was altered by the payee and the person to whom it was assigned, or by either of them, so as to call for \$765, or was so altered by their procurement, and plaintiff purchased the note with knowledge thereof, she was not an innocent purchaser, and would be chargeable with the infirmities of the note, was proper.

9. Where, in a suit on a note, the answer contained a general plea of non est factum, the defendant was entitled to prove that after the execution of the note it was altered without his consent.

Appeal from Circuit Court, Delaware County; Joseph G. Leffler, Judge.

Action by Susannah E. Fudge against Henry M. Marquell. A judgment was rendered in favor of defendant, and plaintiff appealed to the Appellate Court, by which the case was transferred to the Supreme Court, as authorized by Burns' Ann. St. 1901, § 1337u. Affirmed.

W. W. Orr, for appellant. Templer & Templer, for appellee.

JORDAN, J. Appellant in this action (plaintiff below) alleged in her complaint that appellee, Henry M. Marquell, and Willard E. Baldwin, on February 6, 1899, executed a promissory note payable to the order of Lewis N. Martin at the Delaware County National Bank of Muncie, Ind., for the sum of \$765, with interest and attorney's fees; that Martin, before the maturity of this note, assigned it, by indorsement, to John M. Fudge, who subsequently, before its maturity, in like manner assigned it to the plaintiff. Appellee filed his separate answer to the complaint, in eight paragraphs. Appellant's demurrer was sustained to the fourth, fifth, sixth, and seventh, leaving therein the first, second, third, and eighth paragraphs. Upon leave of court, appellee filed an additional paragraph, numbered 9. The first paragraph of the answer in question is the general denial. The second is a plea of non est factum. The third is likewise an answer of non est factum, whereby appellee alleged that he did not execute the note in suit; that the same was not his act or deed. The eighth paragraph appears to be a special plea of non est factum, by which appellee admits that he signed the note in suit, but avers that since he signed the same it has been altered and changed, without his knowledge or consent, in this: At the time he signed the note, it called for \$700, as principal, and John M. Fudge was the payee therein. Said principal sum has been changed so as to make the note call for \$765, and the payee has been changed from John M. Fudge to one Lewis N. Martin. By the ninth paragraph it is averred that the plaintiff is not the bona fide holder or owner of the note in suit; that John M. Fudge is the owner thereof, etc. The answer, except the ninth paragraph, is verified by the affidavit of appellee. Plaintiff replied by the general denial. The issues as

joined were tried by a jury, and a verdict returned in favor of appellee. Along with this verdict the jury returned answers to a series of interrogatories. Over appellant's motion for a new trial, judgment was rendered that she take nothing by her action, and that the defendant recover of her his costs laid out and expended.

The general error relied on for a reversal by appellant arises out of the ruling of the court in denying the motion for a new trial. The specific grounds advanced and argued by her counsel are (1) that the verdict is not sustained by sufficient evidence and is contrary to law; (2) surprise occurring at the trial; (3) error of the court in admitting in evidence the tax schedules of plaintiff for the years of 1900 and 1901; and (4) that the court erred in giving certain instructions to the jury.

The contention of appellant's counsel that the evidence is not sufficient to sustain the verdict and is also contrary to law is untenable. The evidence discloses that John M. Fudge, the husband of appellant, prior to February 6, 1899, was conducting a boot and shoe store at the town of Albany, Delaware county, Ind. About that date it appears that he sold his stock of goods to Willard E. Baldwin, who is the principal in the note in suit. A part of the purchase price for the sale of the goods was paid in cash, and the remainder was to be settled by Baldwin executing notes with surety thereon. It appears to have been agreed between Baldwin and appellee that the latter would become his surety on two notes to be executed by him to Fudge for the deferred payments of the purchase money. At the trial appellee testified positively that Baldwin presented two notes for him to sign as surety, each of which was payable to John M. Fudge, and not to Lewis N. Martin, who appears as the payee in the note in suit. One of the notes was for \$700, and the other for \$800. Appellee testified that these notes were the only notes which he signed as surety for Baldwin, and that he never signed or executed the note upon which appellant sought to recover against him in this action. It is true that his evidence upon the issue of non est factum was controverted by two witnesses introduced by appellant; one being her husband, John M. Fudge, and the other Joseph Le Favour, one of her attorneys in the suit. Appellee, however, appears to have introduced evidence which tended to impeach the character of these witnesses; and the jury seems to have accepted the testimony of appellee, along with the other circumstances, as the most credible evidence, for it is expressly disclosed by their answers to the interrogatories that they found in favor of appellee upon the issue of non est factum.

In reviewing the sufficiency of evidence to sustain the judgment below, we consider only that which is most favorable to the prevailing party in the lower court; and, if it

is sufficient to support the judgment in all material respects, we cannot, under such circumstances, disturb it, although the preponderance may apparently be in favor of the losing party.

In regard to the question urged by appellant, that she was surprised at the trial by the evidence given by appellee to the effect that he did not execute the note in controversy, it may be said that there are no substantial grounds or reasons presented by her to sustain this contention. Appellee's answer tendering the issue of non est factum had been on file some three months before the trial of this cause. She certainly should have anticipated that he would testify in support of this issue. While it is true that section 568, Burns' Ann. St. 1901, provides that a new trial may be granted for "surprise which ordinary prudence could not have guarded against," nevertheless it is well settled that a party has no reason to be surprised at evidence introduced by his adversary which was admissible under the issues in the case. *Helm v. The Bank*, 91 Ind. 44; *Bingham v. Walk*, 128 Ind. 164, 27 N. E. 483; *Working v. Garn*, 148 Ind. 546, 47 N. E. 951; *Ellis v. City of Hammond*, 157 Ind. 267, 61 N. E. 565.

On the trial, appellee, over the objections of appellant, was permitted to introduce in evidence the tax lists or schedules of appellant returned for the years of 1900 and 1901. These lists were shown to have been made by her under the direction of the township assessor, and were verified by her affidavit. The schedules in question were on file in the auditor's office of Delaware county. They were offered and admitted as evidence only as tending to support the issue tendered by the ninth paragraph of the answer, to the effect that appellant was not the owner of the note in suit. This note was not returned for taxation in these schedules. Under the circumstances, therefore, they were admissible as tending to prove that the note was not owned by her on the 1st day of April of each of the aforesaid years. It could be properly assumed that her tax lists or schedules embraced all of the personal property owned by her on the 1st day of April of each of the respective years. *Lefever v. Johnson*, 79 Ind. 554; *Cincinnati, etc., R. Co. v. McDougall*, 108 Ind. 179, 8 N. E. 571; *Towns v. Smith*, 115 Ind. 480, 16 N. E. 811, and cases there cited. But if it were conceded that the court erred in admitting the schedules in controversy, such error is shown to have been harmless, for the jury expressly find, in their answer to an interrogatory, in favor of appellant on the issue tendered by the ninth paragraph of the answer.

The court, at the request of appellant, and on its own motion, appears to have fully instructed the jury upon the questions at issue between the parties. Counsel for appellant, however, insist that the court erred in giving

on its own motion the third, tenth, eleventh, and fourteenth instructions.

By the third instruction of the court's charge the jury was advised that under the issues formed by the complaint, and the first, second, and third paragraphs of the answer, the burden was cast upon the plaintiff to prove the material allegations of her complaint by a fair preponderance of the evidence. The court further stated therein that, under the issues joined by the complaint and the eighth paragraph of the answer, the burden was upon the plaintiff to prove the material allegations of her complaint by a fair preponderance of the evidence, and that the burden was on the defendant to prove the material allegations of the said paragraph of his answer. In connection with the third instruction, the tenth informed the jury that the burden of proof as to the execution of the note in suit by appellee was on the plaintiff, and, in order to recover, she must prove its execution by a fair preponderance of the evidence. Neither of the instructions in question is erroneous. The authorities fully affirm that when the execution of a written instrument is denied under oath, as was the execution of the note in issue by the first, second, and third paragraphs of the answer, the party relying on such instrument has throughout the trial the affirmative of that issue, and the burden rests upon him to establish the execution of the instrument by a preponderance of the evidence. *Carver v. Carver*, 97 Ind. 497, and cases there cited; *Wines v. State Bank*, 22 Ind. App. 114, 53 N. E. 389; *Stair v. Richardson*, 108 Ind. 429, 9 N. E. 300; section 367, Burns' Ann. St. 1901 (section 364, Horner's Ann. St.). Where, however, a party admits the execution of a promissory note or other instrument, but sets up as a defense that it was subsequently, without his consent, materially altered, the burden is upon him to establish the alleged alteration by a preponderance of the evidence. *Insurance Co. v. Brim*, 111 Ind. 281, 12 N. E. 315, and cases cited on page 283, 111 Ind., page 316, 12 N. E.; 2 Cyc. p. 233, subd. 9.

The eleventh instruction advised the jury that if they believed from the evidence that the defendant, Marquell, executed the note in suit, and at the time of its execution it called for \$700, but thereafter, without the consent of said defendant, it was altered by Martin, the payee, and John M. Fudge, to whom it was assigned, or by either of these parties, so as to call for \$765, or was so altered by their procurement, and that the plaintiff, before she became the owner thereof, had notice of such alteration, and with such knowledge purchased the note, then she would not be an innocent purchaser, and would be chargeable with the infirmities of the note. Under the evidence in the case, the court committed no error in giving this instruction.

The fourteenth charge, of which appellant

complains, states that the defendant had the right, under the issues in the case, to make the defense (1) that he did not execute the note in suit; (2) that after its execution it was changed and altered in some material part. Counsel urge as an objection to this charge that it assumes that under the general plea of non est factum the defendant had the right to prove alterations of the note, other than the particular one alleged in paragraph 8 of the answer. A general plea of non est factum will authorize the party interposing it to prove that after the execution of the instrument in question it was altered without his consent. As the answer contained a general plea of non est factum, therefore the defendant was not confined alone to the eighth paragraph. *Palmer v. Poor*, 121 Ind. 135, 22 N. E. 984, 6 L. R. A. 469; *Conner v. Sharpe*, 27 Ind. 41.

We have examined and carefully considered all of the questions upon which appellant relies, but find no available error in the record. The judgment is therefore affirmed.

(163 Ind. 503)

COOLMAN v. STATE. (No. 20,289.)

(Supreme Court of Indiana. Nov. 29, 1904.)

CRIMINAL LAW—HOMICIDE—REAL PROPERTY—LICENSE—RIGHT TO GIVE—DEADLY WEAPON—MALICE—INTENT—BURDEN OF PROOF—INSTRUCTIONS—JURY—MISCONDUCT OF BAILIFF.

1. Whether the witnesses in a criminal case should be separated is entirely within the discretion of the trial court.

2. When an order for a separation of witnesses is made in a criminal case, it is proper for the court to except the prosecuting witness, and to permit him to be present during the trial.

3. It is not error for the court to refuse requested instructions, the substance of which is contained in other instructions given.

4. Where the court in its charge had not in terms instructed the jury concerning their duty in case they were satisfied of defendant's guilt of some degree of murder, but were in doubt as to which degree, it was error for the court to refuse to charge the rule prescribed by Burns' Ann. St. 1901, § 1893, that, when there is a reasonable doubt in which of two or more degrees of an offense defendant is guilty, he must be convicted of the lowest degree only.

5. Where, in a prosecution for homicide, there was no evidence of combat between defendant and deceased, it was not error for the court to refuse an instruction based on the supposition that there had been a combat.

6. Though malice is not conclusively presumed from the use of a deadly weapon, malice may be inferred from the intentional use of a deadly weapon in such a manner as to cause death.

7. Where it appeared that defendant killed deceased by the intentional use of a deadly weapon, the burden of showing that such use of the weapon was in self-defense or otherwise excusable, or occurred on sudden heat caused by adequate provocation, was on defendant.

8. The fact that decedent's wife and minor stepdaughter owned the land on which deceased resided with his wife and family did not give the stepdaughter the right to authorize defendant to remain on the land after deceased ordered him to leave.

9. An instruction that if the jury found beyond a reasonable doubt that defendant shot deceased, using a deadly weapon in such a manner

as was likely to, and did, produce death, defendant's purpose to kill might be inferred from the act itself, and if the jury should find beyond a reasonable doubt that the killing was done purposely, without sufficient justification, legal excuse, or provocation, malice might be inferred from such act, was proper.

10. After the jury, in a prosecution for homicide, had been deliberating for 20 hours, the foreman stated to the bailiff, "We can't agree upon a verdict, and have agreed to disagree." The bailiff answered that he would see the judge, and, after doing so, returned and stated to the foreman that the judge stated that he could not receive a verdict of disagreement; that, if an agreement was reached before a certain time, he would receive the verdict when he returned, otherwise he would receive the verdict when the jury agreed. The foreman replied, "But we must agree to disagree," to which the bailiff said, "Oh, pshaw, Henry!" and closed the door, after which a verdict of guilty of murder in the second degree was returned within two hours. *Held*, that such communication between the bailiff and the jury was a violation of Burns' Ann. St. 1901, § 1897, prohibiting a bailiff from speaking to the jury unless by order of the court, except to ask them whether they have agreed.

Appeal from Circuit Court, Whitley County; Joseph W. Adair, Judge.

Claude L. Coolman was convicted of murder, and he appeals. Reversed.

B. E. Gates, D. E. Whiteleather, and Thomas Gallivan, for appellant. C. W. Miller, Atty. Gen., and W. H. Kissinger, A. E. Grant, C. C. Hadley, W. O. Geake, and L. G. Rothchild, for the State.

DOWLING, C. J. The appellant was duly charged upon indictment in the Whitley circuit court with murder in the first degree. He pleaded not guilty, was tried by a jury, and was found guilty of murder in the second degree. A motion for a new trial was overruled, and judgment was rendered on the verdict. The refusal of the court to grant the appellant a new trial is the error relied on for a reversal of the judgment. The reasons for a new trial discussed by counsel for appellant are the overruling of a motion of the appellant to exclude the prosecuting witness from the courtroom while the other witnesses were being examined, the giving of certain instructions, the refusal to give others tendered by the appellant, the incompetency of one of the jurors trying the cause, the alleged misconduct of the bailiff in charge of the jury in making improper communications to them during their deliberations, and the supposed misconduct of the jury in conversing with the bailiff in regard to the consequences of their failure to agree.

Whether the witnesses should be separated or not was a matter entirely within the discretion of the court. *Southey v. Nash*, 7 Car. & P. 632; *Sanders v. Johnson*, 6 Blackf. 50, 36 Am. Dec. 564; *Johnson v. State*, 2 Ind. 652; 8 Ency. Pl. & Pr. 92. Such separation is not required by statute, nor by any rule of the common law. When asked for, it is granted, not of right, but as a favor. *Porter v. State*, 2 Ind. 425. When

an order for such separation of witnesses is made in a criminal cause, it is proper to except the prosecuting witness, and to permit such witness to be present during the examination of the other witnesses. The information which he may furnish to the prosecuting attorney during the trial may be necessary or advantageous to the state, and the same reasons which make it proper for the parties in a civil action, although witnesses, to remain in the courtroom while the evidence in the cause is being heard, justify the court in permitting a witness designated by the state to be present to aid the prosecuting attorney by suggestion and information during the trial of a criminal cause. To exclude the prosecuting witness would in many cases place the state at great disadvantage, by leaving its representative without aid from any one having personal knowledge of the case.

Instruction numbered 2 tendered by the appellant related to the doctrine of self-defense by one originally upon the premises of another without right, but who was attempting in good faith to withdraw from the place, and while so leaving was violently assaulted by his adversary under circumstances justifying a belief that the defendant was in danger of great bodily harm. The instruction probably stated the law correctly, but its substance was contained in other instructions given by the court, and especially by instruction numbered 3 tendered by the appellant, and instructions numbered 12, 13, and 14 given at the request of the state.

Instruction numbered 5 tendered by appellant was a statement of the law concerning reasonable doubt—a subject which had been fully and carefully considered in other instructions given by the court. It did contain the additional statement that, "when there is a reasonable doubt in which of two or more degrees of an offense he is guilty, he must be convicted of the lowest degree only." The sentence just quoted was stricken out by the court, and the instruction was given as so modified. The clause above set out was a correct declaration of a statutory rule of law. Section 1893, Burns' Ann. St. 1901; Newport v. State, 140 Ind. 299, 39 N. E. 926. In other instructions the court had clearly advised the jury in regard to the three degrees of homicide included in the charge of murder in the first degree, and had told them what proof was necessary to establish each degree of the felony. But it had not, in terms, instructed them concerning their duty in case they were satisfied of the guilt of the defendant of some degree of homicide, but were in doubt as to which degree. Under the circumstances, we are of the opinion that the instruction should have been given without modification.

Instruction numbered 8 was not applicable to the evidence. It proceeded upon the supposition that there had been a combat between the appellant and the deceased, in which the appellant was the aggressor, but,

from which having withdrawn, he was pursued and unlawfully and violently assaulted by the deceased. There was no evidence of any combat, and it was not necessary to state the law governing such a case. Besides, so far as this instruction declared the law correctly, its substance was given in instruction numbered 3 requested by appellant, and instructions numbered 12, 13, and 14 given at the instance of the state.

Instructions numbered 12, 13, and 17 asked for by appellant attempted, at great length, to set forth the law of self-defense. This doctrine was fully and correctly stated in instructions numbered 7, 9, and 10 tendered by appellant and given by the court, and the instructions so given were quite as minute in their details and as favorable as the appellant had a right to demand. The iteration and reiteration of legal propositions in instructions is neither necessary nor desirable. Such method is calculated to create an impression that the court desires to emphasize and give especial prominence to the subject so treated, with the possible result that the jury are led to believe that on the point so emphasized the court is seeking to indicate its own views of the legal effect and weight of the evidence.

Instruction numbered 18 tendered by the appellant and refused by the court was as follows: "Malice is not implied from the use of a deadly weapon, and the fact that the defendant used a deadly weapon does not cast upon the defendant the burden of proof on this point; and if, upon considering the whole evidence in the case, there is reasonable doubt whether malice entered into the act, you must acquit the defendant of murder." This instruction is directly at variance with the law as declared by this court. It is true that malice is not conclusively presumed from the use of a deadly weapon, because there may be cases where the use of such a weapon is, or seems to be, necessary, and is therefore lawful. But malice may be inferred from the intentional use of a deadly weapon in such manner as to cause death. *McDermott v. State*, 89 Ind. 187; *Kingen v. State*, 45 Ind. 518; *Miller v. State*, 37 Ind. 432; *Clem v. State*, 31 Ind. 480; *Smith v. State*, 142 Ind. 288, 41 N. E. 595. If it appeared from the proof that the defendant killed the deceased by the intentional use of a deadly weapon, the burden of showing that such use of the weapon was in self-defense, or otherwise excusable, or occurred upon a sudden heat, caused by adequate provocation, rested upon the defendant. The court did not err in refusing to give the instruction.

Instruction numbered 19 tendered by appellant reads thus: "The presumption is that the owner of property is entitled to the possession of the same until the contrary is shown. The court therefore instructs you, gentlemen of the jury, that if you find from all the evidence in this case that the real estate upon which the alleged crime was

committed was owned by Emma E. Stallsmith and her minor daughter by a former marriage, Pearl Shrader, as tenants in common, and that the said Pearl Shrader lived and resided in the dwelling thereon, and that the defendant was upon said premises at the invitation and with the consent of the said Pearl Shrader, unless the state has proved beyond a reasonable doubt that the said Pearl Shrader, at the time she invited or consented to the defendant entering upon said premises, had in legal manner released or relinquished her right to so permit the defendant to enter and be upon said premises, then I charge you that you cannot find that the defendant was at a place where he had no right to be." The fact that Pearl Shrader, the minor stepdaughter of the deceased, owned an interest in the land on which the deceased resided with his wife and family, did not give the stepdaughter the right to license or authorize the appellant to remain upon said land after the deceased, who was the responsible head of the family, ordered him to leave. It was not incumbent upon the state to prove that the stepdaughter had relinquished any of her rights in the premises. If her stepfather was in possession and had the general control of the premises as husband and father, so long as he was recognized as the head of the family he had the right to exclude the appellant therefrom, even if the appellant came there as a visitor or suitor of the stepdaughter. *Commonwealth v. Wood*, 97 Mass. 229; *Commonwealth v. Carroll*, 124 Mass. 30; *Commonwealth v. Hill*, 145 Mass. 305, 14 N. E. 124; *Elijah v. Taylor*, 37 Ill. 247; *Davis v. Watts, Adm'r*, 90 Ind. 372.

Counsel for appellant next complain of the seventh, twelfth, thirteenth, fourteenth, and fifteenth instructions which were given at the request of the state. The seventh was as follows: "If you should find from all the evidence in the case beyond a reasonable doubt that the defendant did shoot and kill Frank H. Stallsmith, using a deadly weapon in such manner as was likely to and did produce death, the purpose on the part of the defendant to kill may be inferred from the act itself. And if you should further find from all the evidence, beyond a reasonable doubt, that the killing was done purposely, without sufficient justification, legal excuse, or reasonable provocation, then malice may also be inferred from such act." We discover no error in this instruction. The twelfth, thirteenth, fourteenth, and fifteenth instructions given at the instance of the state related to the authority of the deceased to order the appellant from the premises, and to compel his departure therefrom. As already stated in this opinion, if the deceased, as the head of the household, was living on the premises with his wife and stepdaughter, who were the owners of the farm, he had the right to say whether the appellant should come upon such lands as a visitor,

or should remain after entering thereon. No question of the title to or ownership of the land was involved in the case, and, under the proof, such ownership had nothing to do with the rights of the parties. The instructions objected to were in harmony with this view of the law, and we find no error in them.

After the jury had retired to deliberate on their verdict, in the absence of the defendant and his counsel, and out of the presence and hearing of the judge of the court, the foreman of the jury said to the bailiff, who had been called to the door of the room in which the jury were kept, "We can't agree upon a verdict, and have agreed to disagree." The bailiff answered that he would go and see the judge. After doing so he returned to the door of the room and said to the foreman: "The judge says that he cannot receive a verdict of disagreement; that he is going out to his cottage at Shriner Lake, and will not be back until between six and seven o'clock; and that if you agree before that time he will receive the verdict when he returns, and, if you have not agreed at that time, he will receive your verdict when you do agree." The foreman then said to the bailiff, "But we must agree to disagree." To this, the bailiff replied, "Oh, pshaw, Henry!" and closed the door. This is the statement contained in the counter affidavit of the bailiff filed on behalf of the state, and presents in its most favorable light for the state all that took place between the bailiff and the foreman of the jury. It was not proper for the judge to make any communication to the jury after they had retired, except in open court and in the presence of the defendant or his counsel. *Hall v. State*, 8 Ind. 439; *Quinn v. State*, 130 Ind. 340, 30 N. E. 300; *People v. Knapp*, 42 Mich. 267, 3 N. W. 927, 36 Am. Rep. 438. The conduct of the bailiff in holding a conversation with the foreman, in which he told the latter that the judge could not receive a verdict of disagreement; that the judge was going away to be absent until 6 or 7 o'clock, and would, on his return, receive the verdict if they had agreed, and otherwise he would receive it when they did agree; the remark of the foreman, "But we must agree to disagree;" and the response of the bailiff, "Oh, pshaw, Henry!"—were grossly improper. *Rickard v. State*, 74 Ind. 275; *People v. Knapp*, 42 Mich. 267, 3 N. W. 927, 36 Am. Rep. 438. Their prejudicial effect on the minds of the jury may be conclusively presumed. The foreman had reported that the jury were unable to agree. The jury had been deliberating for 20 hours. This conversation took place. Within two hours thereafter, the jurors changed their views, a verdict was agreed upon, and the punishment of the defendant was fixed at imprisonment for life. We need not speculate in regard to the effect of the communication so made. The statute expressly prohibits the bailiff from

speaking to the jury unless by order of the court, or to ask them whether they have agreed upon their verdict. Section 1897, Burns' Ann. St. 1901. In the case before us there was a flagrant violation of this rule, which was speedily followed by a startling change of opinion on the part of the jury. The statement of the bailiff to the foreman that the jury could not agree to disagree; that the judge would return between 6 and 7 o'clock to receive the verdict if they did agree, and, if they had not, he would receive it when they did agree—may well have been understood as a warning from the court that no disagreement would be permitted, and that he would keep them together until they did agree. Coming from the judge himself in the courtroom, in the presence of the defendant and his counsel, such a statement would have been improper. Made by a bailiff at the door of the jury room, in the absence of court, defendant, and counsel, and embellished by a contemptuous reference to the possibility of an honest disagreement, it cannot be too severely condemned.

In view of the disposition which must be made of the case, we do not deem it proper to decide whether a new trial should have been granted upon the evidence. And as the judgment must be reversed because of the refusal of the court to give instruction numbered 5 tendered by the appellant, and because of the misconduct of the bailiff, we need not express an opinion upon any other questions, as they may not arise upon another trial.

Judgment reversed, with instructions to sustain the motion for a new trial for the reasons herein stated, and for further proceedings not inconsistent with this opinion.

(163 Ind. 518)

INDIANAPOLIS ST. RY. CO. v. JOHNSON.
(No. 20,398.)

(Supreme Court of Indiana. Nov. 29, 1904.)

STREET RAILROADS—VEHICLES—COLLISIONS—INJURIES TO TRAVELERS—IMPUTED NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR JURY—GENERAL VERDICT—SPECIAL INTERROGATORIES—CONFLICT—WITNESSES—CREDIBILITY—INSTRUCTIONS—APPEAL—REVIEW.

1. In determining whether special findings are in irreconcilable conflict with the general verdict, all reasonable presumptions and inferences must be indulged in favor of the verdict, and nothing can be presumed in favor of the special findings or answers to interrogatories.

2. Where plaintiff was injured by a street car striking a vehicle in which she was riding with her husband, special findings of isolated facts to the effect that plaintiff, while passing along the street prior to the accident, did not look to discover the approach of the car; that she made no effort to ascertain the location of the car; that she heard it approaching, and gave her husband some warning that they were in danger, etc.—were insufficient to overthrow a general verdict in favor of plaintiff, as showing that she was guilty of contributory negligence as a matter of law.

3. In an action for injuries to plaintiff in a collision between a street car and a vehicle in which she was riding, evidence held to require submission of plaintiff's alleged contributory negligence to the jury.

4. The preponderance of the evidence does not depend on the number of witnesses, but means the greater weight of the evidence.

5. The use of the words "shall" and "should," in an instruction that, if the jury shall find from the preponderance of all the evidence that plaintiff acted as a person of ordinary prudence under all the circumstances, they should find her free from contributory negligence, did not render such instruction erroneous.

6. Where the jury had been instructed that they should consider all the circumstances and surroundings at the time of the injury in determining whether plaintiff was guilty of negligence which contributed to her injury, and were fully and correctly charged as to imputed negligence, an instruction that, on the question of plaintiff's contributory negligence, the jury should consider not only her own acts and conduct, but all other circumstances surrounding the accident, and determine from these whether plaintiff was free from contributory negligence, and if she was herself free from such negligence, and was merely a passive guest of her husband, without any authority to control his conduct or movements in driving and managing the horse and vehicle in which she was riding at the time, his negligence, if any, could not be imputed to her, was not objectionable as invading the province of the jury, and misleading them to believe that in considering plaintiff's contributory negligence they were not to consider the negligence of her husband.

7. Where, at the time plaintiff was injured, she did not in any manner undertake to exercise reasonable care for her safety through the agency of her husband, who was driving and managing the vehicle in which plaintiff was riding at the time, the negligence of the husband in failing to look out for an approaching street car, etc., by which plaintiff was injured, could not be imputed to her.

8. An instruction that the jury were the exclusive judges of the credibility of the witnesses, and that it was their duty to reconcile, so far as they could, conflicting evidence, etc., was not objectionable as confining the jury to the consideration of the interest and character of such witnesses whose evidence was conflicting.

9. Failure of the court to charge with sufficient fullness on particular issues is unobjectionable, where no further instructions were requested.

Appeal from Circuit Court, Boone County; Samuel R. Artman, Judge.

Action by Mary E. Johnson against the Indianapolis Street Railway Company. A judgment was rendered in favor of plaintiff, and defendant appealed to the Appellate Court, by which the case was transferred to the Supreme Court, as authorized by Burns' Ann. St. 1901, § 1337u. Affirmed.

F. Winter, W. H. Latta, and S. M. Ralston, for appellant. W. J. Beckett, for appellee.

JORDAN, J. The complaint in this action upon which a recovery below was had alleges, among others, the following facts: On October 5, 1901, plaintiff was riding in a buggy with her husband, who was driving the horse attached to said vehicle. She had no control of the horse, and did not attempt in any way to direct her husband how he should drive the buggy or where he should drive, or in what manner he should manage

and control the horse. She was merely a passive guest of her husband while riding in the buggy. The defendant's double line of tracks of street railway which it was operating in the city of Indianapolis extends east and west on Market street, running past and in front of the market house, commonly known as "Tomlinson Hall." At the time in question, which was Saturday night of the day aforesaid mentioned, there were horses and vehicles along said market place which were backed down to the curb on both sides of the defendant's double tracks, leaving a passageway on East Market street from Delaware to Alabama street, which way consisted of defendant's tracks, for the reason that all of the space on either side of the tracks in said street was occupied by vehicles and horses down to the curb, as hereinbefore stated. The condition of the street at the time of the accident was well known to the defendant and its servants and employees in charge of its cars running east and west on said Market street in front of said hall. The only part of the roadway left unoccupied in said street for the passage of horses and vehicles was the part occupied by the defendant's south track in passing east, and upon the north track in passing west. Vehicles were driven through said Market street and place east upon the south track of the defendant's tracks, and west upon the north track, and all of these facts were well known to defendant at the time of the accident. Plaintiff's husband desired to pass in and through said Market street from Delaware Street East to Alabama street, and for that purpose he turned on defendant's south track at Delaware street, at which time plaintiff looked west on Market street for a street car, but neither saw nor heard one approaching on said south track. Her husband then turned the vehicle in which she was riding east upon said south track, and drove east thereon about one-half square, and while thus driving on said track one of defendant's cars, in charge of its servants in the line of their employment, negligently approached from the rear the buggy in which plaintiff was riding. The motorman and servants of the defendant in charge of said car could see and did see the buggy in which plaintiff was seated, which was then upon the track in front of said car. That said motorman could see and did see and know that neither plaintiff nor her husband could drive the horse and vehicle off said track by reason of the condition of the street as hereinbefore described. That the motorman could see and did see the perilous position and condition in which the plaintiff was placed upon said track, and could, in the exercise of ordinary care, have stopped said car and checked the speed thereof, and thereby avoided inflicting any injury upon plaintiff. But the pleading charges that, when the plaintiff was in the position of peril upon said track as aforesaid stated, the defendant's servant and

motorman in charge of said car negligently ran it upon said track towards said vehicle, and negligently ran against said vehicle, striking it in the rear, thereby negligently overturning it, throwing the plaintiff therefrom onto the street, under said vehicle, thereby negligently and seriously injuring her about the head, body, back, and limbs, etc. A demurrer to the complaint was overruled by the lower court, and the cause was put at issue by appellant's filing an answer of general denial. The venue of the cause was changed to the Boone circuit court, wherein a trial by jury resulted in a general verdict being returned in favor of appellee. Along with its verdict the jury returned answers to a series of interrogatories. Appellant unsuccessfully moved for judgment in its favor on the answers of the jury to the interrogatories. Its motion for a new trial was denied, and judgment was rendered in favor of appellee upon the verdict of the jury. Appellant appeals, and assigns as error (1) that the court erred in overruling the demurrer to the complaint; (2) overruling its motion for judgment on the answers to the interrogatories; (3) in overruling its motion for a new trial.

The first error assigned is not argued by appellant, and consequently must be considered as waived.

Appellant's counsel argue that the answers of the jury to the interrogatories conclusively disclose that appellee was guilty of negligence which contributed to the injury she sustained. These answers in part show that, at the time of the accident in controversy appellee and her husband were driving in a buggy along Market street in the city of Indianapolis. They turned onto Market street from Delaware street, and were driving eastward on the latter street on and along the south track of appellant's railway, and at the time of the accident had reached a point on Market street about 75 feet from Alabama street. The car which collided with the buggy and turned it over, thereby injuring appellee, was running towards the east on said street, in the rear of plaintiff's buggy. It appears that neither she nor her husband looked to the rear to see how near the car was in the rear of the buggy. The motorman in charge of the car sounded the gong when he discovered a boy with a wheel on the track. On account of the boy being on the track, the car, it appears, stopped to let him get off, and at the time it stopped for this purpose the distance intervening between the front of the car and the buggy in which the plaintiff was seated was 12 feet. The jury find that after the boy got out of the way the car ran about 20 feet before it collided with the buggy. As the plaintiff and her husband were travelling towards the east along Market street, the jury find that she heard the car approaching in the rear. At the time of the accident the buggy was moving along the street towards the east

with its two north wheels between the rails of the track on which the car was running. The jury further find that the appellee, while she and her husband were traveling from Delaware street to where the collision occurred, warned her husband of the danger they were in by reason of the car approaching their buggy in the rear. After turning into Market street from Delaware street, the plaintiff made no effort to ascertain the location and whereabouts of the car that came up from the rear. From these facts alone appellant's counsel contend that it appears that appellee did not exercise such care as the law exacts. An examination of the special findings, in part and as a whole, discloses no such irreconcilable conflict between them and the general verdict as would entitle appellant, over the general verdict, to a judgment in its favor. The rule is one well settled that all reasonable presumptions and inferences must be indulged by the court in favor of the general verdict, and nothing can be presumed in favor of the special findings or answers to interrogatories. The reason for this rule has been repeatedly given in the decisions of this court. Under the general verdict the jury is required to find upon all of the issuable facts proven in the case, while the court, in testing the force of isolated facts as disclosed by the special findings, is not in a position to know, and consequently is not advised, what other facts bearing on the same matter or question were considered by the jury in arriving at the general verdict. The force and effect of the general verdict in this case compels the court to assume that the jury found under the evidence that the plaintiff was not guilty of contributory negligence. *Southern Ind. Ry. Co. v. Peyton*, 157 Ind. 690, 697, 61 N. E. 722, and cases there cited.

A motion for judgment on the special findings and answers to interrogatories is properly denied, unless the antagonism between such findings and the general verdict is beyond the possibility of being removed or reconciled by any evidence legitimately admissible under the issues in the case. *McCoy v. Kokomo, etc., R. Co.*, 158 Ind. 662, 64 N. E. 92, and cases cited.

The mere isolated facts as shown by the special findings, viz., that appellee, while passing along the street prior to the accident, did not look to the rear to discover whether a car was approaching from that direction; that she made no effort, after the vehicle in which she was riding turned onto Market street, to ascertain the location of the car coming from the west; that she heard it approaching, and gave her husband some warning to the effect that they were in danger by reason of its approach towards them from the rear—are in the main, as contended by counsel, sufficient to overthrow the general verdict. It may be asserted, however, that there is nothing in the special findings to advise the court of the particular surround-

ings of the appellee and her husband immediately at and prior to the collision in question. No facts are found disclosing the speed at which the car in question was running at the time. Appellee and her husband were driving towards the east on the south side of Market street, which apparently was the proper side. There is no finding to show that appellee or her husband could have removed the buggy from the south track upon which they were driving to the north track, even if under the circumstances it had been right for them to have done so. Under the facts alleged in the complaint, and impliedly found in the general verdict in favor of appellee, the jury may be said to have found that the vehicle in which appellee was riding at the time of the accident was required, when going east on Market street, to keep on the south side thereof, and that this fact was known to appellant and its motorman in charge of the car. Certainly we cannot adjudge as a matter of law, under the mere facts disclosed by the special findings, that appellee was guilty of negligence at the time of the accident in question which contributed to her injuries. The question in regard to her contributory negligence under the evidence in this case was one of fact for the determination of the jury from all of the evidence and circumstances in the case touching or bearing thereon, and, as previously said, the jurors by their general verdict have found that fact in favor of appellee, and, as there is nothing in the special findings when tested by the rule asserted which would warrant the overthrow of the general verdict, appellant's motion, therefore, for judgment in its favor was properly denied. *Citizens' St. Ry. Co. v. Damm*, 25 Ind. App. 511, 58 N. E. 564; *Indianapolis St. Ry. Co. v. Darnell* (Ind. App.) 68 N. E. 609.

The court gave to the jury what apparently is a carefully prepared charge, but certain parts thereof are criticised by counsel for appellant. By the third instruction the jury was advised that, in order to entitle the plaintiff to recover, she must prove by a preponderance of all of the evidence all the material allegations contained in the complaint. Immediately following this statement, the court, in the same instruction, stated to the jury that: "*The preponderance of evidence does not depend upon the number of witnesses, and does not mean the greater number of witnesses. It does depend upon the weight of the evidence, and means the greater weight of the evidence.*" (Our italics.) Appellant criticises that part italicized, for the reason asserted that it does not state the law correctly, and was an invasion of the province of the jury. They assert that, where the witnesses are equally credible in respect to their character, the preponderance of the evidence does depend upon the number of witnesses, and that the preponderance thereof is necessarily deter-

mined by the greater number of witnesses. As a general rule, the preponderance of the evidence in a case does not depend upon or mean the greater number of witnesses testifying upon the matter or matters in issue. Counsel mistake the law in their contention that, where the witnesses in a case are equally credible in respect to their character, then in such a case the preponderance of the evidence depends upon the number of witnesses testifying. This certainly is not the true test in any case. Any number of witnesses may be of equal credibility and possess equal information, and still differ greatly in the amount or weight of their evidence. The authorities generally affirm that the number of witnesses are not to be counted by the jury or court trying the case in order to determine upon which side is the preponderance, but the evidence given by them is to be weighed, and the preponderance thereof does not depend on the greater number of the witnesses in the particular case. *Wray, Adm'r, v. Tindall*, 45 Ind. 517; *Howlett v. Dilts*, 4 Ind. App. 23, 30 N. E. 313; *Bierbach v. Goodyear, etc., Co.*, 54 Wis. 208, 11 N. W. 514, 41 Am. Rep. 19; *Ennis v. Dudley* (City Ct. N. Y.) 48 N. Y. Supp. 622; 3 *Jones on Evidence*, § 902; *Savannah, etc., R. Co. v. Wideman*, 99 Ga. 245, 25 S. E. 400; *Village of N. Alton v. Dorsett*, 59 Ill. App. 612; *Bishop v. Busse*, 69 Ill. 403. In *Bouvier's Law Dict.* vol. 2, p. 730, preponderance of evidence is defined to be "the greater weight of evidence, or evidence which is more credible and convincing to the mind." *Citing Button v. Metcalf*, 80 Wis. 193, 49 N. W. 809. The instruction in question is not open to the objections urged by counsel for appellant. If not as full and explicit under the circumstances as desired, they should have tendered and requested an instruction expressing their views of the law on the question involved.

The fourteenth instruction given by the court is as follows: "In determining whether or not the plaintiff in this case was guilty of contributory negligence, you shall consider her own acts and conduct, and all the other circumstances shown in evidence surrounding the accident and injury, if any, to the plaintiff. And, if you shall find from the preponderance of all the evidence that the plaintiff acted as a person of ordinary prudence under all the circumstances, you should find her free from contributory negligence, although you may find that her husband was guilty of negligence in the driving and management of his horse and vehicle. In other words, no negligence of the husband in the driving and management of said horse can be imputed to the plaintiff, if you find that she herself was free from any fault or negligence, and was merely the passive guest of her husband, without any authority to direct or control the conduct or movements of her said husband in the driving and management of said horse." It is insisted

that this charge is bad, for the reason that it invades the province of the jury in stating to them that they shall consider the conduct of the plaintiff and other circumstances, etc.; the further contention being that by this statement of the court the question of plaintiff's contributory negligence was to be considered alone, to the exclusion of the negligence on the part of her husband. It is insisted that the jury must have understood by the charge that the fact that plaintiff was merely a passive guest of her husband was equivalent to establishing her freedom from fault or negligence. It is further contended that it was not proper for the court to use the words "shall" and "should" as they are employed in the instruction. That the charge is not rendered bad for the latter reason is fully settled by the decision of this court in *Strebin v. Lavengood*, 71 N. E. 494, and cases there cited.

It will be observed that by the instruction in controversy the jury was advised that on the question of plaintiff's contributory negligence they should take into consideration not only her own acts and conduct, but all other circumstances surrounding the accident. From a consideration of all of the facts the jury was informed that they should determine, under all of the circumstances, whether the plaintiff was free from contributory negligence. The charge further stated that if the plaintiff herself was free from such negligence, and was merely the passive guest of her husband, without any authority to control his conduct or movements in driving and managing the horse and vehicle, then under such circumstances the negligence of her husband could not be imputed to her.

The court, in the 10th, 11th, 12th, and 13th instructions, fully advised the jury relative to the law governing the question of imputed negligence, and in this connection stated in these instructions that if plaintiff was but a passive guest of her husband, riding in the vehicle with him, he having the control and management of the horse and buggy, she, under such circumstances, could not be held chargeable with his negligence. But the fact that she was but a passive guest of her husband at the time would not relieve her from exercising ordinary care and caution, and with that degree of judgment and intelligence as should be employed by a person of ordinary prudence, to rescue himself from danger.

The eleventh instruction further informed the jury that they should consider all of the circumstances and surroundings at the time the injury occurred, and determine therefrom and from all of the evidence in the case whether or not plaintiff was guilty of acts of negligence, or of the want of ordinary care which contributed to her injury. This part of instruction 11 was virtually repeated in charge 14, and when the latter is considered, either alone or in connection with other parts of the charge to which we

have referred, it certainly cannot be said to be open to the objections advanced by appellant's counsel. Surely the jury must have understood from the charge that on the question of plaintiff's negligence they were to consider her own acts and conduct at the time of the accident, together with all of the other circumstances and surroundings and evidence in the case, and thereby determine the question of contributory negligence.

In the case at bar there is no contention that at the time plaintiff was injured she in any manner undertook to exercise for her safety the care which the law exacts of her through the agency of her husband, who was driving and managing the movements of the buggy in which she was riding at the time. Therefore counsel are mistaken in their contention that the rule of imputed negligence, as asserted in *Abbitt, Adm'r, etc., v. Lake Erie, etc., R. Co.*, 150 Ind. 498, 50 N. E. 729, is applicable.

Instruction No. 18 also meets with objection. By it the court informed the jury that they were the exclusive judges of the credibility of witnesses, and that it was their duty to reconcile, so far as they could, conflicting evidence, etc. It is said that the vice of this charge is to confine the jury to the consideration of the interest and character of such witnesses whose evidence was conflicting. The instruction, however, does not warrant this assertion, and cannot be said to be erroneous to the extent which it undertook to inform the jury upon the question of weighing the evidence. If appellant desired a fuller or more complete instruction on the points and matters therein enumerated, it ought to have requested the court to have given one which comported with their view of the law.

Finally, it may be said that the instructions in this case, when considered as a whole, as they must be, disclose no room for appellant to complain that it was in any manner prejudiced by the court's charge to the jury.

We find no available error, and the judgment is therefore affirmed.

(164 Ind. 242)

HOHN et al. v. SHIDELER. (No. 20,404.)*

(Supreme Court of Indiana. Nov. 29, 1904.)

BUILDING CONTRACTS—PROVISIONS—WAIVER—SURETIES—DISCHARGE—TRIVIAL ALTERATIONS—INSURANCE—CONDITIONS—BREACH—SPECIAL FINDINGS—HARMLESS ERROR.

1. Where a building contract contemplated alterations of the plans, and substitution of materials and work of a different character, provisions that such alterations should be made on the written order of the architects, the value of the work added or omitted to be computed by them, and the amount so ascertained added or deducted from the contract price, were for the exclusive protection of the owner, which he was entitled to waive; and hence the contractor's surety was not discharged because unimportant alterations, trivial in value, were

made by agreement between the parties without reference to the architects.

2. Where a building contract required the owner to insure the buildings and the materials on the premises in his own name, or in the name of the contractor, the proceeds of the policy, in case of loss, to be paid to the builder and owner as their interest might appear, the owner's failure to insure was insufficient to discharge the contractor's surety; no loss having occurred which such insurance would have covered.

3. No notice to a contractor's surety of the contractor's failure to comply with the contract being necessary to charge the surety, the admission of secondary evidence of a notice given to the surety, in an action on the bond, if error, was harmless.

4. The failure of the court to make certain special findings in an action against a contractor's surety was not prejudicial, where such findings, if made, would not have changed the court's conclusion of law on the facts.

Appeal from Superior Court, Marion County; Vinson Carter, Judge.

Action by David B. Shideler against John Hohn and others. From a judgment in favor of plaintiff, defendants appeal. Case transferred from the Appellate Court, as authorized by Burns' Ann. St. 1901, § 1337u. Affirmed.

Herod & Herod, for appellants. Chas. A. Dryer, for appellee.

DOWLING, C. J. The questions on this appeal arise upon exceptions to conclusions of law on a special finding, and to the decision of the court overruling a motion for a new trial. This is a second appeal. *Standiford v. Shideler*, 23 Ind. App. 496, 60 N. E. 168. The appellant Hohn was sued by the appellee on a bond executed by one Standiford, as principal, and appellant, as his surety, to secure the performance of a building contract entered into between Standiford, as the builder, and appellee, as the owner of the contemplated improvements. His defense was a discharge from liability by reason of deviations from the contract without his consent, and a breach by the appellee by his failure to cause the property and materials to be insured. By the special finding, it appeared that there were several slight deviations from the original plans and specifications, in the following particulars: By the mistake of the foreman of the builder, and without the knowledge of the appellee, the brick foundation of the dwelling house was built six inches higher than the contract required. A change was made by mutual agreement between the builder and appellee in the kind and location of a pump, dry well, and drain pipe; there being no difference in value between the original work and materials and the substitutes for them. A plastered wall alongside a stairway, with a door in it, was substituted for a boarded or wainscoted wall without a door, for which an agreed charge of \$5 was paid by appellee. Appellant also complains of the substitution of a mantel-piece costing \$32 for one costing \$25, the dif-

*Rehearing denied February 15, 1905.

ference being paid by the appellee; and, although this change is not included in the special finding, it will be considered in disposing of this branch of the case. All these alterations and deviations from the original plans and specifications were made with the mutual consent of the builder and the appellee, but without written orders of the architects, or a computation by them of the comparative value of the substituted work and materials and those specified in the contract.

The agreement between the builder and the owner contemplated alterations of the plans of the buildings, and substitution of materials and work of a different character. These provisions entered into the undertaking of the appellant as surety on the bond of the contractor, and he was bound by them. It is true that the building contract declared that all alterations should be made on the written order of the architects; that the value of the work added or omitted should be computed by them; that the amount so ascertained should be added to or deducted from the contract price. But the interposition of the architects was exclusively for the protection of the owner, by whom, as the contract expressly states, they were employed, and for whom they were the agents. The builder was competent to take care of his own interests, and, if the owner of the property saw fit to make changes in his plans, he had the right to do so without aid or authority from the architects. This condition of the contract being exclusively for his benefit, he could waive it, and such waiver would not affect the liability of the surety, unless the changes so made materially altered the contract price or cost of the buildings. But had there been no provision in the contract authorizing changes in the plans of the buildings, those described in the special finding and the change in the kind of mantelpiece would not have released the surety. All the alterations were unimportant in their nature and trivial in value, and were such only as might reasonably be anticipated in the process of the construction of a building. Alterations of this kind have not been considered evidence of the abrogation or abandonment of a building contract, and the courts have shown an inclination to regard them as contemplated by the agreement and permissible under it. *Henricus v. Englebert*, 63 Hun, 625, 17 N. Y. Supp. 235, 237.

A question of greater difficulty is presented upon the finding that the owner was to insure the buildings and the materials on the premises in his own name or in the name of the contractor against loss by fire, the proceeds of the policy in case of loss to be paid to the builder and owner as their interest might appear, but that the appellee insured the dwelling house to the amount of \$1,500 for five years in his own name; the policy containing a clause making the proceeds payable to one Henry Frank, a mortgagee, as his interests might appear. This policy was not

such as the contract described, and the question is, did the failure of the owner to insure the buildings and materials in the manner required by the contract release the surety? The condition of the bond sued on was that Standford, the builder, should duly perform his contract. It has often been said that the contract of a surety is to be strictly construed in his favor, and that, if liable at all, he is liable only according to the precise terms of his undertaking. Anything done or omitted by the property owner in a building contract to prejudice the position of the surety will discharge him either pro tanto or altogether. *Capel v. Butler*, 2 Sim. & Stu. 457. In *Watts v. Shuttleworth*, 5 H. & N. 233, Watts, the owner of a warehouse in Manchester, contracted with one Harrap, a builder, for certain property, described as "fittings" of the first and second floor of the warehouse, for which the builder was to receive £3,450. One stipulation of the contract was that Watts, the owner, should insure the fittings from risk or accident by fire at the expense of the builder. The owner advanced to Harrap, the contractor, £1,800. A number of the fittings, to the value of £2,800, were made and placed in a room in Harrap's workshop, where they were destroyed by accidental fire. The fittings were never put up. Harrap having become insolvent, the owner had not been repaid the £1,800 advanced, and had been obliged to pay £340 beyond the sum of £3,450 to another builder to do the work. The fittings destroyed had not been insured by the owner. Shuttleworth was guarantor for the performance of the work by the builder. After the destruction of the fittings, the insolvency of Harrap, the builder, and the completion of the work by another contractor, suit was brought by Harrap against Shuttleworth upon the bond, and the foregoing facts were shown. In rendering the judgment, the court (Pollock, C. B.) said: "The substantial question in the case is whether the omission to insure discharges the defendant, the surety. The rule upon the subject seems to be that if the person guaranteed does any act injurious to the surety or inconsistent with his rights, or if he omits to do any act which his duty enjoins him to do, and the omission proves injurious to the surety, the latter will be discharged. Story's Eq. Jurisprudence, § 325. The same principle is enunciated and exemplified by the Master of the Rolls in *Pearl v. Deacon*, 24 Beav. 186, 191, where he cited with approbation the opinion of Lord Eldon in *Craythorne v. Swinburne*, 14 Ves. 164, 169, that the rights of a surety depend rather on principles of equity than upon the actual contract; that there may be a quasi contract, but that the right of the surety arises out of the equitable relation of the parties. The Master of the Rolls also referred to the judgment of Vice Chancellor Wood in *Newton v. Charlton*, 10 Hare, 651, where he laid down that a creditor is bound

to give the surety the benefit of every security he holds at the time of the contract; that the surety has a complete right to the benefit of it, and, if the benefit be lost, he would be discharged. * * * We think the plaintiff ought to have insured. It therefore seems to us that the plaintiff has omitted to do an act which his duty toward the defendant required him to do; that, if he had done it, the defendant would have been relieved to the amount of the insurance; that the omission, therefore, was injurious to him; and that he has been thereby discharged from the suretyship." The rule referred to in the opinion just quoted is little more than the statement of the law by Judge Story in the following terms: "Indeed, the proposition may be stated in a more general form: That if a creditor does any act injurious to the surety or inconsistent with his rights, or if he omits to do any act, when required by the surety, which his duty enjoins him to do, and the omission proves injurious to the surety, in all such cases the latter will be discharged, and he may set up such conduct as a defense to any suit brought against him, if not at law, at all events in equity." Story's *Eq. Jurisprudence*, § 325. "In *Pearl v. Deacon*, 3 Jur. N. S. 1187, a person became surety for a moiety of a debt, with the knowledge that the whole of the debt was secured by a bill of sale of the furniture of the debtor to the creditors, who were his landlords. The creditors took the furniture under a distress for rent, which became due subsequent to the bill of sale. It was held by the Lords Justices, affirming the decision of Sir John Romilly, M. R. (reported 3 Jur. N. S. 879), that the landlords had precluded themselves from appropriating the furniture to any other purpose than the payment of the debt for which it was given as a security, and that the surety was entitled to be discharged to the extent of one-half of the value of the furniture." 3 *Leading Cases in Equity* (notes) 541 (*830). It is also stated in the notes of the editors of the work last referred to [page 543 (*832)] that as a surety on payment of the debt is entitled to all the securities in the hands of the creditor, whether he is aware of their existence or not, if the creditor, who has had or ought to have had them in his full possession or power, loses them or permits them to get into the possession of the debtor, the surety will, to the extent of such security, be discharged. *Capel v. Butler*, 2 S. & S. 457; *Ex parte Mure*, 2 Cox, 68; *Law v. East India Company*, 4 Ves. 824; *Williams v. Price*, 1 S. & S. 581; *Phillips v. Astling*, 2 Taunt. 206. So, too, it is stated that it is well settled that the negligence or default of the creditor with regard to the property or securities held for the debt is only material when it has resulted in actual injury, and that the surety will be discharged only to the extent of the injury suffered. *Ward v. Vase*, 7 Leigh, 185; *Payne v. Commercial Bank of Natchez*, 6 Smedes & M. 24; *Neff's Appeal*, 9

72 N.E.—37

Watts & S. 36; Everly v. Rice, 20 Pa. 297. If the rights of a surety are to be determined upon the equitable principles stated in these cases, it would seem to follow that, although the owner of the property failed to insure the structure and materials on the premises, yet, as they were not damaged by fire, and no loss occurred which such insurance would have covered, the surety was not injured by the default of the owner, and hence was not discharged thereby. If the property had been injured or destroyed by fire, as in *Watts v. Shuttleworth*, supra, a different result would have followed. There was here no alteration of the contract, nor any omission on the part of the owner of the property which was injurious to the surety, and it would be inequitable to hold that the surety was released on account of an omission which proved to be entirely harmless.

The admission of a letterpress copy of a notice to the surety of the failure of the builder to perform his contract is the next error complained of. No notice was necessary. The admission of the evidence, even if erroneous, was harmless.

The failure of the court to find that a mantelpiece costing \$32 had been substituted for one described in the contract and costing \$25 (the difference being paid by the owner), and that the owner paid one De Greenort \$10 for hauling sand, was not such an error as will reverse the judgment. These departures from the original plan were immaterial, were fully authorized by the contract itself, and were in no way prejudicial to the surety. If included in the special finding of the court, they would not have changed the conclusion of law on the facts.

We find no error. Judgment affirmed.

(180 N. Y. 58)

PEOPLE v. WAGNER.

(Court of Appeals of New York. Dec. 13, 1904.)

ARSON—EVIDENCE.

1. Evidence held sufficient to sustain a conviction of arson in the first degree.

Appeal from Supreme Court, Appellate Division, First Department.

Frederick Wagner was convicted of arson, and from an order of the Appellate Division affirming the conviction (82 N. Y. Supp. 1109) he appeals. Affirmed.

See 75 N. Y. Supp. 950.

Lewis Stuyvesant Chanler, for appellant. William Travers Jerome, Dist. Atty. (Robert C. Taylor, of counsel), for the People.

O'BRIEN, J. The defendant was convicted in the court of general sessions in New York of the crime of arson in the first degree. The record before us is of the second trial of the case. On the first trial the defendant was convicted, and sentenced to the

State Prison for 25 years. The second verdict of conviction resulted in a sentence to the State Prison for 19 years. The conviction on the first trial was reversed by the Appellate Division, but it has unanimously affirmed the second conviction.

The crime of which the defendant has been convicted was formerly a capital offense, and is still one of the most atrocious crimes known to the law. The indictment charged him with setting fire in the nighttime to a tenement house in the city of New York in which 24 families lived, and at the time there were many human beings in the building. The evidence upon which the conviction was had was largely circumstantial, but, we think, was sufficient to warrant the jury in rendering a verdict of guilty against the defendant. The fire occurred on the 30th of January, 1901, under such circumstances as to render it quite improbable that it was the result of an accident. The proof tended to show that it was an incendiary fire. It appears that some months prior to the fire the defendant and his family resided in this building as tenants, but for some reason he was dispossessed and removed from the premises by legal process. At the time of his removal he threatened, as the witnesses testified, to get even with the landlord by burning the building. This is substantially the threat which the defendant is said to have made in the presence and hearing of the witnesses who testified to it. The fire originated in the cellar of the building, the door to which was not fastened, or at least access to that part of the house was possible, if not quite convenient. It was shown that the defendant was in the vicinity of the building on the night of the fire, and while in a saloon, shortly before, took a bottle from his pocket, saying to the bartender, "I am going to fix somebody to-night." The defendant, after the fire occurred, admitted, in substance, that he had seen it, and stated some other things, which, although standing alone, would be of very little consequence, yet, taken in connection with the previous threat, and his presence in the vicinity of the building on the night of the fire, would indicate a consciousness of guilt on his part. It was shown that about two weeks before the fire in question an unsuccessful attempt had been made to burn the building. That fire occurred in the afternoon. The street door was then open, leading from the stoop into the vestibule, and the fire was started in the dumb waiter. It was a slight fire; nothing having been burned except the woodwork around the bottom of the dumb-waiter shaft.

We think that the evidence on the part of the people tended to prove that the defendant was the author of the fire. At all events, the evidence was of such a character as to present a fair question of fact for the jury, and therefore this court has no power to interfere with the verdict.

The learned counsel for the defendant does

not attack the verdict on the ground that the evidence was insufficient to warrant it. He contends that the judgment should be reversed on the ground that the district attorney was permitted to offer evidence which he thinks is incompetent. It is difficult to find any proper objection or exception in the record to raise the questions which are discussed upon his brief, but they relate principally to some proof that was given of the unsuccessful attempt to burn the building two weeks before the fire in question. It is not very clear that whatever proof was given of the fire that was kindled two weeks before the fire in question was incompetent. After the threat to burn the building, any evidence tending to prove even an unsuccessful attempt to carry out the threat by the defendant was, I think, competent. *People v. O'Sullivan*, 104 N. Y. 481, 10 N. E. 880, 58 Am. Rep. 530. But it is not necessary to justify the conduct of the district attorney in attempting to prove the prior fire, since the trial court struck out from the record all of the evidence in regard to that fire, and expressly directed the jury, in the clearest terms, to disregard it; having announced to the prosecuting officer that, inasmuch as he had failed to connect the two fires with each other, the evidence in regard to the first fire should be excluded. This ruling, we think, was most favorable to the defendant, and cured any possible error that might have been committed on the part of the district attorney in referring to the first fire, and on the part of the court in receiving evidence in regard to it.

The learned counsel for the defendant complains of various remarks made by the district attorney in the course of the trial, and in presenting the case to the jury. The record does not present any exception with reference to such question, and, upon an examination of the proceedings at the trial, there does not seem to be any just ground for complaint in that regard. The prosecuting officer in a criminal case must be permitted to conduct the trial without unreasonable restrictions upon the right to state the case to the jury to offer such evidence as he deems pertinent to the issue, and take the ruling of the court thereon; and in summing up the evidence the same right of advocacy and the same freedom of speech must be conceded to him as is conceded to respectable counsel upon trials in civil cases. This, of course, does not permit the prosecuting officer to refer to facts that are foreign to the issue, or to offer evidence which he knows to be incompetent, or to base arguments to the jury upon facts or circumstances outside of the record. We do not think that any rule of propriety was violated by the prosecuting officer in this case, and as we think that the evidence was sufficient to warrant the verdict, and that no error of law is presented by the record, the judgment of conviction must be affirmed.

CULLEN, C. J., and GRAY, BARTLETT, and HAIGHT, JJ., concur. VANN, J., concurs in result. WERNER, J., absent.

Judgment of conviction affirmed.

(180 N. Y.)

SAUER v. CITY OF NEW YORK.

(Court of Appeals of New York. Dec. 6, 1904.)

MUNICIPAL CORPORATIONS—CONSTRUCTION OF VIADUCT—LIABILITY TO ABUTTING OWNER.

1. Under Laws 1887, p. 787, c. 576, allowing the city of New York to construct an elevated viaduct along 155th street, the fee of which street is in the city, a proper use of the street is made, and the structure is not, therefore, a nuisance, and the damages to an owner of abutting property by its construction are *damnum absque injuria*.

Vann and Bartlett, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, First Department.

Action by George W. Sauer against the city of New York. From a judgment of the Appellate Division (85 N. Y. Supp. 636) affirming a judgment in favor of defendant, plaintiff appeals. Affirmed.

Abram I. Elkus and Carlisle J. Gleason, for appellant. John J. Delany, Corp. Counsel (Theodore Connolly, of counsel), for respondent.

HAIGHT, J. This action was brought to enjoin the defendant from using a viaduct constructed in 1893 along 155th street, with approaches from 8th avenue, in the city of New York, to compel the removal of the same, and to recover damages. The plaintiff is the owner of premises situated on the southwesterly corner of 8th avenue and 155th street, on which he maintained a frame building known as the "Atlantic Casino," as a public resort for recreation and amusement, until the same was destroyed by fire in 1897. The city of New York is the owner in fee of 155th street and 8th avenue, and holds the same in trust for the public as highways. 155th street had been regulated and graded from 8th avenue westerly to Bradhurst avenue, which runs along the foot of a bluff about 70 feet high. The street, as laid out on the records, ascends the bluff, and continues on westerly to the North river, but it had never been opened and graded from Bradhurst avenue up the bluff to St. Nicholas Place. A bridge known as "McComb's Dam Bridge" had been constructed over the Harlem river at the easterly end of 155th street, and from that bridge to Bradhurst avenue was substantially a level plain.

The Legislature, by chapter 576, p. 787, of the laws of 1887, authorized the commissioner of public works of the city of New York, with the approval of the board of estimate and apportionment, to improve 155th street by erecting an elevated iron roadway, viaduct or bridge from the top of

the bluff at St. Nicholas Place over 155th street to McComb's Dam bridge, with the necessary abutments and arches over intersecting avenues, and approaches thereto for the passage of animals, persons, vehicles, and traffic. Subsequently the viaduct or bridge complained of was constructed according to the provisions of this act. In front of the plaintiff's premises it is 50 feet above the surface of 155th street as originally graded. The surface of the street as it existed prior to the construction of the viaduct has not been changed, but remains unobstructed for public travel, except as interfered with by the necessary abutments upon which the viaduct rests and the stairway leading thereto.

The plaintiff has undoubtedly suffered consequential damages by reason of the construction and maintenance of the viaduct, for which the Legislature might properly provide. His ingress and egress, together with the free and uninterrupted circulation of air and light, have been impaired, and the value of his property has been decreased by reason of dust, dirt, and noise occasioned by the structure. It may be that he has a remedy under existing statutes, but that question we are not now called upon to determine. The question now before us is whether he is entitled, as a matter of right, to the injunction prayed for and for the damages suffered. It has been found as a fact upon the stipulation of the parties that long "prior to the year 1886 (the time when the plaintiff became the owner of the lands in question) the title in fee simple to the lands included within the lines of 8th avenue and 155th street had been duly acquired according to the statutes in such case made and provided, and its ancient grants and charters, by the mayor, aldermen, and commonalty of the city of New York, and these streets were duly designated as public streets and highways according to law, and were used and maintained as such streets and highways in the city and county of New York." The fee of the street having been acquired according to the provisions of the statute, we must assume that full compensation was made to the owners of the lands through which the streets and avenues were laid out, and that thereafter the owners of lands abutting thereon hold their titles subject to all of the legitimate and proper uses to which the streets and public highways may be devoted. As such owners they are subject to the right of the public to grade and improve the streets, and they are presumed to have been compensated for any future improvement or change in the surface or grade rendered necessary for the convenience of public travel, especially in cities where the growth of population increases the use of the highways. The rule may be different as to peculiar and extraordinary changes made for some ulterior purposes other than the improvement of the street; as, for instance, where the natural surface has been changed by artificial means, such as the con-

struction of a railroad embankment or a bridge over a railroad making elevated approaches necessary. But as to changes from the natural contour of the surface, rendered necessary in order to adapt the street to the free and easy passage of the public, they may be lawfully made without additional compensation to abutting owners, and for that purpose bridges may be constructed over streams and viaducts over ravines, with approaches thereto from intersecting streets.

The leading case upon this question is that of *Radcliff's Executors v. Mayor, etc.*, of Brooklyn, 4 N. Y. 195, 58 Am. Dec. 357. In that case the city of Brooklyn, in grading a street, caused an embankment to be dug away, whereby the premises of the plaintiffs were undermined and caved in, causing them heavy damage. It was held that, in the absence of proof showing a failure to exercise proper care and skill in the execution of the work, no action for damages could be maintained by the adjacent owner. *Bronson, C. J.*, in delivering the opinion of the court, said: "In some instances the landowner will suffer a heavy loss, and this case may perhaps be one of the number; but it is *damnum absque injuria*, and the owner must bear it. He often gets the benefit for nothing, when the value of his land is increased by opening or improving a street or highway; and he must bear the burden in the less common case of a depreciation in value in consequence of the work." This case has been repeatedly followed in this state in numerous cases which have been collated and cited by *Martin, J.*, in the case of *Fries v. N. Y. & H. R. Co.*, 169 N. Y. 270, 283, 62 N. E. 358. In the case of *Transportation Co. v. Chicago*, 99 U. S. 635, 25 L. Ed. 336, the city was engaged in constructing a tunnel under the Chicago river for street purposes. In doing the work the plaintiff's access to its wharf, in the navigation of the river, as well as its access to its warehouse from the street, was temporarily impeded, and the plaintiff suffered damages thereby. The improvement was made under the authority conferred by the Legislature. It was held that the municipality was not liable. *Mr. Justice Strong*, in delivering the opinion of the court, said: "It is undeniable that in making the improvement of which the plaintiffs complain the city was the agent of the state, and performing a public duty imposed upon it by the Legislature; and that persons appointed or authorized by law to make or improve a highway are not answerable for consequential damages, if they act within their jurisdiction, and with care and skill, is a doctrine almost universally accepted alike in England and in this country. * * * The state holds its highways in trust for the public. Improvements made by its direction or by its authority are its acts, and the ultimate responsibility, of course, should rest upon it. But it is the prerogative of the state to be exempt from coercion by suit,

except by its own consent. This prerogative would amount to nothing if it does not protect the agents for improving highways which the state is compelled to employ. The remedy, therefore, for a consequential injury resulting from the state's action through its agents, if there be any, must be that, and that only, which the Legislature shall give. It does not exist at common law. The decisions to which we have referred were made in view of *Magna Charta*, and the restriction to be in the constitution of every state, that private property shall not be taken for public use without just compensation being made. But acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the state or its agents, or give him any right of action. This is supported by an immense weight of authority." See *Smith v. Corporation of Washington*, 20 How. 135, 15 L. Ed. 858; *Chicago v. Taylor*, 125 U. S. 161, 8 Sup. Ct. 820, 31 L. Ed. 638; *Governor & Co. of The Cast Plate Mfgs. v. Meredith*, 4 Durnf. & East, 794; *Sutton v. Clarke*, 6 Taunt. 28; *Boulton v. Crowther*, 2 Barn. & Cres. 703; *Green v. Borough of Reading*, 9 Watts, 382, 36 Am. Dec. 127; *O'Connor v. Pittsburgh*, 18 Pa. 187; *Callender v. Marsh*, 1 Pick. 418; *City of Chicago v. Rumsey*, 87 Ill. 348, 363, and authorities there cited. See, also, *Cooley on Const. Lim.*, p. 542 and notes.

In the case under consideration, as we have seen, 155th street continued west to Bradhurst avenue. There it met a steep bluff 70 feet high, on the top of which was St. Nicholas Place. The title of the street up the bluff had been acquired and recorded, but it had never been opened and worked as a street. The bluff was the natural contour of the surface, and for the purpose of facilitating the easy and safe travel of the public from St. Nicholas Place to other portions of the city the Legislature authorized the construction of the viaduct in question. It is devoted to ordinary traffic by teams, vehicles, and pedestrians. It is prohibited for railroad purposes. It is one of the uses to which public highways were primarily opened and devoted. It was constructed under legislative authority in the exercise of governmental powers for a public purpose. It is not, therefore, a nuisance, and the plaintiff is not entitled to have its maintenance enjoined, or to recover in this action the consequential damages sustained.

The judgment should be affirmed, with costs.

VANN, J. (dissenting). I dissent upon the ground that the construction by a municipal corporation of a new and independent street in the form of a bridge 50 feet high and 63

feet wide, extending lengthwise through block after block over an existing street, which, graded and paved for years, is left undisturbed except by the huge columns supporting the elevated structure, is neither the improvement of the street as a street, nor a proper street use sanctioned by precedent, or coming within the reasonable contemplation of the parties when the fee of the surface street was acquired from the abutting owner, who has no access to the aerial street from his own premises; and when this is done without compensation it is a taking of private property for public use in direct violation of the Constitution.

BARTLETT, J. (dissenting). I agree with Judge VANN'S memorandum of dissent. Under the judgment about to be made the city could bridge 5th avenue from 110th street to Washington Square at a level above the heights of the adjoining structures, thereby impairing the light, air, and access of every residence and business building, and under the plea of a street use escape all liability for damages. If this can be done, it simply amounts to confiscation. The prevailing opinion cites *Raddcliff's Executors v. Mayor, etc.*, of Brooklyn, 4 N. Y. 195, 58 Am. Dec. 357, and the line of cases following it, which hold that the legitimate change of the grade of a street to the damage of abutting lot owners is *damnum absque injuria*. In the case at bar there is no change of grade. It is stipulated in the case as follows: "The grade and surfaces of 155th street and 8th avenue, in front of the plaintiff's premises, as they existed on June 15, 1887, have not been changed by the erection of the viaduct, and the said surfaces of said streets remain as before, open to the public, except for the obstruction by the columns of the viaduct as before stated." It is thus apparent that the change of grade cases have no application. It is to be said of these cases that they involve a principle that has been condemned in many jurisdictions, and the hardship of which has been cured in some of the states by constitutional amendment providing for the payment of such damages. It is a doctrine which ought not to be extended. In *Reining v. N. Y., L. & W. Ry. Co.*, 128 N. Y. 157, 104, 28 N. E. 640, 642, 14 L. R. A. 133, Judge Andrews, in applying the law of the elevated railroad cases, as laid down in the *Story Case*, 90 N. Y. 122, 43 Am. Rep. 146, said: "It is no longer open to debate in this state that owners of lots abutting on a street, the fee of which is in the municipality for street use, although they have no title to the soil, are nevertheless entitled to the benefit of the street in front of their premises for access and other purposes, of which they cannot be deprived except upon compensation." I am of opinion that the structure in the case before us is a bridge built along and above a street, and cannot be regarded as a "street use." If

such an erection can be permitted to exist, it falls within the doctrine of the elevated railroad cases, and, notwithstanding the title of the streets is in the city, the abutting owner is entitled to compensation for such damages as he has suffered.

CULLEN, C. J., and **GRAY** and **O'BRIEN, JJ.**, concur with **HAIGHT, J.** **VANN** and **BARTLETT, JJ.**, read dissenting opinions. **WERNER, J.**, absent.

Judgment affirmed.

(179 N. Y. 473)

STEMMLER et al. v. MAYOR, ETC., OF CITY OF NEW YORK.

(Court of Appeals of New York. Nov. 29, 1904.)

MUNICIPAL CORPORATIONS—CLAIM AGAINST CITY—ALLOWANCE—EVIDENCE ON SECOND TRIAL—CONSTITUTIONAL LAW.

1. Laws 1894, p. 1141, c. 543, provided that the board of estimate and apportionment of the city of New York should ascertain the amount of unpaid salary due to a justice of the District Court of such city while the office was unlawfully occupied by one who claimed an election to such office, and provided that the comptroller, on the certificate of such board, should pay the amount of the salary so found to be due, with interest. *Held*, that the act of the board in inserting a provision allowing the claim at a sum not exceeding \$35,000 is not a sufficient compliance with the statute to authorize an action to recover such sum, with interest, without evidence that a certificate was issued by the board, after due investigation, fixing the amount of such salary, and certifying that the same had not been paid.

2. Where, in an action by a justice of a District Court to recover from the city of New York a salary withheld from him by one claiming to be such justice, an admission was made that while the office was held by the usurper he performed the duties of such office and received the salary thereof, such admission remains binding on the parties during the entire litigation, and is evidence of the fact that the salary was paid to him, and on appeal to the Court of Appeals from a judgment rendered in a second trial may be read from the record of the first trial in support of such judgment, though it is not in the record of the second trial.

3. Laws 1894, p. 1141, c. 543, making the city of New York liable for the unpaid salary of a *de jure* officer where it has paid the salary to a *de facto* officer who has performed the duties of such office, is within the prohibition of Const. 1846, art. 3, § 24, as amended in 1874 (Laws 1874, p. 926), prohibiting the Legislature from granting extra compensation to public officers.

O'Brien, J., dissenting.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Theodore Stemmler and others against the mayor, aldermen, and commonalty of the city of New York. From a judgment of the Appellate Division (84 N. Y. Supp. 1147) affirming a judgment in favor of defendant, entered on dismissal of the complaint, plaintiffs' appeal. Affirmed.

Upon the defendant's motion the complaint was dismissed by the court at the conclusion of the plaintiffs' evidence. The grounds of the motion were twofold: (1) That the

plaintiffs had failed to establish a cause of action against the defendant; and (2) that chapter 543, p. 1141, of the Laws of 1894, upon which the action was based, was unconstitutional. In 1869—nearly 35 years ago—John A. Stemmler was elected justice of the District Court for the Seventh Judicial District in the city of New York for the term of six years commencing January 1, 1870. A controversy arose between Stemmler and one McGuire as to who was legally entitled to the office. A litigation to determine that question ensued, and on October 15, 1873, it was decided in favor of Stemmler. From January 1st to October 15th the duties of the office were performed by McGuire, and it is obvious from the plaintiff's admissions made on the first trial and from the papers contained in the record that the salary was paid by the city to him. From that time to the expiration of his term the office was held by Stemmler and he received the salary. He died on the 28th of March, 1875, leaving, him surviving, his widow, Babetta Stemmler, and the former plaintiffs in this action, his only heirs at law and next of kin. Babetta died on the 28th of July, 1892, and Franklin A. Stemmler, who was one of the original plaintiffs, died on the 24th of December, 1899, leaving a last will and testament, by which he appointed Bertha L. Stemmler, one of the present plaintiffs, as his executrix. Nearly 20 years after John A. Stemmler's death and 2 years after the death of his widow the Legislature enacted chapter 543, p. 1141, of the Laws of 1894, upon which this action is based. The plaintiffs and none of their predecessors had any right of action against the defendant independently of the statute of 1894. Indeed, no such right of action is claimed, as the complaint is based exclusively upon the statute.

This action has been twice tried. Upon the first trial the court directed a verdict against the defendant for \$35,000 principal and \$50,994.86 interest, making a total of \$85,994.86. An appeal from the judgment entered upon that verdict was taken to the Appellate Division (54 N. Y. Supp. 288) where it was reversed, and a new trial granted; that court holding that the plaintiffs had not complied with the requirements of section 1 of the statute of 1894, and hence were not entitled to recover. The statute referred to provides:

"Upon proof that John A. Stemmler was duly elected justice of the District Court in the city of New York, for the term of six years, commencing on the first day of January, eighteen hundred and seventy, and that the salary of the said office was wrongfully withheld from and has not been paid to him for the portion of the said term prior to the fifteenth day of October, eighteen hundred and seventy-three, or any part of that time, pending his contest for said office, and while it was wrongfully occupied by one Joseph McGuire, who has since been finally adjudged

by the courts to have usurped said office, which proof shall be satisfactorily established by a certified copy of the judgment of the Supreme Court of this state declaring that said John A. Stemmler was duly elected to said office as aforesaid, and that said Joseph McGuire usurped and unlawfully held said office during said period prior to October fifteenth, eighteen hundred and seventy-three, and by a certificate from the comptroller of the city of New York, that no part of said salary for said period has been paid to said John A. Stemmler or his representatives, the board of estimate and apportionment of the city of New York is hereby authorized and directed to meet and ascertain the amount of said unpaid salary belonging to said John A. Stemmler as such justice at the rates fixed by law and paid to the justices of the other district courts in the city for the same period, and upon the certificate of the said board of estimate and apportionment, or a majority of the members thereof, that no part of the said salary has been paid to either John A. Stemmler or his representatives from January first, eighteen hundred and seventy, to October fifteenth, eighteen hundred and seventy-three, and the amount of said salary for said period, the said comptroller upon such certificate and proofs aforesaid being filed in his office, shall pay the amount of the said unpaid salary, with lawful interest thereon from the day last aforesaid to the heirs of the said John A. Stemmler or their representatives.

"Sec. 2. The comptroller is authorized to make such payment out of any unexpended appropriations in the city treasury, and, if necessary, to cause the same to be inserted in tax levy for the following year.

"Sec. 3. This act shall take effect immediately."

The learned Appellate Division, after calling attention to the remarkable character of the act of 1894, whereby the Legislature, nearly 25 years after the commencement of the term of the office mentioned therein, and nearly 20 years after it ended, sought to impose upon the city of New York a liability for Stemmler's salary for a period during which he performed no service, and after the city had paid such salary to the person to whom the certificate of election had been awarded, who actually performed the service, and when it had no part in determining who was elected, held that, before the city of New York could be rendered liable in an action at law to recover the amount directed to be paid by the act, the plaintiffs must allege and prove that every requirement of the statute had been strictly complied with.

Delos McCurdy, for appellants. John J. Delany, Corp. Counsel (Theodore Connolly and Terence Farley, of counsel), for respondent.

MARTIN, J. (after stating the facts). Section 1 of the statute under consideration,

after declaring that certain facts should be established, and that they might be established by a certified copy of the judgment of the Supreme Court declaring Stemmler duly elected, provided: (1) That there should be furnished to the board of estimate and apportionment a certificate from the comptroller that no part of said salary for said period had been paid to Stemmler or his representatives; (2) that the board should meet and ascertain the amount of said unpaid salary belonging to Stemmler at the rates fixed by law; (3) that the board, or a majority of its members, should make a certificate that no part of such salary had been paid to Stemmler or his representatives, and the amount of said salary for said period; and (4) that the comptroller, upon such certificate and proofs being filed in his office, should pay the amount of such unpaid salary, with interest, to Stemmler or his representatives. Thus the several acts above enumerated were to be performed before the comptroller could be required to pay. The comptroller's certificate of nonpayment must be presented. The board must ascertain the amount of the claim. It must also make a certificate stating that no part has been paid and the amount thereof. It was only upon the making and filing in the office of the comptroller of such proofs and certificates that a recovery could be had. There was no pretense that a certificate by the board in pursuance of such statute was executed and filed with the comptroller, but it is contended that the insertion in the tax levy for 1895 of the following provision: "Claim of heirs of John A. Stemmler or their representatives for salary of John A. Stemmler as Justice of the Seventh Judicial District Court from January 1, 1870, to October 15, 1878, audited and allowed, in pursuance of chapter 543, Laws of 1894, at a sum not exceeding \$35,000," was sufficient, and all that was required. With this contention we cannot agree. In this connection it is to be observed that section 2 of that act authorized the payment of the claim mentioned in section 1 out of unexpended appropriations, or, if necessary, the amount was to be inserted in the tax levy for the following year. It is quite obvious, we think, that the insertion in the tax levy for 1895 was in pursuance of the provisions of section 2. Indeed, there seems to have been no attempt to comply with the provisions of section 1, and the case is entirely barren of any certificate of such action by the board as was required by that section. Thus the precise question presented is whether the plaintiffs can recover against the city under the provisions of chapter 543, p. 1141, of the Laws of 1894, without any compliance whatever with the requirements of section 1. This action, as has already been seen, was purely statutory, and the plaintiffs could not recover without showing strict compliance with its requirements on their part. That they have failed to do, and

the trial court granted the defendant's motion for a nonsuit upon the ground that the plaintiffs did not prove facts sufficient to constitute a cause of action. It was held by the learned Appellate Division, following its former decision in this case (34 App. Div. 408, 54 N. Y. Supp. 288), that the mere insertion in the tax levy by the board of estimate and apportionment of a provision auditing and allowing the claim at a sum not exceeding \$35,000, did not, in the absence of proof that a proper certificate was issued by such board to the effect that such salary had not been paid and giving the amount thereof for the period mentioned, constitute a sufficient compliance with the provisions of section 1 to entitle the plaintiffs to recover. We are of the opinion that the decision of the court below in that respect was correct, and should be sustained. In other words, the plaintiffs failed to establish facts sufficient to constitute a cause of action, and were, therefore, properly nonsuited upon that ground. While it is true that the board stated in regard to that item that it audited and allowed the claim at a sum not exceeding \$35,000, it can hardly be said that such action by the board was an auditing of the claim in the sense of reaching a definite determination of its amount. The language "not exceeding \$35,000" was indefinite and uncertain. To audit is to hear and examine an account, and includes its adjustment, allowance, or disallowance at some definite sum. *People ex rel. Myers v. Barnes*, 114 N. Y. 317, 327, 20 N. E. 609, 21 N. E. 739; *People ex rel. Brown v. Board of Apportionment*, 52 N. Y. 224, 227; *People ex rel. McCabe v. Matthies*, 179 N. Y. 242, 247, 72 N. E. 103.

Upon a full consideration of this question and of the opinion of the learned Appellate Division upon the former appeal, we have reached the conclusion, not only that the determination of the court below was correct, and should be affirmed, but also that this branch of the case was there so fully examined that no further discussion need be had, except to announce that we concur in that opinion and in the conclusion reached by the Appellate Division in this case.

The defendant also claims that the judgment appealed from should be upheld upon the ground that the statute of 1894 is in conflict with the Constitution of this state. In determining that question we are required to refer to the Constitution of 1846, as amended in 1874 (Laws 1874, p. 926), since the Constitution of 1894 did not go into effect until after the passage of that act. Section 24 of article 3 of the amended Constitution of 1846, which is the same as section 28 of article 3 of the Constitution of 1894, provided: "The Legislature shall not, nor shall the common council of any city, nor any board of supervisors, grant any extra compensation to any public officer, servant, agent or contractor." Section 11 of article 8

of the same Constitution, which is substantially re-enacted in section 10 of article 8 of the present one, provided: "No * * * city * * * shall hereafter give any money or property, or loan its money or credit, to or in aid of any individual, * * * nor shall any such * * * city * * * be allowed to incur any indebtedness, except for * * * city * * * purposes." The appellants contend that there was no proof that the salary of the office was paid by the city to McGuire while it was occupied by him. That contention cannot be sustained if the plaintiffs' admission upon the former trial was sufficient to justify the court in holding that it was not limited to that trial alone, but remained binding upon the parties during the entire litigation. There was proof of such admission submitted to this court. On the argument the record of the former trial was presented which contained the following admission: "It is admitted that during the time John A. Stemmler was ousted from office the defendant paid the salary to Joseph McGuire." This was a general admission, was not limited to the first trial, and therefore remains binding upon the parties during the entire litigation. A stipulation made by the parties or their attorneys with respect to the facts in a case for the purpose of evidence is general, and not limited in respect of time or occasion, but stands in the case for all purposes until the litigation is ended, unless the court upon application shall relieve either or both of the parties from its operation. *Clason v. Baldwin*, 152 N. Y. 204, 46 N. E. 322; *Converse v. Sickles*, 16 App. Div. 49, 44 N. Y. Supp. 1080, affirmed 161 N. Y. 606, 57 N. E. 1107; *Fortunato v. Mayor, etc.*, of N. Y., 74 App. Div. 441, 77 N. Y. Supp. 575, affirmed 173 N. Y. 608, 66 N. E. 1109. The rule is well settled that record evidence not in the return may be read by the court on review in support of a decision, although not to secure a reversal. *People ex rel. Warschauer v. Dalton*, 159 N. Y. 235, 239, 53 N. E. 1113; *Wines v. Mayor, etc.*, of N. Y., 70 N. Y. 613; *Matter of Cooper*, 93 N. Y. 507; *Day v. Town of New Lots*, 107 N. Y. 148, 13 N. E. 915; *Dunham v. Townshend*, 118 N. Y. 281, 23 N. E. 367; *Atlantic Ave. R. R. Co. v. Johnson*, 184 N. Y. 375, 31 N. E. 903. Consequently the evidence and stipulation, so far as it was contained in the record of such preceding trial and offered upon the argument, was admissible upon this appeal.

Under the previous decisions of this court, the disbursing officers of the city of New York charged with the duty of paying official salaries, had the right, in the discharge of that duty, to rely upon the apparent title of McGuire, who was an officer de facto, and to treat him as an officer de jure, without inquiring whether another had the better right to the office. As the city had the right, and it was its duty, to pay the salary to McGuire

during his actual incumbency, and, having paid it, it cannot be required to pay it again to the plaintiffs. The remedy of a person wrongfully deprived of an office is to recover his damages for the wrong against the usurper. *Dolan v. Mayor, etc.*, of N. Y., 68 N. Y. 274, 23 Am. Rep. 168; *McVeany v. Mayor, etc.*, of N. Y., 80 N. Y. 185, 36 Am. Rep. 600; *Terhune v. Mayor, etc.*, of N. Y., 88 N. Y. 247; *Demarest v. Mayor, etc.*, of N. Y., 147 N. Y. 203, 41 N. E. 405; *Nichols v. MacLean*, 101 N. Y. 526, 5 N. E. 347, 54 Am. Rep. 730. Therefore, we think, it follows that, as there was no liability on the part of the city to pay Stemmler or his representatives any portion of the salary which had already been paid to McGuire, to whom the city was liable while he held the office of such justice, the statute of 1894, requiring the defendant to pay its public money for a service never rendered, and for which it was not liable, falls within the inhibition of the provisions of the Constitution to which we have already referred. While this case might fall within the broad doctrine laid down in *Town of Guilford v. Board of Supervisors*, 13 N. Y. 143, and similar cases, yet, with the amendments of the Constitution of 1846, adopted in 1874, we think the rule is now quite different. Those amendments were new, and for the first time forbade any city to give or loan its money or credit in aid of an individual, prohibited the Legislature or any city from granting any extra compensation to public officers, and prevented them from employing or requiring the use of city funds for any but city purposes. The statute in question clearly falls within the inhibition of the Constitution as amended in 1874, as it required the city of New York to pay an amount for which it was not liable legally nor in equity or justice. It, in effect, provided for a mere gratuity or extra compensation to a public officer, who had performed no service for the city, and had done nothing which entitled him, as against the city, to any such compensation, and directed the employment of the funds of the city for other than city purposes.

Since those amendments to the Constitution, their effect has often been the subject of judicial construction by this and other courts in the state. Although we are not unmindful of the decisions of this court anterior to their adoption, and realize that the broad doctrine was then held that the Legislature was not confined in its appropriation of public money, or of sums to be raised by taxation in favor of individuals, to cases where a legal demand existed, and that it could thus recognize claims founded upon equity and justice, yet since the amendments that rule has been changed, and they have eliminated all considerations of gratitude and charity as grounds for the appropriation of public money, except for the aid and support of the poor.

In *Sun Printing & Publishing Ass'n v.*

Mayor, etc., of N. Y., 152 N. Y. 257, 265, 46 N. E. 499, 500, 37 L. R. A. 788, a county, city, town, or village purpose was thus defined: "The purpose must be necessary for the common good and general welfare of the people of the municipality, sanctioned by its citizens, public in character, and authorized by the Legislature." The attempted appropriation of the city funds to pay a claim not based upon services rendered to the city but for money never earned, cannot, we think, be said to be a purpose for the common good and general welfare of the municipality, and therefore is not within the foregoing definition of a city purpose. In *Bush v. Board of Supervisors Orange Co.*, 159 N. Y. 212, 53 N. E. 1121, 45 L. R. A. 556, 70 Am. St. Rep. 538, this court considered a statute to indemnify drafted men who had served personally in the Civil War, furnished a substitute, or paid commutation money. There the question whether such an act was prohibited by the amendments of 1874 was discussed, and it was held that the act was void as being in violation of section 10 of article 8, which prohibits the giving of any money or property to any individual, forbade any county, city, town, or village to incur any indebtedness except for county, city, town, or village purposes, and the action of the town authorities in recognizing such a claim to be paid by taxation was incurring obligations for other than city purposes. In *People ex rel. Waddy v. Partridge*, 172 N. Y. 305, 65 N. E. 164, an action was brought to recover certain pensions provided by the charter of the city of Brooklyn, which included the construction and examination of that statute, and this court held that under the statute the relator could not recover, and, if the charter was so construed as to cover the relator's case, it would be plainly unconstitutional as an appropriation of public moneys to private purposes. In *Matter of Greene*, 166 N. Y. 485, 60 N. E. 183, where the Legislature had passed an act vacating a judgment upon the merits in favor of a county, granted the plaintiff a new trial, and directed the levy of a tax to pay any amount found due him, it was held unconstitutional, as it was virtually the bestowal of a gratuity, in violation of sections 9 and 10 of article 8 of the Constitution. Again, in *Matter of Chapman v. City of New York*, 168 N. Y. 80, 86, 61 N. E. 108, 110, 56 L. R. A. 846, 85 Am. St. Rep. 661, it was held that a statute which provided for the payment from the funds of a county or city of the expenses incurred by a police officer in successfully defending charges preferred against him would constitute their application to an individual, and not to a city or county, purpose. It was there said that, "when a citizen accepts a public office, he assumes the risk of defending himself against unfounded accusations at his own expense." We think it may be equally well said that when a citizen accepts a nomina-

tion for a public office, and is elected, he assumes the risk of defending himself against the unfounded accusations of another candidate, and incurs the risk of losing the salary during the time the office is occupied by his adversary. The same doctrine was held in *Matter of Straus*, 44 App. Div. 425, 429, 61 N. Y. Supp. 37, 40. In that case the court discussed the question as to the class of obligations which could be said to be excepted from the operation of the language of the amendments to which we have referred. The learned judge referred to instances, such as cases where the statute of limitations had run, or where a debtor had been discharged by bankruptcy, where money had been expended for the benefit of the city and it had received the full benefit of such expenditure, and other cases where the city had actually received a pecuniary benefit from the person who presented the claim, or it had imposed upon it a liability in regard to which he had become honorably estopped from refusing to pay, and then he added: "Unless there was some relation between the person making the claim and the city by reason of which a burden was imposed upon him, or his money was taken for the benefit of the city, clearly no reason can exist why the city should be called upon to pay back to him the money he has paid out voluntarily for his own immediate benefit." See, also, *Matter of Jensen*, 44 App. Div. 509, 60 N. Y. Supp. 933; *Matter of Chapman*, 57 App. Div. 583, 68 N. Y. Supp. 1135; and *Rockefeller v. Taylor*, 69 App. Div. 176, 183, 74 N. Y. Supp. 812.

An examination of the foregoing cases renders it quite obvious that there was no such legal, just, or moral liability upon the city to pay Stemmler or his representatives for services which were not performed by him as would justify the Legislature in passing the act which is the basis of this litigation. We are of the opinion both that the plaintiffs did not prove facts sufficient to constitute a cause of action under the statute and that the statute upon which this action was founded was unconstitutional.

The judgment should be affirmed, with costs in all the courts.

CULLEN, C. J., and BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur. O'BRIEN, J., dissents.

Judgment affirmed.

(212 Ill. 477)

CHICAGO CITY RY. CO. v. LANNON.*

(Supreme Court of Illinois. Oct. 24, 1904.)

INJURIES TO PASSENGERS—EVIDENCE—INSTRUCTIONS—REVIEW.

1. In an action against a street car company for an injury to a passenger resulting from the car on which he was riding coming in contact

*Rehearing denied December 22, 1904.

with a vehicle which it was passing, evidence as to the right of way of street cars over vehicles was properly excluded.

2. Refusing an instruction the substance of which had already been given is proper.

3. The Supreme Court will not review the conflicting evidence where there is evidence to support the judgment.

Appeal from Appellate Court, First District.

Action by Charles J. Lannon against the Chicago City Railway Company and another. Judgment for plaintiff was affirmed by the Appellate Court, and defendant railway company appeals. Affirmed.

This is an action on the case, brought by appellee, Charles J. Lannon, against the Chicago City Railway Company, appellant, and the Pabst Brewing Company, to recover for personal injuries sustained by him on June 4, 1901, while riding as a passenger on one of appellant's cars. On the morning in question, appellee, who was a bricklayer, boarded a car bound for the stockyards. He sat at the extreme left end of the last seat at the rear of the car, facing the front. The car was open, and the seats extended across it without any center passageway. As the car proceeded southwest on Archer avenue it came up behind and near to a heavily loaded beer wagon of the Pabst Brewing Company going in the same direction along the car tracks. The driver of the wagon attempted to turn out of the railway tracks to the left, and in a southerly direction, during which time the car kept moving at about three or four miles an hour. The wagon got far enough from the tracks for the front end of the car to pass it, though in close proximity. Just as the part of the car where the appellee sat was about to pass, the corner of the wagon box collided with the car, and the appellee's arm was crushed at the elbow between the wagon box and the side of the car. The suit was brought against both the Chicago City Railway Company and the Pabst Brewing Company, and the jury found the defendant brewing company not guilty, and the defendant the Chicago Railway Company guilty, and assessed plaintiff's damages at \$5,000. An appeal was prayed to the Appellate Court for the First District, where the judgment of the superior court was affirmed, and a further appeal has been prayed to this court.

William J. Hynes, James W. Duncan, and C. Le Roy Brown, for appellant. Theodore G. Case and John T. Murray (A. W. Browne, of counsel), for appellee.

WILKIN, J. (after stating the facts). The defendant street car company requested the court to give an instruction to the jury to the effect that the street car had the right of way over other vehicles, and that the jury had the right to take that fact into consideration in determining whether or not its

servants were negligent at the time of the accident; but the court refused to give it. It also offered in evidence, but the court refused to admit, an ordinance of the city of Chicago providing that street cars should have the right of way as against other vehicles, and making it unlawful for the driver of any wagon to obstruct a street car. Both of these rulings are urged as reversible error. The question at issue was not as to the right of way of the street car, or whether or not the driver of the beer wagon was a trespasser liable to punishment for obstructing the car, but whether or not the servants of the appellant negligently, carelessly, wrongfully, and improperly operated the car at the time it came in contact with the wagon, and caused the injury to the plaintiff. Neither the offered evidence nor the refused instruction was pertinent to that issue. Conceding that appellant had the absolute right of way, and that the wagon was wrongfully on the track, those facts could in no way excuse its employees in failing to exercise the highest degree of care consistent with the operation of the car for the safety of passengers riding therein, and, if they were negligent in that regard, causing the accident, the company must be held liable; but not otherwise. The evidence was immaterial, and the instruction inapplicable to the case.

Complaint is also made of the refusal of the trial court to give the second instruction asked on behalf of the defendants. Of the 21 instructions asked by their counsel 18 were given, and they cover every substantial theory of the defense. The nineteenth and twentieth contained all that was material or proper to be given in the second, and there was, therefore, no error in the refusal to give it.

It is also assigned for error that the trial court refused to instruct the jury, at the close of all the evidence, to find the defendants not guilty; the contention being that the evidence wholly failed to prove negligence on the part of the servants of the street car company, as alleged in the declaration. Peter Gore, the driver of the beer wagon, testified: "I was driving southwest and the street was not paved on the right-hand side. The first thing I knew I was pulling out of the switch, and swung the horses south. I was not quite out, I don't hardly believe, but the hind wheel, I believe, was dragging on the switch, or something like that; and I got one little jar—a hard jar," etc. Meda Schlaizer, a passenger in the car, testified: "Before the wagon got all of the way out the car started to go with a kind of a jerk, so the Pabst wagon ran the whole length of that car along the little fender that was there. It struck the whole length of that, and Mr. Lannon was sitting resting his arm, and the wagon struck him on the left arm." This evidence fairly tended to prove that the motorman started his car forward before the wagon had cleared the

¶ 2. See Trial, vol. 46, Cent. Dig. § 651.

track, thereby causing the collision and inflicting the injury complained of. Accepting it as true, as we must for the purpose of considering the question now before us, the servants of appellant in charge of the car did not exercise that degree of care for the safety of those being conveyed in it as passengers which the law requires, and we cannot, therefore, say that there is no evidence tending to support the verdict. It is true that there is much evidence in the record tending to prove that the wagon had entirely cleared the track when the speed of the car was increased, and that the hind wheels were swung back against the car by reason of a switch at that place; but it was for the jury, under proper instructions from the trial court, and the Appellate Court, to determine all controverted questions of fact. Our jurisdiction is limited to the single question, was there any evidence which, with all its reasonable inferences and intendments, fairly tended to prove the plaintiff's case? and, limiting our inquiry to that question of law, we cannot say that the trial court improperly refused to give the peremptory instruction.

There seems to be no reversible error in this record, and the judgment of the Appellate Court must be affirmed.

Judgment affirmed.

(212 Ill. 456)

MERRIFIELD et al. v. CANAL COM'RS OF ILLINOIS & M. CANAL et al.

(Supreme Court of Illinois. Dec. 22, 1904.)

Dissenting opinion. For majority opinion, see 72 N. E. 405.

WILKIN, CARTWRIGHT, and HAND, JJ. (dissenting). The principal legal questions in dispute in this case are whether appellant Merrifield is entitled to draw from the feeder a certain proportion of all the water flowing in Fox river, or only of the water flowing in the feeder, and whether he has a prescriptive right to draw from the feeder as much water as was drawn therefrom by himself and his predecessors in title for a period of years. Both these questions are decided against him. It is held that the rights of the parties were settled in the action at law, and that it became the duty of the canal commissioners to take such steps as may be found proper to control and restrict the use of water by him to the proportion to which he is entitled. So far we concur in the foregoing opinion, but we do not understand that the commissioners are restricted to the use of gates because they were in use when Merrifield and his predecessors were permitted to take as much water as they chose, and took more than they were entitled to. In our opinion, the commissioners may adopt and install any device that will accomplish the desired result. What Merrifield is entitled to is a

definite share of the water power supplied by the feeder, and, if he gets it in any way for practical use on his water wheels, he has no cause for complaint. The evidence shows that a proper distribution of the water power by means of gates operated by an individual is not practicable. The amount of water flowing through a given space under gates depends upon velocity as well as volume, and is governed largely by the head or pressure of the water above. The head is lowered by opening the gates and releasing a portion of the water, and it is constantly changing in some degree. To make and maintain a just apportionment would require the presence and personal attention of an expert. The hydraulic engineer employed by Merrifield testified for him that the theory or system adopted by the commissioners for an automatic distribution of the water according to the rights of the parties was sound and correct, but that the form of the weir should be different, and present a vertical side to the flow instead of a sloping one. Perhaps the form was objectionable, but, according to the evidence, there never was a time when the water did not flow over it, nor when Merrifield did not get more water and water power than his just proportion. The crest of the weir was 3.56 feet below the crest of the dam, and the evidence did not show that there had been or would be a time when water would not flow over the weir. If there was some loss of head as compared with the use of gates, it was fully compensated for by the increased amount of water, and the full share of water power was furnished. If there was a better form of weir, it might properly be adopted, but Merrifield himself proved that a weir is the proper means of controlling the distribution of the power.

(163 Ind. 536)

CRUM v. NORTH VERNON PUMP & LUMBER CO. et al. (No. 20,484.)

(Supreme Court of Indiana. Dec. 8, 1904.)

APPEAL—SUPREME COURT—JURISDICTIONAL AMOUNT.

1. Under Burns' Ann. St. 1901, § 1337j, subd. 3, providing for appeals from the Appellate Court to the Supreme Court "only when the amount in controversy, exclusive of costs and interest on the judgment of a trial court, exceeds \$5,000," no appeal lies to the Supreme Court from a judgment of the Appellate Court affirming a judgment of the trial court sustaining a demurrer to a complaint.

Appeal from Circuit Court, Jackson County; Joseph H. Shea, Special Judge.

Action by Oliver D. Crum against the North Vernon Pump & Lumber Company and others. A judgment for defendant, on demurrer to the complaint, was affirmed by the Appellate Court (72 N. E. 193), and plaintiff appeals. Dismissed.

McHenry Owen, for appellant. Lincoln Dixon and H. C. Meloy, for appellees.

JORDAN, J. This is an appeal from the judgment of the Second Division of the Appellate Court affirming the judgment of the Jackson circuit court.

Appellant, as plaintiff, instituted this action in the lower court to recover for personal injuries alleged to have been sustained by him, while at work in appellees' sawmill in Lawrence county, Ind. His complaint consisted of two paragraphs, in each of which he alleged that he had been damaged in the sum of \$10,000, for which he demanded judgment. A demurrer was sustained to each paragraph of the complaint, and judgment was rendered against him on demurrer. From this judgment he appealed to the Appellate Court, wherein the judgment of the lower court was affirmed.

Appellant seeks to prosecute this appeal under subdivision 3 of section 1337j, Burns' Ann. St. 1901, the same being section 10 of an act of the Legislature in force March 12, 1901 (Acts 1901, p. 567). The provisions of the statute read as follows: "Third. In any case decided by either of said divisions of the Appellate Court any losing party shall have the right to appeal to the Supreme Court, *only when the amount in controversy, exclusive of costs and interests on the judgment of the trial court exceeds six thousand dollars (\$6,000).* The appeal may be taken within sixty days after the rendition of the judgment, or within thirty days after the overruling of a petition for a rehearing by said division of the Appellate Court, and not afterwards. The appeal shall be held to be perfected by filing with the clerk of the Supreme Court an assignment of the errors alleged to have been committed by the divisions of the Appellate Court." (Our italics.)

It will be observed that by the positive provision of this statute an appeal by a losing party from a judgment of either division of the Appellate to the Supreme Court is only allowed when the judgment of the trial court from which the appeal was taken to the Appellate Court, after excluding all costs thereon, and all interest accrued subsequent to its rendition, exceeds \$6,000. The amount in controversy is not in any sense to be determined from the pleadings, but is to be determined from the amount disclosed by the judgment of the trial court, after excluding, as heretofore stated, interest and costs. In all cases the amount of the judgment is to be taken as the standard by which the right of appeal from the Appellate to the Supreme Court must be tested. It follows, therefore, that the amount in controversy in the case at bar for the purpose of this appeal cannot, within the meaning of the statute in question, be determined by the amount demanded in the complaint, nor by the amount disclosed in the body of that pleading. The rule, therefore, as asserted in *Ex parte Sweeney*, 126 Ind. 583, 27 N. E. 127, pertaining to an appeal from a judgment of the trial court to the Appellate Court

under the statute then in force, has no application to the statute herein involved.

Under the facts in this case, for the reasons stated, this appeal cannot be entertained, and is therefore dismissed.

(163 Ind. 532)

MILLER v. JULIAN. (No. 20,429.)

(Supreme Court of Indiana. Dec. 6, 1904.)

APPEAL — BRIEFS — FAILURE TO FILE — ASSIGNMENTS OF ERROR — CONFESSION — REVERSAL.

1. Where appellee neglected to file his brief within the time required, and an extension of time asked for as a matter of grace was refused, and no excuse was offered other than mere negligence, the assignments of error would be taken as confessed, and the case reversed.

Appeal from Circuit Court, Cass County; John S. Lairy, Judge.

Action between William A. Julian and Henry N. Miller. From a judgment in favor of the former, the latter appealed to the Appellate Court, by which the case was transferred to the Supreme Court, as authorized by Burns' Ann. St. 1901, § 1337u. Reversed.

Justice & Guthrie, for appellant. Lairy & Mahoney, for appellee.

JORDAN, J. Appellant appeals from a judgment of the lower court awarding appellee a recovery of money. The errors assigned and argued for a reversal relate (1) to the overruling of the demurrer to the complaint; (2) the ruling of the court in striking out upon appellee's motion the fourth, fifth, sixth, and seventh paragraphs of appellant's answer and counterclaim; (3) overruling a motion in arrest of judgment; and (4) denying motion for a new trial. Under these assignments counsel for appellant present and discuss various alleged errors of the trial court, and cite many authorities in support of their contentions. Appellee, without any excuse whatever, seems to have neglected to file any brief in this appeal, consequently appellant's contentions stand uncontroverted. It appears that in the Appellate Court, from which this cause has been transferred, appellee, after allowing the time for filing his brief to expire, presented an application to that court asking, as a matter of grace, and not as a matter of right, for an extension of time in which to prepare and file a brief. This request the court finally denied, and the cause was transferred to this court for decision without any brief on file in behalf of appellee; hence we are left unaided by him to solve the numerous questions herein involved. Appellant's counsel insist that we enforce the rule declared in *Berkshire*, etc., v. Caley, 157 Ind. 1, 60 N. E. 696; *Neu v. Town of Bourbon*, 157 Ind. 476, 62 N. E. 7; *People's*, etc., Bank v. State, 159 Ind. 353, 65 N. E. 6; *Union Traction Co. v. Forst*,

¶ 1. See Appeal and Error, vol. 3, Cent. Dig. § 310.

162 Ind. 567, 70 N. E. 979; and Moore v. Zumbum (Ind. Sup.) 70 N. E. 800. Under the rule asserted and adhered to in the cases above cited, the neglect of an appellee to file a brief controverting the errors complained of by an appellant may be taken or deemed to be a confession of such errors, and the judgment may accordingly be reversed, and the cause remanded without prejudice to either party. This rule was not declared in the interest of an appellant, but for the protection of the court, in order to relieve it of the burden of controverting the arguments and contentions advanced for reversal, which duty properly rests upon counsel for the appellee. The rule is not a hard and fast one, but is enforced only within the discretion of the court. Appellee in this appeal offers no excuse whatever except that of mere negligence.

Without passing upon the merits of any of the questions presented, the judgment below is reversed, without prejudice to either party, and the cause remanded to the lower court for further proceedings.

(163 Ind. 617)

SOUTHERN INDIANA RY. CO. v. FINE.
(No. 20,434.)

(Supreme Court of Indiana. Dec. 9, 1904.)

INJURIES TO SERVANT.—RAILROADS.—EMPLOYERS' LIABILITY.—STATUTES.—PLEADING.—DUTY OF MASTER.—PROXIMATE CAUSE.—EVIDENCE.—MISCONDUCT OF COUNSEL.—ARGUMENT.—CORRECTION.—REQUEST TO CHARGE.—INSTRUCTIONS.—APPEAL.—EXCEPTIONS.—HARMLESS ERROR.—REVIEW.

1. Burns' Ann. St. 1901, § 7083, subd. 4, provides that every railroad corporation shall be liable for personal injury to an employé while in its service, exercising due care, where the injury is caused by the negligence of any person in the service of the corporation in charge of any locomotive, engine, or train, the person injured obeying the order of some superior at the time of such injury having authority to direct, etc. *Held*, that where a complaint in an action for injuries to a servant by a cable used in unloading a gravel train alleged that the conductor had full control of the train, and, knowing plaintiff's position, carelessly, and without notice to plaintiff, suddenly ordered the engineer to start the train, with knowledge that plaintiff's position would thereby become dangerous, it was not objectionable for failure to allege that the conductor owed plaintiff a duty to warn him.

2. A statement, by plaintiff's attorney, in argument, directing the jury to find their general verdict, and then take each interrogatory submitted, and answer each, so that it may dovetail in and agree with their general verdict, was improper.

3. Under Burns' Ann. St. 1901, § 637, defining an exception as "an objection taken to the decision of the court on a matter of law," no exception can be reserved to the argument of counsel, objection to which can be preserved only by an exception to the ruling of the court refusing to sustain a proper motion to instruct the jury not to consider such argument.

4. Where plaintiff's counsel indulged in improper argument to the jury with reference to the manner in which they should answer interrogatories, defendant was only entitled to have the jury admonished without delay that the statements should not be considered.

5. Where, on objection to certain improper argument, the court properly overruled a motion to withdraw the submission of the cause, and stated that it would instruct the jury to answer the interrogatories according to the evidence, and the court thereafter charged the jury to answer each of the interrogatories without reference to the general verdict, defendant having failed to request the court to instruct the jury not to consider such statements at the time they were made, such failure was not reversible error.

6. Where an action for injuries to a railroad employé was brought under Burns' Ann. St. 1901, § 7083, subd. 4, authorizing an action for such injuries caused by the negligence of an employé in charge of the work or by a fellow servant, etc., and the jury found for plaintiff thereon, the inadvertence of the court, in assuming in its instructions that a paragraph of the complaint attempting to state a cause of action on defendant's common-law liability to furnish plaintiff a safe place to work, to which a demurrer had been sustained, was still in the record, was harmless.

7. Where the court clearly charged the doctrine of assumed risk, and declared that it was necessary for plaintiff to have a preponderance of the evidence on some paragraph of his complaint in order to recover, an instruction detailing the charges of negligence, and concluding with the statement that, if the jury found that defendant was guilty of negligence through its conductor, plaintiff "might" recover whether there was any negligence on the part of the engineer or not, was not objectionable as eliminating plaintiff's duty to show that he had not assumed the risk.

8. Plaintiff, as was his duty, took a position at the end of a gravel train to let down an end board before the unloading was commenced, and while in this position was injured by the whipping of a cable attached to the engine, which was negligently started by order of the conductor, without notice to plaintiff, before he had succeeded in completing his task. *Held*, that the negligence of the conductor was the proximate cause of the injury.

9. In an action for injuries to a railway employé by the whipping of a cable attached to an engine, used for the purpose of unloading a gravel train, evidence held sufficient to sustain a verdict for plaintiff.

Appeal from Circuit Court, Lawrence County; James B. Wilson, Judge.

Action by Andrew J. Fine against the Southern Indiana Railway Company. A judgment was rendered in favor of plaintiff, from which defendant appealed to the Appellate Court, and the case was transferred to the Supreme Court under Burns' Ann. St. 1901, § 1337u. Affirmed.

Brooks & Brooks and F. M. Trissal, for appellant. East & East and McHenry Owen, for appellee.

GILLETT, J. Appellee filed his complaint in four paragraphs to recover against appellant for negligence. The first three of said paragraphs were held sufficient on demurrer. A demurrer was sustained to the fourth paragraph. Appellant closed the issues by a general denial. There was a verdict in appellee's favor, and in connection therewith the jury returned answers to 51 interrogatories. Appellant filed a motion for a new trial, which was overruled, and judgment was rendered for appellee. The errors assigned draw

in question the overruling of the demurrer to the first three paragraphs of the complaint and the overruling of the motion for a new trial.

The case, as presented to us, is somewhat peculiar, in that the interrogatories which were submitted were so framed as to be calculated to bring out an unusually full disclosure of the findings of the jury on the evidence, and the jury returned such answers that on most, if not all, of the matters on which there would have to be a finding in appellee's favor to warrant a recovery by him, we are sufficiently advised as to what the jury's conclusion was on the questions of fact. It is generally a difficult undertaking to make a narrative statement of the effect of a jury's answers to a long series of interrogatories, and this case is no exception to the rule. Nevertheless, since the findings, or their substance, must be stated, if the basis of our rulings on most points is to be made clear, we shall undertake to reduce the matter to narrative. After grouping the findings, so far as possible, according to what seems to be their natural sequence, it may be said that, in substance, they are as follows: On the 5th day of December, 1899, appellant was engaged in unloading dirt from a train of flat cars by means of a plow or shovel, which was pulled eastward by a wire cable, which was stretched lengthwise along said cars and attached to a locomotive. One Charles H. Deer was the conductor, and in full charge of said train. On said day appellee was in the employ of appellant on said train as a cable man, and he had been so working during the three months immediately preceding said date. It was the duty of appellee, while in said employment, to conform to the orders of said conductor. At the time in question, four cable men, including appellee, were at the east end of said train, engaged in uncoupling the locomotive from the train and preparing for starting the plow. On that portion of the train which was nearest the locomotive there was an apron or end board, which it was necessary to let down before commencing to plow. It was the duty of appellee under his employment, as said apron was up, to lower it, preparatory to unloading the dirt. In the straightening of said cable by the locomotive it was a frequent occurrence that the cable would fly to one side, if the apron was up, and it was dangerous, because of such tendency, to stand at said end board and near said cable in such circumstances. Before signaling the engineer to start the locomotive, it was the duty of the conductor to get information that all was ready from the cable men or the brakemen at the head of the train. At the time referred to appellee had gone to said apron for the purpose of lowering it. Although the conductor did not receive any signal that all was ready, and although he knew that appellee was in a dangerous place, and at the place where he was hurt, as hereinafter stated, yet

he gave the engineer a signal to start, with the result that the latter suddenly started the locomotive, thereby causing the cable instantly to strike and severely injure appellee, before he had time to escape. At that time appellee was in the line of his duty, standing in the usual place for lowering said apron, and was engaged in so doing in conformity to the orders of the conductor. It is further found that appellee had no warning or notice that the locomotive was about to start, and that he did not know that his location was dangerous, because he had received no signal. The jury answered in the affirmative the twenty-second interrogatory propounded to them, which was as follows: "Was not the plaintiff, at the time of his injury, using and exercising ordinary care and diligence for his own safety?"

The second paragraph of the complaint was evidently drafted on the theory of stating a cause of action under the first part of the fourth subdivision of section 1 of the employer's liability act (section 7083, Burns' Ann. St. 1901). See *Indianapolis, etc., Co. v. Houlihan*, 157 Ind. 494, 60 N. E. 943, 54 L. R. A. 787; *Thacker v. Chicago, etc., R. Co.*, 159 Ind. 82, 64 N. E. 605, 59 L. R. A. 792. It is objected that this paragraph is insufficient, for the reason that it is not averred that a duty of warning appellee was owing to him, or that he had a right to expect it. It is alleged that Deer had full charge and control of the train, and also that he knew that appellee was standing near the car, and that to give such signal or order, and so cause the locomotive to start, would instantly cause appellee's working place to become dangerous and unsafe to him. It also sufficiently appears that appellee was in a place where his duty under his employment called him. It is in these circumstances that it is alleged that said conductor "carelessly and negligently, without any notice or warning to this plaintiff whatever, suddenly signaled, ordered, and caused the engineer of said train to suddenly start said locomotive eastward." The failure to give notice is not charged as a substantive ground of negligence. The ground of negligence was the giving of the signal, but we should be prepared to hold, if the averment were that the conductor negligently started the locomotive without giving notice to appellee, that, considering that the conductor was in full charge of the train, and knew that appellee's position would be rendered perilous by starting the locomotive without notice, a duty upon the part of the conductor to give notice was sufficiently disclosed by the facts alleged. A bare allegation of the legal duty amounts to nothing. Facts should be alleged which disclose the existence of the duty, and in this respect the paragraph before us appears to be sufficient. See *Pittsburgh, etc., R. Co. v. Lichteiser* (at last term) 71 N. E. 218. We need not consider the sufficiency of the other paragraphs of complaint, for it sufficiently appears from

the answers to interrogatories that the jury found for appellee on the second paragraph.

It is disclosed by a bill of exceptions that in making the closing argument one of the attorneys for appellee said to the jury: "Find your general verdict, inserting the amount you will give the plaintiff. Then take each interrogatory, and answer each so that it may dovetail in and agree with your general verdict, and"— At this point the argument was interrupted by one of appellant's attorneys, who objected to said statements, and moved the court to withdraw the submission of the cause from the jury on account of the misconduct of counsel, and he further objected to proceeding with the cause. It is disclosed that the court overruled the objections and motions, and that it stated that it would instruct the jury to answer the interrogatories according to the evidence, to each of which rulings, as the bill states, appellant excepted. Upon the conclusion of the incident, appellee's counsel stated, in proceeding with his argument, "that the plaintiff did not desire a verdict of any kind that was not based upon the evidence." Among the instructions afterwards given is one which directed the jury to "answer each of the interrogatories submitted as the evidence warrants, without reference to your general verdict." Considering the purpose that answers to interrogatories propounded to the jury are designed to subserve, it is proper, in considering them in argument, to discuss not only the evidence in its application to the interrogatories, but even to go further, and impress upon the minds of the jurors that, as the verdict and the answers will be considered together, great care should be exercised in the framing of their answers, to the end that the jurors shall fully apprehend the import of each interrogatory, and that their answers shall be in accord with the evidence. But we have no hesitation in stating that the suggestion made by counsel for appellee in arguing the cause to the jury was improper. The objection to the statement in question lay in its strong, if not necessary, implication that, having reached a general verdict in favor of the plaintiff, the jurors should not approach the task of answering interrogatories with ingenuous minds, but that they should do so with the predominant purpose of making such answers as would not be out of accord with a general verdict in favor of the plaintiff. If in the argument of a cause counsel go beyond the confines of legitimate argument, the court, as a minister of justice, should interfere; and this it should do whether opposite counsel are objecting or not. It does not follow, however, that a litigant who claims to have been prejudiced by improper argument can successfully complain of the failure of the court to so interfere. A duty is devolved upon his counsel directly to bring the matter to the attention of the court, to make specific statement, if reasonably required, of the ground of the objection, and, if

the wrong is not incurable, to request the court to admonish the jury not to consider the statement to which the objection is made. *Coppenhaver v. State*, 160 Ind. 540, 87 N. E. 453; *Robb v. State*, 144 Ind. 569, 43 N. E. 642; *Worley v. Moore*, 97 Ind. 15; *Morrison v. State*, 76 Ind. 335. An exception is defined by Civil Code as "an objection taken to the decision of the court upon a matter of law." Section 637, Burns' Ann. St. 1901. It therefore follows that an exception cannot be reserved to the argument of opposite counsel. *Robb v. State*, supra; *Coppenhaver v. State*, supra. It is only where the court has refused to sustain a proper motion that an exception can be reserved in case of improper argument. The making of the statements here under consideration furnished no ground for setting aside the submission of the cause. Appellant was only entitled to have the jury sufficiently admonished without delay that the statements should not be considered. *Blume v. State*, 154 Ind. 343, 56 N. E. 771. We may assume that appellant's bill of exceptions concerning the incident states the facts as strongly as was warranted, and we may therefore presume that the statement of the court that it would instruct the jury to answer the interrogatories according to the evidence was made in the presence and hearing of the jury. This was ultimately followed, as we have seen, by an instruction that the jury was to answer each of the interrogatories without reference to the general verdict. While the court might, with propriety, have given a seasonable and emphatic admonition to the jury, yet, apart from the failure to reserve an exception to the refusal to grant a proper motion, we think that appellant has no just cause to complain of the failure of the court to go further than it did. While much is made of the incident in appellant's brief, yet it appears to us that the failure of the court to duly and seasonably admonish the jury was quite as much the fault of the complaining party as it was of the court.

It is urged by counsel for appellant that there was error in the giving of certain instructions, in that the court inadvertently assumed in said instructions that the fourth paragraph of the complaint, to which a demurrer had been sustained, was in the record. The paragraph mentioned attempted to state a common-law liability, it being based on the theory that appellant had negligently failed to provide a safe place. Such an inadvertence as the one mentioned would ordinarily present a serious question, but, in view of the answers to interrogatories, we must refuse to reverse on this ground. It is true that the jury found that the place where appellee was working was rendered unsafe by the act of the conductor, but this was also, in its substance, an element in a state of facts authorizing a recovery under the fourth subdivision of section 1 of the employer's liability act. In part the elements of the common-law liability and of the liability imposed by said subdivi-

sion are common, and, as to the further facts which must have existed to warrant a holding that appellant was liable by virtue of the statute, it will be observed that appellee has special findings in his favor. It therefore appears that the jury found for appellee on the second paragraph of his complaint, and whether it was the further purpose of the jury to find for appellee on any other paragraph is wholly immaterial. Appellant was not entitled to a new trial on the ground urged. *Roush v. Roush*, 154 Ind. 572, 55 N. E. 1017, and cases cited; *Baltimore, etc., R. Co. v. Harbin*, 160 Ind. 441, 67 N. E. 109.

The fifth instruction given by the court contained a detailed statement of the charges of negligence, and it concluded with a statement that, if the jury found that appellant was guilty of negligence, through its conductor, appellee "might" recover, whether there was any negligence upon the part of the engineer or not. The objection made to this instruction is that it did not charge that the evidence must show that appellee had not assumed the risk. It will be observed that the instruction did not state that appellee was entitled to recover if he proved negligence as alleged, but its effect was to charge the jury that there might be a recovery by appellee although the charge of negligence as to the engineer might not have been made out. The third and eleventh instructions which the court gave to the jury stated very clearly the doctrine of assumed risk; the thirteenth instruction was to the effect that it was necessary for appellee to have a preponderance of the evidence on some paragraph of his complaint in order to recover; and the first instruction, in effect, stated that the burden was on appellee to prove the averments of at least one paragraph of his complaint. We are of opinion, considering the charge as a whole, that it was not misleading upon the point indicated. See *American, etc., Co. v. Hullinger*, 161 Ind. 678, 680, 67 N. E. 986, 69 N. E. 460.

Upon the subject of contributory negligence it is clear that under the findings of the jury that defense was not available. In *1 Shearman & Redfield on Negligence*, § 99, it is stated: "It is now perfectly well settled that the plaintiff may recover damages caused by the defendant's negligence, notwithstanding the plaintiff's own negligence exposed him to the risk of injury, if such injury was more immediately caused by the defendant's omission, after becoming aware of the plaintiff's danger, to use ordinary care for the purpose of avoiding injury to him. We know of no court of last resort in which this rule is longer disputed." See, also, *Evansville, etc., R. Co. v. Hiatt*, 17 Ind. 102; *Evans v. Adams Express Co.*, 122 Ind. 362, 23 N. E. 1039, 7 L. R. A. 678; *Krenzer v. Pittsburgh, etc., R. Co.*, 151 Ind. 587, 43 N. E. 649, 52 N. E. 220, 68 Am. St. Rep. 252; *Pickett v. Wilmington, etc., R. Co.*, 117 N. C. 616, 23 S. E.

264, 80 L. R. A. 257, 53 Am. St. Rep. 611; *Thompson v. Salt Lake, etc., Co.*, 16 Utah, 281, 52 Pac. 92, 40 L. R. A. 172, 67 Am. St. Rep. 621; *Fonda v. St. Paul City R. Co.*, 71 Minn. 438, 74 N. W. 100, 70 Am. St. Rep. 341; *Rider v. Syracuse, etc., Co.*, 171 N. Y. 139, 63 N. E. 836, 58 L. R. A. 125; *Everett v. Los Angeles, etc., R. Co.*, 115 Cal. 105, 43 Pac. 207, 46 Pac. 889, 34 L. R. A. 350. Under this view of the law, which has been somewhat sentimentally phrased as the doctrine of "last clear chance," it is plain that the act of appellant's conductor, for whose negligence the statute rendered appellant responsible, was the efficient and proximate cause of appellee's injury.

Complaint is made of the sixth instruction which the court gave to the jury, but, as that instruction related to negligence upon the part of the engineer, we think that for reasons already sufficiently indicated it is not necessary to express ourselves upon this objection.

It is claimed by counsel for appellant that the verdict is not sustained by the evidence. There is a conflict in the testimony as to whether the apron was up or down. In the testimony of the conductor he admitted that he saw appellee at the place where he was injured just before the signal to start was given, and that he (the conductor) knew that the cable would be liable to fly. His excuse for giving the signal seems to be based on the claim that the apron was down; that he had before warned appellee to keep away from the cable except when he was required to lower the apron; and that the latter had plenty of time to get away before the locomotive commenced to move the plow. The jury was justified from the evidence in concluding that appellee was struck by the cable as soon as the locomotive commenced to move, and it is but reasonable to suppose that the tendency of the cable to fly would be while the slack was being taken up, and not after the resistance of the plow had taken the lateral kinks and curves out of the cable and caused it to be partially buried in the dirt upon the cars. Regarded apart from the matter of the issues, the jury were fully warranted in concluding that the conductor was negligent. It is claimed, however, that there was a signal given to the conductor, and that, therefore, the allegation of the second paragraph respecting negligence was not made out. One witness (Emery) testified that he said, "I am ready." The conductor does not claim that he heard said words. He testified that he was pretty sure a signal was given; that it was his recollection that it came from one Ramsey. The latter's recollection was deficient on that point. Other men, who were about the head of the train, testified that they saw no signal given to the conductor and heard no warning. There is no reason for disturbing the verdict.

Judgment affirmed.

(164 Ind. 483)

FT. WAYNE TRACTION CO. v. HARDENDORF. (No. 20,400.)^{*}

(Supreme Court of Indiana. Dec. 7, 1904.)

CARRIERS—INJURY TO PASSENGER—STREET CARS—STANDING ON RUNNING BOARD—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—VERDICT—SPECIAL FINDINGS—INCONSISTENCY—INSTRUCTIONS.

1. Under the express provisions of Burns' Ann. St. 1901, § 556, special findings control the verdict only when inconsistent therewith.

2. A passenger on a crowded street car, who stands on the running board and supports himself by the guard bar, does not, as a matter of law, fail to exercise such ordinary care as the circumstances require, especially when the representative of the carrier, charged with the duty of seating and directing the passengers, expressly authorizes him to stand there.

3. Where a passenger standing on the running board of a street car was injured by being struck by another car passing on another track, *held*, that the question whether defendant was negligent in running its cars so close together was one for the jury.

4. It is not the province of the Supreme Court on appeal to review the facts and weigh the evidence.

5. Where a passenger on a street car, while standing on the running board, was injured by being struck by another car passing on another track, in an action by him for the injuries, evidence considered, and *held* to sustain a verdict for plaintiff.

6. Where a passenger on a street car, while riding on the running board, was injured by being struck by another car passing on another track, in an action by him for the injuries an instruction that if plaintiff's injuries were due to his violation of the rules of the defendant, and if a guard rail was placed on the car, so that passengers were warned not to stand on the running board, and plaintiff ignored the presence of the guard rail, he could not recover, even though the conductor permitted him to stand on the running board, was properly refused, in that it omitted to inform the jury that notice of the existence of the rules must be shown before plaintiff could be bound by them.

7. In an action against a street railway company for injuries to a passenger, the question whether the conductor of the car had authority to permit a passenger to stand on the running board was for the jury.

Appeal from Circuit Court, Wells County; El. C. Vaughn, Judge.

Action by Theodore Hardendorf against the Ft. Wayne Traction Company. From a judgment in favor of plaintiff, defendant appealed. Transferred from the Appellate Court, under Act March 13, 1901 (Acts 1901, p. 590, c. 259; section 1337u, Burns' Ann. St. 1901). *Affirmed*.

Barrett & Morris, for appellant. S. M. Hench, for appellee.

DOWLING, C. J. Hardendorf, who was the plaintiff below, sued the Ft. Wayne Traction Company for a personal injury alleged to have been sustained by him while a passenger on one of appellant's cars. The complaint was in two paragraphs, the negligence charged in the first being that the appellant wrongfully permitted the car on which the appellee was a passenger to run

into and against another car before it had cleared a switch; and the second paragraph alleging that the appellant negligently ran two cars against each other, whereby appellee, who was a passenger on one of them, was injured. The answer denied all the averments of the complaint. The cause was tried by a jury, who returned a general verdict in favor of the appellee. Answers to numerous questions of fact submitted to the jury accompanied their verdict. Motions for judgment on the special answers and for a new trial were overruled, and judgment was entered upon the verdict. These rulings are assigned for error.

The following is a summary of the facts stated in the special answers: The plaintiff was injured while riding on one of defendant's open cars, May 30, 1900, going eastward from Linwood Cemetery to the city of Ft. Wayne, Ind. Before it started, the defendant caused a wooden guard bar, 3 inches wide and 1½ inches thick, extending past all the seats, elevated 2 feet above the floor, and securely fastened in its position, to be placed on the left side of the car, 3 feet above the running board on that side, which also extended the whole length of the car. The bar was so placed, as the plaintiff knew, to warn passengers not to enter or leave the car on its left side, and not to stand on the running board. When the car started from the cemetery toward Ft. Wayne, the plaintiff made no attempt to get on the car on its south side, but stood on the running board, against said bar, and remained in that place until the car passed into the south side of defendant's switch, west of the St. Mary's River Bridge. At that time another of defendant's passenger cars was on the north side of the switch to be moved westward, and the plaintiff was then on the running board, between the two cars; and, at the point where they met or attempted to pass each other, the space between the tracks was too narrow to permit the plaintiff to stand safely on the running board. The plaintiff received the injuries complained of at the time the two cars passed each other on the switch, by being struck, while on the left running board, by the side of the car on the north track of the switch. The plaintiff was not acquainted with the lines and tracks of defendant's railway at the place of the accident.

Counsel for appellant argue that the special answers of the jury show contributory negligence on the part of the plaintiff, and that his injury was caused by his want of ordinary care, in occupying a place of obvious danger, in disregard of the warning and prohibition implied by the presence of the guard bar. They further contend that, even if the plaintiff was on the running board with the permission or by the direction of the conductor of the car, the appellant is not liable, because the conductor had no authority to permit or license a violation of

¶ 1. See Trial, vol. 46, Cent. Dig. § 857.

the rules of the company, or a disregard of known precautions adopted by the appellant for the safety of passengers and for its own protection. They cite *Bass, Receiver, v. Reitdorf*, 25 Ind. App. 650, 58 N. E. 95; *Railway v. Goddard*, 25 Ind. 185; *Railway v. Duncan*, 28 Ind. 441, 92 Am. Dec. 322; *Nave v. Flack*, 90 Ind. 205, 46 Am. Rep. 205; *Baltimore R. Co. v. Jones*, 95 U. S. 439, 24 L. Ed. 506; *Louisville R. Co. v. Eves*, 1 Ind. App. 224, 27 N. E. 580; *Trout v. City of Elkhart*, 12 Ind. App. 343, 39 N. E. 1048; *Smith v. Wabash R. Co.*, 141 Ind. 92, 40 N. E. 270; *Aurelius v. Lake Erie & Western R. Co.*, 19 Ind. App. 584, 49 N. E. 857; *Nelboer v. Detroit Electric R. Co.* (Mich.) 87 N. W. 626. A general verdict is the response of the jury to the whole of the evidence in the cause. The particular facts found in answer to interrogatories in most cases constitute a part only of the facts proved on which the general verdict rests. The special finding shows that the facts stated, as the jury believed, were proved upon the trial, and that they probably were considered by the jury; but the general verdict, taken in connection with the special answers, indicates that because of other facts, and from presumptions or inferences from them, the particular facts found were not of controlling influence in determining the nature of the verdict. The special finding of facts controls the general verdict only when inconsistent with it. Section 556, *Burns' Ann. St.* 1901. And every reasonable presumption will be indulged in support of the general verdict. *Ridgeway v. Dearing*, 42 Ind. 157. There is no difficulty in this case, and the answers to the interrogatories are easily reconciled with the verdict. The position of the plaintiff on the running board may not have been necessarily dangerous or improper, or he may have taken it with the permission or by the direction of some agent of the company who was authorized to assign him a place on the car, or there may have been other circumstances which made it necessary or proper for him to stand there. Nothing in the answers to the interrogatories was inconsistent with the fact that, by reason of special precautions in the running of the cars on that occasion, their reduced rate of speed, and special instructions to motormen and conductors for their guidance when meeting or passing other cars, a place on the running board may have been rendered as safe and as suitable for a male passenger as a seat within the car. Hence, although the plaintiff may have known that the guard bar was put up to warn passengers not to enter or leave the car on its left side, and not to stand on the running board, yet the circumstances may have been such as to justify a person of ordinary prudence and care for his own safety in standing on the running board, and in following the directions of an agent of the company charged with the duty of placing the passengers, in taking a position there. *Citi-*

zens' St. R. Co. v. Jolly, 161 Ind. 80, 67 N. E. 935. The special findings were not irreconcilable with the general verdict, and appellant's motion for judgment upon them was properly overruled.

The motion for a new trial rests upon two grounds: First, that the verdict was not sustained by sufficient evidence; and, second, error of the court in refusing to give instructions numbered 4 and 6. Upon the motion, counsel for appellant undertake to maintain two propositions: (1) That it appears from the evidence that appellee's injuries were not occasioned by appellant's negligence; and (2) that they were the result of his own contributory fault. Upon this branch of the case the facts proved were as follows: Before the car started from the cemetery, which was about 1¼ miles from the courthouse at Ft. Wayne, a substantial guard bar was securely fastened on the left side of the car, three feet above the running board, and extending the whole length of the car. The plaintiff knew that it was put up to warn passengers not to enter or leave the car on that side, and not to stand on the running board. May 30, 1900, was Decoration Day, and a great number of people—men, women, and children—had assembled at Linwood Cemetery to hear and to see the exercises. Shortly after 3 o'clock the plaintiff, with his son, a child seven years old, went to the appellant's car to take passage back to Ft. Wayne. The car was crowded, and the plaintiff stepped upon the running board on its left side. The agent of the company, one of whose duties it was to superintend the loading of the cars, to place and remove the guard bars, and to start the cars, came to the left side of the car, where the plaintiff was standing, and proceeded to put up the guard bar. The car was standing still, plaintiff's son was on the ground, and plaintiff was trying to get him up on the step. The agent pushed the bar along the side of the car and under plaintiff's arm. He said to plaintiff, "Put the boy inside, and hang on this guard rail." The plaintiff did as he was told to do, and, afterward, while on the running board, paid his fare to the conductor of the car. No objection to his riding on the running board was made by any one. Other persons also stood upon the running board. While the car was passing out of a switch, and was near its point, it came into collision with another of defendant's cars moving in the opposite direction, which had started out of the other track too soon to clear the plaintiff's car; and the plaintiff was caught between the two, and was crushed and rolled along their sides until his body dropped out at the rear end of the car on which he stood. His injuries were of a very serious character, and their effect was permanent. It cannot be stated as a conclusion of law that a passenger on a crowded street car, who stands upon the running board and supports himself by the

guard bar, does not exercise such ordinary care as the circumstances require. More especially may the passenger be justified in taking and maintaining such a position when the representative of the company who is charged with the duty of seating and directing the passengers expressly authorizes him to standing in that place. The facts that no objection is made by the conductor of the car who collects the fare of the passenger, and that other persons at the same time are suffered to stand upon the running board, may also be considered in determining the question whether the plaintiff exercised ordinary care under the circumstances. The nature of the construction of a street railroad, and the manner in which it is operated, may be such as to render the position of passengers on the running board apparently safe. The presence of a guard bar, when the persons in charge of the road and engaged in the management of the car direct the passenger to stand on the running board, outside of the bar, is not to be regarded as a positive and unmistakable indication that the running board is a place of danger, or that the persons in charge of the car have no authority to permit passengers to stand there while the car is in motion. The perils of such a position are neither so great nor so obvious in all cases as to bar a recovery when the passenger is injured while occupying it. There was no evidence that the knowledge of any rule of the company prohibiting passengers from standing on the running board was brought home to the plaintiff.

The questions whether the plaintiff exercised ordinary care, and whether the defendant was negligent in running its cars at the switch so close together that they could not clear each other, or pass without coming in collision, were questions of fact, and it was the especial duty of the jury to decide them. It is not the province of this court on appeal to review the facts and weigh the evidence, and the possibility that, upon such facts, another and different opinion might be arrived at, furnishes no reason why the practical conclusions of the jury should be set aside, and an opposite view of the effect of the evidence substituted for their verdict. *Cooley on Torts* (2d Ed.) 805; *Cincinnati, etc., Ry. Co. v. Grames*, 136 Ind. 39, 34 N. E. 714; *Board, etc., v. Bonebrake*, 146 Ind. 311, 45 N. E. 470; *Railroad Co. v. Stout*, 17 Wall. 657, 21 L. Ed. 745; *Ohio, etc., Ry. Co. v. Collarn*, 73 Ind. 261, 38 Am. Rep. 134; *Indiana Pipe Line v. Neusbaum*, 21 Ind. App. 361, 52 N. E. 471; *Louisville, etc., R. Co. v. Williams*, 20 Ind. App. 576, 51 N. E. 123; *Citizens' Street R. Co. v. Hoffbauer*, 23 Ind. App. 614, 56 N. E. 54. It is to be observed in the present case that there was no evidence of any rule of the appellant forbidding passengers to stand on the running board; that it was not proved as a fact that such a position was a dangerous one; it did

appear that the car was crowded, and that other passengers were on the running board. These facts distinguish this case from several of those cited by counsel for appellant. We are also of the opinion that the guard bar did not necessarily import notice to the passengers that standing on the running board was not allowed, and that the agents of the company had not authority to permit it.

An examination of the authorities discloses wide differences of opinion among the courts upon the effect of evidence that the passenger, when injured, was upon the running board of a street car. The more reasonable view seems to us to be that the question is generally one of fact, depending upon the circumstances of the particular case. *Kentucky, etc., Bridge Co. v. Quinkert*, 2 Ind. App. 244, 23 N. E. 338; *Willis v. Long Island R. Co.*, 34 N. Y. 675; *Morris v. Eighth Ave. R. Co.*, 68 Hun, 39, 22 N. Y. Supp. 686; *Lake Shore, etc., R. Co. v. Brown*, 123 Ill. 162, 14 N. E. 197, 5 Am. St. Rep. 510; *Jacobus v. St. Paul, etc., R. Co.*, 20 Minn. 125 (Gil. 110), 18 Am. St. Rep. 360; *Bruno v. Brooklyn City R. Co.*, 5 Misc. Rep. 327, 23 N. Y. Supp. 507; *Werle v. Long Island R. Co.*, 98 N. Y. 650; *Chicago, etc., R. Co. v. Fisher*, 141 Ill. 614, 31 N. E. 406; *Woods v. Southern Pacific R. Co.*, 9 Utah, 146, 33 Pac. 628; *Cleveland, etc., R. Co. v. Manson*, 30 Ohio St. 451; *Louisville, etc., R. Co. v. Kelly*, 92 Ind. 371, 47 Am. Rep. 149. In 5 Am. & Eng. Ency. Law, 682, the general rule is stated to be that where the passenger acts under the direction of the conductor, or other servant of the carrier having apparent authority in that behalf, he is not guilty of contributory negligence, on the ground that the carrier's agent and servant is presumably familiar with the operation of the cars, and has reasonable knowledge of what is required for the safety and protection of passengers. As a qualification of the rule, it is also said that, even in the case stated, the question ordinarily is one for the jury, to be determined from all the circumstances. *Haunibal, etc., R. Co. v. Martin*, 111 Ill. 219; *Lent v. N. Y. Cent., etc., R. Co.*, 120 N. Y. 467, 24 N. E. 653; *Davis v. Louisville, etc., R. Co.*, 60 Miss. 136, 10 South. 450.

Our conclusion on this branch of the case is that the verdict was sustained by sufficient evidence. In *Bass, Receiver, v. Hardendorf*, 25 Ind. App. 650, 58 N. E. 95, cited by counsel for appellant as much in point, printed notices in conspicuous places warned all persons using the swimming pool against passing beyond the ropes which marked the places of danger, and it was shown that the injured person was able to read them.

Instructions numbered 4 and 6 were to the effect that if appellee's injuries were due to his violation of the rules of the company, and that if a guard rail was placed on the car, so that passengers were warned not to stand on the running board, and appellee,

with knowledge of that, ignored the presence of the guard rail, and by reason thereof was injured, he could not recover, even if the conductor permitted him to stand on the running board, because such consent would be beyond the authority of the conductor. The first of these instructions wholly omitted to inform the jury that notice of the existence of the rules must be shown before the plaintiff could be bound by them, and for this reason, if for no other, it was objectionable. The sixth declared, as a rule of law, that it was beyond the authority of the conductor to permit a passenger to stand on the running board. This was not a correct statement of the law. The power and authority of the conductor were such as were expressly conferred upon him by the company, such as were necessary to the discharge of his duties, and such as he was accustomed to exercise with the knowledge and approval, express or implied, of the corporation. Whether he had authority to permit passengers to stand on the running board was a fact to be determined by the jury. Besides, the substance of both these instructions, so far as they stated the law correctly, was given elsewhere in the charge of the court.

There is no error in the record. Judgment affirmed.

WELTY v. WARD, Sheriff. (No. 20,442).¹

(Supreme Court of Indiana. Dec. 9, 1904.)

CRIMINAL LAW—VENUE—TRANSFER OF CAUSE—INDICTMENT—CONSTITUTIONAL GUARANTIES.

1. Const. art. 1, § 13, provides that in all criminal prosecutions the accused shall have a right to a public trial by an impartial jury in the county in which the offense shall have been committed. Article 7, § 17, authorizes the General Assembly to modify and abolish the grand jury system. Burns' Ann. St. 1901, § 1900 (Horner's Ann. St. 1901, § 1831; Rev. St. 1881, § 1831), provides that when defendant is prosecuted in a county not having jurisdiction the court may order the venue of the indictment to be corrected, and direct that all papers be certified to the court of the proper county, and recognize defendant to appear at such court, and the prosecution shall proceed therein as though commenced there. *Held* that, where defendant is indicted in one county, and the offense is charged to have been committed there, but it appears upon the trial that the offense was committed in another county, the court may amend the venue of the indictment, and transfer the cause as authorized by section 1900, supra, and the court to which the transfer is made acquires jurisdiction of the person of defendant and the prosecution against him.

2. Under Const. art. 7, § 17, providing that the General Assembly may modify or abolish the grand jury system, a person charged with a felony cannot demand, as a constitutional right, that he be tried only upon an indictment returned by the grand jury of the county in which the offense was committed.

3. Burns' Ann. St. 1901, § 1900 (Horner's Ann. St. 1901, § 1831; Rev. St. 1881, § 1831), providing for the correction of the venue of an indictment or information, and the transfer of the cause to the court of the proper county, where it appears on the trial that the offense

was committed in a different county than that charged in the indictment, must be construed in connection with all the other sections of the Code of Criminal Procedure, and, when so construed, is not in conflict with any other section thereof.

Appeal from Circuit Court, Warrick County; E. M. Swan, Judge.

Habeas corpus proceedings by Robert Welty against Edward W. Ward, as sheriff of Warrick county. From a judgment remanding Ward to custody, he appeals. Affirmed.

Dune & Lorch and Edward Gough, for appellant. Union W. Youngblood, for appellee.

MONKS, J. This is a proceeding by writ of habeas corpus against appellee, as sheriff of Warrick county, for the discharge of appellant from his custody as such sheriff. Final judgment was entered remanding appellant to the custody of appellee as such sheriff. It appears from the record that appellant was charged by indictment returned in the Vanderburg circuit court with having, on February 8, 1903, "feloniously and bigamously married one Laura York in said Vanderburg county"; that said cause, with all the papers therein, was transferred to the Warrick circuit court, and appellant was recognized to appear at said court under the provisions of section 1900, Burns' Ann. St. 1901 (section 1831, Rev. St. 1881; section 1831, Horner's Ann. St. 1901), which reads as follows: "When it appears at any time before verdict or judgment, that the defendant is prosecuted in a county not having jurisdiction, the court may order the venue of the indictment or information to be corrected and direct that all the papers and proceedings be certified to the proper court of the proper county, and recognize the defendant and witnesses to appear at such court, on the first day of the next term thereof; and the prosecution shall proceed in the latter court in the same manner as if it had there commenced." The proceedings in this cause were in strict conformity with the provisions of said section. Appellee insists that, "as the Vanderburg circuit court had no jurisdiction of this case, that it could not confer jurisdiction upon the Warrick circuit court." The indictment charged that the offense was committed in Vanderburg county, and the circuit court of that county had jurisdiction to try the same. When it appeared from the evidence at the trial of said cause in said court that the offense charged, if committed, was committed in Warrick county, then said section 1900 (1831), supra, directed what action the court should take. Section 13 of article 1 of the Constitution of the state provides that "in all criminal prosecutions the accused shall have a right to a public trial by an impartial jury in the county in which the offense shall have been committed." The statutes of this state concerning the trial of persons charged with crime, including said section 1900 (1831), supra, are in harmony with said section 13. The statutes give the

¹ Superseded by opinion, 73 N. E. 839.

Warrick circuit court jurisdiction of all felonies committed in that county, and said statutes, including section 1900 (1831), supra, and the order of the Vanderburg circuit court, and the recognizance of appellant made in conformity with the requirements of said section 1900 (1831), and filing the papers and proceedings mentioned therein in the Warrick circuit court gave said court jurisdiction of the person of appellant and the prosecution against him.

Appellant insists that courts cannot amend indictments, citing *Ex parte Bain*, 121 U. S. 1, 7 Sup. Ct. 781, 30 L. Ed. 849; *Commonwealth v. Mahar*, 10 Pick. 120; *Commonwealth v. Child*, 18 Pick. 198; *Commonwealth v. Drew*, 3 Cush. 279. These cases are not in point here, for the reason that in Massachusetts there was no statute authorizing the amendment of an indictment; and in the *Bain* Case, which was a prosecution for the violation of a statute of the United States, there was no statute authorizing the amendment of the indictment, and the offense charged belonged to a class which the federal Constitution provides shall only be prosecuted by presentment or indictment of a grand jury. In this case we have a statute which authorized the court to order the correction of the indictment, and a Constitution which (section 17, art. 7) provides that the General Assembly may modify or abolish the grand jury system. Statutes authorizing the amendment of indictments have been sustained in a number of states. *Com. v. O'Brien*, 2 Brewst. 566; *Knight v. State*, 64 Miss. 802, 2 South. 252; *Peebles v. State*, 55 Miss. 434; *Miller v. State*, 53 Miss. 403; *People v. Dunn*, 53 Hun. 381, 6 N. Y. Supp. 805; *People v. Herman*, 45 Hun. 175; *People v. Johnson*, 104 N. Y. 213, 10 N. E. 690; *Rosenberger v. Com.*, 118 Pa. 77, 84, 11 Atl. 782; *Rough v. Com.*, 78 Pa. 495; *Myers and Murray v. Com.*, 79 Pa. 308, 311; *People v. Waller*, 70 Mich. 237, 38 N. W. 261; *People v. Brown*, 110 Mich. 168, 67 N. W. 1112; *Shiflett v. Com.*, 90 Va. 386, 18 S. E. 838; *State v. Casavant*, 64 Vt. 405, 23 Atl. 686; *State v. Blaisdall*, 49 N. H. 81; *State v. Stebbins*, 29 Conn. 463, 79 Am. Dec. 223; *State v. Pierre*, 39 La. Ann. 915, 3 South. 60; *State v. Christian*, 30 La. Ann. 367. It is evident that a person charged with a felony cannot, in this state, demand as a constitutional right that he be tried only upon an indictment returned by a grand jury of the county in which the offense was committed. The order of the court made in this case that the venue of said indictment be corrected operated as an amendment of said indictment to that extent, and the requirement of the statute that all the papers and proceedings in the cause be certified to the court of the county where the offense charged was committed is in harmony with section 13 of the Bill of Rights, supra.

Appellant next insists that said section 1900 (1831), supra, "is in conflict with every

statute of criminal procedure, and that, if it is construed to sustain the proceeding in this case, it revolutionizes criminal procedure in this state." Said section must be construed in connection with all the other sections of our Code of Criminal Procedure, and, so construed, it is not in conflict with any other section thereof. It provides for a course of procedure under conditions not provided for in any other section. In this state all crimes are statutory, and the method of procedure in the prosecution thereof, including the form of the accusation and the manner in which and by whom preferred, is for the Legislature to determine, except when restrained by the state or federal Constitution. It is not claimed by appellant that said section 1900 (1831), supra, is in violation of any provision in either of said Constitutions. It is not necessary, therefore, to consider that question.

Judgment affirmed.

(163 Ind. 584)

FILLINGER v. CONLEY et al. (No. 20,435.)
(Supreme Court of Indiana. Dec. 6, 1904.)

WILLS—PROBATE—EXECUTORS—AUTHORITY
—EMPLOYMENT OF ATTORNEYS.

1. Burns' Ann. St. 1901, § 2766, authorizes any person to contest a will, or resist the probate thereof, within three years after the same has been offered for probate, for certain enumerated causes, "or any other valid objection to its validity, or the probate thereof," and requires the executor and all other persons beneficially interested to be made defendants. Section 2705 declares that, if objections are filed to the admission of a will to probate, the clerk shall continue the proceeding until the succeeding term, when, if the contesting party fail to resist probate, the will may be admitted to probate; but if such objection be made, reasonable time shall be allowed to the party making the same to resist probate of the will. Held that, where a will was ultimately established, attorneys employed by the executor named in the will, before probate, to resist a contest thereof, were entitled to payment of their fees from the assets of the estate.

Appeal from Circuit Court, Vermillion County; Joseph M. Rabb, Judge.

Action by Hugh H. Conley and others against John B. Fillinger, as administrator. A judgment was recovered in favor of plaintiffs, from which defendant appealed to the Appellate Court, and the case was transferred to the Supreme Court, as authorized by Burns' Ann. St. 1901, § 1337u. Affirmed.

M. G. Rhoads, B. S. Aikman, and Johnston & White, for appellant. G. O. Rhenby and Conley & Conley, for appellees.

GILLETT, J. This action is based on a claim which was filed by appellees against the estate of George P. Daly, deceased, to recover the reasonable value of their services as attorneys, rendered at the request of the nominated executor of the will of said decedent, in representing said executor as a party defendant to a proceeding instituted by the heir at law to resist the probate of

said will. Appellant, by proper assignments of error, draws in question the correctness of certain conclusions of law in favor of appellees, entered upon special findings of fact. In the brief filed on behalf of appellant it is stated by his counsel, after setting out the findings and conclusions of law, that the following is the sole legal question for consideration on this appeal: "Before a will is admitted to probate, has the person therein named as executor power to bind the testator's estate by the employment of attorneys to represent him as a defendant in a suit brought to resist the probate of the will?" As this admission impliedly concedes that the case was fully made out upon the facts, if in any circumstances the executor had power to charge the estate for services as set forth in the claim file, we may omit to make any statement of the facts found.

Section 2766, Burns' Ann. St. 1901, provides: "Any person may contest the validity of any will, or resist the probate thereof, at any time within three years after the same has been offered for probate, by filing in the circuit court of the county where the testator died, or where any part of his estate is, his allegation in writing, verified by his affidavit, setting forth the unsoundness of mind of the testator, the undue execution of the will, that the same was executed under duress or was obtained by fraud, or any other valid objection to its validity or the probate thereof; and the executor and all other persons beneficially interested therein shall be made defendants thereto." Appellant's counsel contend that there can be no executor of an unproved will, and that the provision of said section relative to making the executor a party has reference to the contest of probated wills. They further call attention to the provision of the decedent's act making it lawful to appoint a special or temporary administrator pending a will contest, and to the provision of said act prohibiting an executor from interfering with an estate intrusted to him, further than to preserve it, until the issuing of letters to him (sections 2393, 2378, Burns' Ann. St. 1901); and under these sections, as well as under what they conceive to be the general law, counsel for appellant contend that an executor who has merely been nominated cannot employ counsel to defend a proceeding brought to prevent the probate of his decedent's will. Section 2765, Burns' Ann. St. 1901, provides that if objections are filed to the admission of any will to probate before the clerk, and an affidavit is filed as required by said section, the clerk shall continue the proceeding until the succeeding term of court, "when, if the person contesting such will fail to resist the probate thereof, the judge of said court may admit the will to probate, but if such objection be made before such court, reasonable time shall be allowed to the party making the

same to resist the probate of such will." In the next section, as we have seen, provision is made for a proceeding to "contest the validity of any will or resist the probate thereof." The identity of these latter words with the closing words of the preceding section is very significant. Under section 2766 there is the same limitation as to the time in which either proceeding may be brought, namely, within three years after the will has been offered for probate, although, ex necessitate, if the probate has taken place, no available method of attack remains except a contest. If the latter is successful, the order of probate is annulled, since the order, which is an incident, must go down with the overthrow of the instrument on which the probate is based. *Curry v. Bratney*, 29 Ind. 195. The section last mentioned contains further evidence that it also applies to a proceeding to resist the probate of the instrument, since the section provides for the filing of an allegation in writing setting forth "the unsoundness of mind of the testator, the undue execution of the will, that it was executed under duress or was obtained by fraud, or any other valid objection to its validity, or the probate thereof." (Our italics.) The view that section 2766 applies to proceedings to prevent the probate of wills, and that section 2765 is not alone applicable thereto, is indicated by section 2772, Burns' Ann. St. 1901, which provides that, "If such determination be against the validity of such will or the competency of the proof, the court shall refuse or revoke the probate thereof; but if it be in favor of the validity and due execution of such will, probate thereof shall be admitted or ratified." Giving special attention to the words in this section which we have italicized, it is clear that it was not the legislative purpose to make no other provision for a proceeding to resist the probate of wills than such as is found in section 2765.

The proceeding before the clerk is necessarily ex parte. On the other hand, it is clear that the proceeding before the court was intended to be of an adversary character, and that the party who unsuccessfully resisted the probate should be estopped by the judgment from contesting the will. *Duckworth v. Hibbs*, 38 Ind. 78. To this end there must be a party or parties defendant, an issue, and a judgment. We find provision for these elements in the sections which follow section 2765, and, in view of the general structure of such subsequent sections, we conclude that they were intended to supplement section 2765 in the particulars mentioned. This involves the conclusion that the nominated executor was required to be made a defendant, since the provision of section 2766 as to who are to be made parties defendant is general, and therefore applies to proceedings to resist the probate. That the executor appointed by the will should be made a party in such a proceeding was in

effect decided by this court in *McGeath v. Starr*, 157 Ind. 320, 81 N. E. 664. In that case it was urged that the court which entered the order of probate should have sustained a motion subsequently made to set aside the order, on the ground that there was on file, at the time of the hearing of the evidence as to the will, and at the time of the order, objections to the probate of the instrument, together with the proper affidavit, which had been filed by the party making the motion, and that the hearing and order had been had and entered while he and his attorneys were absent, and without the knowledge of any of them. In disposing of the case, this court said: "But the appellant has made one fatal omission. He failed to take any steps to bring the defendants, who were the beneficiaries under the will, and its executor, into court. The mere filing of his complaint was not notice to them. * * * As no process was issued, and none of the defendants named in the complaint was brought before the court, the persons beneficially interested under the will, and the executor, were entitled to have the proof of the due execution of the will heard at any time while the court was in session. By simply filing his complaint the appellant could not arrest the proving of the will." Assuming that the nominated executor was required to be made a party, it is difficult to escape the conclusion that appellant was liable to pay the reasonable value of appellees' services rendered under the employment of said executor. But when we consider the point in the light of the common law and the course of adjudication in this country, it becomes absolutely clear, notwithstanding section 2378, *supra*, that the judgment of the court below was authorized.

An administrator derives his whole authority from his letters, but it is laid down by the older writers that, as an executor derives his title from the will, he is capable of performing many acts which are incident to the office before the will is established by probate. *Toller's Law of Executors*, pp. *46, *154; 2 *Black. Com.* p. *507, and *Chitty's note*; 4 *Bac. Abr.* art. "Executors," E, § 14. We find it laid down by *Blackstone* that "the executor or the administrator *durante minore ætate*, or *durante absentia*, or *cum testamento annexo*, must prove the will of the deceased; which is done either in common form, which is only upon his own oath before the ordinary or his surrogate, or *per testes*, in more solemn form of law, in case the validity of the will be disputed." 2 *Com. p.* *507. Judge *Redfield* says: "The executor is presumed to have the custody of the will, and he is the only person who can in the first instance properly prove the same." *Redfield on Wills* (part 3), p. *4. In *Henderson v. Simmons*, 33 Ala. 291, 299, 70 Am. Dec. 590, it was said: "It is the privilege, if not the duty, of one named as executor of a paper purporting to be a last will and testament, to propound it for probate.

If he have no knowledge or reasonable grounds on which to predicate a well-grounded suspicion against the legality of the will, and propound the paper in good faith, he but carries out the intention with which he was appointed. Any reasonable costs and expenses in the honest endeavor to give effect to the will is a proper charge on the estate in his hands." See, also, *Baker v. Cauthorn*, 23 Ind. App. 611, 55 N. E. 963, 77 Am. St. Rep. 443; *Wills v. Spraggins*, 3 *Grat.* 555; *Bradford v. Bondmot*, 3 *Wash. C. C.* 122; *Lassiter v. Travis*, 98 *Tenn.* 330, 39 S. W. 226; *Hazard v. Engs*, 14 R. I. 5; *Mathis v. Pitman*, 32 *Neb.* 191, 49 N. W. 182; In re *Estate of Soulard*, 141 *Mo.* 642, 43 S. W. 617. In holding that it was the duty of the executor to propound the paper which he supposed was the will, and that he was entitled to recover his counsel fees incurred in the preliminary contest, the Supreme Court of Missouri, in the case last cited, said: "An executor represents his testator, not only in executing the will after its probate, but in having it probated. He is appointed on account of the confidence reposed in him, and it is his duty to do everything necessary to carry it into execution. This duty includes that of propounding the will for probate, for it cannot be executed until it has been properly adjudged to be the will of the testator. The executor acts, not only in the capacity of a trustee of the estate, but he represents the testator in carrying out his will. It is therefore clearly the duty of an executor to obtain for the will in the first instance the sanction of the law which is necessary to make it effective. In performing that duty, he acts as a representative of his testator, and should of right be reimbursed out of the estate for all expenses incurred in good faith in the discharge of this duty, whether the will be established or rejected. That the advice and services of attorneys are proper items of expense in the first probate of the will cannot reasonably be doubted." It was held in Kentucky that although the statute made no provision for expenses, yet, as a duty existed upon the part of the executor to propound the will, he should be compensated. *Phillips v. Phillips, Adm'r*, 81 *Ky.* 328.

A number of the authorities cited above are to the effect that where the nominated executor was reasonably justified in propounding the paper as the will of the decedent, and in employing counsel to secure its probate, he should be allowed his reasonable expenses on such account, whether the contest was successful or not. In *Pennsylvania* and *Ohio*, executors incurring such expenses before their appointment are allowed therefor only in the event that they are successful, and this for the reason that the service inures to the benefit of the devisees and legatees under the will. *Scott's Estate*, 9 *Watts & S.* 98; *Andrews' Executors v. His Administrators*, 7 *Ohio St.* 143.

Under the law of this state, and especially

in view of section 2378, supra, it is our opinion that the power of an executor before his qualification is much more limited than at common law. *Calloway v. Joyes*, 1 Blackf. 372; *Lucas v. Tucker*, 17 Ind. 41. But we have no hesitancy in stating that those offices of necessity or of humanity which he performs before appointment should be ratified after probate, if no other objection than that of time can be urged against the manner of performance. *Pease v. Christman*, 158 Ind. 642, 64 N. E. 90. See 2 Black. Com. p. *507. Where, as here, the instrument is ultimately established, there appears to us to be no reason for a distinction in respect to the authority of the executor to employ necessary counsel, whether it be in a proceeding to resist the probate or in a proceeding to contest the probated will. It is not our purpose to lay down a rule which shall be so general as to be capable of a concrete application to every case of this general nature, but here, where every possible question is impliedly conceded except the one of power upon the part of the nominated executor to incur an obligation for reasonable and necessary attorney's fees in securing the probate of his testator's will, our holding must be adverse to appellant.

Judgment affirmed.

(163 Ind. 626)

STIFEL v. STATE. (No. 20,444.)

(Supreme Court of Indiana. Dec. 9, 1904.)

FALSE PRETENSES—INFORMATION—SUFFICIENCY.

1. Under *Burns' Ann. St. 1901, § 1747*, requiring informations to be based upon the affidavit of some competent and reputable person, an information is not bad for failing to show upon its face that it was based upon the affidavit of a competent and reputable person.

2. An indictment for false pretenses, charging that defendant, in order to defraud the prosecutor, falsely pretended to him that he was the authorized agent of another to sell whisky and receipt for money owing and due from the prosecutor to that other, and that the prosecutor believed the pretenses to be true, and relied upon them, so that defendant was thereby enabled to unlawfully obtain from the prosecutor a check, on which he received money, was bad, in failing to show that prosecutor was deceived by the false representations, or induced by the deceit to part with his money.

Appeal from Circuit Court, Allen County; E. O'Rourke, Judge.

Albert G. Stifel was convicted of obtaining money by false pretenses, and appeals. Reversed.

Robertson & O'Rourke, for appellant. Ronald Dawson, Pros. Atty., C. W. Miller, Atty. Gen., W. O. Genke, C. C. Hadley, and L. G. Rothschild, for the State.

HADLEY, J. Appellant was convicted, on an affidavit and information, of obtaining money by false pretenses. He asks that

the judgment be reversed for alleged errors of the court in overruling his motions to quash and for a new trial.

The information is not bad, under section 1747, *Burns' Ann. St. 1901*, for failure to show upon its face that it was based upon the affidavit of a competent and reputable person. *Blake v. State*, 18 Ind. App. 280 47 N. E. 942. But it is bad for uncertainty and failure to show affirmatively some reasonable connection between the false pretense and the obtaining of the check and the receiving of the money thereon.

Omitting the formal parts of the information and the venue, the information charges that "Albert G. Stifel on June 22, 1903, did then and there unlawfully, feloniously, and designedly, with intent to defraud one Louis Langard, falsely pretend to said Louis Langard that he, the said Albert G. Stifel, was then and there the duly authorized agent of Robert Young, doing business under the firm name and style of the Cincinnati Distilling Company, and duly authorized by said Young to sell whisky and other merchandise for said Young to said Langard, and to collect, receipt, and receive from said Louis Langard money due and owing from said Louis Langard to said Robert Young, under the firm name and style aforesaid the Cincinnati Distilling Company; that by means of such false pretenses, the said Louis Langard relying upon and believing the same to be true, said Albert G. Stifel did then and there unlawfully and designedly obtain from said Louis Langard a check issued by the firm of Langard & Langard, of which said Louis Langard was a member, which check, drawn upon the Hamilton National Bank of Fort Wayne, Indiana, was in the words and figures following, to wit: 'No. 51. Langard & Langard. Fort Wayne, Ind., June 20, 1903. Pay to the Cincinnati Distilling Co. or bearer, \$119.50 One hundred nineteen.....⁵⁰/₁₀₀ dollars. To the Hamilton National Bank, Fort Wayne, Ind. Langard & Langard'—and which check was then and there of the value of one hundred nineteen dollars and fifty cents, and the said Albert G. Stifel did then and there present said check to the Hamilton National Bank, and receive thereon one hundred nineteen dollars and fifty cents in money of the United States, of the value of one hundred nineteen dollars and fifty cents, the property of said Louis Langard, whereas in truth and in fact the said Albert G. Stifel was not then and there the agent of said Robert Young, doing business under the firm name and style of the Cincinnati Distilling Company, and was not authorized to collect, receipt for, and receive from said Louis Langard any money due and owing from said Louis Langard to said Robert Young, as is set forth in the affidavit of Homer A. Gorsline, filed herein. Wherefore," etc. The substance of the charge is that the defendant, to defraud Louis Langard, falsely pretended

¶ 1. See Indictment and Information, vol. 27, Cent. Dig. § 157.

to him that he (defendant) was then the authorized agent of Robert Young to sell whisky to and receipt for and receive from Langard any money owing and due from the latter to Young; that Langard believed said pretenses to be true, and relied upon them, and the defendant was thereby enabled to unlawfully and designedly obtain from Langard a check for \$119.50, which check the defendant then and there presented to the bank, and received thereon the money. To constitute a good charge for obtaining money by false pretense, it must be shown that the injured party was deceived by the false representations, and induced by the deceit to part with his money. *State v. Williams*, 103 Ind. 235, 2 N. E. 585; *State v. Conner*, 110 Ind. 469, 11 N. E. 454; *State v. Miller*, 153 Ind. 229, 54 N. E. 808. It is not so shown in this information. Here there is a total absence of averment as to the intent of Langard in giving his check to the defendant. It does not appear that Langard was indebted to Robert Young on any account whatever, or that Langard at the time bought any goods of the defendant, or that the defendant requested a loan of the money on his own account, or that he solicited in any way or for any purpose the execution of the check. For aught that appears, Langard, because he believed that the defendant was an accredited representative of Robert Young, voluntarily and without request presented the check to the defendant as a gift. The law will not tolerate in criminal pleading such uncertainty, and, in this class of cases, such a want of coherent and consistent connection between the false pretense and fraud perpetrated. *Campbell v. State*, 154 Ind. 309, 56 N. E. 665; *Funk v. State*, 149 Ind. 338, 49 N. E. 266.

Judgment reversed, with instructions to sustain the motion to quash the information. The clerk will issue the proper order for a return of the prisoner.

McDANIEL et al. v. OSBORN et al. (No. 4,673.)¹

(Appellate Court of Indiana, Division No. 2
Dec. 8, 1904.)

INSOLVENT ESTATES—LABORER'S CLAIMS—PREFERENCE—STATUTES—CONSTRUCTION—DEMURRER—INFORMALITY—APPEAL.

1. A receiver appointed in an action to foreclose, on allegation that the property is insufficient to satisfy the debt, as expressly authorized by Burns' Ann. St. 1901, § 1238, subd. 4, is neither an assignee nor receiver, within section 7051, providing that where a property owner's business shall be put into the hands of any assignee, receiver, or trustee, the debts owing to laborers or employes by the property owner shall be treated as preferred debts; nor is such receiver an assignee or receiver within section 7058, providing that all debts due any person for manual or mechanical labor shall be preferred claims in all cases where property shall pass into the hands of an assignee or receiver, and shall be first paid in full.

2. To establish a preference under Burns' Ann. St. 1901, §§ 7051, 7058, making debts of insolvents, owing to laborers or employes, preferred claims against the insolvent estate, it is essential that it be alleged and proved that the labor was performed in connection with the business in which the insolvent debtor was engaged.

3. The sustaining of an informal demurrer to an insufficient answer is not cause for reversal.

Appeal from Circuit Court, Hendricks County; Thomas J. Cofer, Judge.

Action by Cyrus Osborn against James O. Winsted and others (Raymond R. McDaniel and others, interveners). From a judgment for plaintiff, interveners appeal. Affirmed.

M. W. Hopkins and R. T. MacFall, for appellants. R. T. Hollowell and Harding, Hovey & Wiltale, for appellee.

WILEY, J. The appellee Cyrus Osborn brought a suit against James O. Winsted et al. to foreclose two mortgages upon real estate. The debts which the mortgages were given to secure were evidenced by two promissory notes executed on the 13th day of January, 1898, and were respectively for \$850 and \$1,200, the first of which was due in four months, and the latter in two years, from date. Appellants were not made parties to the original action, but they filed a petition in the trial court, asking to be made parties on the ground that they had claims against the mortgagor which were prior liens to the mortgages in suit. Their petition to be made parties was granted, and thereupon they appeared and filed their intervening petition; setting up their respective claims, and averring that they were liens against the property mortgaged, superior to the lien of the mortgages. The demurrer on behalf of the appellee Cyrus Osborn, the mortgagee, to their intervening petition, was sustained. They declined to plead further, and suffered judgment to go against them for costs. Such other proceedings were had as that the appellee Cyrus Osborn recovered a judgment for the amount due on the two notes, and a decree of foreclosure, with an order for the sale of the property. Appellants, who were the intervening petitioners below, prosecute this appeal, and by their assignment predicate error upon the sustaining of the demurrer to their intervening petition. In their intervening petition they aver that the action to which they appear was to foreclose a mortgage upon two lots, designating them by numbers, as described in the mortgage; further, that on the 15th of July, 1901, James O. Winsted, the mortgagor, executed to one Henry S. Cox his voluntary deed of assignment, conveying to the said Henry S. Cox, as assignee, all of his property; that said voluntary deed of assignment was executed under the provisions of the assignment laws of the state for the benefit of creditors; that said Winsted became the owner of said real estate on

¹ Rehearing denied. Superseded by opinion in Supreme Court, 75 N. E. 647. Rehearing denied.

the 19th day of December, 1892, and continued as such owner until the 15th of July, 1901; that, at the time of the execution of the mortgages sued on, said Winsted was, and a long time prior thereto had been, engaged in general farm implement merchandising, and continued in such business up to the time of the execution of his deed of assignment; that on the 15th day of July said Cox accepted the deed of assignment, and on the same day filed it for record in the recorder's office of Hendricks county, and also filed a copy thereof in the clerk's office of said county; that he took the oath required by statute and gave an undertaking, and that thereupon all the property of said Winsted passed into his hands as assignee, and that he entered upon his duties as such; that on the 5th of October, 1901, said Winsted was adjudged a bankrupt by the United States District Court for the District of Indiana, and one James M. Ogden was on the 25th day of November of said year duly appointed as trustee in bankruptcy of all the property of said Winsted, and duly qualified as such; that thereafter, in January, 1902, the appellee Cyrus Osborn commenced his action to foreclose said mortgage, and caused one William C. Osborn to be appointed receiver by the court, "to take charge of the property, rent the same, and collect the rents and profits, and apply them to the payment of the plaintiff's debt, taxes, and the making of necessary repairs of buildings on said property," and that the property of which said receiver took charge is the real estate described in said mortgage; that said William C. Osborn qualified as such receiver, and took charge of said property. It is further averred that the money realized from sales of property coming into the hands of James M. Ogden as trustee in bankruptcy is not more than sufficient to pay the actual and necessary costs of the administration of said bankruptcy matter, and that there are no funds, and will be none, for distribution to any creditor of said Winsted, and especially to the intervening petitioners. It is then averred that within six years next preceding the 15th day of July, 1901, the petitioners each performed "manual and mechanical labor, work, and services for the said James O. Winsted, at his special instance and request, for which he is indebted to your petitioners as follows." The petition then shows that the indebtedness in favor of the appellant McDaniel was \$107.85; to the appellant Sadie Winsted, \$112.75; and to appellant Elmer B. Winsted, \$800.39; that such labor was performed by each of them immediately and next prior to the 15th day of July and 4th day of May, 1901. The petition further avers that said several sums of money were due respectively to said petitioners; that the said James O. Winsted is insolvent, and that all of his property passed into the hands and into the control of Henry S. Cox, as assignee, aforesaid; and

that since said time said Winsted has not had any control or management thereof. It is next averred that the claim and right of the appellee Cyrus Osborn in and to the subject-matter in suit is inferior and subordinate to the right and lien and claim of these several petitioners. The prayer of the complaint is that in any judgment or decree that might be entered in said cause the claims of the petitioners be held as just liens and charges upon the real estate covered by said mortgages, and that said claims be ordered first paid in full out of the proceeds of the sale of said mortgaged premises.

If appellants have any right to have their claims against appellee Osborn declared liens, and superior and paramount to the lien of his mortgage, it must be by virtue of some statute, for no such rights exist at common law. We have statutes which are said to be founded upon the broadest equity, the object of which is to secure to mechanics, laborers, etc., their rights, and by which they may reap the reward of their toil under certain conditions and contingencies. But before they can secure such rights, they must bring themselves within the provisions of the law, and affirmatively show that the conditions have arisen and the contingencies exist that bring them in the class whose claims are made superior by the statute. If appellants, under the facts pleaded in their intervening petition, have a right to have their claims declared as preferred debts, and hence superior to the lien of appellee's mortgage, such right exists by virtue of one or the other of the following sections of the statute: "Hereafter when the property of any company, corporation, firm or person, engaged in any manufacturing, mechanical, agricultural or other business or employment, or in the construction of any work or building, shall be seized upon any mesne or final process of any court of this state, or where their business shall be suspended by the action of creditors or put into the hands of any assignee, receiver or trustee, then in all such cases, the debts owing to laborers or employés, which have accrued by reason of their labor or employment to an amount not exceeding fifty dollars to each employé, for work and labor performed within six months next preceding the seizure of such property, shall be considered and treated as preferred debts, and such laborers and employés shall be preferred creditors and shall be first paid in full, and if there be not sufficient to pay them in full, then the same shall be paid to them pro rata after paying costs." Burns' Ann. St. 1901, § 7051. "All debts due any person for manual or mechanical labor shall be a preferred claim in all cases against any individual, co-partnership, corporation or joint stock company where the property thereof shall pass into the hands of an assignee or receiver, and such assignee or receiver, in the distribution and payment of the debts,

shall be required to first pay in full all debts due for manual or mechanical labor before paying any other, except the legitimate costs and expenses." Burns' Ann. St. 1901, § 7058.

The intervening petition avers that the mortgagor, Winsted, at the time of the execution of the mortgage, was engaged in "general farm implement merchandising, and continued in such business until he made an assignment" for the benefit of creditors. It is also averred that appellants "within six years next preceding the 15th day of July, 1901 [the date of the assignment], * * * they each performed manual and mechanical labor * * * for the said Winsted, at his special instance and request, * * * immediately and next prior to" May 4 and July 15, 1901, respectively. The intervening petition avers all necessary facts incident to the assignment, and the subsequent declaration of bankruptcy of Winsted. But it does not appear that such labor was performed in connection with the business in which Winsted was engaged, nor that it was in any wise connected with the mortgaged property. Do the facts pleaded bring appellants within any of the provisions of section 7051, supra, so that their claims against the mortgagor may be declared "as preferred debts," within the meaning of the statute, and superior to the lien of appellee's mortgage? They have not shown that the property of the mortgagor "had been seized by any mesne or final process of any court of this state," nor that his business had been suspended by the action of the creditors. They do show that his property had been put into the hands of an assignee by his voluntary assignment, and that subsequently he had been declared a bankrupt by the federal court, and a trustee in bankruptcy had been appointed, who took charge of his property. While the property of Winsted, the mortgagor, passed into the hands of an assignee by virtue of the assignment for benefit of creditors, and subsequently into the hands of a trustee in bankruptcy, it is evident that when appellants filed their intervening petition the mortgaged property was not in the custody of either an assignee or trustee in bankruptcy, to be administered in the interest of creditors. So far as the intervening petition shows, appellants made no effort to secure an adjustment of their rights, either while the property of Winsted was in the custody of the assignee or trustee in bankruptcy. Whether, by virtue of the statute under consideration, appellants could have had relief by asserting their rights in the federal court through the trustee in bankruptcy, we do not venture an opinion. There are other reasons why appellants are not entitled to relief under this section of the statute, but, as the same reasons are pertinent to section 7058, supra, we will consider them in connection therewith.

By section 7058, supra, it will be observed that labor claims "shall be preferred" only upon the contingency that the property of

any individual, co-partnership," etc., " * * * shall pass into the hands of an assignee or receiver," and in that event such assignee or receiver, "in the distribution and payment of debts, shall be required to first pay in full all debts due for manual or mechanical labor, before paying any other," etc. By section 7051, supra, also one of the conditions upon which labor claims attach and become preferred is that the property of the debtor is "put into the hands of an assignee, receiver or trustee." Courts should give to a statute a reasonable construction, and such as is warranted by the language used and the intention of the Legislature, if such intention can be ascertained. At the time appellants intervened and filed their petition there was no receiver or assignee in possession of the mortgaged premises, as contemplated by either section of the statute. The mortgaged property was in possession of a receiver; by order and appointment of the court, in the action of the mortgagee to foreclose his mortgage. Such receiver was appointed upon the allegation of the complaint that the property was insufficient in value to satisfy the mortgaged indebtedness, and the receiver was appointed, as an officer of the court, to take charge of the property pending the litigation; and the only authority he had was to collect the rents, care for the property, and apply the proceeds as the court should direct. The statute specifically provides for the appointment of a receiver in such cases, and the courts have frequently extended the relief thus given. Section 1236, subd. 4, Burns' Ann. St. 1901; *Main v. Ginthert*, 92 Ind. 182; *Hursh v. Hursh*, 99 Ind. 500; *Reynolds v. Quick*, 128 Ind. 316, 27 N. E. 621. Such receiver has no power, either under the statute, or order of the court, appointing him to adjust and pay claims, for he has nothing to do with "distribution and payment of debts." The words "assignee" and "receiver," as used in the statute, cannot be misunderstood, for it is clear what the legislative intent was in using them. The word "assignee," as there used, signifies an assignee to whom an assignment has been made under the statute for the benefit of all the creditors of the assignor; and the word "receiver" signifies a receiver appointed by a court to wind up the affairs of the "individual, co-partnership," etc., designated by the statute. True, the property in question here did pass into the hands of an assignee by an assignment under the statute, and also into the hands of a trustee in bankruptcy. When the mortgagor was declared a bankrupt, his voluntary assignment for the benefit of creditors was thereby vacated. *Wilbur v. Watson*, 7 Am. Bankr. Rep. 54, 111 Fed. 493; *Carling v. Seymour Lumber Co.*, 8 Am. Bankr. Rep. 29, 113 Fed. 483, 51 C. C. A. 1. The record shows that by an order of the federal court the mortgaged property was abandoned by the trustee on the ground that there were no equities in the property above

the mortgage. As above stated, it is not alleged that the labor performed by appellants was performed in connection with the business in which the mortgagor or debtor was engaged, or that it was in any wise connected with the mortgaged property. We think it clear that the statute contemplates that, before labor claims can stand as preferred debts, it must be shown that the labor was performed in connection with the business in which the insolvent debtor was engaged. In any event, appellants have not shown that their claims are superior to appellee's mortgage. It appears, therefore, that, if appellants had any rights in the premises, they have slept upon them.

Counsel for appellants insist that, because the intervening petition asks for affirmative relief, the demurrer, which challenges it on the ground that it does not state facts sufficient to constitute a cause of defense to appellee's complaint, does not present any question as to its sufficiency. What we have said leads us to the conclusion that the intervening petition neither states facts constituting a defense, nor facts showing that appellants are entitled to any affirmative relief.

Conceding, without deciding, that the demurrer was informal, a judgment will not be reversed on account of sustaining an informal demurrer to an answer that does not state a cause of defense. *Bollman v. Gemmill*, 155 Ind. 33, 57 N. E. 542; *Blue v. Bank*, 145 Ind. 518, 43 N. E. 655; *Garrett v. Bissell Works*, 154 Ind. 819, 56 N. E. 667.

Judgment affirmed.

(34 Ind. App. 188)

CLEVELAND, C. & ST. L. RY. CO. v.
PIERCE. (No. 4,627.)

(Appellate Court of Indiana, Division No. 2
Dec. 6, 1904.)

MASTER—DEATH OF SERVANT—COMPLAINT—
SUFFICIENCY—IDEM SONANS—DE-
MURRER—ADMINISTRATORS.

1. One suing as administratrix of the estate of "Ferdinand N." A. cannot maintain an action for the death of "Fernando W." A.

2. Where plaintiff sues, as administratrix of the estate of one person, for the death of a person of a different name, the question of her right to maintain the action is properly raised by a demurrer to the complaint for want of sufficient facts to constitute a cause of action.

3. Where the complaint, in an action against a railroad for the death of an employé, charges that the death of plaintiff's decedent was the result of the negligence of the defendant's servants in charge of defendant's switchyard and roundhouse, but contains no averment that defendant's servants were in the line of their duty when they committed the acts charged, it is insufficient.

Appeal from Circuit Court, Marion County;
Henry Clay Allen, Judge.

Action by Elizabeth Pierce, administratrix of the estate of Ferdinand N. Armstrong, deceased, against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

Elliott, Elliott & Littleton, for appellant
John M. Bailey and F. C. Durham, for ap-
pellee.

WILEY, J. Appellee sued appellant to recover damages for causing the death of the decedent, alleging that it resulted from appellant's negligence. Her complaint was in one paragraph, to which a demurrer was overruled. Appellant's motion to make the complaint more specific was also overruled. Appellant answered in two paragraphs, to the second of which appellee replied in three paragraphs, to the second and third paragraphs of which a demurrer was overruled. Trial by jury, verdict, and judgment for appellee. The jury also found specially by its answers to interrogatories addressed to it. Appellant's motion for judgment on the answers to the interrogatories, and for a new trial, were each overruled. All the rulings adverse to appellant are assigned as errors.

In her complaint appellee avers that appellant owns and operates a system of railroads, with one of its main lines running from Indianapolis, Ind., to Cincinnati, Ohio; that another of its main lines runs from the city of Louisville, in Kentucky, in a northerly direction to St. Joe, Mich.; that said two lines cross and intersect each other at the city of Greensburg, in the state of Indiana; that said facts existed on the 18th day of September, 1898; that on said date "one Fernando W. Armstrong was employed by and working for said company in the capacity of brakeman, and was working upon the main line from Indianapolis to Cincinnati, and had been so employed for some time; that on said day said Armstrong was acting as brakeman in the discharge of his duties on said railroad, and was in the act of delivering cars from the line upon which he was working to the main line from Louisville to St. Joe; that at said time, while in the discharge of his duties and using due care and caution, the said Armstrong, by reason of the carelessness and negligence of said defendant and its servants and employes, and by reason of the defective ways, works, cars, and machinery, known to the defendant, received injuries from which he died; that by reason of the carelessness and negligence of the person or persons in the service of the defendant who had charge of the switchyard and roundhouse at Greensburg, controlled by said defendant, a freight car was carelessly and negligently caused, suffered, and allowed to run out of said switchyard upon one of the switch tracks in said yard at ten (10) o'clock at night, without any one upon or in charge or control of the same, and without any light thereon, and without any brake or brakes being set thereon or attached thereto; that said freight car ran off of said switch upon the line that the train the said Armstrong was aboard, ran into, upon, and over the car or coach

that said Armstrong was in and upon, thereby cutting, maiming, and wounding said Armstrong's entire body, from which injuries he died." It is then averred that he left surviving him the appellee, who was his wife, and one son 13 years old, and that the appellee was appointed and qualified as administratrix of his estate.

The capacity in which appellee sues is designated in the complaint as "Elizabeth Peirce, administratrix of the estate of Ferdinand N. Armstrong, deceased." The complaint shows that the person whose death was caused by appellant's alleged negligence, and for whose death she seeks to recover damages, was "Fernando W. Armstrong," and not the decedent of whose estate she is administratrix. Under the statute, a person suing in the capacity of administratrix can only recover for the use and benefit of the estate she represents, or, in such case as this, for the use and benefit of the next of kin of the decedent. It is true that the complaint alleges that Fernando W. Armstrong was the husband of the plaintiff, but she is not suing for the death of Fernando W. Armstrong, for she sues as administratrix of the estate of Ferdinand N. Armstrong. She could be such administratrix, but could not sue to recover damages for the death of Fernando W. Armstrong, as her husband, in that capacity.

Appellee's counsel concedes the discrepancy which is apparent upon the face of the complaint, but seeks to avoid its effect by asserting that the two names are idem sonans. We cannot agree with this assertion. The well-understood meaning of the term idem sonans is "sounding the same; substantially identical in sound." Anderson's Law Dict. p. 520. The names "Ferdinand" and "Fernando" do not sound the same, nor are they substantially identical in sound. Both words are common Christian names, and their pronunciation and sound radically different. The rule by which to determine whether two names are idem sonans has been stated by the Supreme Court as follows: "If the names may be sounded alike, without doing violence to the power of the letters found in the variant orthography, then the variance is immaterial." Black v. State, 57 Ind. 109. Measured by this rule, it was held in the case just cited that the names "McKaskey" or "McKlaskey" and "McCasky" were not idem sonans. And in Vance v. State, 65 Ind. 460, it was held that "Dellia Weaver" and "Della Weaver" were not idem sonans. Also that "A. B. Robinson" and "Alexander Robinson" were not. Zellers v. State, 7 Ind. 659. Nor "Wortman" and "Workman." City of Lafayette v. Wortman, 107 Ind. 404, 8 N. E. 277. Nor "Hannah McCormick" and "Hannah McGermick." State v. McCormick, 141 Ind. 685, 40 N. E. 1089. In the case we are considering, the names "Ferdinand" and "Fernando," as they appear in

the title of the cause and body of the complaint, cannot be "sounded alike," even by "doing violence to the power of the letters in the variant orthography." In "Ferdinand" we have the vowel "i", and no letter to correspond with it in sound in "Fernando," while in the latter name we have the vowel "o," and no corresponding letter in sound in the former. The only syllable in the two names that has the same sound is the first, "Fer," while the other two are essentially and radically different.

But in addition to this well-marked difference in the Christian names, we also find an irreconcilable difference in the initial of the middle name. As a legal proposition, a middle name is often unimportant in law; but where they or the initials thereof are used, they may become important for identification, and in such case a substantial or distinguishable difference is fatal to the invocation of the doctrine of idem sonans. And this is especially true where there is a difference, however slight, in the Christian names. The prevailing rule now seems to be that, while it is not necessary to give the middle name or initial, yet, if either be given, a mistake therein constitutes a fatal variance. Ency. of Pl. & Prac. 276; State v. Hughes, 1 Swan. (Tenn.) 261; Price v. State, 19 Ohio, 424; King v. Clark, 7 Mo. 269; Commonwealth v. Buckley, 145 Mass. 181, 13 N. E. 368. The letters "N" and "W" are not consonant in sound, and have no similarity. Presumptively the names Ferdinand N. Armstrong and Fernando W. Armstrong designate two different persons. Massillon, etc., Co. v. Churchill (Minn.) 71 N. W. 899. We are dealing with a question of pleading, and not one of proof. The question before us may be tested by a demurrer to a complaint for want of sufficient facts to constitute a cause of action, for it embraces also the right of the particular plaintiff to maintain the suit. Farris v. Jones et al., 112 Ind. 498, 14 N. E. 484; Pence v. Aughe, 101 Ind. 317; Wilson v. Galey, 103 Ind. 257, 2 N. E. 736; Walker v. Heller, 104 Ind. 327, 3 N. E. 114; Frazer v. State, etc., 108 Ind. 471, 7 N. E. 203. Appellee, in the capacity in which she sues, is a stranger to the cause of action made by the complaint, in that she has no interest in the subject-matter of the litigation.

But there is another objection to the complaint which makes it bad. The complaint avers that the injury complained of was caused by the negligence of "defendant and its servants, and by reason of defective ways," etc. But the specific acts of negligence relied upon relate to the "negligence of the person or persons in the service of the defendant," in that they "carelessly and negligently caused, suffered, and allowed" a freight car to run "upon one of the switch tracks" against a car that decedent was on. The pleader having stated the specific acts of negligence relied upon, and having also

stated that such acts were those of appellant's servants, he is bound thereby. Hence the rule applies that, where a complaint states the specific facts constituting the defendant's negligence, it will be tested by the facts alleged, without aid from an allegation that the acts charged were negligently done or omitted. *Scheiber v. United Tel. Co.*, 153 Ind. 609, 612, 55 N. E. 742; *Cleveland, etc., Ry. Co. v. Berry*, 152 Ind. 607, 53 N. E. 415, 46 L. R. A. 33; *Cincinnati, etc., Ry. Co. v. Voght*, 26 Ind. App. 665, 60 N. E. 797; *Pierce v. Oliver*, 18 Ind. App. 87, 47 N. E. 485. Thus it appears from the plain language of the complaint that appellant is not charged directly with any negligent act, for there is no question but what the complaint proceeds upon the theory that the injury resulted from the negligent acts of its servants, and such acts are specifically designated. It was said in *Cincinnati, etc., Ry. Co. v. Voght*, supra, that. "The master is not liable for any and every negligent act of his servant. It is necessary to show that the negligence was committed by the servant while engaged in the service, and in some way connected with the doing of the service. It does not necessarily follow, because the employes were in charge of appellant's engine, that they were then, while running the engine, engaged in appellant's service. The presumption might be that they were, but no presumptions are indulged in favor of the pleader. The employes may or may not have been acting in the line of their duty." The case from which we have quoted is decisive of the question now before us. As far as the complaint goes is to aver that the injury to appellee's decedent was the result of the negligence of appellant's servants who were in charge of the "switchyard and roundhouse," etc. It is not shown by any averment of the complaint that the employes were in the line of their duty when they committed the acts charged. For the reasons stated, the complaint was vulnerable to the attack of the demurrer.

As the judgment must be reversed because of the insufficiency of the complaint, other questions presented by the record need not be decided.

Judgment reversed, and the court below is directed to sustain appellant's demurrer to the complaint.

PROVIDENCE WASHINGTON INS. CO. v. WOLF. (No. 4,981.)¹

(Appellate Court of Indiana, Division No. 2, Dec. 9, 1904.)

FIRE INSURANCE—POLICY—APPRAISAL—WAIVER—EVIDENCE—SUFFICIENCY.

1. Where an agreement for submission of a loss under a fire insurance policy to appraisers was entered into on the ninth day after the loss, the failure of the insurer to answer a telegram sent by the insured on the seventeenth day after the loss, stating that his adjuster was at the place of fire at heavy expense, and asking the insurer to state when his appraiser would be there, is not a waiver of the rights of the insurer under the policy to an appraisal when de-

manded, so as to justify the insured in disposing of the property on the third day after sending the telegram.

2. In an action on an insurance policy, the allegations of the complaint and the reply that defendant entered into an agreement to appraise, not for the purpose of securing an appraisal, but only to delay and coerce plaintiff into a settlement of his claim for an amount less than was due, are not averments of facts sufficient to defeat defendant's right to an appraisal.

Appeal from Circuit Court, Monroe County; James B. Wilson, Judge.

Action by Lee Wolf against the Providence Washington Insurance Company. From a judgment for plaintiff, defendant appeals. Reversed.

Chambers, Pickens & Moores and Duncan & Batman, for appellant. East & East, for appellee.

COMSTOCK, C. J. This action was brought by appellee against appellant upon a policy of fire insurance issued by the appellant to appellee, insuring the appellee against loss or damage by fire upon a certain stock of goods, wares, merchandise, furniture, and fixtures therein described, in the sum of \$1,000. There was \$8,500 other and concurrent insurance, making \$9,500 in all.

The complaint is in a single paragraph. It makes the usual averments as to issuing the policy, description of property insured, the loss by fire, and avers that the plaintiff has performed the conditions on his part to be performed, except as to filing proofs of loss and as to appraisal of the goods. But "he charges that the defendant has fully waived each of these stipulations by its conduct since said fire, as follows," and sets out the conduct claimed to constitute the waiver. The allegations in the complaint as to what the parties did after the fire are again made substantially in the second paragraph of reply to the plea in abatement hereinafter set out. It is not necessary, therefore, to state them here.

The policy, made an exhibit with the complaint, contains the following provisions:

"This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation, however caused."

"Said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers as hereinafter provided."

"If fire occurs the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon, and within sixty days after the fire, unless such time is extended in writ-

¹ Rehearing denied and original opinion modified. Rehearing denied.

ing by this company, shall render a statement to this company signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies.

"The insured as often as required, shall exhibit to any person designated by this company, all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof, if original be lost, at such reasonable place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made.

"In the event of disagreement as to the amount of loss, the same shall as above provided be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire, and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them, and shall bear equally the expense of the appraisal and umpire.

"This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirements, act or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required, have been received by this company, including an award by appraisers when appraisal has been required.

"No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire."

To this complaint the defendant entered its special appearance and filed its plea in abatement. It sets out that among the conditions and provisions of the policy it is provided, among other things, that, in the event of disagreement as to the amount of loss, such disagreement shall be submitted to disinterested appraisers, one to be selected by the company, one by the insured, and the two thus selected to select an umpire. It is

further provided that the company shall not be held to have waived any provision or condition of this policy, or any forfeiture thereof, by any agreement, act, or proceeding on its part relating to the appraisal, or to any examination in the policy provided for, and the loss shall not become payable until 60 days after notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including award by appraisers, when appraisal is required. It is further provided that no suit or action on the policy shall be sustainable until all said requirements have been fulfilled. It further appears that the loss occurred on the 11th day of January, 1903; that a disagreement arose between the appellant and appellee as to the amount of loss and damage suffered by the plaintiff to the property insured; that such disagreement existed as to all the companies interested in the fire.

The plea in abatement further states that on the 20th day of January, 1903, within nine days after said fire had occurred, and upon said disagreement arising, all of said companies and the appellee entered into a written agreement to submit the amount of such loss and damage to appraisers, as provided in the policy. A copy of said written agreement is made a part of the plea in abatement. That in accordance with such written agreement the appellant named one T. J. Boyd as its appraiser, and the appellee selected one D. Juday as his appraiser.

It is averred in the plea that, notwithstanding said agreement and the terms and conditions of the policy, the insured refused, and still refuses, to abide by the same, and refused to have its appraiser or any other appraiser that might be selected by him to meet with the defendant's appraiser for the purpose of such appraisal, and avers that it has always been ready and willing to have said appraisement as provided, and that it has not in any manner or form waived or refused or declined to have the loss and damage appraised. Wherefore the said defendant averred that no suit or action on said policy had matured, and asked for judgment accordingly.

The plaintiff's motion to strike out the plea in abatement, and his demurrer to the same, were each overruled.

The plaintiff then filed its reply to the plea in abatement in two paragraphs, the first being a general denial. In the second paragraph the plaintiff admitted that the policy contained the provisions and conditions set forth in the plea in abatement; that there had been a failure to agree as to the amount of the loss suffered by the plaintiff, and that the other companies named in said plea held policies of like character; that on the 20th day of January said written agreement was entered into; and averred that it was agreed orally between the plaintiff and the defendant, both before and after making said writ-

ten agreement, that the appraisal should begin at once, and that the plaintiff, by telegram, and at great expense to himself, procured the attendance of his appraiser to be at Bloomington for a period of 10 days, at an expense of \$30 a day, and other expenses; but the defendant, as soon as it procured said agreement to enter into an appraisal, pursued a systematic course of evasion, deception, and neglect toward the plaintiff, with the intention of coercing him to accept the sum of \$300, which the defendant and its adjusters had offered him prior to said agreement to submit to an appraisal; that the defendant did not intend to complete said appraisal, but abandoned the same by its conduct, in this, to wit, that plaintiff's stock of goods were soaked with water, frozen with ice, the colors running, smelling with smoke, fast decaying, and becoming rotten and worthless, which facts were well known to the defendant, but that the defendant, with such knowledge, willfully and wrongfully sought to put the plaintiff to great expense in procuring his appraiser, forcing him to suffer daily loss on said goods on account of their damaged and damaging condition, denying him the right to sell or dispose of the same, and that on the 28th day of January the plaintiff sent a telegram to one of the defendant's adjusters at the city of Indianapolis, in the following words: "Our adjuster here at heavy expense. When will yours be here? - Answer;" but the defendant, although it received said message on the day it was sent, willfully and unjustly declined to answer the same, well knowing that by such delay the defendant was causing plaintiff trouble and expense; that by such refusal the plaintiff was led to believe, and did believe, that said appraisal had been fully waived and abandoned by defendant, and, in order to save himself from further loss, on the 31st day of January, 1903, the plaintiff commenced selling his goods, but before doing so he caused the same to be appraised by said Juday and one Moses Kahn, who appraised the loss on said goods at \$11,364.

A further averment in the reply is that his goods were worth \$12,080 at the time of the fire; that the insurance was \$9,500; that the plaintiff, by reason of such conduct and delay, was caused to lose the sum of \$500 on the uninsured portion of said goods, and that the failure to appraise said goods, as provided by the policy and said written agreement, was caused by the negligence, bad faith, fraud, and attempt on the part of the defendant to coerce the plaintiff to accept a much less sum in settlement than his actual loss; that it was necessary that said goods, on account of their condition, should be appraised at once, else plaintiff would suffer the loss of their value over and above the amount of the insurance, and that these facts were well known to the defendant at the time said agreement was made, and ever since said time; that defendant knew that

said goods were becoming more worthless every day, and that, if plaintiff saved anything from the uninsured portion of said goods, he was compelled to do so by an early appraisal and disposition of said goods; that defendant went to no expense whatever to procure an appraisement, but sought to delay and oppress the plaintiff by evading said appraisal until said goods would become wholly worthless; that defendant wholly failed and refused to communicate with or answer plaintiff's telegram until the 5th day of February, 1903, at which time defendant, well knowing that all of said goods except two or three hundred dollars' worth had been sold and disposed of and scattered among the general public, then asked for an appraisal of the visible stock left of said goods, and notified the plaintiff that they would be present on the 5th day of February, 1903, unless defendant gave plaintiff notice to the contrary; that said notice was given after all of said goods had been disposed of, and long after plaintiff's appraiser had returned home, and long after defendant had caused plaintiff to be put to an expense of \$205 appraisal expenses, and said proposition was simply to gain further time to coerce plaintiff into its proposition to settle the entire loss under said policy for \$300.

A trial was had upon the plea in abatement, and reply thereto, by a jury, and a verdict returned for the plaintiff, and a judgment rendered that the defendant had abandoned the right to an appraisal, and that it take nothing by its plea in abatement. The cause was put at issue on the complaint by an answer and reply, and a trial by jury had, resulting in a verdict on which judgment was rendered in favor of appellee for \$1,000. With the general verdict answers to interrogatories were returned.

The first of numerous specifications of error questions the sufficiency of the second paragraph of the reply to the plea in abatement. It appears from the plea in abatement that the defendant requested and insisted upon an appraisement; that appraisers were selected by each party; that the defendant used diligence in endeavoring to secure the presence of its appraiser; that it did secure his presence on the 10th day of February, 1903; that at that time appellee had sold the stock of goods, and refused to enter into an appraisement. The only question presented by this plea was whether the defendant had waived the appraisal. The reply set up the fact that plaintiff's appraiser and one Kahn, selected by the plaintiff's appraiser, entered into an appraisal of the stock on the 28th day of January, 1903, and appraised the same at the sum of \$12,000; that on the 31st day of January plaintiff proceeded to sell the stock, and on the 5th day of February certain correspondence passed between plaintiff and defendant in relation to the conduct of the parties up to that time, and the demand by the defendant for an appraisement, and fixing

February 10, 1908, for the defendant's appraiser to be present. Whether appellant abandoned or waived appraisal must depend on its conduct. The only fact pleaded as a waiver of the right to the appraisal is that the defendant's adjuster failed to answer the dispatch on January 27th. After that day plaintiff acted on his own motion, without reference to the rights or obligations of defendant. Appellant, before and after said date, as alleged in the plea in abatement, sought to have an appraisal. It cannot be conceded that appellant, by its act or omission, waived appraisal as provided for in the policy and the agreement. The fact intended to show waiver set out in the complaint is the same in the complaint and in the said paragraph of reply, to wit, the failure to answer the dispatch of January 27th. The answer made by the jury to interrogatory 56, returned with their verdict, shows that the claim of waiver is based solely upon the failure to answer said dispatch. Are the facts averred in the complaint sufficient to avoid the duty of appellee either to furnish proof of loss, or to secure an appraisal as provided in the stipulations contained in the policy? Certain duties devolved upon plaintiff. It was his duty to protect the damaged and the undamaged goods, put them in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article, and the amount claimed thereon, etc. It is averred both in the complaint and the reply that the goods were in a frozen condition, stinking from smoke, and decaying every day, etc. Manifestly they were not in a condition to be appraised. Defendant had 60 days within which to investigate the amount of loss, according to the methods provided by the policy. The condition of the goods at or since the fire did not determine the time within which the defendant might investigate as to the amount of the damage. That was fixed by contract. Nor was the expense to which the parties were put to secure an appraisal material. Proof of loss, it is averred, was furnished on the 27th day of January, and the sale commenced on the 30th of the same month. By the sale the insured put it out of his power to exhibit to the insurer the property damaged. The appellant was entitled to the appraisal. The policy provides that no action is sustainable in any court of law until after the compliance by the insured with the requirements of the policy. Where a policy contains such provision, it must be complied with before bringing of the action, unless waived. *Niagara Fire Ins. Co. v. Bishop*, 154 Ill. 9, 39 N. E. 1102, 45 Am. St. Rep. 105; *Hamilton v. L. & G. Ins. Co.*, 136 U. S. 242, 10 Sup. Ct. 945, 84 L. Ed. 419; *Northern Assur. Co. v. Grandview*, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 218; *Vernon Ins. Co. v. Maitlen*, 158 Ind. 893, 63 N. E. 755. The ex parte appraisal by appellee, and the sale of the goods without notice to appellant, could not relieve ap-

pellee of his obligation under the policy, nor tend to show that defendant has waived an appraisal. Each party was entitled to have his case submitted to all the appraisers. *Smith v. Smith*, 28 Ill. 56; *Morse on Arbitration*, § 117; *Baker v. Farmbrough*, 43 Ind. 240. The allegations of the complaint and reply, that appellant entered into an agreement to appraise, not for the purpose of securing an appraisal, but only to delay and coerce plaintiff into a settlement of his claim for an amount less than was his due, are not averments of facts sufficient to defeat appellant's right to an appraisal. Under the facts alleged, that right was absolute. "It was essential to the enjoyment of that right that the damaged stock should be retained by the insured where it could be examined for the purposes of appraisal." *Astrich v. German Amer. Ins. Co. (C. C. A.)* 131 Fed. 17. "The right to demand an appraisal was a distinct and contractual right. The motive which lay behind the assertion of that right did not lie within the province of the court and jury." *Insurance Co. v. Carnahan*, 63 Ohio St. 272, 58 N. E. 809. Whether the motive of a contracting party may be inquired into by the court, either in the performance of the obligation of the contract on his part to be enforced, or in demanding strict performance of the obligation of the other contracting party, is clearly presented by the record, and we must hold that such inquiry cannot be made. Neither the complaint nor the reply to the plea in abatement shows an abandonment of the right to appraisal upon the part of the appellant.

The conclusion reached renders it unnecessary to consider other alleged errors. The judgment is reversed, with instructions to sustain the demurrer to the complaint and the demurrers to the second paragraph of reply.

TAYLOR v. STEPHENS et al. (No. 5,494.)¹
(Appellate Court of Indiana, Division No. 1.
Dec. 7, 1904.)

ESTATES OF DECEDENTS—SALE OF REAL ESTATE—PETITION—REQUISITES OF PETITION—DEMURRER FOR WANT OF FACTS—WILLS—CONSTRUCTION—JOINT ESTATES—REMAINDERS—TIME WHEN REMAINDERS VEST.

1. *Burns' Ann. St.* 1901, § 2491, provides that a petition for sale of lands of a decedent for the payment of debts must set forth, among other things, a description of the real estate liable to be made assets for the payment of the debts, and the title of the decedent therein at his death, and section 2498 provides for the admission of persons not parties to such petition, and authorizes them to set up their interest. *Held*, that a petition to sell real estate to pay debts of a decedent may be tested by demurrer for want of facts, though the procedure under the decedents' act does not provide for a demurrer.

2. *Burns' Ann. St.* 1901, § 2491, provides that a petition to sell real estate to pay debts of a decedent must set forth, among other things, the title of the decedent at the time of his death. *Held* that, where a petition not only contained the general averment "that the decedent died

opinion in Supreme Court, 74 N. E. 980.

¹ Rehearing denied, 74 N. E. 12. Superseded by 72 N. E.—39

the owner in fee simple of the land sought to be sold," but also an allegation as to the source of his title, and the facts relied on to show a fee simple in decedent, the general allegation did not render the petition invulnerable as against a demurrer for want of facts, where the specific facts showed no fee-simple title.

3. Burns' Ann. St. 1901, § 3341, enacts that all conveyances and devises made to two or more persons shall be construed to create estates in common and not in joint tenancy, unless it shall be expressed therein that the grantees or devisees so hold the same in joint tenancy and to the survivor of them, or it shall manifestly appear from the terms of the instrument that it was intended to create a joint tenancy. Testator's will gave his wife his lands for life, and recited that at the decease of the wife testator desired that the lands "be owned equally and jointly" by his children, or, in case of the decease of any of the children, "his or her share to descend to the heirs of their bodies if any, and if not to those surviving." *Held*, that the estate granted the children was a tenancy in common.

4. The lands did not at the death of testator vest absolutely and unconditionally in his children as remaindermen, but the children took a conditional fee conditioned on the death of the widow, the fee being defeasible by the death of a child prior to the death of the widow, in which case the survivors took the interest of the deceased child if the deceased left no children, but, in the event that she did, the interest of the child passed to them.

Appeal from Circuit Court, Warren County; Joseph M. Rabb, Judge.

Petition by John C. Stephens, as administrator of the estate of William N. Swank, deceased, to sell real estate of decedent for the payment of debts, for partition, and to quiet title. From a judgment in favor of petitioner, Emily T. Taylor appeals. Reversed.

C. C. Holland, for appellant. C. V. McAdams and I. E. Schoonover, for appellees.

MYERS, J. On July 29, 1903, John C. Stephens, as administrator of the estate of William N. Swank, deceased, filed in the Warren circuit court a petition to sell real estate of his decedent to pay debts, also asking partition and to quiet title.

For the purpose of the question here to be decided, the material facts as set forth in the petition are as follows: James C. Swank, father of the decedent, in the year 1872, departed this life testate, leaving, as his only heirs and devisees, Malissa Swank, his widow, and John E. Swank, Emily J. Taylor, William N. Swank, and Sarah J. Swank, who afterward married Dora Ammerman, as his only children. That at the death of James C. Swank he was the owner of 80 acres of real estate in said county, by him disposed of as follows: "I also desire that my said wife Malissa, have the use and occupancy of any and all lands that I may own at my decease, during her natural life, on the condition that she pay the taxes on and keep said lands free from incumbrances, and at the decease of my said wife, I desire that said lands be owned equally and jointly by my children Emily J. Taylor, William N. Swank, John E. Swank and Sarah J. Swank,

or in case of the decease of any of said children, his or her share to descend to the heirs of their bodies if any, and if not, to those surviving." That after the death of James C. Swank, and prior to the death of William N. Swank, Sarah J. Ammerman died intestate, leaving Dora Ammerman, her husband, George and Clyde Ammerman, her children, surviving. That on November 29, 1902, William N. Swank departed this life intestate, leaving a widow, the appellee, Generva Swank, but no children; also Malissa Swank, his mother, Emily J. Taylor, a sister, John E. Swank, his brother, said Dora Ammerman, and said two nephews, George and Clyde Ammerman, surviving him. That the real estate sought to be sold is the interest of William N. Swank in said 80-acre tract devised by his father as aforesaid. The allegations in the petition as to title are as follows: "That by virtue of the foregoing facts the said William N. Swank died the owner in fee simple of the undivided one-fourth of all of said real estate, subject to a life estate therein in his mother, the defendant, Malissa Swank, as provided in said will." Other allegations appear in the petition as to debts of decedent, value of personality, value of his interest in said real estate, interest therein of appellees, also as to partition and to quiet title, all immaterial to the question here presented.

A demurrer to the petition by appellant was filed and overruled. Answer, trial, and judgment; exceptions, and appeal by appellant. The ruling of the court on the demurrer to the petition is the only error assigned.

The question relied on for a reversal of the judgment of the lower court is stated by appellant as follows: "By this appeal but a single question is raised, and by it a proper legal construction of the last will and testament of James G. Swank is sought to be secured." Appellees insist that no question is presented by the demurrer to the petition, "as the special statute provides the procedure, and the Code cannot apply." We cannot agree with appellees in this contention. It is true that a petition for the sale of real estate to pay debts of a decedent, by whomsoever authorized to file the same, is statutory, and, so far as the statute prescribed the procedure and rules of practice, the same must be followed. *Seward v. Clark*, 67 Ind. 239. "The statute contemplates a trial of all the facts alleged in the petition, and issues of law and fact may be formed and tried." *Henry's Probate Law*, § 208. The procedure under the decedents' act does not provide for the filing of a demurrer to a petition to sell real estate to pay debts, yet the statute requires certain facts to be averred and proved before the petition can be granted. In this particular a complete mode of procedure is not provided by the decedents' act, and we may look to the Civil Code to supply the defect, and to this extent the proceeding is a civil action. *Scherer v. Ingerman*, Admr,

110 Ind. 428, 441, 11 N. E. 8, 12 N. E. 304. The decedents' act does not provide for a change of venue from the judge, yet it may be done. *Scherer v. Ingerman*, Adm'r, *supra*. A demurrer may be filed to an answer to a petition by an administrator to sell real estate to pay debts. *Hunter*, Adm'r, v. *French*, 86 Ind. 320. Section 2491, Burns' Ann. St. 1901, provides what facts must be set forth in the petition. Among other things, it "shall set forth a description of the real estate of the deceased liable to be made assets for the payment of his debts; the title of the decedent therein at his death." Section 2498, Burns' Ann. St. 1901, provides for the admission of persons not parties to such petition, and authorizing them to set up their interest. Therefore, in our opinion, a petition to sell real estate to pay debts of a decedent may be tested by a demurrer for want of facts. *Jackson v. Weaver*, Adm'r, 98 Ind. 307.

The appellees further contend that the petition contains the general averment "that the decedent died the owner in fee simple of the land sought to be sold," and is therefore "sufficient to withstand a demurrer, as the will is not a written instrument which is required to be set forth in the pleading, and no force can be given to the part thereof copied in the petition." Had the petitioner been content with the general allegation that his decedent at the date of his death was the owner in fee simple of the real estate sought to be sold, there would be no question as to the sufficiency of the petition in this particular. *Jackson v. Weaver*, *supra*. But, instead, he proceeds to state the source of his title, or the facts from which he draws the conclusion that his decedent at the time of his death was vested with a fee-simple title. "A conclusion of law thrown into a complaint cannot control the specific statements of facts, nor can conclusion from facts stated in general terms control; on the contrary, the specific statement rules the pleading." *Ragsdale v. Mitchell*, 97 Ind. 458; *Frain v. Burgett*, 152 Ind. 55, 50 N. E. 873, 52 N. E. 395. From the specific facts averred in the petition we must conclude that whatever title petitioner's decedent had in the land in question he took by virtue of the will of his father, James C. Swank.

The question in this case to which counsel give most attention is, did the will of testator vest in his children a joint tenancy or a tenancy in common? The decision of this question depends upon the construction to be given to that part of the will of James C. Swank which reads as follows: "At the decease of my said wife, I desire that said lands be owned equally and jointly by my children, Emily J. Taylor, William N. Swank, John E. Swank and Sarah J. Swank, or in case of the decease of any of said children, his or her share descend to the heirs of their bodies if any, and if not, to those surviving." This court, in the case of *Rohrer v. Burris*, 27 Ind. App. 344, 61 N. E. 202, by Robinson,

J., uses the following language: "The paramount object in construing a will is to express the true intention and meaning of the testator. And, to arrive at the true meaning of a particular clause, the court will look to the whole will, if any light will thus be thrown upon the clause to be construed. It is also settled that if the testator's intention is doubtful, or the language used is ambiguous, the court will adopt that construction which will cast the property as the law would have cast it had no will been made." When the intention of a testator is ascertained, it must be given effect, "unless in violation of some rule of law." *Fenstermaker v. Holman*, 158 Ind. 71, 62 N. E. 699. Section 3341, Burns' Ann. St. 1901, provides that: "All conveyances and devises of lands, or of any interest therein, made to two or more persons, except as provided in the next following section, shall be construed to create estates in common and not in joint-tenancy, unless it shall be expressed therein that the grantees or devisees shall hold the same in joint-tenancy and to the survivor of them, or it shall manifestly appear, from the tenor of the instrument, that it was intended to create an estate in joint-tenancy." "In this state a joint tenancy can only be created as provided by section 3341, Burns' Ann. St. 1901." *Wilkins v. Young*, 144 Ind. 1, 41 N. E. 68, 590, 55 Am. St. Rep. 162. *Hopkins*, in his work on real estate, defines a joint tenancy as "an ownership of land in community in equal undivided shares, by virtue of a conveyance which imparts an intention that the tenants shall hold one and the same estate. The interests of all the tenants go to the last survivor." The same author defines a tenancy in common as "a joint ownership of lands to which the principle of survivorship does not apply." *Hopkins on Real Property*, §§ 208, 209. Courts of this country do not favor joint tenancies. In this state it must unquestionably appear from the tenor of the will that testator fully intended to grant an estate in joint tenancy before it will be so declared. If, from the language of the will, there be a doubt in the mind of the court, it must be resolved in favor of a tenancy in common. *Nicholson v. Caress*, 45 Ind. 479; *Simons v. Bollinger*, 154 Ind. 83, 56 N. E. 23, 48 L. R. A. 234; *Lawson's Rights*, R. & P. vol. 6, § 2720. Mr. Freeman, in his work on *Cotenancy and Partition*, speaking of joint tenancy, says: "No doubt the courts always lean toward tenancy in common when the parties claim under a will, and are ever ready to give full effect to any language of the testator showing a design to create several interests. It may be stated generally that all expressions importing division by equal or unequal shares, or referring to the devisees as owners of respective or distinct interests, and even words simply denoting equality, will have this effect. Whenever a bequest or devise is to two or more equally, or to be equally divided, or in equal shares, or equally

among, * * * the devisees or legatees, as the case may be, will acquire the property as tenants in common." *Freeman on Cotenancy and Partition*, § 23. It has been held in this state that a deed to L. R. and J. R., jointly, conveys an estate in joint tenancy. *Case et al. v. Owen et al.*, 139 Ind. 22, 38 N. E. 395, 47 Am. St. Rep. 253. A provision in a deed, "to have and to hold the same to the said S. G. and P. G., his wife, in joint tenancy, their heirs and assigns forever," vests the estate in the husband and wife as joint tenants. *Wilkins v. Young*, 144 Ind. 1, 41 N. E. 68, 590, 55 Am. St. Rep. 162. Also a deed conveying to D. W. and L. W., his wife, in joint tenancy, vests the land in the husband and wife as joint tenants. *Thornburg v. Wiggins*, 135 Ind. 178, 34 N. E. 999, 22 L. R. A. 42, 41 Am. St. Rep. 422. Also a deed conveying and warranting to D. K. and C. K., his wife, jointly, does not convey a joint tenancy, but an estate by entireties. *Simons v. Bollinger*, 154 Ind. 83, 56 N. E. 23, 48 L. R. A. 234. *Hadley, C. J.*, speaking for the court in the latter case, says: "The cases of *Thornburg v. Wiggins*, 135 Ind. 178, [34 N. E. 999, 22 L. R. A. 42, 41 Am. St. Rep. 422], and *Wilkins v. Young*, 144 Ind. 1 [41 N. E. 68, 590, 55 Am. St. Rep. 162], are not analogous. In each of these the words employed were 'joint tenancy,' the very language of the books, and we are satisfied that the application of the rule in these cases was as liberal as is warranted by the authorities. *Case v. Owen*, 139 Ind. 22 [38 N. E. 395, 47 Am. St. Rep. 253], has no application. In the *Owen* Case the grantees were unmarried." *Tilghman, C. J.*, speaking for the court in *Martin v. Smith* (Pa.) 6 Am. Dec. 305, says: "When a man is providing for his children by his will, nothing can be more unnatural than an estate in joint tenancy. It is with good reason, therefore, that courts of justice have long since been disposed to lay hold of slight expressions in order to make a tenancy in common. * * * Where an estate is given to several persons jointly, without any expressions indicating an intention that it should be divided among them, it must be construed as a joint tenancy. But where it appears, either by express words or from the nature of the case, that it was the testator's intent that the estate should be divided, it then becomes a tenancy in common." In Illinois the statute relative to joint tenancies and tenancies in common is very similar to ours, and there it was held: "If it shall appear from the phraseology of the devise that the testator understood the nature and incidents of the two estates, and the language employed be such as to clearly and explicitly show that the premises are not to pass in tenancy in common," then a joint tenancy would be created, otherwise in common. *Mustain v. Gardner* (Ill.) 67 N. E. 779. In the case at bar we cannot say that from the "tenor" of the will the testator intended to devise his estate to his children as joint ten-

ants. The language of the will for this purpose cannot be aided by the "circumstances surrounding the grantor, and attendant upon the execution of the instrument, to ascertain his intention." *Nicholson v. Carless*, supra. Testator uses the words "equally and jointly." If he intended to devise his estate so as to create a joint tenancy in his children, then the word "equally" may be considered as surplusage, as there could not be a joint tenancy without a unity of interest, unity of title, unity of time, and unity of possession, which is not consistent with that part of his will which provides, "or in case of the decease of any of said children, his or her share to descend to the heirs of their bodies, if any, and if not, to those surviving." If it can be said that by the use of the words "equally and jointly" he intended to create a joint tenancy, it could be said with equal propriety that at the same moment he had in mind the destruction of the identical estate so created by destroying one of the necessary unities constituting it, viz., unity of interest. By the last clause of that part of the will under consideration, he had in mind the possibility of grandchildren, and they were to him objects of his bounty, consequently he endeavored to provide for such a contingency by giving to them the interest ("share") of the father or mother in case of their death before distribution of his estate. He speaks of the time when the land is to be "owned equally and jointly" as of the date of the death of his wife. His widow still survives. But as survivorship is to be construed from the date of the death of the testator, interests vest in real estate from that time, unless by the will or conveyance it clearly appears a contrary intention exists not in conflict with some established rule of law. No such conflict here appears. In our opinion, the estate granted by the will was a tenancy in common.

According to the theory of appellees, the real estate in question, at the death of testator, vested absolutely and unconditionally in his children as remaindermen. We cannot agree to this contention. By the language used in the will, testator fixes the time of distribution "at the decease of my said wife." He explicitly and definitely states who shall take the property at that time, viz., "my children," naming them, and, in case of the death of either of "said children" leaving heirs of their body, such heirs to take the share of their father or mother. Testator further expressly states that, in case any of his children should die without heirs of their body, such share to go "to those surviving." In construing a will, all the words used by a testator "are to be understood to have been used by him in their common and ordinary sense." *Borgner v. Brown*, 133 Ind. 391, 33 N. E. 92; *Wilson, Adm'r, v. White*, 133 Ind. 623, 33 N. E. 361, 19 L. R. A. 581; *State v. Joyce*, 48 Ind. 310. "No word or clause in a will is to be rejected to which a

reasonable effect can be given." Moore v. Gary, 149 Ind. 51, 68 N. E. 630. In our opinion, the language of this will expressly gave to the children of testator a conditional fee "to ripen and fasten absolutely" upon the death of the widow; that the fee so given is defeasible by the death of the child prior to the death of the life tenant (Corey, Exec., v. Springer, 138 Ind. 506, 37 N. E. 322); that as to the interest of such children as may die before the time for distribution of testator's estate, and leaving no children, the same shall go to the survivors; that is to say, the children of testator surviving his widow will take the interest of the child dying without children by virtue of the will, and not by descent; but in case of the death of one of the children named in the will, leaving children surviving at the time fixed for distribution of the estate, such children will take the interest of the parent as fixed by the will at the date of the parent's death, and no more. Therefore it may be inferred from what we have said that at the death of William M. Swank, he having died without children, and prior to the time fixed for his estate in that of his testator "to enlarge and ripen into an absolute fee," his interest was defeated, and, being defeated, there was nothing for the appellee administrator to sell.

The statute (section 2491, supra), among other things, requires the petitioner to set forth in his petition "the title of the decedent," in the real estate sought to be sold, "at his death." If by his death his title was defeated, and it so appears from the facts set forth in the petition, such petition on demurrer will be held insufficient.

In our opinion the court below erred in overruling the demurrer of appellant to the petition, and for this error the judgment is reversed.

(34 Ind. App. 235)

BRESSLER v. KELLY. (No. 5,022.)

(Appellate Court of Indiana, Division No. 1.
Dec. 8, 1904.)

SALE—LIABILITY FOR PURCHASE PRICE—CONDITION PRECEDENT—FINDING—CONCLUSIVENESS—APPEAL.

1. A contract to purchase a partnership stock of goods when an inventory of the assets and liabilities of the firm shall have been taken and matters adjusted, makes the taking of the inventory and adjustment a condition precedent to the liability of the buyer for the purchase price.

2. A finding of fact by the trial court is conclusive on appeal when the evidence is not in the record.

Appeal from Circuit Court, St. Joseph County; W. A. Funk, Judge.

Action by John F. Bressler against Jacob Kelly. From a judgment for defendant, plaintiff appeals. Affirmed.

Talcott & Fish, for appellant. E. A. Howard and Hubbard & Hubbard, for appellee.

ROBINSON, P. J. Suit by appellant for damages for breach of a contract to purchase a stock of merchandise. The correctness of the court's conclusion of law in appellee's favor on the special finding of facts is the only question presented. On September 9, 1901, appellant and one William W. Kelly entered into a partnership in the merchandise business, and purchased the stock of the prior firm of Bressler & Bressler, composed of appellant and another. The new firm did not assume or agree to pay any of the debts of the old firm. Afterwards the new firm executed a chattel mortgage upon their stock to certain bankers in the sum of \$1,300. Bressler requested Kelly to execute the mortgage, and stated to him that the mortgage was for a loan of money to Bressler and Kelly, but in fact the consideration was a note for \$530, due from the old firm to the bankers, and an overdraft by the old firm on the bankers for \$643.13; making a total of \$1,173.13 of debts of the old firm which were evidenced by the chattel mortgage, and only the residue of \$126.87 was for the use of the new firm. Afterwards, March 29, 1902, the bankers took possession of the stock under the mortgage, and placed one Tromp in possession as their agent. On March 31, 1902, appellee purchased the mortgage debt and security of the bankers, and the same was assigned to him, Tromp remaining in possession as appellee's agent. On April 1, 1902, appellant, appellee, and William W. Kelly entered into a written contract which recited that whereas, Bressler and Kelly were desirous of dissolving their partnership, it was agreed, that the dissolution should be effected as follows: (a) An inventory of their stock, fixtures, and furnishings should be taken at its actual cost; (b) an inventory of all their debts and liabilities; (c) that the difference between the assets and liabilities thus obtained should be divided equally between the partners. It was further agreed in the contract between the firm and appellee that in consideration of one dollar "and other and good valuable consideration" appellee would purchase from the firm the stock, fixtures, and good will of the business by assuming all the firm debts inventoried as above provided, and paying the difference between the assets and liabilities as above provided, and an additional 10 per cent. for freight and drayage, such difference to be paid one-half to each partner 30 days after the date of the contract, possession to be given as soon as inventory was "taken and matters adjusted." At the time the agreement was made the stock was being inventoried, and was afterwards finished, and amounted to \$5,406.10. The firm debts and liabilities were then inventoried by Tromp, and amounted to \$3,979.14. It was understood that there was an account for insurance, one for coal, one due a firm for goods, and other small bills which were left for subsequent ascertainment and

¶ 2. See Appeal and Error, vol. 2, Cent. Dig. § 2911.

adjustment. Among the debts inventoried was \$108.88 due from appellant to the firm; a note for \$400 executed by the firm to the partner Kelly; also an item of \$1,218.90 was marked on the inventory as an indebtedness of the firm, being the mortgage and notes given to the bankers; that the members of the firm disagreed as to the indebtedness of \$1,218.90 (appellant insisted the item was a debt of the firm, and Kelly insisted it was the debt of appellant); that the partners disagreed, and made no adjustment at the time, or at any time, of their partnership liabilities, nor of their partnership balances. Appellee thereafter remained in possession of the stock under the mortgage, and thereafter purchased and caused to be assigned to him the general debts of the firm excepting the items of \$108.88 and note for \$400, and an attorney fee of \$50, which was paid without assignment. Thereafter appellee sold and assigned the chattel mortgage to William W. Kelly and one Francis Allen, who took, and have since had possession, of the stock. Prior to the commencement of this suit, appellant demanded of appellee any amount that might be found due him under the contract, which appellee refused to pay. A few days after April 1st W. W. Kelly notified appellee in the hearing of appellant not to pay appellant any sum of money, as there had been no adjustment of their partnership liabilities, and that nothing was due him.

The complaint avers the execution of the contract of April 1, 1902, making the same an exhibit, and that the assets and liabilities were duly ascertained as provided therein, and the amount to be paid the partners was found to be \$1,600, and the possession and title of the property and business was on that day transferred to appellee, who accepted and has since had the same; that on April 1st the partnership was dissolved; that appellant has performed all the conditions of the agreement on his part to be performed; that appellee, on the 1st day of May, 1902, failed and refused to pay appellant \$800 as his part of the purchase price, and still refuses to pay the same, though often demanded. Appellee answered by general denial.

Had the court found the material averments of the complaint to be true, a conclusion of law should have followed in appellant's favor. But it is clear that appellee could not be required to carry out his part of the agreement until the assets and liabilities of the firm were duly ascertained as provided in the agreement. And the court expressly finds that the partners disagreed, and made no adjustment at the time, or at any time, of their partnership liabilities, or of their partnership balances. The finding as to the negotiations between the partners in an attempt to settle the partnership liabilities is not material, for the fact is found that they never did adjust them. The com-

plaint is on the theory that the liabilities were adjusted and the finding shows that they were not adjusted. The complaint tenders no issue as to how the liabilities of the firm should be settled, nor do we understand that the finding undertakes to adjust them. The finding may contain some matters of evidence concerning the liabilities, but the fact is found that some of the partnership liabilities were never adjusted or ascertained, and by the agreement appellee was not bound to pay any sum of money until the liabilities were adjusted. The complaint is on the theory that appellee took possession of the stock under the contract, but the finding shows that his possession was under the chattel mortgage executed to the bankers, and assigned to him. The finding shows that the partnership liabilities have never been determined and adjusted, and until that was done appellee could not be required to pay anything under the agreement. No attempt has been made to bring the evidence into the record, and upon the finding the conclusion of law is right.

Judgment affirmed.

(34 Ind. App. 215)

CHICAGO, I. & L. RY. CO. v. WICKER.
(No. 4,752.)

(Appellate Court of Indiana, Division No. 2
Dec. 7, 1904.)

DEATH—ACTIONS—INSTRUCTIONS.

1. An instruction authorizing the jury, in determining what facts had been proved, to consider what facts the parties had attempted to prove, was erroneous.

2. Where, in an action for death, defendant alleged, and introduced evidence in support of a defense of contributory negligence, which might have been sufficient to defeat the action, though the allegations of the complaint had been proven, an instruction directing the jury to find for plaintiff if the material allegations of the complaint had been sustained was erroneous.

On Rehearing. Reversed.

For former report, see 71 N. E. 223.

ROBY, J. Action to recover damages on account of the death of Elmer Wicker, alleged to have been the result of negligence on the part of the appellant. Trial by jury, verdict for \$3,500, with answers to interrogatories, and judgment upon the verdict.

Appellant's motion for a new trial was overruled, and such action is made the basis of an assignment of error. One ground for a new trial stated in the motion was the giving of instruction No. 2 requested by appellee. This instruction, as given, was in terms

as follows: "The burden rests upon the plaintiff to prove the material facts averred in the complaint. You may consider what facts have been proved, and, to this end, you may consider what facts the parties have attempted to prove. Where the plaintiff has offered evidence to prove a point, and the defendant has offered evidence to disprove it, you will then weigh all the evidence on such point, and determine the point in favor of the party whose evidence you find has the greatest weight as affecting such point; and if, upon weighing the whole evidence, you find that the plaintiff has not made her case out by a fair preponderance of the evidence, your verdict should be for the defendant, but, taking the evidence as a whole, you find that the plaintiff has sustained the material allegations of her complaint by a fair preponderance of the evidence, then you should find for the plaintiff, and assess such damages as will adequately and reasonably compensate decedent's next of kin for the loss sustained by his death." By it the jury were told that, to determine what facts had been proved, they might consider what facts the parties had attempted to prove. The instruction was radically wrong. Juries are apt enough to consider matters outside of the evidence, without being directed to do so by the court. At the time the cause was tried, the burden of proving contributory negligence was upon the defendant. It follows that the instruction was wrong, in that it directed the jury to find for the plaintiff if the material allegations of her complaint had been sustained; ignoring the question of contributory negligence, proof of which, having been made by the defendant, might have been sufficient to defeat the action, although the allegations of the complaint had been proven. The instruction is otherwise defective, and, after very mature consideration, we are of the opinion that the error in giving it is one which ought not to be condoned.

The judgment is reversed and the cause remanded, with instructions to sustain appellant's motion for a new trial, and for further consistent proceedings.

(34 Ind. App. 285)

REED SMOKELESS FURNACE CO. v. STATE. (No. 4,954.)

(Appellate Court of Indiana, Division No. 2
Dec. 9, 1904.)

SALES — CONTRACT — CONSTRUCTION—LIABILITY FOR PURCHASE PRICE.

1. A contract for the installation of a smoke consumer with warranty that it would consume 75 per cent. of the smoke otherwise produced by a furnace, and save 25 per cent. of the coal otherwise consumed, allowed the buyer 90 days for a trial, and provided that at the end of the trial the buyer should at once announce to the seller the result, and that, if the buyer should determine that the device met the warranty, and the installation was completed to the satisfaction of the buyer, then the buyer should pay a stipulated price. The device was installed, and tests

were made, and within 90 days after the completion of the installation the representative of the buyer notified the seller that he would neither recommend acceptance nor the payment of the price, and also expressed his inability to determine whether the device met the requirements of the contract. Thereafter tests were made, but the device was rejected after a compliance with the contract on the part of the buyer. *Held* that, notwithstanding the good faith of the seller, the buyer was not liable for the price.

Appeal from Superior Court, Marion County; Vinson Carter, Jas. H. Leathers, and Jno. L. McMaster, Judges.

Action by the Reed Smokeless Furnace Company against the state of Indiana. From a judgment for defendant, plaintiff appeals. Affirmed.

C. E. Barrett, F. E. Barrett, J. E. McCullough, and B. B. Cohen, for appellant. C. W. Miller, Atty. Gen., O. O. Hadley, W. C. Geake, and L. G. Rothschild, for the State.

ROBY, J. This action was instituted by appellant to recover the contract price of a certain furnace device for saving coal and consuming smoke, alleged to have been installed at the Indiana State Prison at Michigan City. Trial was had, finding made, and judgment rendered in appellee's favor. The complaint was founded upon the contract, performance of which was averred. The answer was a general denial.

The contract contained provisions as follows:

"Fourth. Said first party [appellant] shall grant to said second party a period of ninety days (90) from the date when said device is completely installed and constructed, as a trial period, within which said second party may test the same, during which time first party shall furnish an experienced fireman, free of expense (except his board and lodging, which said second party shall provide), for such period as shall be necessary to instruct the fireman of the second party in the use and operation of said device. * * *

"Eighth. At the end of said trial period of ninety (90) days said second party shall at once determine and announce to said first party the result of their determination as to the question of consumption of smoke and saving of fuel, as before described in this contract. If said second party shall determine that said device does meet the guaranty and warranty aforesaid, in all particulars, and said construction and installation of such device, and the machinery and appliances connected therewith are furnished, made and done in good and workmanlike manner, and to the satisfaction of said second party, then, in that event, said second party shall thereupon and within thirty (30) days from that time pay to said first party the sum of eighteen hundred (\$1,800) dollars cash, in full satisfaction and payment for said device."

The "guaranty and warranty" referred to was that the device sold would consume 75

per cent. of the smoke otherwise produced by a furnace, and save 25 per cent. of the coal otherwise consumed. In various ways the appellant questions the sufficiency of the evidence. Its point is that under the issue but two questions were presented for decision: (1) Did appellant construct the furnace as contracted for? (2) Did appellee, within 90 days after its completion, make a test and notify appellant of its rejection? Appellant began the construction according to the contract. The work was delayed for various reasons, some of which were due to the officers of the institution and some to the company, and not completed until quite an interval after the time specified by the contract. It was, perhaps, not entirely finished at any time; but the delay was acquiesced in, and the unfinished part was of such trifling importance that the allegation of performance by appellant was fairly established. There was considerable communication after the completion of the work relative to its approval and acceptance. Tests were made under appellant's supervision, and the appliances were regularly used. Within 90 days after the completion the warden notified appellant that he could not recommend the acceptance of the plant or the payment of the money. He also expressed his inability to determine whether the plant met the requirements of the contract. The tests made were subsequent to this letter, and did not result in an acceptance. The evidence warranted the court in finding that there was a substantial compliance by appellee with the terms of the contract on its part, and a rejection of the plant. The case is a severe one. Appellant acted in good faith, and it is regrettable that it is compelled to lose so heavily as it does, but such facts are not sufficient to authorize the reversal of the judgment.

Judgment affirmed.

(34 Ind. App 231)

KING et al. v. BOARD OF COM'RS OF MARTIN COUNTY. (No. 4,900.)

(Appellate Court of Indiana, Division No. 2. Dec. 8, 1904.)

MANDAMUS—COUNTIES—CONSTRUCTION OF HIGHWAY—PAYMENT.

1. Acts 1893, pp. 198, 199, c. 112, §§ 5, 6, as amended by Acts 1895, p. 147, c. 63, relative to highways, provide that the county treasurer shall sell bonds, and that the proceeds shall be kept as a fund for the construction of the particular road for which they are issued; that the treasurer shall pay the money to the contractor on warrant of the auditor, as directed by the board of commissioners, but that the commissioners shall not order payment in excess of 80 per cent. of the engineer's estimate of the work done, until the road shall have been received as completed by the board of commissioners. *Held*, that the indebtedness created by the construction of a road under the statute is not that of the county, but of the persons assessed for its construction, and hence, where a contract for the construction of a road was performed by the completion of the road, the

remedy available to the contractors was not an action against the county, but mandamus to compel the commissioners to bring about final payment; Burns' Ann. St. 1901, § 1182, authorizing mandamus to compel the performance of an act specially enjoined by law, or a duty resulting from an office.

Appeal from Circuit Court, Orange County; T. B. Buskirk, Judge.

Action by Carolus C. King and others against the board of commissioners of Martin county. From a judgment for defendant, complainants appeal. Affirmed.

Padgett & Padgett and McCormick & Glickerson, for appellants. Fabius Given and Brooks & Brooks, for appellee.

ROBY, J. The question for decision is whether appellants' complaint stated facts sufficient to constitute a cause of action. A demurrer to it was sustained in the trial court, and, the plaintiffs refusing to plead further, judgment was rendered for the defendant.

The substance of the complaint is that appellants, as partners, on December 9, 1898, entered into a written contract with the board of commissioners of Martin county for the improvement of certain public highways, and were to receive as compensation for making such improvements \$23,595.80; that the work was to be done in accordance with the specifications and plans on file in the auditor's office of said county, to be commenced within 10 days after the sale of bonds by the treasurer, and to be completed on or before the 9th day of September, 1899; "that thereafter, on the ——— day of ———, 1898, said board of commissioners issued the bonds of said county for and in the amount of \$23,595.80 for the purpose of providing funds out of which to pay for said improvements, which bonds were thereafter sold by the treasurer of said county for a premium of \$50, and the proceeds thereof placed in the hands of said treasurer as a fund for such purpose." Plaintiffs, within the time specified, commenced said work, and thereafter made such improvements, and completed seven out of eight highways specified in the contract. The contract price of road No. 3 was \$3,750.54; its length, 12,382 feet. A part of such highway was to be graded and improved with gravel and stone, a culvert constructed, and a part thereof graded and improved "along and over certain parts of the right of way of the Baltimore & Ohio Southwestern Railroad Company at points between the station of said company at Shoals and the station at Ironton." Plaintiffs commenced the work of improving said road, graded 8,882 feet, put on stone as required for a distance of 6,300 feet, did work on the remaining 3,500 feet of said road to the value of \$75, and were proceeding to complete the same, when said railroad company instituted an action against them, which resulted in a perpetual injunction restraining them from interfering with the fill on the right of way,

and from cutting or excavating any part thereof. The work done up to the time of such injunction was of the value of \$3,400. "By reason of said injunction, without any fault of the plaintiff, they were unable to complete said road." They have received on account of such work the sum of \$2,534.49, being 80 per cent. of the value of the work as estimated by the engineer in charge. They aver that there is due and owing to them on account of the work done on said road, according to such estimate, the further sum of \$845.51; that they filed a claim with the auditor of said county, which claim was by the board of commissioners rejected, and said board refused to allow anything for said work; that there is now in the hands of the treasurer an unexpended balance of the proceeds of the sale of said bonds and of said fund amounting to \$1,231.13. Wherefore, etc.

The proceeding for the construction of the road was governed by the act of 1893 as amended in 1895 (Acts 1893, p. 196, c. 112; Acts 1895, p. 143, c. 63). By section 5 of the act of 1895 it is provided that the county treasurer shall sell bonds, and that the proceeds shall be kept as a separate and specific fund to pay for the construction of the particular road for which the bonds are issued, and that the treasurer shall pay such moneys to the contractor upon warrant of the auditor as directed by the board of commissioners. The indebtedness created by the construction of such road is not the indebtedness of the county, nor of the township constituting the tax-paying district, but is the indebtedness of the persons assessed for its construction. *Board v. Harrell*, 147 Ind. 500, 46 N. E. 124. It is the duty of the commissioners to order the payment, but no payment in excess of 80 per cent. of the engineer's estimate of the work done by the contractor shall be made, and payment of the whole amount of the contract cannot be made "until the road shall have been received as completed by the board of commissioners." Acts 1895, § 5, supra. In *Little v. Board of Commissioners*, 7 Ind. App. 118, 34 N. E. 499, the contractor for the construction of a free gravel road filed his claim before the board of commissioners for extra material and expense. It was held that the action could not be maintained. In *Deitrick v. Board*, 28 Ind. App. 83, 62 N. E. 97, the contractor for the construction of a free gravel road under the Acts of 1893-95, supra, filed a claim before the board for extra work, which was disallowed. He appealed to the circuit court, and a demurrer was sustained to his complaint. It was held that there was no liability on the part of the county, and that the county is not liable for the cost of constructing the road is otherwise decided. *Kline v. Board*, 152 Ind. 321-325, 51 N. E. 476-477.

In the case at bar it appears that a fund is in the hands of the treasurer, available for the payment of the contract price for the

construction of the road. When the contract is performed by the completion of the road, the law enjoins the duty upon the board of receiving the same, and directing the auditor to issue the warrant upon which final payment is made. The duty thus enjoined by law is specific. No other adequate remedy exists, and the remedy by mandamus is therefore appropriate. Section 1182, Burns' Ann. St. 1901; *State ex rel. v. Board*, 136 Ind. 207, 85 N. E. 1100. "The case falls within the rule that a ministerial officer who has in his hands a specific fund may be compelled by mandamus to make lawful distribution of the fund." *Ingerman v. State ex rel.*, 128 Ind. 225-227, 27 N. E. 499-500.

Appellants seek recovery of part of specific fund because of facts which they aver excuse further effort by them to complete the contract. If a contingency has arisen upon which it becomes the duty of the officers to pay, and they refuse to do so, the remedy is not to sue the county, but to compel the officers to act. Whether the facts averred are sufficient to require such action is a question not presented by this appeal.

Judgment affirmed.

(34 Ind. App. 217)

RICHOREEK v. RUSSELL et al. (No. 3,213.)
(Appellate Court of Indiana, Division No. 2.
Dec. 7, 1904.)

EJECTMENT—TAX TITLE—PLEADING AND PROOF
—SALE IN GROSS—EXCESSIVE JUDGMENT—AT-
TACK ON JUDGMENT—JURISDICTION—LIEN
FOR TAXES—TIME FOR PAYMENT.

1. Under Burns' Ann. St. 1901, § 1067, providing that defendant in ejectment may show under the general denial any defense, "either legal or equitable," where plaintiff's title in such action is based on a sheriff's sale under a default judgment, defendant may attack the judgment by showing that it was rendered on matters not in issue.

2. Where the complaint on which a judgment for the sale of land for taxes was rendered did not allege that the land could not be sold in parcels, it is error to render a judgment providing that the land should be sold as a whole, and that it was not susceptible of division.

3. A sale of land for taxes on a judgment is void where the judgment was excessive by \$9.80 costs erroneously taxed.

4. Where the land of the value of \$3,800 was sold on an execution for \$39.17 taxes, the sale was void.

5. Where it appears that, before a judgment for sale of land for delinquent taxes, defendant made inquiry as to the amount of assessments against the land, and, having then paid the amount she was informed was delinquent, she gave the action no more attention, but that judgment was afterward taken, without further notice to her, for an amount which plaintiff had failed to include in the statement given her, there was such "inadvertence, surprise, and excusable neglect" as, under Burns' Ann. St. 1901, § 399, entitled defendant to relief against the judgment.

6. It being the duty of the county treasurer to collect taxes on land from the landowner, or make the same from his personal property, if possible (Burns' Ann. St. 1901, §§ 8571, 8572), a sale of land for delinquent taxes without showing diligence in seeking personal property conveys no title to the land.

7. Burns' Ann. St. 1901, § 1395, provides for the establishment of superior courts having three judges. Section 1404 relates to the terms, adjournment, and jurisdiction of such courts. Section 1409 provides that "when a superior court consists of more than one judge there shall be held general and special terms; that a general term may be held by a majority of the judges and a special term by any one or more of them, and general and special terms or one or more of them may be held at the same time as the judges of the court may direct, and whenever such term or terms are held they shall be taken and deemed to be held by the authority and direction of the judges." *Held*, that the proceedings before the several judges of such court are in the same court and jurisdiction, though had in different courtrooms by different judges.

8. Where a tax deed under which plaintiff in ejectment claims is declared invalid to convey title to the land, but only entitles plaintiff to a lien for the amount of the tax, interest, etc., a judgment giving defendant 60 days in which to pay the same is authorized by Burns' Ann. St. 1901, § 8641.

Appeal from Superior Court, Marion County; V. G. Clifford, Judge pro tem.

Action in ejectment by Seth M. Richcreek against Mary K. Russell and others. From a judgment for defendants, plaintiff appeals. Affirmed.

James W. Harper, for appellant. J. T. Lecklider and D. A. Myers, for appellees.

COMSTOCK, O. J. This action is founded on a complaint in ejectment, and was commenced by the appellant as plaintiff, and tried in room 2 of the Marion superior court; the Honorable Vincent Clifford presiding pro tem. The appellant claims that he is the owner in fee simple of the real estate described in the complaint, and, as such owner, is entitled to possession. He claims title by reason of two delinquent tax deeds and a sheriff's deed. The sheriff's deed rests on a decree and sale in cause numbered 59,969, tried in room 1 of the Marion superior court. Appellee Mary K. Russell claims that each of these deeds is invalid, and that she owns said real estate. Mrs. Russell, as defendant, filed a general denial, and subsequently at different times filed four paragraphs of cross-complaint, to the first of which a demurrer was overruled, and an exception entered. There was a special finding of facts. The appellant claims that nothing appears in any or all of these cross-complaints or in the special findings that can defeat his title by either of the tax deeds or the sheriff's deed, and that her claim of defense to the sheriff's deed, whether in these cross-complaints or in the special findings, is in the way of a collateral attack on a judgment in another action commenced and tried in another court of undisputed jurisdiction, and the sheriff's sale and the deed made in pursuance of such judgment. In her paragraph of cross-complaint, Mrs. Russell alleges that she owns the real estate in question; that the appellant's claim of title rests on a sheriff's sale to him under a decree of the Marion county superior court in cause No. 59,969,

room 1, in favor of the Marion Bond Company; that at the time of such judgment plaintiff had no legal existence; that before said decree was rendered her husband inquired of appellant, who was the manager and attorney for said company, as to assessments against her said real estate and other lots owned by her; that the appellant gave him a statement of the assessments against his property, which he paid, informing him that said company held no other assessments against either of them; that, relying on this information, she paid no further attention to said cause 59,969; that by oversight and negligence the appellant failed to include her said real estate in said statement; that said real estate was worth \$4,000, and was sold under said decree for \$5.13 and costs, of which sale she had no knowledge until the year for redemption had expired; that by reason of these facts the judgment of foreclosure is illegal and void, and should be set aside; and that she be allowed to defend against said claim. The second paragraph of cross-complaint was filed on the 2d day of October, 1902, within two years after judgment was rendered in said cause 59,969. The Marion Bond Company, trustee, and appellant, Richcreek, were made parties. She seeks to be relieved from said judgment on the ground of inadvertence, surprise, and excusable neglect under section 399, Burns' Ann. St. 1901. It is also alleged that the judgment in said cause 59,969 is a nullity for the reason that the Marion Bond Company had no legal existence. The third paragraph of cross-complaint was filed the 28th day of April, 1903. In said paragraph the facts stated in said first and second paragraphs are substantially repeated, and in addition it is alleged that the decree in said cause 59,969 was for \$10.15 and costs, and, on its face, shows for a much larger sum than was due under the law, and, as thus rendered, is a fraud of her rights; that the appellant, to defraud her out of her property, either intentionally or by oversight, omitted to state to her husband that the alleged corporation held the alleged assessments against her; that the judgment and decree upon the face of the public record show that the same was illegal and void, and, under the same, sale was made to the appellant; that within a year after the sale her husband redeemed the real estate from the sheriff's sale, but, if there is any balance required to effect a complete redemption, it is because the appellant fraudulently omitted to state to her the full amount required for that purpose; that, "in any event, on the 24th day of December, 1901, prior to the expiration of the year of redemption, she paid said Richcreek a part of the money to so redeem it, and that, in good conscience and equity, she should be allowed to complete the redemption by paying the balance; and that the sheriff's deed should be held void for these reasons, and set aside." In her

fourth paragraph of cross-complaint the only new matter contained is that the sheriff made an attempt to sell said real estate, which sale is illegal and void for the reason that the sheriff did not offer to sell the same in parcels, but only offered the entire lot, the value of which was far in excess of the amount of said judgment, being worth \$4,500; that said lot was susceptible of division, and 40 feet could have been sold off the west end, which was worth \$20 a front foot, without injuring the balance of the property, which would be more than sufficient to pay said judgment; that appellant had full knowledge of the fact that said lot was susceptible of division; that she had no knowledge of the sale until after the year for redemption had expired; and that her husband paid said judgment before said time. The prayer to each paragraph may be generally stated as asking that the judgment be declared null and void and set aside; that appellee be permitted to pay appellant's claim, with interest, etc.; that her title to the property in question be quieted, and for other proper relief. The case was put at issue by general denial of the first, second, third, and fourth paragraphs of said cross-complaint.

The court made, in substance, the following special finding of facts: In the year 1883 the defendant Mary K. Russell, wife of the defendant Isaac Russell, became owner in fee simple of the real estate described in the complaint, from which time to the present she and her codefendant have been in the possession of and occupying the same as a residence. That said lot is located at the southwest corner of Seventeenth street and Ashland avenue, in the city of Indianapolis. That the value of the whole of said lot and improvements is now, and has been for three years last past, \$3,800. That the west portion of said lot is worth \$15 per front foot, fronting on Seventeenth street. That said lot is susceptible of division, and could have been sold in parcels without material injury to the value of the whole. The taxes against said real estate for the years 1895, 1896, and 1897 were not paid and became delinquent, and for said delinquent taxes said real estate was sold on the 11th day of February, 1898, to William B. Austin at a delinquent tax sale for \$137.48—\$2 being for poll tax assessed against Isaac Russell—and the auditor of said Marion county executed to him a certificate of purchase. That on the 25th day of August, 1900, said real estate not having been redeemed, said auditor executed to said Austin a tax deed conveying said real estate to said Austin. Said deed was duly executed, and was recorded in the recorder's office of said county before delivery, and the fee for recording the same was paid by said William B. Austin. That said deed was in the form as provided by law, as nearly as the case would admit. That on the 28th day of February, 1902, the said Austin and his then

wife, for a valuable consideration, conveyed said real estate to the plaintiff by a quitclaim deed, which was duly recorded on the 1st day of March, 1902, in the recorder's office of said county. That the taxes against said real estate for 1898 and 1899 were not paid and became delinquent, and for said last-named delinquent taxes said real estate was again sold at a delinquent tax sale to H. E. Fosdick on the 12th day of February, 1900, for \$92.37, and the auditor of said Marion county executed a certificate to him of said purchase. That afterwards said Fosdick assigned said certificate to the plaintiff, who on the 13th day of February, 1902, produced the same to said auditor, and thereupon said auditor executed to the plaintiff a deed of conveyance of said real estate. Said last-named tax deed was duly executed by said auditor and witnessed by the then treasurer of said county, and was recorded in the recorder's office of said Marion county before delivery, and the fee for recording the same was paid by the plaintiff, and the same was in form as provided by the tax law of the state, as nearly as the case would admit. That the said Richcreek paid the following amounts, additional taxes, upon said lot, to wit: January 23, 1902, tax for 1900, amount, \$48.81; on April 26, 1902, the first half of the taxes for 1901, amounting to \$21.84; on October 21, 1902, the second half of the taxes for 1901, amounting to \$21.84; on April 11, 1903, the first half of the taxes for 1902, amounting to \$25.59. That in addition to the taxes he also paid municipal assessments for sewer and street improvement against said lot on February 10, 1901, \$36.36; April 15, 1902, an assessment for \$24.90; January 20, 1903, an assessment of \$4.22. That said real estate was not redeemed from said last-named tax sale. That the defendant Mary K. Russell is, and at all times for more than 20 years has been, the owner in her own right and in possession of personal property of the value of \$600, consisting of piano, household goods, and furniture, located in said residence on said lot occupied by her. That the treasurer of said Marion county has never, in person or by deputy, made any demand upon her for the payment of any delinquent taxes due from her on the sale set out in said findings. That there was no affidavit or verified showing in the treasurer's office showing that any demand was ever made upon her for the payment of delinquent taxes, or for the distraint of her personal property therefor. That when the delinquent list was made by the auditor, upon which said tax sale occurred, no affidavit or verified showing was made or presented by the auditor that any call had been made or notice given to Mary K. Russell of delinquent taxes, or any demand for personal property for the payment of the same, or that the treasurer of said county had diligently sought for, and had been unable to find, any personal property from which to collect said taxes. That the auditor of said

county did not post or cause to be posted at the door of the courthouse, or anywhere else in Marion county, any notice whatever of the delinquent tax sales herein found; nor was any notice posted in said county showing that the lot in question was delinquent for nonpayment of taxes, or that Mary K. Russell owed any taxes whatever, or that her property was liable for sale for any tax claims due thereon for any or either of the years of sales for which said lot was sold for taxes. That the plaintiff, Seth M. Richcreek, acting as the attorney for the Marion Bond Company, trustee, and who was also president of said company, as such attorney commenced an action in the superior court of Marion county, Ind., on February 2, 1900, wherein the Marion Bond Company, trustee, was plaintiff, and Minnie A. Boyd, Francis M. Stoop, Mary K. Russell, and others were defendants; said cause being numbered 59,969. That said cause was brought for the purpose of enforcing a sprinkling assessment against separate pieces of property owned by the defendants severally. That all of said defendants were notified of the pendency of said action by service of summons, except the defendant Francis M. Stoop. That on October 18, 1900, the plaintiff in said cause dismissed the same as to all of said defendants except Mary K. Russell, Isaac Russell, and Francis M. Stoop, and that no part of the court costs in said action was taxed against the plaintiff, the Marion Bond Company, trustee, as the result of the dismissal aforesaid. That on said 18th day of October, 1900, a judgment was rendered in said cause against said lot 9 owned by Mary K. Russell, and enforcing a sprinkling assessment against the same, as shown by said decree, amounting to the sum of \$5.13, and the further sum of \$5.73 as attorney's fees thereon. That the judgment in said cause 59,969 was rendered upon the default of all the defendants. That the complaint in said cause contained no allegations or averments that said lot No. 9 was not susceptible of division, or that it could not be sold in parcels, but that the decree rendered found that said lot 9 was not susceptible of division, and that it should be sold as a whole, without relief from valuation or appraisal laws. That said decree did not find the amount of the costs, or apportion them among the several defendants and the plaintiff. That a certified copy of the decree was issued to the sheriff of Marion county, and on January 19, 1901, the sheriff sold lot 9 as a whole, without first offering a less portion of the same, to the plaintiff in this action, Seth M. Richcreek. That at the time said Richcreek purchased said property at said sheriff's sale he was, and always has been, the attorney for the plaintiff in that cause. That the clerk of the court erroneously and inadvertently taxed the costs against said lot 9, owned by Mary K. Russell, at \$26.30, whereas the proper amount of costs that should have been

taxed by the clerk was \$16.50. That the sheriff's sale was made for a sum in addition to the judgment and costs properly taxed of \$9.86, wrongfully and erroneously taxed. That a short time prior to the rendering of the judgment in said cause 59,969 the defendant Isaac Russell, acting for himself and his wife, Mary K. Russell, visited the office of the plaintiff, Richcreek, and made inquiries of him as to the amount of assessments which he, the said Richcreek, had, either for himself or the Marion Bond Company, against his property; meaning thereby to inquire for all assessments against himself and his wife, and supposing he was so understood. That said Richcreek, in response to such request, gave him the amount of the assessments against his property individually, which was paid. That the Russells, believing that they had paid the assessments due upon the property in said cause 59,969, paid no further attention to the action. That neither of the Russells had any actual knowledge of the rendition of the judgment against said lot, and had no actual knowledge of the sheriff's sale in such judgment until after the year for redemption had expired. That the plaintiff purchased the real estate described in the complaint at the sheriff's sale the 12th day of January, 1900, for \$37.19, and, having paid the amount of the bid, the sheriff executed and delivered to him a certificate of sale of said real estate in due form; said real estate being at that time worth \$3,800. That on the 21st day of January, 1902, said property not having been redeemed, the sheriff of Marion county executed and delivered to Seth M. Richcreek a sheriff's deed conveying to him the real estate described in the complaint. Said deed was in due and legal form, and duly recorded in the office of the recorder of Marion county on the 29th day of January, 1902. That the rental value of said real estate on and since the 21st day of —, 1902, has been \$20 per month, making a total sum to date of \$——. That plaintiff has not transferred or conveyed his interest in said real estate. That before this action commenced the plaintiff demanded of both the defendants possession of the real estate.

Upon the foregoing finding of facts the court stated conclusions of law as follows: (1) That said tax deeds are insufficient to convey a fee simple title to the grantee; (2) that the plaintiff, Seth M. Richcreek, holds a good and valid lien against the property described in the complaint for taxes paid, penalties, interest, expenses necessarily incurred in the execution and recording of deeds, and street and sewer assessments paid by him, in the sum of \$665.15; (3) that the sheriff's sale made in cause 59,969 is illegal and void, and should be set aside, annulled, and held for naught; (4) that the cross-complainant, Mary K. Russell, upon the payment of the sum due to the plaintiff under his tax liens and said judgment within 60 days, is entitled to have the title to said lot described

in the complaint quieted in her; (5) that upon such payment a commissioner shall be appointed in this cause to convey by deed to her whatever apparent interest said Richcreek may hold against said lot by virtue of said tax debts. Upon the foregoing conclusions of law, the court rendered judgment in substance as follows: "That the tax deeds are invalid and convey no title to the respective grantees; that the appellant holds a lien against said real estate on account of said tax sales and deeds, for taxes, interest, etc., in the sum of \$665.15; that the sheriff's sale made under the decree in said cause 59,969, so far as it affects said real estate, is illegal and void, and is set aside; that the appellant holds a valid lien against said real estate by reason of the judgment and costs in said cause 59,969, and that Mary K. Russell be and is permitted to satisfy said judgment by paying the amount thereof, with interest and costs, within sixty days; that on paying the costs of this proceeding, and said \$665.15, and interest thereon, and the sum required to satisfy the judgment, interest, and costs in said cause 59,969, within sixty days after the rendition of this judgment, Mary K. Russell shall be entitled to have the title to said real estate quieted in her, and, if she fail to pay these liens within sixty days, said real estate shall be sold to satisfy the same."

Appellant claims that the trial court erred (1) in overruling his demurrer to the first paragraph of the cross-complaint; (2) in the first, third, and fourth conclusions of law; (3) in sustaining appellee's motion for a judgment; (4) in adjudging that said tax deeds are invalid; (5) in adjudging that said sheriff's sale is illegal and should be set aside, and that Mary K. Russell be permitted to satisfy the judgment under which said sale was made by paying the amount due, with interest and costs thereon, within 60 days; (6) in adjudging that Mary K. Russell, on paying said sum of \$665.15, and interest thereon, and the costs of this proceeding, and the sum required to satisfy said judgment, interest and costs, rendered in cause 59,969, within 60 days after the rendition of this judgment, shall be entitled to have the title to said real estate quieted in her.

Appellant must recover, if at all, upon the strength of his own title. Section 1069, Burns' Ann. St. 1901. The burden is upon him to show his title. "To prove title by sale on execution or order of sale, the purchaser must show a valid judgment, an execution or order of sale, and deed." *Indianapolis, etc., Ry. Co. v. Center Township*, 143 Ind. 63, 40 N. E. 134, and cases cited. In an action of ejectment, under an answer of general denial, "the defendant shall be permitted to give in evidence any defense to the action that he may have, either legal or equitable." Section 1067, Burns' Ann. St. 1901. Under this provision of the statute, appellees had the right to attack the judgment by virtue of which the sheriff's sale was made, and

show that it was invalid. The special findings show that the judgment in said cause 59,969 was rendered on default against appellees; that the complaint did not allege that the lot in question was not susceptible of division, or that it could not be sold in parcels, but the decree provided that the property should be sold as a whole, and that it was not susceptible of division. Only traversable averments in a complaint are admitted by default. *Briggs et al. v. Sneghan et al.*, 45 Ind. 14; *Unfried v. Heberer et al.*, 63 Ind. 87. A judgment on matters not in issue is erroneous. *Koons v. National Bank, etc.*, 89 Ind. 178. Every fact on which a judgment rests must be averred. *Day et al. v. Watts*, 92 Ind. 442; *Nicholson v. Carena*, 76 Ind. 24. It follows that that part of the decree in said cause 59,969 directing said lot to be sold as a whole was without the issue, and that the sale as a whole, without offering the same in parcels, was illegal and void. *Bardeus v. Huber*, 45 Ind. 235. It is specially found in the case at bar that said lot is susceptible of division, and that 65 feet off of the rear thereof is more than sufficient to pay the amount of the claim in suit. As the judgment rendered was for an amount greater than that allowed by statute, and the sale made for a sum in addition to the judgment and costs properly taxed of \$9.86 costs wrongfully and erroneously taxed, this makes said sale void. *Key v. Ostrander*, 29 Ind. 1; *Vail v. McKernan*, 21 Ind. 421. Property of the value of \$3,800 was sold for \$39.17. In *Banks v. Bales*, 16 Ind. 423, real estate of the value of \$500 was sold for less than \$50, and the court held that the sale could not be upheld. The facts found show such mistake, inadvertence, surprise or excusable neglect as warranted the trial court in setting aside the sheriff's deed, under section 899, Burns' Ann. St. 1901, *supra*.

Appellant's claim of title through the tax deeds can only be upheld upon the ground that the law has been complied with. A tax deed is only *prima facie* evidence of the regularity of the sale of the premises. Section 6473, *Horner's Ann. St. 1901*.

Where the law is not complied with, the sale conveys no title. Where there is personal property primarily liable for the payment of taxes, it must be exhausted before proceeding against the real estate. *Hannah v. Collins*, 94 Ind. 201; *Morrison v. Bank of Comm.*, 81 Ind. 335; *Schrodt v. Deputy*, 88 Ind. 90; *State ex rel. MacKenzie v. Casteel*, 110 Ind. 174, 11 S. E. 219; *Millikan et ux. v. Patterson*, 91 Ind. 515.

Section 8571, Burns' Ann. St. 1901, enumerates the specific duties of the county treasurer and county auditor with reference to demand and distraint of personal property for collecting taxes, namely: (1) Make a delinquent list; (2) list must be certified to be correct; (3) must call on every taxpayer, and demand payment and distraint personal property, etc.; (4) if unable to collect, must

make return showing diligent search. Section 8572, Burns' Ann. St. 1901, forbids the county auditor to credit the county treasurer with any uncollected delinquencies unless the treasurer shall show by return, verified by his oath, that he diligently sought for personal property to pay the tax. Sections 8601, 8602, Burns' Ann. St. 1901, declare the duty of the auditor in making delinquent lists, and require him to certify to the correctness thereof, and to cause a copy of such list to be posted on the door of the courthouse, and also in some public and conspicuous place in each township, and to state the time and terms of sale, etc. The special findings show that none of these requirements of the statute have been complied with.

A tax deed vests title only when all of the requirements of the law have been complied with by the proper officers charged with the duty of assessing and collecting taxes. *Earle v. Simons*, 94 Ind. 577. The law distinguishes between sales that are void and those that are ineffectual to convey title. "Our cases uniformly hold that, if a taxpayer has personal property, a sale of his real estate is insufficient to convey title, but is effectual to transfer the lien. *State ex rel. MacKenzie v. Casteel*, supra. See sections 8640, 8641, Burns' Ann. St. 1901.

Counsel for appellant contends that the judgment attacked by the cross-complaint, being rendered in room 1 of the superior court of Marion county, was rendered in another and separate jurisdiction from room 2, in which the attack was made. There is but one superior court in Marion county. It consists of three judges. Section 1395, Burns' Ann. St. 1901, and sections 1400-1404 relate to the terms, adjournments, and jurisdiction of all but one court. Section 1409 provides that when any superior court consists of more than one judge there shall be held general and special terms; that a general term may be held by a majority of the judges, and a special term by any one or more of them, and general and special terms, or one or more of them, may be held at the same time as the judges of the court may direct, and, wherever such term or terms are held, they shall be taken and deemed to be held by the authority and direction of the judges. The court is not changed by a change of judge or judges, nor its jurisdiction thereby affected. The cross-complaint is in the nature of an independent action and a direct attack upon the judgment. Appellee's right is the basis of a cross-action. The difference between a complaint and a cross-complaint is that the former is filed by the plaintiff, and the latter by the defendant.

Appellant claims that the trial court was without authority to give appellee 60 days in which to pay the judgment entered. This action was warranted by section 8641, Burns' Ann. St. 1901.

The special findings have been set out at perhaps greater length than absolutely nec-

essary. This has been done for the purpose of more clearly showing the features of the case than would appear from a briefer summary, and renders extended comment upon the facts unnecessary. The trial court reached a correct conclusion, the record disclosing no reversible error. The dispossession of the appellee of her home under the circumstances would be a reproach to the law. The judgment provided for the payment to appellant of all that he had invested, with interest thereon. It does not and should not give him property of the value of \$3,000 for less than \$700.

Judgment affirmed.

(34 Ind. App. 259)

E. T. KENNEY CO. et al. v. RUFF. (No. 4,975.)

(Appellate Court of Indiana, Division No. 1.
Dec. 9, 1904.)

SALE OF MACHINERY—WARRANTY—BREACH OF CONTRACT—SUFFICIENCY OF COMPLAINT—CONFLICTING EVIDENCE.

1. A contract for the purchase of a corn husker provided that if, after a two-days trial, the machine failed to fill the warranty, notice be given to the seller, who should have a reasonable time to remedy the defect, and, if it could not then be made to work, it should be returned to the place where it was received, "when another husker, at the option of [the seller], will be furnished, * * * or the money and notes" given for the price returned. Held, that a complaint for the cancellation of the notes given for such machine, which stated the trial of the machine, its failure to work, the efforts of the seller to remedy the defects, his failure to do so, his admission that it would not work, his acceptance of the machine when returned by plaintiff, his refusal to surrender the notes and failure to tender another machine, states a cause of action, without also stating what efforts, if any, plaintiff made to procure another machine.

2. Where the evidence on an issue as to which of the parties thereto violated a contract was conflicting, the findings of fact cannot be disturbed on review.

Appeal from Circuit Court, Pulaski County; John C. Nye, Judge.

Action by Frank F. Ruff against the E. T. Kenney Company and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Hathaway & Vurpillat, for appellants.
Henry A. Steis, for appellee.

BLACK, J. The appellee sued the appellants for the cancellation of certain promissory notes and a chattel mortgage executed by him to the appellant the E. T. Kenney Company. The demurrer of the appellants to the complaint for want of sufficient facts was overruled.

The complaint showed that the appellee, a farmer, and engaged in the raising of corn, executed his written order to the appellants for the purchase of a certain machine known as the "Jarney Common-Sense Corn Husker," made for the purpose of husking corn.

and cutting and grinding the corn stalks into small particles for feeding live stock. The order was set out in the body of the complaint. It is of great length, and only the portions thereof necessary for the illustration of the dispute of counsel relating to the sufficiency of the complaint will be specially noticed. It was dated at Star City, Ind., signed by the appellee, and addressed to the appellant A. W. Hartman, at that place, as agent; and he was thereby requested to furnish or ship for and to the appellee about October 1, 1902, to that place, in care of Hartman, agent, such a corn husker, named and described, for the price of \$525. The appellee agreed to receive it subject to the conditions stated in the order, and to pay therefor that price by giving his three promissory notes, for \$175 each, and his chattel mortgage, described. The order was therein expressly made subject to the acceptance of the E. T. Kenney Company at its home office at Indianapolis, Ind. In a portion of the order it was stated that the corn husker was warranted to be well made, of good material, and, with proper use and management, to do as good or better work as, and as fast or faster than, any other husker of the same size, and manufactured for a like purpose; that, if within two days from the date of its first use it should fail in any respect to fill the warranty, written notice, stating wherein it failed, should be given to a manufacturing company named, in Iowa, and to the E. T. Kenney Company, by registered letter or telegram, and like notice given the agent from whom the husker was purchased, and a reasonable time allowed to get to it and remedy defects, if any, if the defects should be such that the remedy could not be suggested by telegram or letter; that, if it could not be made to work, the appellee should return it to the place from which it was received, "where another husker, at the option of the E. T. Kenney Company, will be furnished, which shall perform the work, or the money and the notes which have been given for the above-named husker shall be returned to the makers and no further claim be made on the E. T. Kenney Company or its agents or the manufacturers." It was alleged in the complaint that, upon the execution of the order, the appellants delivered the husker to the appellee, who thereupon executed the notes, for which such husker, when complying with the warranties and conditions set forth in the order, was the sole consideration, and also executed the mortgage mentioned to secure the payment of the notes. It was alleged that the whole consideration for the notes and mortgage had failed, in that the machine for which they were given had wholly failed to properly husk corn; that it shelled a great quantity of the corn; that it was improperly constructed, so that certain parts of the machinery necessary to operate it, to wit, the cogwheel, snapping roller, shucking rolls, and belt tight-

ener, constantly broke, and rendered it impossible to use the machine for husking corn; that the appellee repeatedly notified the appellants of such failure of the machine to successfully work, and of the breakage of such parts thereof, and the appellants unsuccessfully attempted to remedy said defects so as to make it work properly or to prevent it from constantly breaking, and, after trying to put it in proper condition for use, and failing to do so, the appellants wholly abandoned any further attempts, and told the appellee that it would not work; that the appellee then tendered back to the appellants the machine, and demanded back his notes and mortgage; that the appellants accepted the machine, and told the appellee where to deliver it, and he delivered it at the place designated by the appellants, but they wholly failed and refused, and still refuse, to surrender to the appellee his notes and mortgage; that the appellants wholly failed to furnish or tender to the appellee a machine that was properly constructed and in good working order, and which would properly husk corn, at the time the appellee surrendered the machine which was accepted by the appellants. "Wherefore plaintiff demands judgment against the defendants for the cancellation of said notes and mortgage, and for all other proper relief."

The complaint showed, by allegations of facts, with sufficient particularity and definiteness, that the machine failed to comply with the terms of the warranty. *McCormick, etc., Co. v. Hays*, 89 Ind. 582; *McCormick, etc., Co. v. Gray*, 100 Ind. 285; *Marion Mfg. Co. v. Harding*, 155 Ind. 648, 58 N. E. 194; *Ohio, etc., Co. v. Hensel*, 9 Ind. App. 328, 36 N. E. 716.

It is claimed that a total failure of consideration was not sufficiently shown; that for such purpose it was necessary, under the terms of the contract, to show that the E. T. Kenney Company furnished a second machine, which also failed to work as warranted, or that it refused to supply a second machine; and that the appellee was willing to receive another machine, and demanded it. Also it is claimed that the warranty was unconditional, and that, no fraud being shown, the purchaser could not rescind the contract without the consent of the seller, and recover back the purchase money as money paid upon a consideration which had failed. The contract provided that, under conditions shown by the pleading to have occurred, the machine was to be returned by the buyer to the place where it was received, where another husker, at the option of the E. T. Kenney Company, would be furnished, which should perform the work, or the money and notes given for the machine should be returned. When, the warranty being broken, the machine was returned according to the contract, and accepted back by the seller, the buyer had done all that was required to be done on his part to relieve himself of obliga-

tion to pay for that machine; and, by the terms of the contract, the seller was then to return the notes, or to furnish another machine which would perform the work. It was alleged in the complaint that the appellants failed and refused to surrender the notes, and wholly failed to furnish or tender such a machine. It was not required by the contract that the buyer should demand another machine; it devolved upon the seller to exercise its option to furnish it, or to return the notes; and, the buyer having shown the performance by him of what was required of him, the burden was upon the seller to show that it furnished another husker, or was ready and willing to do so, and tendered it, or offered to do so, but was prevented or relieved from obligation to do so by the refusal of the buyer to accept another machine, or that it exercised its alternative right to return the notes given for the purchase money; otherwise a cause of action existed for the cancellation of the notes retained by the appellants. It was upon the doing of one of these things or the other that "no further claim" was to be made. *Skeen v. Springfield, etc., Co.*, 34 Mo. App. 485. There was not here merely an offer to surrender the machine to the seller upon condition that the buyer's notes be surrendered. The surrender was unconditional, and the machine was accepted back, and the buyer's demand for the surrender of his notes did not make the return of the machine conditional. See *Davis' Sons v. Buttrick*, 68 Iowa, 94, 26 N. W. 27; *Pitt's Sons' Mfg. Co. v. Spitznogle*, 54 Iowa, 36, 6 N. W. 71. The complaint sufficiently stated a cause of action.

The appellants jointly answered, in a single paragraph, in which they admitted all the allegations of the complaint not expressly denied or controverted in this paragraph of answer, and for defense alleged that when the appellee returned the machine, as stated in the complaint, he demanded the return and surrender to him of his notes and mortgage; that the appellants then and there refused to surrender them, and declared to the appellee their right, under the contract, and their intention to exercise the option agreed to therein, to furnish him another husker, such as was described in the contract, which could perform the work as warranted; that the appellee then and there told the appellants he would not accept the new machine proposed to be sent to him, and that he would refuse to receive it if tendered to

him; that, as soon as he returned the machine, he demanded his notes, without offering to comply any further with his contract, and took steps to bring this action; that he did not give the appellants an opportunity to comply with the contract, and did not give them reasonable time in which to procure and furnish him a second machine from the factory where such machines were made, or from any other place within the control or management of the appellants, but, on the contrary, he immediately sought counsel, and caused this action to be instituted, thereby preventing the carrying out of the contract, although the appellants had always been ready and willing, and were still ready and willing, to perform all the conditions of the contract to be performed by them. To this answer the appellee replied by general denial. On trial by the court a special finding was rendered, with a conclusion of law in favor of the appellee. The appellants attack the action of the court in overruling their motion for a venire de novo, and, for specific objection, complain that the finding does not purport to set out the contract, and contains only two quotations from the written warranty. The appellants also insist that the court erred in overruling their motion for a new trial. The action was not one seeking a recovery upon the contract—was not based upon the contract as a cause of action—but was a suit for the cancellation of the notes and mortgage. The finding did set forth portions of the contract, showing sufficiently the provisions thereof for the violation of which the sale was rescinded by the action of the appellee in returning the machine. Under the pleadings the issue was a narrow one, the question of fact to be tried being that presented by the affirmative allegation of the answer that upon the return of the machine the appellants informed the appellee of their election to furnish him a second machine. On this question there was such a conflict of testimony that its determination by the trial court cannot be disturbed here.

In view of the express finding that the defendant company never by itself or its agent made any offer to furnish the appellee a new machine until some time after the return of the purchased husker and after the commencement of this suit, we cannot say that a conclusion of law in favor of the appellee was erroneous.

Judgment affirmed.

(180 N. Y. 60)

OSBORN v. CARDEZA et al

(Court of Appeals of New York. Dec. 16, 1904.)

APPEAL—INTERLOCUTORY JUDGMENT—TAXATION OF COSTS.

1. That a judgment entered on report of a referee, directing an accounting by the trustees of a dissolved corporation, gave plaintiff judgment for costs, did not render it final, the provision for costs being an irregularity which should have been corrected by a motion to strike out.

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Ellen C. Osborn against Howard J. M. Cardeza and others. From a judgment of the Appellate Division (86 N. Y. Supp. 1142) affirming a judgment for plaintiff on report of referee, defendants appeal. Dismissed.

William G. Cooke, for appellants. William P. Pickett, Henry Escher, Jr., and Lytleton Fox, for respondent.

O'BRIEN, J. This was an action in equity by the plaintiff, as a stockholder of a business corporation, against the defendants, as directors. The judgment was entered upon the report of a referee to hear and determine the issues involved. The referee reported in favor of the plaintiff with respect to one or two of the questions at issue, and the judgment was affirmed at the Appellate Division. The complaint alleged, and the referee has found, that before the commencement of the action the corporation had been dissolved under and in pursuance of the stock corporation law (Laws 1892, p. 1824, c. 688); that the Secretary of State issued to the directors a certificate of dissolution, and that they filed a copy thereof in the office of the clerk of the county where the principal office of the company for the transaction of business was located; that upon such dissolution the defendant directors became trustees in dissolution for the purpose of winding up the affairs of the corporation, and it became their duty to adjust and wind up its affairs, carry out its contracts, sell its assets at public or private sale, and apply the proceeds in discharge of its debts and obligations, and, after paying or providing for the payment thereof, to distribute the balance of its assets among the stockholders according to their respective rights and interests; and that as such trustees in dissolution they immediately took possession of all the assets of the corporation, and have remained in possession thereof, except in so far as they sold or disposed of the same. The complaint then proceeds at considerable length to charge the defendants with various irregularities, acts of misconduct, and neglect of duty in the performance of the trust.

The referee, by his findings, has acquitted the defendants of nearly all these charges alleged against them, but made two findings

upon which alone the judgment is based. It was found that the trustees made an arrangement between themselves for compensation to two of their number for services in the performance of the duty imposed upon them by the dissolution. One finding was that two of the trustees had received compensation, one of them \$438.37 and the other \$500, for services, which was held to be improper and was disallowed, and directions were given for the payment of these sums into the general fund in the hands of the defendants. It was also found that the trustees, or some of them, trafficked between themselves with corporate assets, and that all net profits made by any of the trustees through the purchase of any stock of the estate must be accounted for and paid into the estate held by them. The direction for judgment was substantially that the prayer of the plaintiff for the enjoining and restraining of the defendants from proceeding or acting further in the dissolution of the corporation, and for their removal and the appointment of a receiver, should be denied, but that a final accounting of the affairs of the corporation must be had by the trustees, and for such sums as may be found due by any trustee from the sale of the goods of the corporation to any one or more of themselves, and also for such sums improperly paid for services or salaries in the performance of the trust, that a final accounting must be had by the trustees in dissolution, and that on such accounting any sums consisting of net profits made by any one or more of them from the sale of the inventoried stock of goods must be repaid into the trust fund, with certain exceptions mentioned in the finding, and that the trustees who had received compensation or salaries for services must restore the sums so received to the trust fund; also, that the trustees in dissolution must forthwith close up all outstanding matters in their hands, and make full report thereof at such accounting; and that the plaintiff was entitled to judgment in accordance with these findings, with costs.

The plaintiff's attorney entered a judgment upon the report of the referee in conformity with these findings, except that the provision was inserted in the judgment that the plaintiff recover of the defendants the costs of this action, amounting to some \$975.62, and that she have execution therefor. We think the judgment is not final, but interlocutory. The rights of the plaintiff and the liability of the defendants are settled by the report in a general way, but the specific sums of money that the defendants were held accountable for as net profits made in dealing with the assets have not yet been ascertained. It would seem to be necessary that a final accounting should first be had in order to determine that question, and that was the decision of the referee. It is obvious, therefore, that something yet remains

to be done in order to determine the liability of the defendants. The judgment, so far as it proceeded, requires them to render a final accounting, and authorizes an inquiry with respect to certain sums of money that they are required to restore to the trust fund, but the amount of which has not yet been ascertained.

It is said, however, that the judgment for costs is final, and stamps the case with the character of a final judgment in the action. It will be seen that all the referee decided was that the plaintiff was entitled to costs, and clearly that was a matter within his power and discretion, and there was no legal error in that respect in the decision. Nearly all interlocutory judgments are substantially final in many respects—that is to say, certain things are decided that must ultimately prevail upon the entry of the final judgment; so that the mere fact that in the referee's report some things are final and other things are merely interlocutory does not change the character of the judgment, and make it final in the sense that this court has power to review it. It is true that the plaintiff's attorney had no right to enter judgment for costs upon the referee's report, but the taxation of costs and the insertion in the *postea* of the amount thereof was irregular before the final decision of the case. That was the work of the plaintiff's attorney, and his proceeding subsequent to the decision of the case is not here for review. The court is to review, not the irregularity of the judgment, but the decision of the referee, and so far as that decision deals with the question of costs it is obviously not the subject of review here. The remedy of the defendants' attorney for the improper insertion of the costs in the judgment and the direction for execution to issue was to move to correct the same and not by appeal.

It follows that the appeal should be dismissed, without costs.

CULLEN, C. J., and GRAY, BARTLETT, HAIGHT, MARTIN, and VANN, JJ., concur.

Appeal dismissed.

(120 N. Y. 62)

PEOPLE *ex rel.* WEBER PIANO CO. *v.* WELLS *et al.*, Tax Com'rs.

(Court of Appeals of New York. Dec. 13, 1904.)

CORPORATIONS—ASSESSMENT OF CAPITAL STOCK—DEDUCTIONS.

1. Laws 1896, p. 802, c. 908, § 12, provides for the assessment of the capital stock of a corporation at its actual value, after deducting the assessed value of its real estate. *Held*, that where the real estate is mortgaged, and payment of the mortgage has not been assumed by the corporation, and the value of the equity alone has been included in determining the value of its capital stock, only the value of the equity, and not the whole assessed value of the real estate, should be deducted from the valuation.

Werner, O'Brien, and Bartlett, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, First Department.

Action by the people, on the relation of the Weber Piano Company, against James L. Wells and others, commissioners of taxes and assessments of the city of New York. From an order of the Appellate Division (88 N. Y. Supp. 1080), affirming an order of the Special Term vacating an assessment, defendants appeal. Reversed.

John J. Delany, Corp. Counsel (George S. Coleman and E. Crosby Kindleberger, of counsel), for appellants. Henry Warren Beebe, for respondent.

CULLEN, C. J. It is somewhat a work of supererogation to attempt to add anything to what seems to me the very clear opinion rendered by Judge Van Brunt, dissenting, in the court below. I think, however, that a few words, in review of the prevailing opinion, may not be out of place.

The learned Appellate Division held, in *People ex rel. Farmers' Loan & Trust Company v. Wells*, 94 App. Div. 463, 87 N. Y. Supp. 745, 88 N. Y. Supp. 1113, that mortgages on a taxpayer's real estate, the payment of which he had not assumed or become personally liable for, were not debts, and were not to be deducted from the amount of his personal property in assessing the latter for taxation. This decision we unanimously affirmed in October last. The relator has thus far succeeded in accomplishing the very thing condemned in the decision cited, and this by a simple though ingenious process. Under the rule laid down in *People ex rel. Union Trust Company v. Coleman*, 126 N. Y. 433, 27 N. E. 818, 12 L. R. A. 762, the amount of personalty upon which a corporation is liable under our law for taxation is determined by first ascertaining the total amount or value of its property, and then subtracting therefrom the amount of its debts and other statutory deductions. One of those statutory deductions is "the assessed value of its real estate." The relator owned a piece of real estate worth \$250,000, assessed at \$150,000, on which there were mortgages amounting to \$200,000. It has returned as its property only the value of the equity of redemption, \$50,000, while there has been deducted from the total value of the property of the corporation the whole assessed value of the real property as if it were unincumbered. Of this the learned court below says: "The Legislature intended that the real and personal property of such a corporation should be assessed at its fair and true value, the same as the property of an individual, with the exception that it does not provide for a deduction [of the amount of any mortgage upon his real estate, unless he is liable for the indebtedness secured by the mortgage] from the individual's personal property." But there is not in the statutory provisions for the taxation of corporations and individuals any ref-

erence or mention whatever of such an exception. Therefore the exception, if it exists, must result solely because of difference in the methods prescribed for taxing corporations and individuals, and not because the Legislature has directly enacted it. The statutory scheme prescribed by the Legislature, as construed by the courts, directs that on one side of the account be placed the total property of the corporation; on the other side, among other things, the value of its real estate. It seems to me reasonably clear that nothing can be the real estate of the corporation unless it is at the same time its property. The learned counsel for the respondent cites authorities for the proposition that "the mortgagor has, both in law and in equity, been regarded as the owner of the fee, and the mortgage has been regarded as a mere chose in action, a mere security of a personal nature." Assuming that this doctrine proves that the entire value of the piece of realty, regardless of the incumbrances upon it, was the real estate of the relator, and it was entitled to deduction for its whole assessed value, I am at a loss to see why it does not equally prove that such entire value is to be taken as one of the relator's assets. If, however, the relator's property right in the realty is to be treated only as comprehending the equity of redemption in the real estate, the deduction for assessed value could only include an assessment on that interest. This is in accordance with the rule adopted by us in other cases, which, though not identical with the present one and therefore controlling, are at least very much analogous to it. In *People ex rel. Van Nest v. Commissioners of Taxes*, 80 N. Y. 573, a bank having a lease of a vacant plot of ground for a long term of years, with privilege of renewal, constructed a building thereon. By the lease the lessee agreed to pay, in addition to the reserved rent, all taxes and assessments imposed on the property. It was held that the bank was entitled to a deduction only for the assessed value of its building, not for that of the whole property. It seems to me the fair deduction from the case is that, where there are different estates in the same piece of realty, a corporation is entitled to deduct only the assessed valuation of that particular estate which it owns. Therefore, if the estate of the relator was confined to the equity of redemption, it follows it was only the assessed value of the equity of redemption that it was entitled to deduct. It may be that the proper way in which the relator should have been assessed was to treat it as holding the entire ownership of the realty, and to deduct from its assets the whole assessed value. But as such a method would have increased the amount of the relator's liability, it has no good ground for complaint against the one adopted in the present case, and it is not necessary that we should determine which method is correct.

The orders of the Appellate Division and the Special Term should be reversed, with costs, and the proceedings of the appellants confirmed.

WERNER, J. (dissenting). The only question presented by this appeal is whether a corporation liable to taxation under section 12 of the general tax law (Laws 1898, p. 802, c. 908), and owning real estate subject to mortgage, is entitled to have deducted from its capital stock and surplus profits exceeding 10 per cent. of its capital the whole assessed valuation of its real estate, when it has included in its statement of capital stock only its equity in such real estate.

Section 12 of the general tax law provides that "the capital stock of every company liable to taxation, except such part of it as shall have been excepted in the assessment roll or shall be exempt by law, together with its surplus profits or reserve funds exceeding ten per centum of its capital, after deducting the assessed value of its real estate, and all shares of stock in other corporations actually owned by such company which are taxable upon their capital stock under the laws of this state, shall be assessed at its actual value." Under the authority of this statute the appellants assessed the relator upon the basis of certain figures which need not be examined in detail, because the single question of law we are called upon to decide depends upon the construction of section 12, above quoted, as applied to one parcel of real estate owned by the relator. This parcel of land, situated on Seventh avenue and Seventeenth street, in the city of New York, was valued at \$250,000, and was held by the relator subject to a mortgage of \$200,000, thus leaving in the owner an equity of \$50,000. It was assessed at \$150,000. In relator's statement of its capital stock, etc., only the equity of \$50,000 was included, and it insisted upon the right to deduct the whole assessed valuation. This contention was disallowed by the appellants, who held that the ratio of deduction for assessed valuation should not exceed that included in relator's statement of capital stock; in other words, that the deduction for assessed valuation upon the Seventeenth street property should be confined to the equity therein, which the relator had included in its statement of capital stock. The Special Term reversed the determination of the appellants, and held that, although the relator's equity in this real estate was all that could properly be considered in fixing the amount of its capital stock for purposes of taxation, it had the right to have the whole assessed valuation thereof deducted from its total capital stock, and the order entered upon that decision has been affirmed by the Appellate Division.

Since it is conceded that the term "capital stock" as used in section 12 is synonymous with the term "assets," and that therefore only the relator's equity in the Seventeenth

street property was properly included in its statement of capital stock, that phase of the case need not be discussed, and the only question that remains to be considered is whether the assessed valuation of the whole parcel is to be deducted before the relator's taxable assets can be ascertained. The statute says that the capital stock of a corporation liable to taxation under section 12, and its surplus profits or reserve funds exceeding 10 per cent. of its capital, "after deducting the assessed valuation of its real estate," shall be assessed at its actual value. The object of this unequivocal declaration is obvious. While the equity of a corporation in its real estate is all that should properly be included in its actual assets, the corporation is nevertheless considered the owner of the whole land for the purpose of its taxation as real estate, and the provision for deducting from the taxable assets of a corporation the assessed valuation of its real estate is simply designed to prevent double taxation. *People ex rel. Equitable Gas Light Co. v. Barker*, 144 N. Y. 94, 39 N. E. 13. If only the assessed valuation upon the equity of a corporation in its real estate were to be deducted from its total assets, such corporation would be subjected to double taxation, for it is taxed upon its taxable stock as well as its real estate. The argument that, by this process of counting as part of its assets only its equity in real estate, and deducting from its total capital stock the whole assessed value of the real estate, a corporation gains an unjust advantage over the natural person who is liable to taxation, is neither germane nor sound. A corporation is burdened by several forms of taxation that do not affect the individual. Under our laws all business corporations pay a tax for the right to exist. Franchise corporations pay a tax for the privilege of exercising their franchises. Both classes pay a tax upon their assets which represent capital stock, and both are taxed upon their real estate. It is true that the individual may not deduct the assessed valuation of his real estate from the valuation of his personal property for which he is taxed; but that is so, first, because the statute has made no such provision in the case of individuals as in the case of corporations, and, second, because there is not the same reason for it in the former case that there is in the latter. Quite aside from the fact that corporations are subjected to several forms of taxation from which individuals are exempt, it is common knowledge that the assets of a corporation are all laid bare to the view of the taxing authorities, while much of the personal property of the individual is put in such form or kept in such places that it cannot be reached for taxation. Then, too, it is true in practice, if not in theory, that corporations, simply because they are corporations, are taxed far in excess of individuals having the same or similar kinds of property liable to taxation.

But whatever the reason for the distinction may be, whether sound or unsound in principle, the fact remains that the Legislature has enacted that the capital stock and surplus profits of a corporation exceeding 10 per cent. of its capital shall only be taxed after deducting therefrom the assessed value of its real estate, and this in itself is a sufficient argument for the affirmation of the order herein.

The cases of *People ex rel. Van Nest v. Commissioners of Taxes*, 80 N. Y. 573, and *People ex rel. Eden Musee Co. v. Feitner*, 90 App. Div. 282, 70 N. Y. Supp. 120, relied upon by the appellants, are not analogous, because there the relators owned buildings upon lands leased for long terms, and upon which the lessees were bound to pay the land taxes as part of their rent. In those cases the courts properly held that the relators were not entitled to have deducted from their taxable assets the value of the land, because the land did not belong to them. In the case at bar the relator is the owner of the land, and it pays taxes thereon, not as part of the rent, but simply because it has the title.

The order of the Appellate Division should be affirmed, with costs.

GRAY, HAIGHT, and VANN, JJ., concur with CULLEN, C. J. O'BRIEN and BARTLETT, JJ., concur with WERNER, J.

Orders reversed.

(189 N. Y. 73)

POMROY v. HINCKS et al.

(Court of Appeals of New York. Dec. 16, 1904.)

WILL—CONSTRUCTION—DESCENT AND DISTRIBUTION.

1. Where the only heirs of testator were his widow and daughter, and by his will he created a trust fund for the benefit of his wife, but made no disposition of the remainder of his estate, he died intestate as to such remainder, and it passed to his wife and daughter, and, on the death of the daughter without issue, her interest, under Code Civ. Proc. § 2732, subd. 8, passed to his widow.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Henry K. Pomroy, trustee of Warren Newcomb, deceased, against Joseph A. Hincks and others. From a judgment of the Appellate Division (77 N. Y. Supp. 595) affirming a judgment of the Special Term, Annie H. Owen and others appeal. Affirmed.

Warren Newcomb died August 28, 1866, leaving a widow and a daughter, an only child, him surviving. By the terms of his will he bequeathed to his wife an annual income of \$10,000, and directed that sufficient of his estate be set aside and invested to produce that sum. He also devised a certain sum in trust for his daughter, providing that, in the event of her death without issue.

said devise should revert to his wife, and directing that, after making provision for the bequests named, the residue of his estate should go to his wife absolutely, and, in the event of her death prior to the daughter's decease, then the amount set aside to provide for his wife's income and all the residue to revert to the daughter absolutely. The daughter died December 16, 1870, unmarried and without issue, leaving her mother surviving. The will not providing as to the disposition of the trust fund for the benefit of the wife in the event of the daughter predeceasing her mother, this action was brought by the trustee of that trust to obtain a direction of the court as to the ownership of the remainder of the said trust fund.

Judson S. Landon, Carlisle J. Gleason, and Bernard M. L. Ernst, for appellants. George F. Canfield and James McConnell, for respondents.

BARTLETT, J. (after stating the facts). While we agree with the learned Appellate Division in the construction of the will of the testator, Warren Newcomb, there is a fatal objection to the plaintiff's maintenance of the action which lies back of the construction of the will, and in reality renders a discussion of that question unnecessary. "It is a settled principle of law that the legal rights of the heir or distributee to the property of deceased persons cannot be defeated except by a valid devise of such property to other persons. * * * It was not sufficient to deprive an heir at law or distributee of what comes to him by operation of law, as property not effectually disposed of by will, that the testator should have signified his intention by his will that his heir or distributee should not inherit any part of his estate." *Haxton v. Corse*, 2 Barb. Ch. 506, 521; *Chamberlain v. Taylor*, 105 N. Y. 185, 194, 11 N. E. 625; *Gallagher v. Crooks*, 132 N. Y. 338, 342, 30 N. E. 746; *Pickering v. Lord Stamford*, 3 Vesey, 491, 493; *Johnson v. Johnson*, 4 Beavan, 318; *Fitch v. Weber*, 6 Hare, 145; *Denn v. Gaskin*, Cowper, 657, 661. Therefore, if the will made no disposition of the remainder in the trust fund for the benefit of the testator's widow, it follows that the testator died intestate as to such remainder; that such interest passed as undisposed-of property to his widow and to his daughter, and that on the death of the daughter, under subdivision 8 of section 2732 of the Code of Civil Procedure, her interest passed to her mother, the testator's widow. Hence under no circumstances could the appellants claim any right to his estate.

The judgment appealed from should be affirmed, with costs.

CULLEN, C. J., and GRAY, O'BRIEN, MARTIN, and VANN, JJ., concur. HAIGHT, J., absent.

Judgment affirmed.

(130 N. Y. 41)

CITY OF NEW YORK v. MATTHEWS.

(Court of Appeals of New York. Dec. 6, 1904.)

TAXATION—PERSONAL PROPERTY TAX—ACTION TO RECOVER—DEFENSES—PLEADING.

1. Under Greater New York Charter, Laws 1901, p. 396, c. 466, § 936, authorizing recovery by the city of New York of any unpaid personal property tax in a personal action, and that where a tax is regularly assessed, and the tax roll properly certified and delivered to the receiver of taxes, with a warrant for its collection, the completed proceeding is entitled to the same legal presumptions in its support that a judgment is; and matter in defense must be specially pleaded, or any objection to jurisdiction specified on the trial of the action.

2. In an action by the city of New York to recover a personal property tax, if defendant is not subject to such tax in his person or property, he must raise the question by way of defense, as the city is not required to assume the burden of showing jurisdiction, and an answer denying any knowledge or information as to the allegations relating to matters of public record is frivolous.

Appeal from Supreme Court. Appellate Division, First Department.

Action by the city of New York against James Matthews. From a judgment of the Appellate Division (86 N. Y. Supp. 1132) affirming a judgment for plaintiff, defendant appeals. Affirmed.

Joseph A. Burr and Francis S. McDevitt, for appellant. John J. Delany, Corp. Counsel (Theodore Connolly, of counsel), for respondent.

GRAY, J. This action was brought by the city of New York to recover a tax which had been imposed upon the personal property of the defendant for the year 1900, pursuant to the provision of section 936 of chapter 466, p. 396, of the Laws of 1901, that "any tax duly imposed for personal property upon any person or corporation in the city of New York, which shall remain unpaid and in arrears on the fifteenth day of January succeeding the year in which it shall have been imposed, may be recovered with interest and costs, by the receiver of taxes of said city, in the name of the city, in an action in any court of record in this state." The complaint alleged that the defendant was duly assessed upon his personal property, "as a resident of the borough of Brooklyn, in the city of New York"; and it set forth, in paragraphs, the proceedings taken by the municipal officers, from the initial one of the deputy tax commissioner, in which the defendant was assessed upon \$20,000 of personal property, to the final one, in which the receiver of taxes, holding the warrant of the municipal assembly for the collection of the sum assessed, publicly notified all persons or corporations who had omitted to pay their taxes to pay the same to him. The answer of the defendant consisted simply in a denial of any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in the several paragraphs of the complaint. Upon the trial the

plaintiff gave certain evidence in support of its allegations, in the testimony of officers of the tax department, and in the public records of the proceedings of the various municipal boards, or bodies, produced from the offices where they were kept by law. The trial court made findings of fact which first determined "that a deputy tax commissioner, under the direction of the board of taxes and assessments, assessed the defendant upon personal property in the sum of \$20,000, for the purposes of taxation for the year 1900, as a resident of the borough of Brooklyn, in the city of New York," and then determined separately the facts of the performance of the acts prescribed by the statutes for the imposition of a tax on personal property. It was found that "the municipal assembly finally completed said assessment roll of said borough, and, when so completed, caused the same to be delivered to the receiver of taxes on the 1st day of October, 1900, with the warrant annexed, signed by the president of the council and the president of the board of aldermen, and countersigned by the city clerk, directing and requiring the receiver of taxes to collect from the several persons named in the said assessment roll the several sums mentioned in the last column of the said roll opposite to their respective names," and that said receiver of taxes on October 1, 1900, gave public notice, as provided by the charter, that said assessment rolls had been delivered to him, and that all taxes were then due and payable at his office, etc. The judgment which the plaintiff recovered has been affirmed unanimously by the learned justices of the Appellate Division, in the First Department.

The stress of the appellant's argument is in the insistence that the plaintiff failed to support a burden, cast by the act upon it, of establishing that the tax was "duly imposed." Those words, obviously, as I think, have reference to the jurisdiction or right to assess. That is to say, any tax which the city was authorized to, and did regularly, impose upon the personal property of the person or corporation, might be recovered in a personal action. The enactment of this law was probably designed to permit the city to have recourse to the remedy of a personal action for the recovery of a tax. Such an authorization seemed necessary, inasmuch as a tax, unlike an ordinary debt, is not contractual in its nature, and the statutory remedies for its collection did not include an action at law. That the city had jurisdiction to assess the person and property of the defendant was an essential fact to be eventually established, if put in question by the defendant under a plea that jurisdiction was lacking. But that was not the case here. I find no question raised as to the city's jurisdiction to impose the tax. The answer does not allege, by way of defense, that the city was without jurisdiction; and, if we might assume, as to which I have

grave doubt, that the general denial raised any issue as to the due assessment of the defendant "as a resident of the borough of Brooklyn, in the city of New York," the unanimous affirmance below must be regarded as conclusive as to the fact. Not only was there no defense pleaded to the jurisdiction, but upon the trial the broadest form of objection taken by the defendant was only to the competency of evidence, or that "no proper foundation was laid for it." But that, in my opinion, is wholly insufficient to raise the question of the plaintiff's jurisdiction to assess. I think that such a defense or objection to the maintenance of the action should be specifically made, and that it should not be left to inference. When the plaintiff's proceedings under the charter have culminated in the completion of the assessment roll by the municipal assembly, and in its delivery, properly certified to by the tax commissioners as required by law, to the receiver of taxes, with a warrant for the collection of the sums assessed to the persons named therein, that is a final act of the municipal governing body, which, in its nature, possesses so far the attributes of a judgment, or which, at least, is so far entitled to legal presumptions in its support, as to warrant the application of the rule that matter in defense of its enforcement must be specially pleaded, or the objection, if going to the jurisdiction, should be specified upon the trial. The proceedings of the taxing officers in imposing a tax are judicial in their nature (*Mercantile Nat. Bank v. Mayor, etc., of N. Y.*, 172 N. Y. 35, 41, 64 N. E. 750), and to assimilate the result to a judgment, with respect to objections based upon want of jurisdiction, or upon a lack of regularity in the official proceedings, is logical. The one is as final a determination in its nature as is the other; however, differing, of course, in the judicial character of the tribunals and of their procedure. The act of 1880 (chapter 269, p. 402, Laws 1880) authorized the issuance of a writ of certiorari to review assessments which might be illegal, erroneous, or unjust, and we have held that that act became the only authority for such a review. *Mercantile National Bank v. Mayor, etc., of N. Y.*, *supra*. The defendant did not choose to avail himself of this effectual remedy, if the imposition of the tax was unwarranted; and, not having done so, it was incumbent upon him, if he was not subject, in his person or property, to the jurisdiction of the municipal authorities, to raise that question in some distinct and appropriate manner. The burden of attacking the assessment of a tax upon such a ground is upon the defendant, as it is upon him to show in his defense that some substantial act in the course of the proceedings for the imposition of a tax has been omitted. The city is no more required by this statute to assume the burden of showing jurisdiction, in making a *prima facie*

case, than if the action were upon a judgment.

The answer of the defendant deserves scant justice from the court, inasmuch as it is unnecessarily evasive in its nature, and designed to unduly burden the city in its litigation. It is frivolous, for denying any knowledge or information sufficient to form a belief as to the truth of allegations which relate to matters of public record, open by law to public inspection, and with knowledge of which the defendant is chargeable by law. The objection to the competency of the evidence adduced by the city, which consisted mainly in the production of public records, is untenable. The city might properly enough have rested its case without so much of detail in its proof of the taxing proceedings, but, having done so, no substantial defect appears, and the books or public records which were required by law to be kept were admissible in evidence upon the proof that they came from the proper custody. Mayor, etc., of N. Y. v. Goldman, 125 N. Y. 395, 26 N. E. 456.

I advise the affirmance of the judgment appealed from, with costs.

CULLEN, C. J., and O'BRIEN, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur.

Judgment affirmed.

(180 N. Y. 507)

CITY OF NEW YORK v. STREETER.

(Court of Appeals of New York. Dec. 6, 1904.)

MUNICIPAL CORPORATIONS—TAX WARRANTS—VALIDITY.

1. Where a city charter provides that the vice chairman of the council may act as president when the latter is sick or absent or acting as mayor, his signature to a city tax warrant will be presumed to have been necessitated by one of the causes stated.

Appeal from Supreme Court, Appellate Division, First Department.

Action by the city of New York against Milford B. Streeter. From a judgment of the Appellate Division (88 N. Y. Supp. 665) affirming a judgment for plaintiff, defendant appeals. Affirmed.

Joseph A. Burr, for appellant. John J. Delany, Corp. Counsel (Theodore Connolly, of counsel), for respondent.

GRAY, J. The judgment appealed from should be affirmed, with costs. The views expressed in the case of this plaintiff against Matthews (180 N. Y. 41, 72 N. E. 629) apply, mainly. The unanimous affirmance concludes us upon all questions raised as to the sufficiency of the evidence; and the objection to the warrant to the receiver of taxes, that it was signed by the vice chairman of the council, and not by the president of the

council, is without force. The charter provided that the vice chairman of the council should perform the duties of the president when the latter was sick or absent or under suspension, or was acting as mayor, or when a vacancy existed. Section 23 of the charter of 1897 (Laws 1897, p. 9, c. 378). The presumption of regularity obtains, in support of the official proceedings, and the signature of the vice chairman upon the warrant will be presumed to have been necessitated by one of the causes stated.

CULLEN, C. J., and O'BRIEN, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur.

Judgment affirmed.

(180 N. Y. 48)

LANDAU v. CITY OF NEW YORK.

(Court of Appeals of New York. Dec. 13, 1904.)

MUNICIPAL CORPORATIONS—FIREWORKS IN STREET—NUISANCE—INJURY TO PEDESTRIAN.

1. A city is bound to exercise due care to keep its streets in a safe condition, and, where it allows fireworks in the public streets, constituting obstructions and nuisances, it is liable for resulting injuries.

2. Where a city allows an extensive exhibition of fireworks in a public street, where many people are assembled, it may be found a nuisance as a matter of fact.

3. A resolution of the aldermen of the city of New York provided for the suspension of ordinances relating to discharge of fireworks in the city as far as they applied to parades of political parties during the campaign of 1902, subject to such restrictions as the police department might deem necessary. Held a permission to display fireworks in the public streets by a limited number of persons for a limited period of time, and not a repeal of the ordinances prohibiting such exhibitions, either in form or substance.

4. Where an exhibition of fireworks takes place in the public streets within the time authorized by a resolution of the board of aldermen, the city is liable, if the exhibition is under such circumstances as would permit a jury to find it a public nuisance, for damages caused to those injured by a premature explosion of the fireworks.

O'Brien, J., dissenting.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Solomon Landau, administrator of George Landau, against the city of New York. From a judgment of the Appellate Division (87 N. Y. Supp. 1139) affirming a judgment for defendant, plaintiff appeals. Reversed.

See 85 N. Y. Supp. 616.

Charles Steckler and Levin L. Brown, for appellant. John J. Delany, Corp. Counsel (Theodore Connolly and Terence J. Farley, of counsel), for respondent.

VANN, J. The question presented by this appeal involves the liability of the defendant

for an explosion of fireworks which occurred on Madison avenue, adjoining Madison square, on the evening of election day, November 4, 1902, whereby 18 persons were killed, including the plaintiff's intestate, and about 200 injured.

The board of aldermen of the city of New York have power to "prevent encroachments upon and obstruction to the streets, and to authorize and require their removal by the proper officers." They "shall not have power," as the charter expressly provides, "to authorize the placing or continuing of any encroachment or obstruction upon any street or sidewalk, except the temporary occupation thereof during the erection or repairing of a building on a lot opposite the same." Revised Charter, Laws 1901, p. 28, c. 466, § 50. They are authorized to pass ordinances for various purposes, and, among others, "in relation to the use of guns, pistols, firearms, fire-crackers, fireworks and detonating works of all descriptions." *Id.* p. 27, § 49. Pursuant to this authority, sections 718 and 719 of the revised ordinances were passed, which provide, in substance, that no person shall fire, discharge, or set off fireworks of any description within the limits of the city, under a penalty named for each violation. In October, 1902, while these ordinances were in force, the board of aldermen adopted, and on the 27th of the same month the mayor approved, the following resolution: "Resolved, that the ordinances relating to the discharge of fireworks in the city of New York be and the same are hereby suspended so far as they may apply to meetings and parades of political parties or associations during the campaign of 1902; such suspension, however, to continue only until November 10th, 1902, and be subject to such restrictions and safeguards as the police department may determine as necessary." On the 27th of October, 1902, a copy of this resolution was sent by the city clerk to the police commissioner, and by him to all precincts and squads of the police department throughout the city, with a notice, officially signed, stating that "the following copy of a resolution of the board of aldermen is transmitted to you for your information and guidance."

The National Association of Democratic Clubs, a political organization, had a parade on the evening of November 4, 1902, and its officers arranged to have a display of fireworks on Madison avenue, between Twenty-Third and Twenty-Fifth streets, in connection therewith. Madison avenue at this point is a wide street, bounded on the west by Madison Square, a park of seven acres, where, as well as in the adjoining streets, 75,000 people assembled to receive the election returns and witness the parade. They stood closely crowded in the park and on both sides of Madison avenue. The fireworks, consisting of mortars, bombs, rockets, and the like, were arranged in six parallel rows in the middle and on the west side of the avenue,

commencing about 12 feet from the curb. A police sergeant testified that they filled the middle of Madison avenue from Twenty-Fourth to Twenty-Fifth street. The bombs were fired from mortars made of steel tubing, and were of a kind that had been frequently used before, without serious results, so far as appeared. The fireworks were placed in the street in the presence of the police, who had been assigned to duty in the locality to the number of several hundred, owing to the large crowd that was expected. While they did not superintend the arrangement of the fireworks in the street, they made no attempt to prevent it, owing to the resolution of the board of aldermen. Between 9 and 10 o'clock in the evening, as the parade was approaching Madison Square, where thousands of people had assembled, some of the fireworks exploded, from a cause not disclosed by the evidence; and the plaintiff's intestate, a young man about 19 years of age, was killed. This action was brought by the administrator of his estate to recover the damages caused by his death, and the complaint is adapted to the theory of either negligence or nuisance. When first tried, there was a verdict for the plaintiff, but the judgment was reversed on appeal by the Appellate Division. 90 App. Div. 50, 83 N. Y. Supp. 616. Upon the second trial the plaintiff was nonsuited, and the Appellate Division affirmed by a divided vote, whereupon he appealed to this court.

The law upon the subject of municipal liability for an explosion of fireworks in a public street varies radically in different jurisdictions, owing possibly to the presence or absence of large cities therein. In certain states the city is held not liable even when express permission is given by the common council, or pursuant to its authority. *Hill v. Board of Aldermen*, 72 N. C. 55, 21 Am. Rep. 451; *Fifield v. Common Council* (Ariz.) 36 Pac. 916, 24 L. R. A. 430. The law in our own state was established the other way by a decision of this court made upon careful consideration, after full argument by distinguished counsel, who cited the pertinent authorities from all the states. *Speir v. City of Brooklyn*, 139 N. Y. 6, 34 N. E. 727, 21 L. R. A. 641, 36 Am. St. Rep. 664. In that case it appeared that an ordinance of the common council of the city of Brooklyn, after prohibiting the discharge of fireworks within the city limits, provided that it should not extend "to any fireworks exhibited by order of the common council, or by any exhibitor, who shall be authorized by a permit from the mayor to exhibit the same for public amusement." There was a display of fireworks of considerable magnitude at the junction of two narrow streets completely built upon, which was managed by private persons, under a permit obtained from the mayor, and it resulted in the destruction of the plaintiff's house by fire. Under these circumstances, "in view of the place, the danger involved, and the occa-

sion," it was held that "the transaction was an unreasonable, unwarranted, and unlawful use of the streets, exposing persons and property to injury, and was properly found to constitute a public nuisance." It was further held that, as the permit was in fact authorized by an ordinance of the common council regulating a matter within its jurisdiction, the city was liable, although the particular act authorized was unlawful. So it was decided in another case that a municipal corporation is liable for the consequences of an unlawful use of its streets, sanctioned by its permit. *Cohen v. Mayor, etc.*, of N. Y., 113 N. Y. 532, 21 N. E. 700, 4 L. R. A. 406, 10 Am. St. Rep. 506. The only effect of such a permit is to make the city liable jointly with the licensee. *Stoddard v. Village of Saratoga Springs*, 127 N. Y. 261, 27 N. E. 1030; *Arthur v. City of Cohoes*, 56 Hun, 36, 9 N. Y. Supp. 160; *Id.*, 134 N. Y. 589, 31 N. E. 628.

While a municipal corporation is not liable for the failure to pass ordinances prohibiting the discharge of fireworks in the public streets, it is bound to exercise due care to keep its streets in a safe condition, and is liable for permitting dangerous obstructions or nuisances therein. If an ordinance is passed in relation to the subject, and it is not enforced, or is subsequently repealed, there is no liability for the repeal, or for the mere failure to enforce, but still the duty remains as to obstructions and nuisances. That duty never ceases, and it cannot be avoided by the passing of ordinances or the failure to pass them.

There is a distinction, well recognized by law, between the discharge of fireworks upon private property and in a public highway. There is also a distinction in this regard between highways, depending on their location, the extent of the traffic upon them, and the danger involved in case of accident. Fireworks in certain streets may or may not be a nuisance, according to the circumstances, which usually present a question of fact. In the case now before us, we have to do with a crowded street, near the center of the largest city on the continent, "where any misadventure in managing the discharge would be likely to result in injury to persons or property." Fireworks exhibited on an extensive scale in a great thoroughfare, in the midst of a large city, where a vast multitude of people is assembled, if not a nuisance as matter of law, may properly be found such as matter of fact. This was so adjudged in the *Speir Case*, which is controlling in principle. While such displays are sometimes tolerated, they are not authorized, and whoever is responsible for them must run the risk of liability for the consequences, so far as they result in injury to person or property. *Conklin v. Thompson*, 29 Barb. 218; *Jenne v. Sutton*, 43 N. J. Law. 257, 39 Am. Rep. 578; *Little v. City of Madison*, 42 Wis. 643, 24 Am. Rep. 435.

If the resolution of the board of aldermen was, in substance and effect, a license or permit which led to the exhibition in question, the city is liable for consenting in advance to the existence of a nuisance in its streets, provided a jury finds the facts as stated. The question of liability turns primarily on the meaning of the resolution, which is claimed by the plaintiff to be a license, and by the defendant a repeal. The resolution contemplates the display of fireworks in the streets, for it applies to the parades of political parties, which must take place in the streets, for they cannot be held anywhere else. The ordinances were not repealed, either in form or substance. The word "repeal" does not occur in the resolution, and the ordinances remain in force as to all persons and organizations, except political parties and associations when holding meetings or having parades. When the ordinances and the resolution are read together, as they must be in order to get at the meaning and intent, there is an absolute prohibition, with a suspension thereof as to certain associations for a limited period only. It did not apply to all persons, but to a comparatively small number, and it was not for all time, but for about two weeks. If the suspension had been permanent, and had applied to all persons, it might be held a repeal. It was not permanent, however, but was to continue only during the political campaign then in progress, and not beyond the early date named. It was neither total nor universal, but was in the nature of a substitute for a series of special permits to political parties until after election. While it was called a suspension, it had the effect of a permit. The limitation as to time and persons shows its real nature, for a repeal is not confined to certain individuals during a single fortnight. It was affirmative and permissive in character, because it allowed the classes named to do the prohibited acts for a limited period. The apparent intent was to grant a permit, but avoid the appearance and responsibility. The actual intent may properly be gathered from the natural and expected effect of the action of the aldermen, which was tantamount to an invitation to do what was done. Their resolution was adapted to that end, and, as we think, was adopted for that purpose. No purpose for passing it is suggested, other than to permit those conducting parades to set off fireworks during that particular campaign. The use of the word "suspended" was an adroit conception, but it is at war with every other word in the resolution, and should be construed accordingly. Mere form is not material, for the real meaning as gathered from the entire resolution must control. The subject of the resolution was the display of fireworks in public streets, which had previously been prohibited, but was thenceforth permitted as to a limited number of persons for a limited period of

time. No other intention than the one suggested can reasonably be imputed to the aldermen, when their action is considered in connection with the circumstances existing at the time it was taken. The suspension as limited is practically a license, because it is personal and temporary. While the persons are not named, they are plainly designated, and, although the places are not specified, all the streets of the city are opened to fireworks in connection with parades. The resolution virtually authorized certain associations to discharge fireworks, with no restriction as to the kind, during the political campaign, then near its close, but not after the 10th of November, which shows that what was in fact done was in contemplation. That is the natural interpretation of the resolution, and that is the way it was interpreted by the police and by the political club to which the fireworks belonged. As was said in the Speir Case, "When given and communicated to the police, it was understood as preventing any police interference with the act permitted, and it had that effect." If the aldermen did not mean this, what did they mean? What other reason was there for passing the resolution? What was to be accomplished by it, unless it authorized political parties to discharge fireworks during the campaign? Why was the suspension made "subject to such restrictions and safeguards as the police department" should regard as necessary? This precaution throws light on the intention. Displays of fireworks were expected as the result of the resolution, and hence they were placed under police regulation. They were expected, because the resolution, as interpreted by the aldermen themselves, permitted such displays, for clearly they could not be had without permission, as it would be the duty of the police to prevent them.

As the purpose of the resolution was personal and temporary, and it was made subject to the restrictions and safeguards of the police department, we think it was a permit, and was intended as a permit. While permission did not make the display lawful—for the aldermen could not legalize a nuisance—it invited and led to it, as the jury could have found. Although the action of the board in granting the permit was beyond their powers, still, it bound the city, because it related to the subject of fireworks, which was within their jurisdiction. They consented to the creation of a nuisance in the streets, and thus placed the city under the same liability as if they had erected the nuisance themselves. They have no more right to authorize or permit a nuisance than to create one, but, if they do either, they make the city liable for the damages directly caused by their action.

The nonsuit was improperly granted, as a case was made for the jury. The judgments below should be reversed, and a new trial ordered, with costs to abide the event.

CULLEN, C. J., and GRAY, BARTLETT, and HAIGHT, JJ., concur. O'BRIEN, J., dissents. WERNER, J., absent.

Judgments reversed, etc.

(180 N. Y. 35)

ROYAL BAKING POWDER CO. v. HOAGLAND et al

(Court of Appeals of New York. Dec. 6, 1904.)

CONTRACTS—TRANSFER OF CORPORATE STOCK—ASSUMPTION OF DEBTS—CONSTRUCTION.

1. The owner of stock in a corporation contracted to transfer it to a new corporation organized to take over the stock of its predecessor and other corporations engaged in the same business. The owner agreed that the corporation should be free of all indebtedness maturing before a certain date, and that he would assume any part of such indebtedness which it was not practicable to discharge before closing the transaction. Such corporation at the time of the agreement was engaged in trade-mark litigation in England, from the judgment in which suit an appeal had been taken. The costs of the action were paid to the solicitors of the old company, according to the English practice, under an undertaking to be repaid if the judgment should be reversed. The owner, in settling with the solicitors of the old company, applied such costs on their bill. The judgment was subsequently reversed, and the new company repaid the costs. *Held*, that the owner of the stock of the old company was liable for the amount of the costs refunded by the new corporation.

Appeal from Supreme Court, Appellate Division, First Department.

Action by the Royal Baking Powder Company against Raymond Hoagland and others. From a judgment of the Appellate Division (84 N. Y. Supp. 1144) affirming a judgment for plaintiff, defendants appeal. Affirmed.

William N. Dykman, for appellants. Latham G. Reed and John M. Bowers, for respondent.

O'BRIEN, J. The plaintiff recovered a judgment upon a claim which it presented to the executors of Joseph C. Hoagland, deceased. The claim was disputed by the executors and referred under the statute. The referee reported in favor of the plaintiff, and his report was confirmed by the court, and subsequently, upon appeal, the judgment was unanimously affirmed. Hence, so far as the facts are concerned, they must be deemed to be settled by that decision.

The questions of law involved in the case arise upon the construction of a written agreement made by the testator with the plaintiff, or at least for its benefit. The legal effect of certain transactions in the rendering of accounts, which will be hereafter referred to, is also incidentally involved. The facts upon which the questions arise are undisputed, and the only question in controversy is with respect to the legal significance of these facts, and how far, if at all, they tended to create a legal liability on the part of the deceased to the plaintiff.

The plaintiff corporation was created under the laws of New Jersey, and is the successor of another corporation of the same name which was created and existed under the laws of New York. In the month of February, 1899, a project was on foot for the incorporation of the plaintiff, in order to purchase and take over the stock of its predecessor and other corporations engaged in the same or kindred business. This project was carried out, and resulted in the incorporation of the plaintiff, and the transfer to it of all the assets of the old corporation and the other corporations comprehended in the scheme. The deceased either owned or controlled all the stock of the old Royal Baking Powder Company, and also the stock of another corporation known as the New York Tartar Company. He agreed to sell to plaintiff, the new company, all his stock in both of the other companies; and this sale was made through a certain trust company and certain bankers in the city of New York, who took over the securities under the agreement with the deceased for the purpose of transferring the same to the plaintiff. The two corporations of which the deceased was the owner of the whole capital stock were both going concerns, and continued to transact business in the usual way down to the date of the transfer to the plaintiff, when they practically ceased to exist and become merged in the plaintiff. The agreement of the deceased whereby he transferred his stock contained certain stipulations which imposed upon him certain pecuniary obligations, and the claim in question arises out of one of these stipulations. He agreed, in substance, that the said two corporations already referred to shall be freed and discharged of all indebtedness payable and matured before February 1, 1899, and that he would assume and pay any part of such indebtedness which for any reason it may not be practicable to discharge before closing the transaction. All the operations of said two companies should on and after February 1, 1899, be for the account and benefit of the new company. There should be made and handed to the bankers certificates of the charges and liabilities which were to be discharged by the deceased as liabilities payable and matured before February 1, 1899. The stock of said two companies was to be taken by the purchasers as stock of going concerns, subject to all unfulfilled contracts, and all charges payable and maturing thereunder subsequent to January 1, 1899, which unfulfilled contracts are such as contracts for purchase and sales of raw materials, engagements and obligations growing out of trade-mark litigations, general, usual, and sundry contracts and engagements appertaining to the business carried on by said two companies. The plaintiff's claim was that it was compelled to pay an obligation of the old Royal Baking Powder Company which was covered by this

stipulation, and which the deceased failed to pay. This claim or liability originated in certain litigations which the old company had in England and was for costs of a certain suit, which amounted to £1,428 7s. 3d. This claim is the sole basis of the judgment in this case, and, although the plaintiff claimed other items, yet none of them was allowed except the one here referred to.

It appears that among the trade-mark litigations in which the old company was involved at the date of the agreement was an action known as a libel suit brought by the old company in the High Court of Justice, Chancery Division, in England, against Wright, Crossley & Co. The action was tried before one of the justices of the court on July 2, 1898, and decided in favor of the old company, which was the plaintiff in the action. But an appeal had been taken by the defendant therein from the judgment, and was pending on February 1, 1899. By the rules of practice then prevailing in the English courts, an appellant was required either to pay into court the costs taxed in the judgment appealed from, which would be repaid to him in case the judgment was reversed, or to pay said costs to the solicitors for the respondent, in which case said solicitors gave an undertaking to repay them in case the said judgment was reversed. The costs taxed in the libel suit against the defendants therein, who appealed, amounted to this sum of £1,428 7s. 3d.; and on December 19, 1898, this sum was paid by the solicitors of the defendant in that suit to the solicitors of the Royal Baking Powder Company, pursuant to the rules and practice referred to, and under the conditions already mentioned. It appears also that upon the hearing of the appeal the defendant in the action succeeded, and the judgment recovered was reversed, and it was ordered that the plaintiff therein pay to the defendant the costs of the appeal and the costs of the action. When the transfer of the stock of the old company was about to be made to the plaintiff, the old company requested from its solicitors in London a statement of disbursements and charges from the time of the last settlement up to February 1, 1899, and an account was rendered in which the charge for services amounted to £1,360 12s. 10d.; the disbursements to £4,618 17s., and the credits to £2,704 1s. 4d.; leaving due to the solicitors of the old company the sum of £3,275 8s. 6d.

It seems that in this statement so rendered the solicitors entered the taxed costs in the libel suit as a disbursement, and likewise credited the same as a payment. Upon receipt of this statement, Mr. Hoagland, the deceased, refused to allow the taxed costs as a disbursement, but accepted and took the benefit thereof as a credit upon the account, and thereupon paid to the solicitors substantially the balance due them as per said

account rendered. After the reversal of the judgment, and on or about May 10, 1899, the plaintiff, upon the demand of the solicitors in the libel suit appearing for the defendant, repaid to them the taxed costs of such suit, amounting to the sum of \$1,428 7a. 3d., the equivalent of which in American money was \$6,996.10. This is the claim which the court has allowed against the deceased's estate. We think that the case was correctly decided. Notwithstanding the fact that the costs in the libel suit had been paid to the solicitors of the successful party, which was the old baking powder company, yet this payment was subject to the subsequent reversal of the judgment, in which event the solicitors who had recovered the judgment were bound to refund the same to the solicitors who had succeeded upon the appeal. When the solicitors of the plaintiff in the libel suit received the costs from the defendant's solicitors, they received them not absolutely, but as a special fund, subject to be restored or refunded upon the reversal of the judgment. Therefore this item was really a special fund in the hands of the plaintiff's solicitors, which had nothing to do with their general account against their client until the payment was made absolute, one way or the other, by the decision of the appeal. It was not a proper item in their general account against the plaintiff in the libel suit, but, if it was, it belonged on the debit as well as on the credit side of the account; and in refusing to treat these costs as a proper charge against the plaintiff, and accepting the item as a credit, the present controversy originates.

Although the judgment which awarded the costs to the plaintiff's solicitors was not reversed until after the 1st of February, 1899, yet the reversal in legal effect related back to the time when the judgment was recovered, or at least to the time when the costs were paid by the solicitors of the defendant in the libel suit. The effect of the reversal was to deprive the solicitors of the successful party at the trial of the benefit of the payment to them of the costs, since that payment was contingent only upon success in the appellate court, and inasmuch as the judgment was reversed, and the solicitors thereby required to refund the costs that had been received, their client was not entitled to be credited with the item; and so the situation is precisely the same as if the account rendered had contained no reference to these costs.

It follows, I think, that the report of the referee was correct, and that the judgment should be affirmed, with costs.

GRAY, BARTLETT, HAIGHT, and VANN, JJ., concur. CULLEN, C. J., taking no part. WERNER, J., absent.

Judgment affirmed.

(163 Ind. 597)

TOLEDO, ST. L. & W. R. CO. v. PARKS.
(No. 20,414.)

(Supreme Court of Indiana. Dec. 7, 1904.)

**RAILROADS—FIRES—CAUSE—NEGLIGENCE—
EVIDENCE.**

1. Where a bill of exceptions was signed and filed on the same day, it will be presumed that the signature of the judge preceded the filing.

2. Evidence that within a few minutes after a freight train passed over defendant's railroad a fire broke out in plaintiff's woods at a point about 10 feet from the right of way, and that prior to the passage of the train there was no fire in the woods, and, aside from the locomotive, there was no known actual or probable source of the fire, was sufficient to justify a finding that the fire was caused by the engine.

3. In an action against a railroad company for damages from fire set by defendant's engine, there was no evidence that the fire originated from coals or sparks from the fire box or ash pan, and the jury found that the fire was started by a spark emitted from the smokestack of the engine. The engine was shown to have been equipped with one of the best and most approved spark arresters, and was being operated in a careful manner, by competent employes; and there was uncontradicted testimony of a witness who personally inspected the spark arrester of the engine after the fire that it was in good condition. *Held*, that there was no evidence of negligence sufficient to sustain a recovery.

Appeal from Superior Court, Grant County; B. F. Harness, Judge.

Action by Henry N. Parks against the Toledo, St. Louis & Western Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Transferred from Appellate Court under section 1837n, Burns' Ann. St. 1901. Reversed.

Guenther & Clark, for appellant. John A. Kersey, for appellee.

HADLEY, J. Appellee recovered judgment for damages caused by fire alleged to have been permitted to escape from a locomotive through the negligence of appellant. The negligence charged in the complaint was the use on the locomotive of an insufficient spark arrester, and an insufficient furnace, fire box, and ash pan, by reason whereof fire was thrown out and away from the engine onto the plaintiff's timber land adjoining the defendant's right of way, ignited the grass, and destroyed his growing trees. The answer was a general denial. The overruling of the motion for a new trial is the decision challenged. The grounds of this motion are the insufficiency of the evidence, the admission of improper evidence, and the giving and the refusing of certain instructions.

Is the evidence sufficient to sustain the verdict? Appellee makes the point that the evidence is not in the record, because the bill of exceptions purporting to contain it is not shown to have been filed after it was signed by the judge. An inspection of the record reveals that the signing and filing

¶ 2. See Railroads, vol. 41, Cent. Dig. § 1721.

of the bill occurred upon the same day, and, under the repeated rulings of this court, in such cases we will presume, in favor of the proper action of the judge, that he subscribed his signature to the bill before it was filed. *Martin v. State*, 148 Ind. 519, 47 N. E. 930; *Minnick v. State*, 154 Ind. 379, 382, 56 N. E. 851; *Bradley, etc., Co. v. Whicker*, 23 Ind. App. 380, 381, 55 N. E. 490.

The plaintiff introduced evidence to the effect that he owns a farm of 100 acres, a portion of which, known as "the woods," was situate north of and adjoining appellant's right of way. The railroad at this point is almost level, and runs east and west. On April 22, 1903, between 11:30 and 12 o'clock a. m., in a dry time, and within a few minutes after a freight train on appellant's road went west, a fire broke out in appellee's woods at a point about 10 feet from the right of way. At the time there was a brisk wind blowing from the southwest towards the northeast. The fire spread rapidly, and, before it could be controlled, destroyed growing trees to the damage of the plaintiff of \$250. Before the passage of the freight train there was no fire in the plaintiff's woods, and, aside from the locomotive that hauled the train, there was no known actual or probable source of the fire. On the other hand, the defendant produced evidence that engine 64 pulled the freight train that passed the point where the fire occurred about 11:45 a. m., and no other engine or train passed the place within one hour of the time of the fire; that engine 64 was equipped with a spark-arresting device that was in common use on railroads, and was generally regarded as one of the best and most approved devices for preventing the escape of fire. On the evening after the fire, upon the return of engine 64 to the roundhouse, it was inspected by a competent inspector, who examined the spark arrester, fire box, and ash pan, and made as the inspection progressed, and as he does in all inspections, a record of the condition of each part, and the spark arrester, fire box, and ash pan were at that time in good condition. The mesh of the netting used in the spark arrester on engine 64 was the same size used in all first-class arresters, and is as small as can be used without impairing the draft and steaming power of the locomotives. Some fire will find its way through the netting under the most favorable conditions, and, once through, will escape from the smokestack to the open air, and be subjected to the control of the elements; and how far it will be carried depends upon the velocity of the wind and state of the atmosphere.

To entitle him to recover, the law requires the appellee to establish two things by a preponderance of the evidence: First, that the fire which destroyed his trees escaped from appellant's locomotive; and, second, that the escape was caused by the negligence of appellant. Appellee, well understanding what

the law required of him in this respect, made the necessary averments in his complaint. Has he established both propositions by competent and sufficient evidence? We assume, without deciding, that there were enough circumstances established to warrant the conclusion that the fire did escape from appellant's engine, but we are unable to find of a syllable of testimony, or a single circumstance shown by the evidence, that will sustain a legal inference in support of the negligence charged. The law recognizes the right of a railroad company to carry fire on its locomotives for the production of steam. It holds the company to a degree of care proportionate to the danger to prevent its escape, but, when the company uses and maintains in good repair devices which are generally used and approved as the best and most efficient means for the suppression of fire, it has done all the law requires; and, if fire escapes notwithstanding such precaution, the escape is not accounted negligence in the company. *Railroad Co. v. Fenstermaker* (this term; No. 20,413) 72 N. E. 561. A railroad company, like an individual engaged in a lawful pursuit, is presumed to obey the law in the running of its trains. If, therefore, fire escapes from its locomotives, the escape is presumed to have occurred without the fault of the company, and whoever charges the contrary must prove it by a preponderance of the evidence. *Railroad Co. v. Ostrander*, 116 Ind. 259, 263, 15 N. E. 227, 19 N. E. 110. There is no evidence whatever that the fire originated from the escape of coals or sparks from the fire box or ash pan, and for the purpose of argument, merely, and as indicating the basis upon which the verdict rests, the jury found in answer to interrogatories propounded to it by the court that the fire was started by a spark emitted from the smokestack of appellant's engine, which engine at the time was equipped with one of the best and most approved appliances in use for arresting sparks and preventing the escape of fire, and was being operated in a careful manner and by competent employes, but the spark arrester was not at the time in good repair. What evidence can appellee point to that tends to prove that the spark arrester was out of repair? No witness testified that it was in bad condition, or to seeing more sparks issue from the smokestack of the locomotive than are usual to engines skillfully equipped with the best and most approved appliances. Such finding is not only not sustained by any evidence, but is contrary to the uncontradicted testimony of a witness who personally inspected the spark arrester the evening after the fire, upon the return of the engine to the roundhouse. A verdict in favor of a party having the burden of proof cannot be arrived at by a mere guess or conjecture, but must be grounded upon some substantial legal evidence. From the evidence adduced, we

have an uncontroverted case where the locomotive claimed to have communicated the fire was equipped with the most approved and best known spark arrester, in good condition, and carefully operated by competent employees. If fire escaped from such an engine, as we have seen, it must be accounted an accident for which appellant is not liable.

The court erred in refusing appellant a new trial.

There are other questions presented, which we deem unprofitable to decide, as they are not likely to arise upon a new trial.

Judgment reversed, and cause remanded, with instructions to grant appellant a new trial.

(165 Ind. 171)

NEWMAN et al. v. GATES. (No. 20,490.)¹
(Supreme Court of Indiana. Dec. 7, 1904.)

PARTNERSHIP—ACTION BY PARTNERSHIP—COUNTERCLAIM—JUDGMENT ON COUNTERCLAIM—DEATH OF PARTNER BEFORE APPEAL—PARTIES TO APPEAL—DEFECT OF PARTIES.

1. On appeal in vacation, all the parties against whom judgment is rendered must be made appellants, or the appeal will be dismissed for want of jurisdiction.

2. Burns' Ann. St. 1901, § 648 (Rev. St. 1881, § 636; Horner's Ann. St. 1901, § 636), provides that, in case of the death of a party to a judgment before appeal, an appeal may be taken by, and notice of appeal served on, those in whose favor and against whom the action might have been revived, had death occurred before judgment. Section 272 (section 271) provides that no action shall abate by the death of a party if the cause of action survive, but the action may continue by or against his representative. By sections 283-285 (sections 282-284), all causes of action survive save certain enumerated ones, not including an action for breach of duty by an attorney to his client. By Burns' Ann. St. 1901, § 2463, a proceeding against the estate of a deceased partner on a claim against the partnership must be filed against the estate if the action was not commenced before the death of the partner; and section 2463 provides that no action shall be brought by complaint and summons against an executor or administrator, but that the holder shall file a statement thereof in the court where the estate is pending. In an action by a firm of attorneys a judgment was rendered for defendants on a counterclaim based on a breach of duty by plaintiffs as defendant's attorneys, but, before appeal by the partners, one of them died. *Held*, that the personal representative of the deceased partner was a necessary party appellant.

3. A firm creditor is not required to exhaust his remedy against the surviving partners, or show that they are insolvent, before he can resort to the estate of the deceased partner, but he may proceed at once on the death of a partner against the estate of the deceased partner as well as against the surviving partners.

4. Under Burns' Ann. St. 1901, §§ 283-285 (Horner's Ann. St. 1901, §§ 282-284), providing that a cause of action arising out of an injury to the person dies with the person of either party, except in cases of false imprisonment, malicious prosecution, and seduction, and in cases where an action is given for an injury causing death, but that all other causes of action survive, a cause of action for breach of duty by an attorney to his client survives the death of either party.

¹ Rehearing denied.

Appeal from Superior Court, Marion County; John L. McMaster, Judge.

Action by Jacob Newman and others, as surviving partners, against Harry B. Gates. From a judgment in favor of defendant on a counterclaim, plaintiffs appeal. Transferred from the Appellate Court under clause 2 of section 1337u, Burns' Ann. St. 1901. Dismissed.

See 67 N. E. 468.

W. A. Ketcham and Charles Martindale, for appellants. L. C. Walker and Baker & Daniels, for appellee.

MONKES, J. This action was brought by appellants and George W. Northrup, Jr., on a judgment recovered by them against appellee in the circuit court of Cook county, Ill., for services as attorneys for appellee, performed by them as partners. Appellee filed a counterclaim alleging certain breaches of duty arising from the relation of attorney and client in connection with the employment of said firm as his attorneys, for which services said Illinois judgment was rendered. The breaches of duty alleged in the counterclaim by appellee were acts of commission and omission by the plaintiffs below as the attorneys for appellee, by reason of which he suffered great pecuniary loss, on account of which he demanded judgment for \$2,500. Said cause was tried, and final judgment rendered, which was reversed by the Appellate Court. *Gates v. Newman*, 18 Ind. App. 392, 46 N. E. 654; *Newman v. Gates*, 150 Ind. 59, 61, 49 N. E. 828. It was held by the Appellate Court on the former appeal that the counterclaim "is based upon a breach of contract." After said cause was returned to the court below, a second trial resulted in a verdict and judgment in favor of appellee against said three defendants to said counterclaim in the sum of \$184.74 and costs. Before the appeal was taken from said judgment, George W. Northrup, Jr., one of the plaintiffs below, and one of the persons against whom said judgment was rendered, died.

Appellee insists that this court has no jurisdiction of this appeal, for the reason that the personal representative of George W. Northrup, Jr., deceased, a co-party to said judgment, has not been made an appellant. This is a vacation appeal, and it is well settled that all the parties against whom the judgment was rendered must be made co-appellants on appeal, or the appeal will be dismissed for want of jurisdiction. *Rich Grove Township et al. v. Emmett* (this term) 72 N. E. 543, and cases cited. Section 648, Burns' Ann. St. 1901 (section 636, Rev. St. 1881; section 636, Horner's Ann. St. 1901), provides that, "in case of the death of any or all the parties to a judgment before an appeal is taken, an appeal may be taken by, and notice of an appeal served upon, the persons in whose favor and against whom the action

might have been revived, if death had occurred before judgment." Section 272, Burns' Ann. St. 1901 (section 271, Rev. St. 1881; section 271, Horner's Ann. St. 1901), provides that "no action shall abate by the death or disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of the death or disability of a party, the court, on motion or supplemental complaint at any time within one year, or on supplemental complaint afterwards, may allow the action to be continued by or against his representative or successor in interest. In case of any other transfer of interest, the action shall be continued in the name of the original party; or the court may allow the person to whom the transfer is made to be substituted in the action." It is clear, under our statutes concerning the causes of action that survive (sections 283, 284, 285, Burns' Ann. St. 1901; sections 282, 283, 284, Horner's Ann. St. 1901), that causes of action for breaches of duty by attorneys to their clients, by which the property rights and interests of the clients are affected injuriously, survive the death of either party. Weeks on Attorneys at Law, p. 625; Allen v. Clark, Ex'r, 11 Weekly Reporter, 304, 7 L. T. N. S. 781; Knight v. Quarrels, 4 Moore, 532, 2 Brod. & B. 102; Feary v. Hamilton, 140 Ind. 45, 51-53, 39 N. E. 516, and cases cited; Boor v. Lowrey, 103 Ind. 468, 3 N. E. 151, and cases cited, 53 Am. Rep. 519, and note pages 525-539; Hess v. Lowrey, 122 Ind. 225, 23 N. E. 156, 7 L. R. A. 90, 17 Am. St. Rep. 355, and cases cited; 33 Albany Law J. 184-187, 204-208, and cases cited.

It is true that after the death of a member of a partnership the surviving partner or partners are vested with the exclusive right of possession and management of the partnership property, including the exclusive right to collect the debts due the partnership by suit or otherwise. Parsons on Partnerships, §§ 342, 344, 345; McIntosh v. Zaring, 150 Ind. 301, 312, 49 N. E. 164, and cases cited; Valentine v. Wysox, 123 Ind. 47-52, 23 N. E. 1076, 7 L. R. A. 788.

In this state a firm creditor is not required to exhaust his remedy against the surviving partners, or show that they are insolvent, before he can resort to the estate of the deceased partner. He may proceed at once on the death of a partner against the estate of the deceased partner as well as against the surviving partners. Ralston v. Moore, 105 Ind. 245, 4 N. E. 673. See Camp v. Grant, 21 Conn. 41, 55, 56, 54 Am. Dec. 321. If suit was not commenced on said claim against the members of the partnership before the death of the partner, the statute requires that the proceeding against the estate be by claim filed against said estate under section 2463, Burns' Ann. St. 1901. In other words, while rights of action for liabilities due a partnership survive, and vest exclusively in the surviving members of

the firm, the liabilities of the partnership on the death of a partner survive not only against the surviving partners, but also against the estate of the deceased partner.

In this case Northrup died after the rendition of the judgment on the counterclaim against him and his codefendants to the counterclaim, Newman and Levison. Such a judgment binds the partnership property and the individual property of each judgment defendant, and may, in the absence of a statute to the contrary, be enforced by execution against the separate property of each of said judgment defendants before having recourse to the partnership property. Story on Partnership, § 260. Said Northrup having died after the counterclaim was filed, the case stands, so far as the question under consideration is concerned, in all respects the same as if said counterclaim was an independent action against the defendants thereto, and judgment had been rendered in favor of appellee for said sum of \$184.74. If an independent action had been commenced against the members of said firm for the cause of action set up in said counterclaim in the court below, and thereafter, and before judgment, said Northrup had died, then his administrator or executor could have been made a party defendant in said action, and the same prosecuted to final judgment, under the provisions of section 272 (section 271), supra. As said cause of action could have been revived against the personal representative of said Northrup under section 272 (section 271), supra, it follows, under the provisions of section 648, supra, that such personal representative was a necessary party appellant to the appeal, and should have been made a co-appellant and served with notice. Rich Grove Tp. v. Emmett (this term) 72 N. E. 543, and cases cited. The prohibition of section 2465, Burns' Ann. St. 1901, against bringing actions against an executor or administrator by complaint and summons, and requiring all claims against the estate to be filed in the clerk's office, does not apply to such a case. It relates to the bringing of actions, and not to those brought before the death of the deceased, while section 272 (section 271), supra, has reference to actions already commenced, and forbids their abatement by the death of any or all the parties if the cause of action survives, and provides for the prosecution of the action by or against the personal representative of the deceased party. Holland v. Holland, 131 Ind. 196, 200, 201, 30 N. E. 1075; Clodfelter v. Hulett, 92 Ind. 426, 434; Lawson v. Newcomb, 12 Ind. 439; Burnett v. Milnes, 148 Ind. 230, 235, 46 N. E. 464; 1 Woolen's Trial Procedure, §§ 555-561.

On account of the failure to make the personal representative of George W. Northrup, Jr., a co-appellant, the court has no jurisdiction to determine the case upon its merits. The appeal must therefore be dismissed.

Rich Grove Township v. Emmett (this term), 72 N. E. 543, and cases cited. Appeal dismissed.

(164 Ind. 1)

CASSELL v. LOWRY. (No. 20,419.)

(Supreme Court of Indiana. Dec. 16, 1904.)

LIMITATIONS—ENFORCEMENT OF VENDOR'S LIEN—EQUITY—NECESSITY OF DOING EQUITY.

1. The limitation of 10 years prescribed by Burns' Ann. St. 1901, § 294, subd. 5, for actions on notes, bars not only an action on a note after 10 years, but also an action to enforce a vendor's lien incident to the note.

2. A suit to quiet title against a vendor's lien is an equitable suit, and plaintiff cannot obtain relief when he himself shows in his pleadings that he has not paid the consideration on account of which the lien complained of exists, although any action on the part of the vendor to enforce payment is barred by limitations.

Appeal from Circuit Court, Benton County; Jos. M. Robb, Judge.

Action by Abram Lowry against Horace G. Cassell. From a judgment for plaintiff, defendant appeals. Transferred from the Appellate Court under Burns' Ann. St. 1901, § 1337u. Reversed in part.

C. M. Snyder, for appellant. B. B. Berry, for appellee.

HADLEY, J. Lowry, the appellee, brought this action to quiet his title to two lots in the town of Roswell, alleging that he was the owner in fee, and that the defendant claimed an adverse interest therein, which claim was unfounded and a cloud upon the plaintiff's title. Cassell, the appellant, in addition to the general denial, in substance answered that on October 5, 1889, he conveyed by warranty deed to the plaintiff the identical real estate described in the complaint; that at the time of the conveyance the plaintiff paid all the purchase price, except \$100, for which he executed to the defendant his promissory note for \$100, due at six months after date; that no security of any kind was taken or received, but he (defendant) reserved his vendor's lien against the property, and which constitutes the cloud upon the plaintiff's title of which he complains; that said debt is due and wholly unpaid; that the plaintiff's wife was a sister of the defendant, and she on December 26, 1896, paid the defendant \$20 on said indebtedness, which he duly credited; that on account of said kinship, and believing and relying upon the payment of said \$20 as having been made with the knowledge and consent of the plaintiff, and accepting said payment as indicating the plaintiff's purpose to pay the defendant as soon as he conveniently could, and believing he intended to do so, the defendant forebore to sue for said purchase money. Prayer that the plaintiff take nothing, etc. The court sustained a demurrer to the answer, and no exception

was reserved. The defendant, however, pleaded the same facts, in various forms, with some elaboration, in four paragraphs of cross-complaint. In all these paragraphs he alleged the insolvency of the plaintiff, and prayed for a declaration of his vendor's lien and for an order of sale. The plaintiff's separate demurrer to each paragraph of the cross-complaint was overruled. The plaintiff then answered the cross-complaint generally in three paragraphs: First. The general denial. Second. That said note was due and payable 180 days from its date; that no part of said note has ever been paid, and suit was not brought upon it against the cross-defendant within 10 years after the cause of action accrued. Third. A verified answer of non est factum. Appellant's demurrer to the second paragraph of answer to the cross-complaint was overruled, and he properly excepted. Appellant then replied to said second paragraph, as an excuse for the delay in instituting suit upon the note, the same matter that he set up for a like purpose in his answer to the complaint. A demurrer was sustained to the reply, and appellant excepted. Trial by the court. Finding and judgment for the plaintiff, quieting his title as prayed.

Appellant has assigned for error the overruling of his demurrer to the second paragraph of answer to the cross-complaint, the sustaining of the demurrer to his affirmative reply to the cross-complaint, and the overruling of his motion for a new trial.

The only important question presented by this appeal is whether a purchaser of real estate is entitled to invoke a statute of limitation to quiet his title against his vendor's lien for unpaid purchase money, when he asserts in his pleading that the consideration he agreed to pay for the estate remains unpaid. In other words, will a court of equity employ a limitation statute to aid a vendee in removing from his title a cloud cast upon it by his confessed failure to pay for the property as he had agreed to do? A vendor's lien is an ancient rule, and had its origin in the principle of natural justice and equity, which impresses the conscience, that it is not fair for a vendee of lands, who gives no other security, to have, as between the parties, the absolute estate until he has fully paid for it. It rests upon the same foundation as the doctrine of subrogation and contribution among sureties. *Arbogast v. Hayes*, 98 Ind. 26. A vendor's lien is not, then, founded on contract, but arises by implication of law. *Warford v. Hankins*, 150 Ind. 489, 50 N. E. 468. It is created by the law solely to secure the payment of purchase money. It is therefore an incident of the debt, and, while it cannot survive the debt, it continues to exist until the debt is paid or otherwise discharged. *Lilly v. Dunn*, 96 Ind. 222, 225. Under our system of procedure, we have but one form of action, and a statute of limitation applies alike to actions

¶ 1. See Limitation of Actions, vol. 33, Cent. Dig. § 652.

at law and suits in equity. The statute is directed to the substance, and not to the forum, or the form of the action. A promissory note given for unpaid purchase money, under the fifth clause of section 294, Burns' Ann. St. 1901, is valid evidence of the debt for 10 years from maturity, after which time the statute may be interposed to an action upon the note, and likewise applied to a suit in equity on the coexistent vendor's lien to subject the land to the payment of the same debt. For it must be said that a statute that bars the debt, the principal thing, bars also the incident, the lien. It follows that the second paragraph of answer to the cross-complaint, setting up the 10-years statute generally as a bar to the cross-complaint, was sufficient, both as to the action on the note and for foreclosure of the lien, and the demurrer thereto was properly overruled.

But this does not dispose of the case. It is a familiar doctrine that the statute of limitations is a statute of repose, and not one of payment or cancellation. 19 Am. & Eng. Ency. p. 146, and cases collated. "It is a bar to the remedy only, and does not extinguish or even impair the obligation of the debtor. It is available in judicial proceedings only as a defense, and can never be asserted as a cause of action in his behalf, or for conferring upon him a right of action. It is to be used as a shield, and not as a sword." Spect v. Spect, 88 Cal. 437, 26 Pac. 203, 13 L. R. A. 137, 22 Am. St. Rep. 314. It is said in the text of 19 Am. & Eng. Ency. p. 177: "Although the mortgage and the debt secured by it may be barred it cannot be annulled or canceled in equity on that ground, as being a cloud on the title, except upon condition that the party complaining pay the principal and interest due." See, also, to the same effect, Booth v. Hoskins, 75 Cal. 271, 17 Pac. 225; Merriam v. Goodlett, 36 Neb. 384, 54 N. W. 686; Hall v. Hooper, 47 Neb. 111, 63 N. W. 33; Gage v. Riverside Trust Co. (C. C.) 86 Fed. 984; Driver v. Hudspeth, 16 Ala. 348. In cases where the statute operates, the right and the restraint to an enforcement of the debt, and to the removal of the lien, are reciprocal. Green v. Capps, 142 Ill. 286, 31 N. E. 597; Jones on Mort. (6th Ed.) 1148. The same principle has found its way into the statutes. "A party to an action may plead, or reply, a set off, or payment, to the amount of any cause of action, or defense, notwithstanding such set off or payment is barred by the statute." Section 370. Burns' Ann. St. 1901. And under this section it has been held that a debt due from an heir to an estate may be set off against his distributive share, though such debt is barred. Holmes v. McPheeters, 149 Ind. 587, 49 N. E. 452. In this case it is said: "The heir or legatee, as the authorities affirm, is not, in accordance with justice and good conscience, entitled to receive his share as long as he is a

72 N.E.—41

debtor to the estate." And it is further held in Gage v. Trust Co., supra, that a party will be estopped from setting up the statute where, in his pleading between the parties, he has admitted and alleged the indebtedness. Citing authorities. A suit to quiet title, though triable by jury, is ruled by equitable principles. Besides, the filing of the cross-complaint to enforce the vendor's lien carried the whole case fully into equity, and it must be disposed of according to the rules of that tribunal. One of these is that he who successfully invokes the interference of a court of equity must himself appear with clean hands—must show that he has done equity to him of whom he complains. Appellee falls far short of a compliance with this rule. He shows by his pleadings, as well as by his evidence, without contradiction, that, if he had paid his just debt to the appellant, as he ought to have done, there would be no cloud upon his title, and no need of the court's assistance. He has in his own hands the complete remedy.

It was assigned as a reason for a new trial that the finding of the court was not sustained by sufficient evidence and was contrary to law. The evidence was but a verification of the pleadings. Appellee testified that he never paid anything on the note, and never authorized any one to make a payment for him. There was no legitimate evidence to sustain the complaint, and the finding was therefore contrary to law. Under the facts of the case, the court will leave the parties where they have placed themselves, by negligence, on the one hand, and by default, on the other. It must be understood that our decision is limited to the right of a debtor himself to have his title to land quieted where it appears that the purchase money is unpaid.

Judgment in main action reversed, with instructions to render judgment on the complaint for the defendant, Cassell, for costs, and the judgment on the cross-complaint is affirmed.

(163 Ind. 667)

MITCHELLTREE SCHOOL TP. OF MARTIN COUNTY v. HALL. (No. 20,497.)

(Supreme Court of Indiana. Dec. 15, 1904.)

TOWNSHIPS—POWERS OF TRUSTEE—ISSUANCE OF WARRANT—NECESSITY OF AUDIT—BURDEN OF PROOF—PLEADING.

1. A township trustee is a special agent possessing only statutory powers, and can only bind the township when authorized by statute and in the manner specified therein, and all who deal with him must, at their peril, take notice of the extent of his authority.

2. The burden is on one seeking to enforce a contract against a township for a debt contracted by the trustee to show by allegation and proof the existence of all the conditions conferring authority upon the trustee to contract the debt.

3. Under Acts 1897, p. 222, c. 144, § 1, constituting the county commissioners an auditing

board to audit the warrants of the township trustees, and making it their duty to investigate the charge represented by the warrant, and authorizing taxpayers to except to any warrant drawn by the trustee, and section 7 (page 225), imposing a double liability on any township trustee who delivers a warrant contrary to the provisions of the act, a township trustee has no power to issue a warrant without the approval of the county commissioners as an auditing board.

4. Under Acts 1897, pp. 222, 225, c. 144, §§ 1, 7, which in effect deprives a township trustee of power to issue a warrant except on the approval of the county commissioners as an auditing board, a complaint, based on a warrant issued by the township trustee, must allege, and plaintiff must prove, facts showing the due approval of the warrant by the auditing board before the delivery of the same to the payee.

Appeal from Circuit Court, Lawrence County; W. H. Martin, Judge.

Action by James K. Hall against the Mitchelltree school township of Martin county. From a judgment for plaintiff, defendant appeals. Transferred from the Appellate Court under Burns' Ann. St. 1901, § 1337j, cl. 2. Reversed.

Rogers & Rogers and Brooks & Brooks, for appellant. W. R. Gardiner, C. G. Gardiner, and T. D. Sllmp, for appellee.

MONKS, J. This action was brought on a school warrant, of date December 6, 1898, payable December 6, 1900. At the time of the issuance of said warrant the act of March 8, 1897, was in force. Acts 1897, p. 222, c. 144.

The theory upon which the trial court ruled in making the issues, and at the trial of the cause, was that the determination by the auditing board of the questions mentioned in section 1 of the act of 1897 (Acts 1897, pp. 222, 223, c. 144), and the approval by said board of the warrant sued upon, was conclusive upon appellant as to all of said questions until set aside by a direct proceeding brought for that purpose; and that, as the approval of said warrant by said board had not been set aside, none of said questions could be raised or tried in this action on the warrant. The question of the correctness of this theory was raised by the demurrer to the amended complaint, the demurrer to the answer, and by the motion for a new trial, each of which rulings is called in question by the assignment of errors.

From the provisions of section 1 of said act of 1897, it is clear that it was the legislative purpose that the trustee should not issue a warrant (except for the payment of a teacher) until the demand for which it was to be issued had been investigated as provided in said act, and the instrument stamped as audited and approved, with the signatures of the president and secretary attached. Section 7 of said act (page 225) provides for a liability upon the part of a trustee on his official bond in double the amount of any warrant issued by him contrary to the provisions of the act. A school trustee has no

general authority to issue promissory notes. It has been uniformly held that a township trustee is a special agent, possessing only statutory powers, and can only bind the township when authorized by statute and in the manner specified therein, and that all who deal with him must, at their peril, take notice of the extent of his authority, and the party seeking to enforce a contract against a township for a debt contracted by the township trustee takes the burden of showing by allegation and proof that all the conditions existed which conferred authority upon the trustee to contract the debt. *Boyd v. Mill Creek School Tp.*, 114 Ind. 210, 16 N. E. 511, and cases cited; *Bloomington School Tp. v. National School Furnishing Co.*, 107 Ind. 43, 46, 7 N. E. 760, and cases cited; *Lee v. York School Tp. (Ind. Sup.)* 71 N. E. 956. It was said in *Boyd v. Mill Creek School Tp.*, 114 Ind. 211, 212, 16 N. E. 512: "It has been decided again and again that a township trustee has no power, by any form of obligation, to bind the corporation or which he is the agent or trustee, by contract, for school supplies, unless supplies suitable and reasonably necessary have been actually delivered to, and received by, the township. *State ex rel. v. Hawes*, 112 Ind. 323 [14 N. E. 87], and cases cited; *Union School Tp. v. First National Bank*, 102 Ind. 464 [2 N. E. 194]. All persons who deal with a school trustee are charged with notice in the beginning that he is not possessed of general and unlimited authority to acknowledge or certify that the school corporation is indebted for goods which have not in fact been actually delivered to and accepted by the township, and they are likewise bound to take notice that the trustee has no power, except as conferred by the statute, to contract a debt payable in the future for school supplies, unless the articles contracted for and received and actually appropriated are suitable and reasonably necessary for the township schools."

It is evident that said act of 1897 was not intended to enlarge or extend the powers of township trustees, but to further circumscribe their authority in respect to the issuing of warrants. The board provided for by said act was also limited in its authority, and it lacked the power to audit and approve an outstanding warrant. The fundamental purpose of the enactment was to give publicity to the official acts of the trustee, and subject the same to the scrutiny of an auditing board at an ex parte investigation, not for the benefit of those who claimed to be the creditors of the civil or school township, but for the better protection of the taxpayers of the public corporations named. The auditing board created by said act was not a tribunal to adjudicate questions between the civil or school township and persons claiming to be its creditors, but merely a ministerial body whose stamp of approval was necessary to the issuance of a warrant, in the investigation of which said creditors were not par-

ties. After said act took effect, until its repeal, the trustee had no power to issue a warrant, for said law required the act of the trustee and the approval of the auditing board before the same could be issued. Sections 1 and 7, Acts 1897, pp. 223, 225, c. 144.

The rules of pleading and proof, in actions like the one at bar, were not modified or repealed by said act of 1897. To make a complaint on a warrant issued while said act was in force, with the approval of said auditing board, sufficient to withstand a demurrer for want of facts, it was necessary to allege and prove not only the facts before that time held essential, but also facts showing the approval of such warrant in the manner provided in said act by the auditing board, and that the same was approved before it was delivered to the payee thereof. Under this rule the amended complaint was not sufficient. It follows that the court below erred in overruling the demurrer to the amended complaint.

It is not necessary to decide what allegations would be required in a complaint on a warrant issued by order of the circuit court under the provisions of said act, or as to the validity of that part of said act.

Judgment reversed, with instructions to sustain the demurrer to the amended complaint, and for further proceedings not inconsistent with this opinion.

(163 Ind. 642)

MONDAMIN MEADOWS DAIRY CO. v. BRUDI et al. (No. 20,399.)

(Supreme Court of Indiana. Dec. 14, 1904.)

CONTRACTS — ACTION — PLEADING — COMPLAINT — CONDITIONS PRECEDENT — PERFORMANCE — CONSTRUCTION OF CONTRACT — QUESTION FOR JURY — LIQUIDATED DAMAGES — BILL OF EXCEPTIONS — NECESSITY.

1. Where plaintiff alleged that he agreed to furnish defendant 1,000 pounds of milk every day for a certain period, and did not allege performance, but averred that he did deliver "an average of 1,000 pounds," etc., except when prevented by defendant, the complaint was insufficient, under Burns' Ann. St. 1901, § 373, providing that in pleading the performance of a condition precedent in a contract it shall be sufficient to allege generally that the party performed all the conditions on his part.

2. The alleged error in denying defendant's motion that the complaint be made more specific was not properly before the Appellate Court where neither the motion, nor the ruling, nor exception thereto had been made a part of the record by a bill of exceptions or order of court, as was required under the law of civil procedure in force at the time of trial.

3. Whether an agreement in a contract in suit to pay five cents a gallon as damages for each gallon of milk not delivered under the contract was to be considered as a penalty or as liquidated damages was a question for the court.

4. Where defendant milkman contracted with plaintiff for the purchase of 1,000 pounds of milk each day, which plaintiff was to be permitted to purchase from certain territory without interference by defendant, the stipulation

that plaintiff should pay five cents as damages for each gallon of milk which he failed to furnish was for liquidated damages.

Appeal from Superior Court, Allen County; E. O'Rourke, Judge.

Action by Henry E. and Gottlieb A. Brudi against the Mondamin Meadows Dairy Company and another. Judgment for plaintiffs against defendant corporation, and it appealed to the Appellate Court. Transferred to the Supreme Court under section 1337u, Burns' Ann. St. 1901. Reversed.

Ellison & Keegan and Barrett & Morris, for appellant. Robertson & O'Rourke, for appellees.

JORDAN, J. The record in this appeal discloses that two cases, numbered, respectively, 7,402 and 7,403, commenced by appellees, Henry E. and Gottlieb A. Brudi, against appellant herein and one Thomas E. Ellison, were consolidated in the lower court, and treated as a single case. On the issues joined upon the pleadings of the parties there was a trial before a jury, and a verdict for \$700 returned in favor of appellees against both of the aforesaid defendants. Along with their general verdict, the jury returned answers to numerous interrogatories propounded. Subsequently, on the separate motion of the defendant Ellison, he was granted a new trial, and thereafter appellees dismissed the cause of action as to him, and judgment was rendered against them in his favor for costs.

The complaint in cause No. 7,402 consists of two paragraphs, numbered 1 and 2. The complaint in cause No. 7,403 is in one paragraph. As the two cases, after their consolidation, appear to have been treated by the trial court and tried as a single case, we will therefore in this appeal treat each paragraph of the two complaints as separate paragraphs of a single pleading, and for that purpose we will consider them in the above order as paragraphs 1, 2, and 3 of the complaint.

The first paragraph declares upon a written contract, a copy of which, it is alleged, is filed with the complaint, marked "Exhibit A." The plaintiffs in this paragraph seek to recover damages for a breach or violation of this contract. It is alleged therein that the defendant, appellant herein, is a corporation operating and doing business in the city of Ft. Wayne, Allen county, Ind. That it is engaged in dealing in milk and in manufacturing dairy products for sale. On July 9, 1900, the plaintiffs were then, and for some years prior thereto had been partners in the milk and dairy business at the town of New Haven, in said Allen county, and were engaged in selling milk and dairy products in said town and in the city of Ft. Wayne. On the date last mentioned they entered into a written contract with the defendant Thomas E. Ellison, who at said time was engaged

¶ 3. See Damages, vol. 15, Cent. Dig. § 156.

in the milk and ice cream business, and was about to organize a corporation to be known as the Mondamin Meadows Dairy Company, to which he proposed to assign all of his rights in and to the said contract. Said company, when incorporated, was to assume all liabilities of said Ellison under the contract, and it was agreed and stipulated therein that the plaintiffs should sell and deliver to the defendant Ellison the property, machinery, and goods used by them in the dairy business, together with the good will of said business. And it was further agreed that they should furnish to the said company, at its depot in Ft. Wayne, 1,000 pounds of good, pure, sweet milk every day for the period of five years, for which the defendants were to pay 12 cents per gallon. Each gallon of said milk was to weigh 8.6 pounds, and was to contain 4 per cent. butter fat. It was provided that, if a greater or less percentage of butter fat than 4 per cent. was contained in each gallon of milk, the price was to be increased or decreased accordingly, etc. It was stipulated that Ellison and the said company should not buy of any other person in the neighborhood in the townships of Adams and Jefferson and north of New Haven, where the plaintiffs were buying or expected to buy milk, and that the plaintiffs were to buy east, north, and south of New Haven, and that said defendants should only buy of dairymen or milkmen west of the Hartzell Road. It is averred that under said contract plaintiffs did deliver to the defendants "*an average of 1,000 pounds of good, pure, and sweet milk every day*, except when prevented from so doing by the act of said defendants in entering upon the territory so assigned to plaintiffs and buying large quantities of milk from persons from whom plaintiffs expected and intended to purchase milk for such delivery, until the ——— day of December, 1901," at which time defendants refused to carry out said contract, or to pay plaintiffs for milk so sold and delivered to them. (Our italics.) It is further alleged that the plaintiffs during said time sold and delivered to the defendants a certain mentioned number of gallons of pure, sweet milk of the value of \$6,796, for which they had received payment, except \$822.32, which amount the defendants, it is alleged, have refused to pay. It is further disclosed that the average of 4 per cent. of butter fat was maintained by the plaintiffs, but the defendants never gave them any credit for any excess over 4 per cent., although there was frequently an excess over such per cent. The paragraph demands judgment for \$1,000. With some exceptions, it may be said that this paragraph substantially sets out the terms, provisions, and conditions of the contract upon which it is based.

The second paragraph of the complaint is in the nature of a common count for goods

sold and delivered. A bill of particulars is filed with this paragraph.

The third paragraph of complaint is founded on the same contract set up in the first paragraph, and charges, among other things, as a breach thereof, that the defendants wrongfully violated said contract by entering into particular territory and purchasing milk therein, which, under the terms and stipulations of the contract, they were forbidden to do, and thereby it is alleged they prevented plaintiffs from furnishing each day the required amount of milk as provided by the contract, etc.

The appellant unsuccessfully moved the court to require the plaintiffs to make their complaint more specific. A demurrer by the company to each paragraph of the complaint was overruled, and proper exceptions reserved. It answered the complaint in three paragraphs—denial, payment, and estoppel—and also filed a cross-complaint, whereby it sought to recover damages against the plaintiffs for alleged breaches of the contract. Among those specified and relied upon in the cross-complaint was the failure of plaintiffs each day to furnish to appellant 1,000 pounds of pure, sweet milk, as required by the contract. The deficit each day in the number of gallons is shown to have aggregated between August 15, 1900, and May 11, 1901, 6,550.6 gallons, for which it is alleged plaintiffs, under the contract, agreed to pay as liquidated damages 5 cents per gallon.

Among the errors assigned and argued by appellant for a reversal are (1) that the court erred in overruling its demurrer to the first paragraph of the complaint; (2) denying its motion to make the complaint more specific; (3) overruling its motion for a new trial.

It is insisted with much force and earnestness by appellant's counsel that the first paragraph of the complaint is insufficient to withstand a demurrer, for the reason that it failed either to allege generally that the plaintiffs had performed all of the conditions of the contract in question on their part, as authorized by section 373, Burns' Ann. St. 1901, or to show such performance on their part by specific facts stated in the pleading. That the plaintiffs were required to conform to this rule of pleading in order to render their complaint sufficient upon the contract upon which it is based in the absence of disclosing a sufficient excuse for their nonperformance is a well-settled proposition. *Home Ins. Co. v. Duke*, 43 Ind. 418; *Bertelson v. Bower*, 81 Ind. 512; *Board, etc., v. Hill*, 115 Ind. 316, 16 N. E. 156, and cases there cited; *Collins v. Amiss*, 150 Ind. 593, 65 N. E. 906, and authorities there cited; *Watson v. Deeds*, 3 Ind. App. 75, 29 N. E. 151; *Louisville, etc., Ry. Co. v. Widman*, 10 Ind. App. 92, 37 N. E. 554. It will be observed that under the averments of the pleading in question there is an entire ab-

sence of any showing that plaintiffs, during the time in which they were not prevented by the acts of the defendants, delivered each day the stipulated number of pounds of good, pure, and sweet milk; but, on the contrary, it is expressly disclosed that they did not comply at least with this positive stipulation of the contract. For aught appearing, they may have on one day delivered 500 pounds of milk, and on the next succeeding day delivered 1,500 pounds, in the aggregate 2,000 pounds for the two days, thereby making an average delivery of 1,000 pounds for each day; but delivery each day on their part of an unequal number of pounds, so as to make a daily average of 1,000 pounds, certainly cannot be said to be a compliance with their agreement under the contract. It follows, therefore, that the failure of the paragraph to conform to the rule of pleading which we have stated renders it insufficient, and the demurrer thereto should have been sustained.

It is next insisted by counsel for appellant that the court erred in denying their motion to make the complaint more specific. This alleged error, however, is not properly before us for consideration, for the reason that neither the motion, nor the ruling thereon, nor the exception to such ruling has been made a part of the record by a bill of exceptions or order of court. Under our law of civil procedure then in force, this was essential. *Board, etc., v. Hill*, 115 Ind. 316, 16 N. E. 156.

The contract in suit contains the following provisions and stipulations: "It is therefore agreed that said parties [referring to appellees herein] are to furnish said company [appellant herein] at its depot in Fort Wayne, 1,000 pounds of good, pure, and sweet milk every day for the period of five years, for which they are to receive the sum of twelve cents per gallon. * * * It is also agreed that if after the 15th day of August next said Brudis [appellees] fail to deliver said stated quantity of 1,000 pounds of milk per day for a period of three successive days they are to pay as damages for such failure five cents for each gallon they fail to furnish." The court, by its instructions, appears to have, in effect, submitted to the jury the interpretation of the above provisions or stipulations of the contract in question. By so doing the court undoubtedly erred. It is the exclusive province of the court to interpret or construe the provisions of a written contract involved in an action. *Manufacturing Co. v. Farquar*, 8 Blackf. 89; *Comer v. Himes*, 49 Ind. 482; *Robbins v. Spencer*, 121 Ind. 594, 22 N. E. 660. The question as to the breach of the contract by the failure of appellees thereunder to deliver daily the prescribed number of pounds of milk of course was a matter of fact for the determination of the jury. As to whether the agreement in the instrument to pay five cents as damages for each gallon of milk

which they failed to furnish, when considered in connection with the entire provisions of the contract, should be construed or held to be either a penalty or liquidated damages, was purely a question for the decision of the court. While the employment of the term "liquidated damages" in a contract in such cases as this may be said to more fully manifest or emphasize the intention of the parties, still the term is not an indispensable test, for if, from a consideration of the particular provision, in connection with other parts of the written instrument, it is disclosed that the parties intended by their agreement to liquidate the damages, such effect will be given the agreement, although they have not expressly declared that the sum or rate stated was fixed or agreed upon as liquidated damages. An agreement in a contract in relation to damages in the future, like all other provisions of a written instrument, is to be so construed as to carry out the intent of the parties. An agreement or declaration, however, that the sum fixed is or shall be considered as liquidated damages, is not, as the authorities assert, conclusive upon a court in determining whether the amount so fixed was intended by the parties to be a penalty or liquidated damages. The rule generally affirmed by the authorities is that, where it is agreed by the parties that the sum or rate fixed in a contract shall be liquidated damages, and the case is one in which they are at liberty to so agree, such an agreement must stand and control, unless it is inconsistent with other parts of the contract, or is unreasonable or unconscionable, in view of the probable damages which may flow from a breach of such a contract. The contract in suit certainly presents a case in which the parties had the right by agreement to fix, within reasonable limits, the damages for a nondelivery of the milk. It appears that appellant was engaged in serving each day numerous patrons with milk, ice cream, and other milk products. Under the contract in question it was confined in its purchase of milk from persons other than appellees to certain prescribed territory. Under such circumstances, to say the least, the actual damages which it might sustain by reason of appellees' failure to furnish each day the number of pounds of milk as stipulated were uncertain, and not susceptible of being measured by any exact standard. It will be observed that the sum fixed by the parties was for the failure of appellees to perform a particular act agreed to be performed by them, and appellant was to be compensated in damages for a breach of such performance by a payment of the stipulated rate as to each gallon of milk which they failed to furnish or deliver. In the interpretation of contracts like the one here involved, wherein the parties by agreement have fixed the damages which may arise in the future by reason of a breach thereof, and the sum or rate so declared or

fixed is not disproportioned to the loss which may result from such breach, and the damages cannot be ascertained or measured by any exact pecuniary standard, then the sum or rate stipulated or fixed in the contract will be deemed as having been intended by the parties as liquidated damages. This is the rule affirmed and sustained by our own decisions and by many other authorities. In support of this rule and other principles asserted in this opinion, see *Jaqua v. Headington*, 114 Ind. 309, 16 N. E. 527, and cases there cited; *Bird v. St. John's, etc., Church*, 154 Ind. 138, 58 N. E. 129, and cases there cited; *Williams v. Vance*, 9 S. C. 344, 30 Am. Rep. 28, and the numerous authorities collected in the footnote to the latter report; *Jones v. Binford*, 74 Me. 439; 13 Cyc. pp. 93, 102; *Morris v. Willson*, 114 Fed. 74, 52 C. C. A. 22; *Harris v. Miller* (C. C.) 11 Fed. 118. In *McCormick v. Mitchell*, 57 Ind. 248, a party contracted to pay a certain sum of money on his failure to deliver certain hogs at a time and place specified. It was held in that case that the sum named or fixed was liquidated damages. When tested by the rules or principles affirmed and enforced by the authorities herein cited, we can perceive no reason why the agreement as to damages in the contract in this case should not be construed and held to have been intended by the parties as liquidated damages. When the damages in a case have been liquidated by the parties, it is neither necessary to allege nor prove any actual damages, because the sum or rate stipulated or fixed by them is, under such circumstances, to be taken and held as the measure of the damages. *Stanley v. Montgomery*, 102 Ind. 102, 26 N. E. 213; *Spicer v. Hoop*, 51 Ind. 385; *Jaqua v. Headington*, supra.

For the errors stated, the judgment is reversed, and the cause remanded, with instructions to the lower court to grant appellant a new trial, and to sustain the demurrer to the first paragraph of the complaint, and for further proceedings not inconsistent with this opinion.

CHICAGO TERMINAL TRANSFER CO. v. WALTON. (No. 20,347.)¹

(Supreme Court of Indiana. Dec. 14, 1904.)

APPEAL — BRIEF — PREPARATION — WAIVER OF OBJECTIONS — ASSIGNMENTS OF ERROR — RULING ON PLEADINGS — NEW TRIAL — INSTRUCTIONS — WEIGHT OF EVIDENCE.

1. Where, on appeal, it was assigned that the court erred in overruling appellant's demurrer to the first and second paragraphs of the complaint, but appellant failed to set forth in its brief a copy of the second paragraph of said complaint, or the substance thereof, and the demurrer, as required by clause 5 of rule 22 of the Supreme Court (55 N. E. vi), the assignments were waived.

2. The assignment that the court erred in overruling appellant's motion for a new trial was waived where the causes assigned for new trial were not set out, or a succinct statement

thereof made, in appellant's brief, as required by Sup. Ct. Rule 22, cl. 5 (55 N. E. vi).

3. On appeal all questions relative to instructions given and offered were waived where neither the language nor a succinct statement thereof was set forth in appellant's brief, as required by Sup. Ct. Rule 22, cl. 5 (55 N. E. vi).

4. Appellant was not in a position to question whether the verdict was sustained by the evidence, or contrary to the law, where he failed to comply with the requirement of Sup. Ct. Rule 22, cl. 5 (55 N. E. vi), that the brief "shall contain a condensed recital of the evidence in narrative form so as to present the substance clearly and concisely."

Appeal from Superior Court, Lake County; H. B. Tuthill, Judge.

Action by John W. Walton against the Chicago Terminal Transfer Company. From a judgment for plaintiff, defendant appeals. Transferred from the Appellate Court under section 1837u, Burns' Ann. St. 1901; Acts 1901, p. 590, c. 259. Appeal dismissed.

Jesse B. Barton and Jno. B. Peterson, for appellant. Crumpacker & Moran, for appellee.

MONKS, J. This action was brought by appellee to recover damages for personal injuries received by his infant son through the alleged negligence of appellant. A trial of said cause resulted in a verdict, and, over a motion for a new trial, a judgment in favor of appellee. The errors assigned are: (1) The court erred in overruling appellant's demurrer to appellee's first paragraph of amended complaint; (2) that the court erred in overruling appellant's demurrer to the second paragraph of appellee's amended complaint; (3) that the court erred in overruling appellant's motion for a new trial of said cause.

Appellee insists that appellant has failed to comply with the requirements of rule 22 (55 N. E. v) in the preparation of its brief. Appellant has failed to set forth in its brief a copy of the second paragraph of the amended complaint, or the substance or a succinct statement thereof, and the demurrer thereto, as required by clause 5 of rule 22 of this court. For this reason the first and second assignments of error are waived. *Perry, etc., Co. v. Willson*, 160 Ind. 435, 437, 438, 67 N. E. 183; *Webster v. Major* (Ind. App.) 71 N. E. 176, 177. The causes assigned for a new trial are not set out or a succinct statement thereof stated in appellant's brief, as required by said rule, for which reason they are waived. *Perry, etc., Co. v. Willson*, 160 Ind. 437, 438, 67 N. E. 183; *City of South Bend v. Turner* (Ind. Sup.) 71 N. E. 637, 638; *Nurrenbern v. Daniels* (Ind. Sup.) 71 N. E. 889, 890.

All questions relative to the instructions given and offered are waived for the further reason that neither the language nor a succinct statement thereof is set forth in appellant's brief, as required by clause 5 of rule 22 (55 N. E. vi). *Lake Erie, etc., R. Co. v. McFall* (this term) 72 N. E. 552; *Penn Ma-*

¹See 74 N. E. 988. Rehearing denied, 74 N. E. 1090.

tual Life Ins. Co. v. Norcross (Ind. Sup.) 72 N. E. 132, 138; Cleveland, etc., R. Co. v. Stewart, 161 Ind. 242, 248, 68 N. E. 170; Barricklow v. Stewart (Ind. Sup.) 72 N. E. 128, 130; City of South Bend v. Turner (Ind. Sup.) 71 N. E. 657, 658; Nurrenbern v. Daniels (Ind. Sup.) 71 N. E. 889, 890. Moreover, even if the causes for a new trial, or a succinct statement thereof, were set out in appellant's brief, appellant is not in a position to ask the decision of the question whether the verdict is sustained by the evidence or is contrary to the law on account of its failure to comply with the requirements of clause 5 of rule 22 of this court, which requires that the brief "shall contain a condensed recital of the evidence in narrative form so as to present the substance clearly and concisely." Conner v. Andrews, etc., Co., 162 Ind. 338, 70 N. E. 376; Pittsburg, etc., R. Co. v. Wilson, 161 Ind. 701, 703, 704, 66 N. E. 899; Security, etc., Association v. Lee, 160 Ind. 249, 66 N. E. 745; Boseker v. Chamberlain, 160 Ind. 114, 118, 66 N. E. 448; Indiana, etc., R. Co. v. Ditto, 158 Ind. 669, 64 N. E. 222; Lake Erie, etc., R. Co. v. Shelley (Ind. Sup.) 71 N. E. 151, 155; Groves v. Hobbs, 32 Ind. App. 532, 70 N. E. 279; City of South Bend v. Turner (Ind. Sup.) 71 N. E. 657, 658; Nurrenbern v. Daniels (Ind. Sup.) 71 N. E. 889, 890. It has been uniformly held by this court that said rule requires that the brief be so prepared that all questions presented by the assignment of errors can be determined by an examination of the briefs without looking to the record, and that to the extent said rule is not complied with the same will be considered waived. Lake Erie, etc., R. Co. v. Shelley (Ind. Sup.) 71 N. E. 151, 155, and cases cited; Wolverton v. Wolverton (Ind. Sup.) 71 N. E. 124, 125. See, also, Glinn v. State, 161 Ind. 292, 294, 68 N. E. 294.

The appeal is therefore dismissed.

(35 Ind. App. 142)

TOLEDO, ST. L. & W. R. CO. v. BOND.
(No. 4,970).*

(Appellate Court of Indiana, Division No. 1
Dec. 7, 1904.)

MASTER AND SERVANT—INJURIES TO SERVANT—
RAILROADS—BELT LINES—STATUTES—AP-
PLICATION—SWITCH LIGHTS—PLEADING.

1. Where a brakeman was injured because of a misplaced switch, and alleged negligence in defendant's failure to provide the switch stand with a signal light, but for which omission the injury might have been averted, notwithstanding the other conditions of the switching appliances, the complaint should not be regarded as stating a common-law liability, but as proceeding under Burns' Ann. St. 1901, § 5173a et seq., requiring every steam railroad operating within the state to place and maintain on each switch a signal light, so attached that it will indicate safety when the switch is set to the main track, and danger when it is otherwise set, etc.

2. A belt line railroad, maintained in a city by two connecting through railroad lines, for the purpose of affording better facilities for receiving and transferring freight from one line

to the other, and from various manufacturing establishments located on such belt line, from which switches were constructed, was a steam railroad operated within the state, within Burns' Ann. St. 1901, § 5173a et seq., requiring switches on such railroads to be indicated by a signal light, so attached as to indicate safety when the switch is closed, and danger when open, and requiring such light to be kept burning at night and on dark and foggy days.

Appeal from Superior Court, Madison County; H. C. Ryan, Judge.

Action by Luther Bond against the Toledo, St. Louis & Western Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Braden Clark and Charles A. Schmettan, for appellant. St. John & Charles, for appellee.

BLACK, J. The action of the appellee was commenced in the Grant circuit court, from which there was a change of venue to the court below. The overruling of the appellant's motion for a new trial is assigned as error. In the complaint it was alleged that the appellant (spoken of in the testimony as the "Clover Leaf") and the Pittsburgh, Cincinnati & St. Louis Railway Company (spoken of in the testimony as the "Pan Handle") owned, controlled, maintained, and operated for their mutual benefit in the city of Marion, Grant county, and in the vicinity of that city, a main steam railway track, and certain switches and side tracks connected thereto, which main track was commonly known in that vicinity as the "Belt Road," and, amongst other purposes, was operated by those companies for transferring cars, locomotives, and trains from the main or trunk lines of one of them to those of the other; that connected with the Belt Road were two switches or side tracks, the south one of which was used for the storage of freight cars and other cars set thereon by the Pan Handle, and the north one of which was used for the storage of freight cars and other cars set thereon by the appellant; that the cars were so set on switches respectively by the employees of the respective companies, known as a yard or switch crew; that on and prior to February 1, 1902, the yard or switch crew of the appellant consisted of five employees, the conductor, the engineer, the fireman, and appellee and another person as brakemen; that there were on the south side track, so connected with the Belt Road, about 15 cars of freight, all standing together, on which the brakes were set, so that, without releasing the brakes, the cars could only be moved by a violent force coming in contact therewith; that the end of this line of cars was within 60 or 70 feet from the point where the south switch was joined to the main track of the Belt Road; that on that day misting snow was falling, and the day was very dark and cloudy, and objects, unless of large size and very bright, could not be seen at a distance of 150 or 200 feet from an observer, especially by a trainman

*Rehearing denied. Transfer to Supreme Court denied.

standing on the top of a train of cars moving at a high rate of speed; that on and prior to that day the south side track was connected with the main track of the Belt Road by means of a switching device operated by means of a long lever, which lay close to the ground or roadbed of the main track, and connected with the moving panel of the switch, the lever being used to throw the moving panel from the main track to the side track, and back again, in setting cars on or removing them from the side track; that when the moving panel was set to the side track it would cause the cars on the main track to go on the side track, and, when set to the main track, cars would pass without going on the side track; that on and prior to that day this switch was not connected with any upright target, or with any signals to designate when the moving panel was set to or from the side track, nor was there on that day placed or maintained upon this switch, thus connected with the main track, any signal light attached in such a manner to the moving panel of the switch that it would indicate safety when the switch was set to the main track and danger when it was not set to the main track, nor was any signal light whatever kept burning at the switch between the hours of sunset and sunrise or on dark or foggy days, and there was no other means of ascertaining how the switch was set, except by the position of the lever, which lay close to the ground, and by the ends of the rails of the moving panel, either of which could be seen only at a very short distance; that on and prior to that day there was no lock on the lever, or any other means of securely fastening the moving panel, but any person passing along the main track could move the panel by turning the lever, thus moving the panel to and from the main track of the Belt Road; that the appellant on that day, and for a long time prior thereto, had full knowledge of the foregoing facts and of the condition of the switch, but it knowingly, carelessly, negligently, and willfully permitted and allowed the switch, side track, and switching device to be and remain in such unsafe, imperfect, and unlawful condition, and knowingly, carelessly, negligently, and willfully failed to provide the switch or switch track, moving panel, and switching device with any signal light, signal, target, or other signal whatever, either in the day or night time; that this switch, side track and switching device, at the time mentioned, was extremely dangerous and unsafe for the employes of the appellant and other persons riding on cars along the main track at that point; that on the day mentioned the switch or yard crew of the appellant, consisting of the persons before mentioned, was engaged in part in transferring and moving cars along the main track of the Belt Road, and, while so engaged, they started at the main or trunk line of the appellant, north on the main

track of the Belt Road, with an engine and eight freight cars, the engine being toward the south and the cars to the north, the north car being a large refrigerator box car; that the train, consisting of the engine and eight cars, was at the time and during all that day in the charge of a person named, as conductor thereof, and was run backward on the main track of the Belt Road, toward the north, at a high and dangerous rate of speed, from 15 to 18 miles per hour, and was moving at that speed when it approached and came up to the said south switch; that the appellee at that time was on top of said refrigerator box car, he being then an employe of the appellant, and being properly at that place in the discharge of his duty as brakeman; that at that time the moving panel of said south switch was so set as to throw cars moving northward, on the main track, upon the side track and against the cars which were standing thereon; that appellee did not and could not see the condition of the switch or the position of the moving panel until the box car on which he was standing was within a short distance of the switch, to wit, 30 or 40 feet; that as soon as he saw the condition of the switch, and that it was set to the side track he attempted to signal the conductor or engineer of the train to stop it, but no one responded to the signal; that if such signal had been seen and acted upon it would have been impossible to stop or materially to check the speed of the train before it collided with the cars standing on the side track; that, had the switch, moving panel, or side track been provided with signal lights attached thereto in such manner as to indicate danger when the switch was not set to the main track, the signal lights could have been seen in time so that the train could have been stopped, or so checked as to have avoided a collision with the cars standing on the side track; that by reason of the moving panel being set to the side track, and not to the main track, the train, with the appellee on the front car, was thrown from the main track upon the side track and violently collided with the 15 cars so standing thereon, with such force as to crush the car on which he was standing, and to break in two the car immediately following it, and if appellee had remained on the box car he would have been in great danger of being fatally injured, and he so believed at the time; that from the time he first observed that the switch had been so thrown, to the time of the collision, the only means he had of getting from the box car, or of escaping from the threatened danger, was to jump from the top of the car to the ground, and he could not have remained on top of the car when the collision occurred; that he believed at the time that the only way to escape from the threatened danger to his life was to jump from the car, and acting upon that belief, when the box car was within five or ten feet from

the cars on the side track, while the train was moving at said high speed, he jumped from the top of the box car to the frozen ground on the side of the track, and by reason thereof both of his ankles and the bones thereof were broken off at the ankle joint, etc., the nature and extent of his injury and expenses being stated; that the injury was the direct and proximate result of the negligence of the appellant, as above set out, in so maintaining said switch, side track, moving panel, and switching device in the manner above set out, and said negligence was the proximate cause of the injury, etc., stating the amount in which he had been damaged, and demanding judgment therefor.

The theory on which the pleader intended to proceed is not as manifest as seems desirable. For application of the closing averments respecting negligence, it is necessary to revert to the former averments, where we find the condition of the switching appliances fully described, and characterized as negligently so maintained. The cause of the injury was the unsignaled open switch with the stationary cars standing on the side track, and the rapid speed of the train on which the appellee was employed. It is not alleged that the appellant caused the switch to be opened or left open, or had any knowledge or notice of its being open, or that it was open because of the want of a lock, target, or signal light; nor is any negligence attributed because of the presence of the freight cars upon the side track, or because of the speed of the train. It is not shown that if there had been a lock or a target or a signal light the moving panel would not have been in the dangerous position, nor does it appear that if there had been a lock or a target the appellee would have had knowledge therefrom of the dangerous position of the moving panel. It is not alleged that the appellee did not know that the switching appliance was not provided with a lock or a target or a signal light. It is alleged that by reason of the moving panel being set to the side track, and not the main track, the train was thrown upon the side track and violently collided with the cars standing thereon; and, if we except what is said with reference to signal lights, it is not shown that any or all the negligent acts or omissions alleged caused the existence of the conditions which brought about the injury. While it is not alleged that the appellee did not have knowledge of the general structure or condition of the switching appliances as described, it does appear that he did not know that the switch was open or that the moving panel was in a dangerous position. This dangerous condition he discovered too late, under the circumstances, to escape the injury caused thereby; and it is alleged that had the switch, moving panel, or side track been provided with signal lights attached thereto in such a manner as to indicate danger when the switch was not set to the main track, the signal

lights could have been seen in time so that the train could have been stopped, or so checked as to have avoided a collision with the cars standing on the main track; and that, from the time he first observed that the switch had been thrown to the time of the collision, the only means of escape was to jump from the car. Thus it appears that the failure to provide the switching appliance with a signal light is charged to have been an omission but for which the injury might have been averted, notwithstanding the condition otherwise of the switching appliances.

So we are of the opinion that the complaint should be regarded as one proceeding, not as at common law, but under the statute of May 15, 1901 (Acts 1901, p. 160, c. 99; section 5173a et seq., Burns' Ann. St. 1901). It is provided by the first section of that statute: "That every steam railroad company operating wholly or partly in the state of Indiana, shall place and maintain upon each switch in said state that is connected with the main track, a signal light attached in such manner to the moving panel of such switch that it will indicate safety when such switch is set to such main track, and that it will indicate danger when such switch is not set to the main track. Said light shall be kept brightly burning constantly between the hours of sunset and sunrise, and on such days or parts of days as are dark or foggy." Section 3 is as follows: "That for any violation or failure to comply with any of the provisions of this act, such company shall be liable to all persons and employes injured by reason thereof, and no employes shall in any case be held to have assumed the risk incurred by reason of such violation or failure."

The controlling matter agitated in the discussion of the evidence is the question whether or not the railroad designated in the complaint as the "Belt Road" was such a main track as is contemplated by this statute. The railroad designated on a plat introduced by the appellant as the "Semi-Belt" was situated about four miles from the railroad station of the appellant at the city of Marion, Grant county. It extended north and south $2\frac{1}{2}$ miles, between the main or trunk line of the Panhandle Company and that of the appellant, and it was owned and operated by both of these companies for their mutual benefit. It was used as a connecting or transfer track between the railroads of these companies, for the exchange or transfer of cars from one road to the other, and for reaching various manufacturing establishments not located on the trunk line of either of the companies, but situated in the vicinity of the Belt Road, and reached by switches and side tracks connecting with it. Sometimes freight trains and passenger trains were run in upon it to permit the passing of other trains on the trunk lines, and sometimes, in case of a wreck on the road of either company, it was used for the passage of trains from the road of one company to and upon that of the oth-

er in detouring for the purpose of avoiding the blockade so caused, but no regular passenger or freight trains were run over it on schedule time. Cars were sometimes stored on it near its ends, for a short time, in cases of emergency. There were no depots or telegraph stations on the Belt Road. It and its side tracks were maintained by a separate section crew, which had no business on the trunk lines of the companies. Among the uses of the side tracks connected with the Belt Road was the storage of cars, and the main track of the Belt Road was kept open by the companies, except in cases of emergency. Trains upon the Belt Road were not subject to the orders of the train dispatchers of the companies by whom the traffic on the trunk lines was regulated. The yard crews worked only in daytime, and sometimes at night a regular train of the Pan Handle Company would run from its road over the Belt Road to deliver cars, and sometimes at night an engine of the appellant with cars attached, to be delivered to connecting lines, would run on the Belt Road. There was telephone connection by means of which the division superintendent had communicated with a witness engaged at the Belt Road. The Belt Road was not kept up to the same standard as the main or trunk line of the appellant. There were four switches connecting as many side tracks with the Belt Road. The first one north of the appellant's trunk line was known as the "South Switch," and was used by the Pan Handle Company for storing cars. The switching crews of the appellant had no business of this side track, but delivered their cars to the Pan Handle Company on a side track further north, known as the "Old Rolling Mill Switch." At the time of the appellee's injury, the switches leading from the main trunk or trunk lines of the appellant and the Pan Handle Company to the Belt Road were equipped with targets, locks, and switch lights, but those leading from the Belt Road to its four side tracks, including the "South Switch," were not so equipped. The appellee was an experienced railroad employé. When injured, February 1, 1902, he had been in the employment of the appellant 10 days, working in the Marion yards and over the Belt track. Some years before he had worked for the Pan Handle Company with switching crews on the Belt track, at which time none of the switches leading therefrom to the four side tracks had targets, locks, or lights, and they were still in the same condition as when he had worked for the Pan Handle Company. When injured he was employed as a brakeman or switchman in the appellant's crew, consisting of a conductor, an engineer, a fireman, and two brakemen. He and the other members of the crew were engaged in transferring eight freight cars from the main line of the appellant, northward, over the Belt Road to the second side track, in front of the engine by which they were moved. The train was in

charge of the conductor, who gave orders to the other members of the crew, directing what they should do. The speed of the train was regulated by the engineer. The appellee was standing upon the top of the forward car, a large refrigerator box car, the one farthest from the engine. The cars were to be stored on the second side track, to reach which the train would pass the "South Switch." The train was moving at the rate of 18 or 20 miles an hour. It was the duty of the appellee to give signals to the engineer if there were obstructions on the track. It was a dark and gloomy day, and it was snowing—fine snow, falling fast. When within 35 feet of the south switch he observed that it was open, or set for running upon the side track, upon which a number of cars were standing. As quickly as he could do so, he signaled the engineer to stop. The signal was not obeyed, but the train could not then have been prevented from running upon the side track and against the cars standing thereon. When the car on which he was standing was within six feet of the stationary cars he jumped to the ground to save himself, and received the injury for which he sought damages. No lights or signals of any kind were at the open switch, and he had no means of ascertaining whether it was open or closed, except the ends of the rails or the lever which was lying close to the ground between the ties, which indications could be seen only at a short distance.

Within comparatively recent years, accompanying the great development of commerce, and the increasing number of manufacturing industries, and the multiplying of lines of railways extending through the country and connecting its cities and towns with each other, there have been constructed, in or near many prospering cities at which two or more through lines touch, other and local railways, often, if not commonly, known as "belt railroads," which furnish convenient means of transfer from one through line to another or others, and also furnish opportunity for the location of manufacturing establishments needing railway facilities, and making it convenient for them to exist in the neighborhood of such cities without bordering upon such through lines of railway. Sometimes such belt railroads are constructed and maintained by independent corporations, wholly distinct as to ownership from the through lines connected therewith. In the case before us, the Belt Road is owned and operated by the two railroad companies which separately own and operate the two through lines connected by it. It is not a part of one of such through lines more than of the other. It is under ownership different from that of either of the two through lines, and is maintained by a distinct set of employés. Its main track cannot be said to be merely a part of the main track of either of the companies considered separately, yet it is a steam railroad having a main track and side tracks con-

nected with it by switches. As to each of the companies separately considered, it serves as a branch railroad leading to the railroad of another company. It is not merely a track in a switchyard of a railroad company. With reference to such side tracks and switches along the Belt Road, the track with which they all connect is the main track. One of the purposes of the statute in question is plainly indicated by its language to be the protection of railroad employes, using the main track, from injury through want of notice of the condition for the time being of the switches connecting side tracks. Looking to the character and uses of the Belt Road here involved, and the circumstances of the appellee's injury, we cannot but regard the main track of the Belt Road as included in the broad meaning necessarily attributable in order to accomplish the remedial purpose of the statute.

We see nothing on which to base a serious question in this court as to contributory negligence.

Judgment affirmed.

(34 Ind. App. 194)

SMITH et al. v. TAYLOR et al. (No. 5,145.)
(Appellate Court of Indiana, Division No. 1.
Dec. 6, 1904.)

**TRUST DEED—DEBTS PAYABLE—CONSTRUCTION
—JUSTICE OF THE PEACE—JURISDICTION.**

1. Where the only express provision in a trust deed requiring the trustees to pay the grantor's debts applied to debts contracted by the grantor prior to the execution of the deed, a subsequent part of the deed directing the trustees to convert the remaining part of the grantor's estate into cash, and distribute it after having paid "all the debts and funeral expenses" of the grantor, does not broaden the express provision as to what debts of the grantor the trustees shall pay, so as to entitle a creditor of the grantor, whose debt was contracted subsequent to the execution of the deed, to enforce his claim against the trust estate; the trust deed having been duly recorded prior to contracting the debt.

2. A suit to enforce payment of a debt contracted by the debtor subsequent to his having conveyed his property in trust for the payment only of debts of the grantor previously contracted is not within the jurisdiction of a justice of the peace.

Appeal from Circuit Court, Huntington County; J. T. Cox, Judge pro tem.

Suit by Enos T. Taylor and others against Firman D. Smith and others. From a judgment for plaintiffs, defendants appeal. Transferred from the Supreme Court under the act of March 12, 1901 (Acts 1901, p. 565, c. 247). Reversed.

Cline, Eberhart & Cline, for appellants.
Spencer & Branyan, for appellees.

ROBINSON, P. J. On July 12, 1897, Nathan Smith and wife conveyed and warranted to appellants, as trustees, certain described lands, the conveyance reciting that it is made upon the express condition that the grantees shall take charge of the land and

cultivate and manage the same for the benefit of the grantors, to provide their father, Nathan Smith, with a "comfortable living from the farm by furnishing him with suitable food and clothing and the best of nursing and medical treatment in case of sickness for and during his natural lifetime; and pay all taxes on the said land and keep the same in a productive condition; the said trustees are also to pay all the debts of said Nathan Smith as heretofore contracted by him and if it shall become necessary and the rents and proceeds of said land are not sufficient to provide means to carry out the above conditions and pay all debts as herein contemplated then the said trustees shall execute a mortgage on said real estate to secure such means or if they shall deem it best they may sell a portion of said real estate to procure the means to carry out this trust and execute a deed for such part as they may sell. The further conditions of this conveyance are that after the death of the said Nathan Smith the said trustees shall provide for and pay to his said wife, Mary J. Smith, the sum of \$30.00 annually for each year she shall live after the death of her said husband and such annual payments shall be a lien upon said real estate until paid and the further conditions of this conveyance are that the said trustees having fulfilled all the above conditions and having paid all the debts and funeral expenses of said Nathan Smith and after the death of said Mary J. Smith then the said trustees shall sell, convey said real estate or such part as remains unsold and convert the same into cash and shall then and there distribute the same" to the children of Nathan Smith in a manner designated, each of the trustees receiving an equal portion with the other children; that the trustees shall not be required to make an inventory or appraisement of the land, or give bond, but the estate settled out of court. The deed was acknowledged on July 27, 1897, and recorded September 3, 1897.

Appellees' complaint avers that on November 9, 1897, Nathan Smith and one A. D. White executed a note promising to pay appellees a certain sum one year after date, that the promise to pay was the several promise of Smith as well as jointly with White, and that White then was, and ever since has been, insolvent; that the note is due and unpaid. The execution of the deed of trust is averred, and that the trustees (appellants) accepted the trust, and proceeded to execute the provisions of the same up to the time of the death of Nathan Smith, in March, 1898, he leaving no property to be administered; that the trustees provided for the payment of the annuity to the wife, and paid the funeral expenses "and other debts of the grantor, except the note herein mentioned, which upon request" by appellees, before the commencement of this suit, they refused and still refuse to pay; that since the death of the grantor the trustees, by

agreement with the surviving wife, she joining therein, sold and conveyed the land for a named sum cash paid to the trustees; that after paying funeral expenses and all debts of grantor except the note in suit the balance was distributed to the beneficiaries named in the deed, with full knowledge that the note held by appellees was unpaid. It is further averred that appellants still hold proceeds of the trust in excess of the amount due appellees on the note, which they have converted to their own use, and which, though requested, they refuse to apply on the note. The note and deed are made exhibits.

As the note was executed after the execution and recording of the deed, the sufficiency of the complaint against the demurrer depends upon the construction to be given the conditions in the deed. The acceptance of the trust by appellants required them to dispose of the estate in accordance with the provisions of the deed. They must answer for any loss resulting from a failure to follow the directions given them by the instrument of trust. When all the provisions in the deed concerning the payment of the grantor's debts are considered together, it cannot be said that the deed requires the payment by the trustees of debts contracted by the grantor after the execution of the deed. The deed states specifically what the trustees shall do for the grantor during his life, and, after providing that they shall pay the taxes on the land and keep the same in a productive condition, they are required to pay all the grantor's debts "heretofore contracted by him," and, if the rents of the land are not sufficient to "carry out the above conditions and pay all debts as herein contemplated," the trustees may mortgage or sell a portion of the land to procure means to carry out their trust. The above provision is the only one in the deed directing the trustees to pay any debts of the grantor, and the debts to be paid are those "heretofore" contracted by him. It is true, mention is made in a subsequent part of the deed of "all the debts and funeral expenses" of the grantor, but it is made by way of recital in a condition requiring the trustees to convert the remaining part of the estate into cash and distribute it, and not made as a direction to the trustees to pay the debts. This subsequent provision that the trustees shall, having fulfilled the "above conditions and having paid all the debts and funeral expenses" of the grantor, convert the remaining estate into cash and distribute it, cannot broaden the only provision in the deed which expressly directs what debts of the grantor the trustees shall pay. The record of the deed was notice to every one that the grantor had parted with all beneficial interest in the land except as expressly stipulated in the deed. There is nothing in the deed authorizing the grantor subsequently to charge the estate in a way that might result in the taking of the whole of the trust

property, after the creation of the trust and its acceptance by the trustees. The demurrer to the complaint should have been sustained.

Appellees' motion to dismiss this appeal on the ground that, when the judgment was rendered, the statute then in force did not authorize an appeal from judgments in civil cases within the jurisdiction of a justice of the peace, was postponed until final hearing. From what we have said on the merits of the case, it is clear that the case is not one within the jurisdiction of a justice of the peace. Motion overruled.

Judgment reversed.

HAUGHTON v. AETNA LIFE INS. CO. OF HARTFORD. (No. 4,563).¹

(Appellate Court of Indiana. Dec. 16, 1904.)

APPEAL—DECISION—DIVISION OF COURT—TRANSFER OF CAUSE.

1. On an equal division of the Appellate Court on the decision of a cause it will be transferred to the Supreme Court.

Appeal from Circuit Court, Sullivan County; O. B. Harris, Judge.

Controversy between Permella P. Haughton and the Aetna Life Insurance Company of Hartford. From the judgment, Parmelia P. Haughton appeals to the Appellate Court. Transferred to Supreme Court.

Alvin M. McClure, Wm. A. Cullop, Geo. W. Shaw, Geo. W. Buff, John S. Bays, J. P. Haughton, and Saml. Emison, for appellant. W. R. Gardiner, John T. Hays, and W. G. Johnson, for appellee.

PER CURIAM. The court being equally divided upon the decision of this cause, it is transferred to the Supreme Court.

(34 Ind. App. 230)

CITY OF FRANKFORT v. IRVIN. (No. 5,021.)

(Appellate Court of Indiana, Division No. 1. Dec. 13, 1904.)

MUNICIPAL CORPORATIONS—BOARD OF HEALTH—CONTRACTS—VALIDITY—SMALLPOX—EMPLOYMENT OF NURSES—EXPENSE OF BURIAL.

1. Under Burns' Rev. St. 1901, § 6718, making the mayor and common council of a city a board of health, where the city had no such board, and making it their duty to protect health, and to take prompt action to arrest the spread of contagious diseases, and to abate nuisances, the hiring by such board of a nurse for smallpox patients was a valid contract, and not in a matter quasi judicial or of a legislative character.

2. Such contract, made through the agency of a committee or other authorized person, was binding.

3. The fact that the pesthouse, where the services were performed, was located outside the city limits, was immaterial as affecting the contract.

4. The fact that it was the duty of the overseer of the poor, and not of the city, to provide for poor persons, did not relieve the city

¹Transferred to Supreme Court, 73 N. E. 592. Rehearing denied, 74 N. E. 612. See 35 N. E. 125. Rehearing denied, 35 N. E. 1050.

from liability for necessary expenses incurred by it in preventing the spread of disease, and therefore a person rendering services and incurring expenses in the burial of such persons who had died of smallpox might recover therefor, as such statute further required such board to perform such duties as might be required by the State Board of Health, and a rule of the State Board of Health made it the duty of any person having charge of the remains of one who had died of smallpox to cause the body to be interred within 12 hours after death.

Appeal from Circuit Court, Hamilton County; Jno. F. Neal, Judge.

Action by Jefferson Irvin against the city of Frankfort. From a judgment for plaintiff, defendant appeals. Affirmed.

Brumbaugh & Curtis and Baldwin & Campbell, for appellant. J. T. Hockman, W. S. Christian, and A. H. Boulden, for appellee.

ROBINSON, P. J. Suit by appellee for services in nursing and caring for smallpox patients confined in a pesthouse, also for services in removing certain persons afflicted with the disease to the pesthouse, and for services rendered in burying certain persons who had died of the disease, such persons, it is averred, being in indigent circumstances and without money or property. The services are claimed to have been rendered under the employment and direction of the common council of appellant, acting as a board of health, appellant city not having created a separate board of health. Appellee had judgment. Counsel for appellant, in their argument, have not questioned either of the two paragraphs of complaint, but have discussed only the motion for a new trial.

The statute, section 6718, Burns' Ann. St. 1901, makes the mayor and common council of an incorporated city, not having a board of health by statute or ordinance, a board of health for the city, and makes it the duty of such board "to protect the public health by the removal of causes of diseases when known, and in all cases to take prompt action to arrest the spread of contagious and infectious diseases, to abate and remove nuisances dangerous to the public health, as directed or approved by the State Board of Health and perform such other duties as may from time to time be required of them by the State Board of Health pertaining to the health of the public." The statute makes it a further duty of the board to "elect a secretary who shall be the health officer of the appointing board." The statute also confers upon city health officers the statutory and common-law powers of constables in all matters pertaining to the public health.

It is first argued that the evidence fails to make the case as averred by appellee in his complaint. But we think the record contains evidence from which it can be said that there was some danger of an epidemic of smallpox in the city, and at a special meeting of the common council, called to con-

sider the situation, a special committee was appointed, consisting of three councilmen, one of whom was designated as chairman, and to this committee was referred the matter of looking after the smallpox in the city. It appears that soon afterwards there were a number of cases of smallpox in the city, and that most of the acts done with reference thereto were done by the chairman of this committee, and that it was through this chairman appellee was employed. It does not appear that this chairman did anything that the city council, acting as a board of health, might not have done itself. It does not appear what authority was given this committee, or its chairman, in the matter, but it does appear that appellant ratified a part of the work of this committee by afterwards paying bills contracted in relation to the management of the pesthouse. It was as a nurse in this pesthouse that appellant was employed through the chairman of this committee. We think it appears from the evidence that what this committee and its chairman did was one entire transaction, which should be repudiated or ratified as a whole.

The statute makes it the duty of the board of health to take prompt action in all cases to arrest the spread of contagious and infectious diseases. It is left to the discretion of the board as to how this may best be done. What power the board has, as against the individual, to confine a person afflicted with smallpox in a pesthouse, we have nothing to do in this case. The board took such measures as it thought best to protect the health of the people at large, and is liable for such expenses as are properly attributable to measures taken for the prevention of the spread of the disease. *Board v. Fertich*, 18 Ind. App. 1, 46 N. E. 699. And we think it can be said that the employment of a nurse to care for a person afflicted with smallpox is an essential precautionary measure to prevent the spread of the disease. *Monroe v. City of Bluffton*, 31 Ind. App. 269, 67 N. E. 711.

Under the circumstances disclosed by the record, appellant, acting as a board of health, could have legally contracted with appellee for his services as a nurse. The making of such a contract would not be in a matter either of a quasi judicial or of a legislative character, but would be in the performance of a ministerial duty. Such a contract made through the agency of a committee or other authorized person is no less binding than if made by the city itself. *City of Logansport v. Dykeman*, 116 Ind. 15, 17 N. E. 537. The extent of the authority of the person or persons empowered to act in such a case must necessarily depend to a large extent upon the conditions existing in the particular case. As is well said in *Blue v. Beach*, 155 Ind. 121, 129, 58 N. E. 89, 92, 50 L. R. A. 64, 80 Am. St. Rep. 195: "Among all of the objects sought to be secured by govern-

mental laws, none is more important than the preservation of the public health; and an imperative obligation rests upon the state, through its proper instrumentalities or agencies, to take all necessary steps to promote this object." It is quite true that a person dealing with an agent of a municipality must take notice of the limit of his powers, and must know, whether the authority assumed is within the law. But the record in this case contains some evidence that appellee was employed to perform the services, for which he sues, by an agent of appellant who had authority to make the employment. It is immaterial that the pesthouse was located outside the city limits. The maintenance of the pesthouse, and the care of such citizens of appellant as it caused to be removed thereto, were a part of the plan adopted to control the disease and prevent its spread in the city. The fact that it is the duty of the overseer of the poor, and not of the city, to make provision for poor and indigent persons, does not relieve the city from liability for necessary expenses incurred by it in preventing the spread of the disease. *Board v. Fertich*, supra. Nor does it prevent the city from legally contracting to pay the services of a person who assists in the burial of a person who has died of the disease while under the control and charge of the city's health board. A rule of the State Board of Health makes it the duty of any person having charge of the remains of one who has died of smallpox to cause the body to be interred within 12 hours after death. The statute makes it the duty of local health boards to promulgate and enforce all rules and regulations of the State Board of Health. See *Blue v. Beach*, supra. The proper and prompt burial of a person who has died of smallpox may be as necessary in preventing the spread of the disease as the proper care of a person while afflicted with the disease.

Judgment affirmed.

(35 Ind. App. 669)

NEW YORK, C. & ST. L. R. CO. v. MARTIN.
(No. 4,971.)*

(Appellate Court of Indiana, Division No. 1.
Dec. 14, 1904.)

RAILROADS—PERSONAL INJURIES—PUBLIC CROSSINGS—FAILURE TO SIGNAL—PERSON INJURED—RIGHT TO COMPLAIN.

1. Under Burns' Rev. St. 1901, § 5307, requiring railway trains to give signals on approaching a crossing, and section 5308, declaring that the company "shall be liable in damages to any person, or his representatives, who may be injured in property or person . . . by the neglect or failure to do so, a person who was approaching a railroad crossing without intending to cross, and who was just turning on a side road running parallel with the railroad track when his horse was frightened by the approach of a train without giving the signal, could not recover for injuries sustained.

¶ 1. See *Railroads*, vol. 41. Cent. Dig. §§ 996, 997, 1243, 1260.

Appeal from Circuit Court, Fulton County; Harry Bernetha, Judge.

Action by Mary A. Martin against the New York, Chicago & St. Louis Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

Olds & Doughman, for appellant. I. Conner, Lairy & Mahoney, and M. Winfield, for appellee.

BLACK, J. This cause was commenced in the Marshall circuit court, from which the venue was changed to the court below. The appellee, Mary A. Martin, sued the appellant to recover damages for a personal injury. A demurrer to the complaint for want of sufficient facts was overruled. In the complaint, after preliminary matter, it was alleged, in substance, that the appellant's railroad passed through the county of Marshall and the town of Argos, in that county; that about one-half mile east of the town a public highway, running north and south, intersected and crossed the track of the appellant; that, as this highway approached the right of way, another highway connected with the former highway, and ran thence east; that it intersected with the north and south highway at a point immediately north of the railway track, and within 14½ feet from the center of the track, and extended thence east almost parallel with the railroad track, and in close proximity to it; that the appellee was a farmer's wife, and lived with her husband about 5 miles east of Argos, which was her market town, and she frequently was required to go to the town with horse and buggy, and her nearest and best route, which she always traveled, was along the highway aforesaid; that just east of the point where the east and west highway connected with the north and south highway there was a deep cut, made by the appellant for its track, through which the trains passed going east and west; that the north and south highway, as it approached the appellant's track, was on low ground, and the ground east thereof and toward the appellant's track rose, and, because of this elevation and the cut and intervening obstructions of fences and trees, it was impossible, as a person approached the track, to see a train coming west into the cut; that May 5, 1900, the appellee had driven with a horse and buggy to Argos, and, after attending to her business, she started to drive home, and drove south on the north and south highway, intending to turn north of the crossing on the highway east, her usual route to her home, and, when within about 80 feet from the east and west highway, she stopped her horse and looked and listened for approaching trains; that she did not want to risk driving her horse on the east highway, which at that point was along the north side of appellant's right of way, if a train was approaching; that, hearing and seeing no train approaching, she started her horse

*Rehearing denied. Transfer to Supreme Court denied.

forward, and, just as she reached the intersection of the two highways and was turning east, a train of cars propelled by a steam locomotive came out of the cut from the east, and by reason of its proximity her horse became frightened, and ran and threw the appellee out of the buggy with great force and violence upon the ground, whereby, etc. (describing her injury); that the appellant's agents and servants in charge of and operating the train were careless and negligent, in that no whistle was sounded, no bell was rung, nor was there any other warning given of the approach of the train; that the appellant's agents and servants in charge of the train did not sound the whistle for the highway crossing at all, nor did they ring the bell; that, had the whistle been sounded at any point not more than 100 rods nor less than 80 rods east of the highway crossing, and had the bell been rung continuously from such point of sounding the whistle until the engine had entirely crossed the highway, the appellee would have heard the same, and would not have approached within dangerous proximity to the railroad, and would have avoided the injury; that she was induced to approach the railway, and drive her horse into a place where he afterward so became frightened, solely by reason of the negligent failure on the part of the appellant and its agents and servants to ring the bell and sound the whistle as aforesaid; and that she was injured as before described solely by reason of the fault and negligence of the appellant in failing to ring the bell and sound the whistle as aforesaid, wherefore, etc. The complaint does not proceed upon the theory that the appellee's horse was frightened by any unusual or unnecessary appearance or noise, or any negligent or willful act or omission in connection with the operation of the train; but it relies upon the assumed liability of the appellant for failure to give the statutory signals at the time and the place prescribed by the statute, whereby the appellee was without warning of the approach of the train, and was induced to drive into dangerous proximity to the approaching train, whereas otherwise she would not have gone to such place, and would not have been injured. There are some allegations concerning the physical surroundings inserted to show want of contributory fault on the part of the appellee, while the only negligence attributed to the appellant as the cause of the injury, without which it would not have occurred, is the violation of the duty imposed by the statute providing for the signaling of the train's approach to the crossing of the railroad track on the north and south public highway. There was no collision of the train with the appellee or her horse or buggy. She was not traveling toward the railroad crossing with a purpose to cross the railroad track, but, having come from the north, she was pur-

posely turning from the north and south highway into the east and west highway north of the crossing, with the purpose of pursuing her journey along the latter road eastward, and nearly parallel with the railroad, when her horse took fright at the train approaching the crossing from the east.

No question is presented as to the failure of the appellant to perform a duty at common law toward the appellee, but the only question is whether or not the appellant owed her the duty to give the signals prescribed by statute of the approach of the train to the crossing. It is claimed on behalf of the appellant that the statutory signals required of railroad companies in sounding of whistle and ringing of bell on approaching highway crossings are for the benefit of persons about to use, using, or having lately used the crossing, and not for the benefit of persons traveling upon public highways parallel with the railroad tracks or working in fields, and who are not crossing or intending to cross the railroad tracks on the highway. On the other hand, it is claimed on behalf of appellee that the act of the Legislature requiring a railroad company, when approaching a highway crossing with its train, to sound the whistle and to ring the bell, is intended for the protection of persons and their property, whether they intend to cross or not; that its language is broad enough to apply to persons who may be at or near the crossing with teams.

Our statute provides: "It shall be the duty of all railroad companies operating in this state to have attached to each and every locomotive engine a whistle and a bell such as are now in use or may be hereafter used by all well managed railroad companies; and the engineer or other person in charge of or operating such engine upon the line of any such railroad shall, when such engine approaches the crossing of any turnpike or other public highway in this state, and when such engine is not less than eighty nor more than one hundred rods from such crossing, sound the whistle on such engine distinctly three times and ring the bell attached to such engine continuously from the time of sounding such whistle until such engine shall have fully passed such crossing," etc. Section 5307, Burn's Ann. St. 1901. It is further provided in section 5308, Burns' Ann. St. 1901, that the company in whose employ the engineer or other person may be, in charge of or operating any such engine, who shall fail or neglect to comply with the provisions of the preceding section, as well as the person himself so failing or neglecting, "shall be liable in damages to any person or his representatives who may be injured in property or person, or to any corporation that may be injured in property, by the neglect or failure of such engineer or other person as aforesaid." The statute cannot be invoked in favor of the appellee unless it may properly be said to be within the inten-

tion of the Legislature to create a legal duty on the part of the railroad company to give warning as indicated in the statute to such a traveler. A railroad company, unless specially otherwise required by statute, is entitled to operate its railroad, in such a locality in the usual manner, without thereby becoming liable to travelers upon highways running parallel with the railroad, or in the neighborhood thereof, and is only liable, if at all, for injuries to such travelers through unusual or unnecessary causes, attributable to negligence or willfulness. This is necessarily included within the privileges conferred by the granting of a franchise to construct and operate a railroad in such localities. Highway crossings over railroad tracks have ever been regarded by the courts as dangerous places, to the use of which both the railroad company and travelers on the highway are entitled; such precedence being allowed to the railroad company as the nature of its business and the necessary means of conducting it require; the company being obliged, in the absence of statutes prescribing signals, to observe the right of travelers upon the highway so far as to give such warnings as the circumstances reasonably require. Because, however, of the great danger of injuries to persons and property at grade crossings, and the manifest need, therefore, of giving warnings of the approach of trains, without reference to the judgment or discretion of the railway employees in charge of locomotive engines, the Legislature prescribed the minimum warnings by means of whistle and bell. The requirement has express reference to the highway crossings, and designates distances therefrom at which the whistle must be sounded, and at which the ringing of the bell must be commenced, to be continued until the highway has been crossed. The signals are to be given when the engine "approaches the crossing." It has been held, as within the remedy contemplated, that the statute is available for the protection of travelers not only when on the railroad at the crossing, but also when approaching for the purpose of crossing, and in some cases the statute has been applied when the injuries occurred immediately after crossing. It may be available to passengers on the railway trains. It is plainly not for the benefit of trespassers upon the railway track, however beneficial the warnings might be to such persons. Nor is it within the intent of the Legislature to create, by such requirements, a duty of the railroad company toward persons at work with animals in adjoining fields, or persons traveling upon highways near the railroad, not purposing to go upon the crossing; and it is manifest that, for persons so situated, such noises frequently or ordinarily would not conduce to safety, but, so far as they would produce any effect, would tend to contribute to danger. The appellee did not at any time intend to cross the

railroad, but when her horse became frightened she was turning from the road which led to the crossing, and was pursuing her course eastward on the connecting highway running parallel with the railroad. It cannot be said that she was more in need of warning there than she would have been at a point 100 or 200 feet eastward upon the parallel road; and, unless the statute would have been available in her behalf if the horse's fright at the train had occurred at some such distance east of the place at which it did occur, it is impossible to make it available under the circumstances of her case. Looking to the manifest intention of the Legislature, as indicated by the language employed in the statute, and as suggested by the nature of the remedy which was contemplated, we cannot conclude that the appellant owed the appellee a legal duty to give the statutory warnings of the approach of the train to the crossing. The general language which we have quoted from section 5808, Burns' Ann. St. 1901, providing for damages to any person or his representatives who may be injured in property or person "by the neglect or failure of such engineer or other person as aforesaid," is much pressed upon our attention on behalf of the appellee. We cannot regard this provision as a modification of the remedial purpose of the Legislature in the preceding section, or as extending or enlarging the duty thereby created. It is the neglect or failure to perform the duty enjoined in the preceding section which will render the company liable for damages, and, if it cannot be said to have been intended in the preceding section to create a duty toward a person in the appellee's circumstances, the person so situated cannot be treated as within the protection of the statute.

The decisions in different jurisdictions construing and applying similar statutory provisions have not been uniform, but the conclusion at which we have arrived seems to be in accord with the weight and tendency of authorities. See *East Tenn., etc., R. Co. v. Feathers*, 10 Lea, 103, 15 Am. & Eng. R. Cas. 446; *Melton v. St. Louis, etc., R. Co.* (Mo. App.) 73 S. W. 231; *Reynolds v. Great Northern R. Co.*, 69 Fed. 808, 29 L. R. A. 695; *Toomey v. Southern Pac. R. Co.* (Cal.) 24 Pac. 1074, 10 L. R. A. 139; *Spicer v. Chesapeake, etc., R. Co.* (W. Va.) 12 S. E. 553, 11 L. R. A. 885; *Williams v. Chicago, etc., R. Co.*, 135 Ill. 491, 20 N. E. 661, 11 L. R. A. 352, 25 Am. St. Rep. 397; *Maney v. Chicago, etc., R. Co.*, 49 Ill. App. 105; *Louisville, etc., R. Co. v. Lee*, 47 Ill. App. 384; *Williams v. Chicago, etc., R. Co.*, 32 Ill. App. 339; *Clark v. Missouri Pac. R. Co.*, 35 Kan. 350, 11 Pac. 134; *Louisville, etc., R. Co. v. Hall*, 87 Ala. 708, 6 South. 277, 4 L. R. A. 710, 13 Am. St. Rep. 84. See, also, *Baltimore, etc., R. Co. v. Bradford*, 20 Ind. App. 348, 49 N. E. 388, 67 Am. St. Rep. 232; *Leavitt v. Terre Haute, etc., R. Co.*, 5 Ind. App.

513, 31 N. E. 860, 32 N. E. 866; Louisville, etc., R. Co. v. Schmidt, 134 Ind. 16, 33 N. E. 774; Terre Haute, etc., R. Co. v. Brunker, 128 Ind. 542, 26 N. E. 178; Pennsylvania Co. v. Fertig (Ind. App.) 70 N. E. 834.

Judgment reversed, with instruction to sustain the demurrer to the complaint

(34 Ind. App. 319)

COPPOCK v. AUSTIN. (No. 4498.)

(Appellate Court of Indiana, Division No. 1.
Dec. 16, 1904.)

RECOVERY OF THE POSSESSION OF REAL ESTATE
—COMPLAINT — ALLEGATION OF TITLE IN FEE
—PROOF — SUFFICIENCY — CONVEYANCE TO
TRUSTEE—TITLE OF BENEFICIARY.

1. Where plaintiff in an action to recover real estate alleges that he has the legal title to the premises in fee, he cannot recover on proof showing an equitable title; Burns' Ann. St. 1901, § 1066, requiring plaintiff in such an action to state the interest claimed in the land.

2. A father purchased land, taking title thereto in his own name, and paying the purchase price therefor. He assumed his grantor's contract with a tenant, receiving the rent as landlord for more than a year before a daughter pretended to assume any dominion over the same under a parol understanding that it should belong to her, and she then entered into possession on condition that she should pay a share of the crops raised thereon. The father continued to pay the taxes thereon out of his own means. There was no proof of a contract that he should take title to the land only as a means of transferring it to the daughter, and there was no trust declared in the deed in favor of any one. *Held*, that the father's title was not transitory, within Burns' Ann. St. 1901, § 3403, declaring that a conveyance to a trustee whose title is nominal only, without power of disposition, shall be deemed a direct conveyance to the beneficiary, and the deed to him was not a conveyance to the daughter.

3. Evidence in a suit for the recovery of the possession of land by one claiming the legal title in fee simple examined, and *held* insufficient to show a fee-simple title in plaintiff, essential to a recovery.

Appeal from Circuit Court, Tipton County; W. W. Mount, Judge.

Action by Catherine E. Austin against Sarah A. Coppock. From a judgment for plaintiff, defendant appeals. Reversed.

B. C. Moon and Charlton Bull, for appellant. Kirkpatrick & Morrison and Blackledge, Shirley & Wolf, for appellee.

MYERS, J. This action was begun in the Howard circuit court, and, on change of venue, tried before a jury in the Tipton circuit court. The appellee's complaint is in two paragraphs. The first paragraph avers fee-simple title in appellee; that she is entitled to the immediate possession of certain described real estate in Howard county, Ind.; that appellant and one Joshua B. Freeman, executor of the estate of Aaron Coppock, deceased, unlawfully keep appellee out of possession thereof. In the second paragraph appellee alleges that she is the owner in fee simple of the real estate in question, and that appellant, Sarah A. Coppock, and one Joshua B. Freeman, as executor of the es-

tate of Aaron Coppock, deceased, were claiming some interest in the real estate adverse to appellee's rights therein, which claim is without right and is a cloud upon her title. To this complaint appellant filed an answer in general denial. Joshua B. Freeman, as executor, filed a disclaimer. Trial, finding, and judgment in favor of appellee on both paragraphs of complaint. Sarah A. Coppock appeals, and in this court insists that the Tipton circuit court erred in overruling her motion for a new trial.

We have carefully read all the evidence given in the cause, and, in our opinion, the evidence tends to prove that Aaron Coppock was the husband of appellant, and for some years prior to December, 1898, the date of his death, he resided in Howard county, Ind.; that in the year 1894 or 1895 appellant and her husband, not being satisfied with the then situation of their children, three in number—two daughters and one son—undertook to assist them to a more comfortable support. At this time Aaron Coppock was the owner of two farms in Howard county, Ind., and a house and 5 acres of real estate in or near the town of Greentown, in said county. One farm consisted of 79 acres, on which he placed his son. On the other farm, of 63 acres, he placed one of his daughters. He made no deed to either of said children. After making the arrangement as above set forth he set about to purchase a farm on which to place appellee; and in the year 1894, or the first of the year 1895, in the presence of this appellant, he gave his daughter, the appellee, her choice between two farms, each containing 40 acres—one farm better improved, in the way of buildings, than the other. At the suggestion of appellant, appellee chose the one having the best buildings thereon, and which is the farm now in question. Aaron Coppock bought, and with his own money paid for, the farm which appellee had selected, and took the title thereto in his own name; receiving a deed therefor on January 22, 1895. At the time Aaron Coppock purchased said farm, it was in the possession of a tenant under contract from Coppock's grantor. This tenant continued in possession of the farm for about one year thereafter as the tenant of Aaron Coppock. In March, 1896, appellee took possession of the farm in question, and remained there until March, 1900—the last year under a lease from appellant to appellee's husband, John Austin. Since March 1, 1900, the farm has been in the possession of appellant, Aaron Coppock, until his death, paid the taxes on the land. The record title to the land was in Aaron Coppock at the time of his death. Appellee never objected to her father holding the title, or made any demand on him for a deed. Aaron Coppock told his daughter he had bought the land for her, and to others he made similar statements; adding that it would be his daughter's when he was through with it.

Aaron Coppock did not have sufficient money to pay for the land in cash at the time of the purchase by him, and it was agreed between appellee and her father that, until such time as the land was paid for, she should deliver one-half of the crops to him, and, after the farm was paid for, she was to deliver one-third of the crops raised on the premises to her father during his life; that while appellee was in possession of the real estate, with some assistance from her father, she made lasting and valuable improvements thereon, in the way of repairing the house, building a veranda thereto, building new fences, setting out fruit trees, and making some other small improvements thereon; that appellee took possession of the land and made the improvements under the belief, and relying upon the promise made by her father to her, that the farm was bought for appellee, and that she should never be compelled to move therefrom; that appellant knew of these facts, and was a party to the arrangement, and consented thereto. The evidence further tends to show that appellee performed her part of said general arrangement.

The appellant, by her motion for a new trial, contends that the verdict of the jury is not sustained by sufficient evidence and is contrary to law.

Section 1066, Burns' Ann. St. 1901, requires the plaintiff to state in her complaint the interest claimed in the real estate. In an action to quiet title, facts must be averred showing title in plaintiff. *Chapman v. Jones*, 149 Ind. 434, 47 N. E. 1065. The proposition that the appellee in this action must recover upon the strength of her own title is so well settled and understood as to require no citation of authority to support it. The appellee, by her complaint, stated her title to the real estate in no uncertain words. She avers her interest to be the highest estate known to the law—an estate without any condition or limitation whatever. Having based her cause of action on this title, she will not be permitted to recover on proof of an inferior title, or by proof of an equitable title. *Stehman v. Crull*, 26 Ind. 436; *Rowe v. Beckett*, 30 Ind. 154, 95 Am. Dec. 676; *Groves v. Marks*, 32 Ind. 319; *Hunt v. Campbell*, 83 Ind. 48; *Stout v. McPheeters*, 84 Ind. 585; *Johnson v. Pontious*, 118 Ind. 270, 20 N. E. 270; *Hersey v. Lambert*, 50 Minn. 373, 52 N. W. 963; *Fenn v. Holme*, 21 How. 481, 16 L. Ed. 198.

Appellee's position is that Aaron Coppock had only a transitory seisin of the property, that he had "no power of disposition or management of the real estate," and that by the statute of uses she was vested with the legal as well as the equitable title. Citing section 3403, Burns' Ann. St. 1901. This statute provides that "a conveyance or devise of lands to a trustee whose title is nominal only, and who has no power of disposition or management of such lands, is void as to the trustee, and shall be deemed a direct

conveyance or devise to the beneficiary." We fail to see how this statute applies to the case at bar. Here the purchase money was all paid by Aaron Coppock. The record title was lodged in him by the deed from Ball. He assumed Ball's contract with the tenant; receiving the rent as the landlord for more than a year before appellee pretended to assume any dominion over the farm at all, and then only upon the condition that she pay a certain share of the crops raised thereon. He continued to pay taxes on the farm out of his own means, as owner thereof. No semblance of a contract that he should take the title to the land only as a means of transferring title, or that he took the conveyance, without consideration, under an agreement to convey to appellee. No trust is expressly declared in the deed in favor of any one, and no attempt to do so. We cannot agree with appellee in her contention of transitory seisin of the title in Aaron Coppock. In our judgment, whatever interest or right appellee has in the land is by virtue of an equitable title, but as to this we express no opinion. It is sufficient to say the proof fails to establish in appellee a fee-simple title. The evidence must support the theory of the pleadings, or relief cannot be granted, or, in other words, "a party cannot seek relief on one theory, and then ask to have relief given on another theory." *Lewis v. Stanley*, 148 Ind. 351, 45 N. E. 693, 47 N. E. 677; *Pittsburgh, etc., Ry. Co. v. O'Brien*, 142 Ind. 218, 41 N. E. 528.

The court erred in overruling appellant's motion for a new trial. Judgment reversed.

(35 Ind. App. 190)

TERRE HAUTE ELECTRIC CO. v. KIELY.
(No. 4,871.)¹

(Appellate Court of Indiana, Division No. 2
Dec. 15, 1904.)

SERVANT'S INJURIES—ASSUMPTION OF RISK—PROMISE TO REPAIR DEFECT—PROXIMATE CAUSE—PLEADING—COMPLAINT—SUFFICIENCY—EVIDENCE—INSTRUCTIONS.

1. Where, in an action for the death of a servant, the complaint discloses the relation of master and servant, the existence of a defective appliance, rendering the servant's work unnecessarily hazardous, a promise to repair the defect, and an injury caused by such defect, a prima facie case is shown.

2. In an action for the death of a motorman on defendant's street car, an allegation that the air brakes of the car, which were necessary to its safe operation, were defective and out of repair, was sufficient to show a breach of duty on the part of the master, as against a demurrer.

3. A motorman of a street car reported the air brakes as defective, and the repair thereof was promised. Repairs were made, and the motorman took the car out, but found that the trouble had not been remedied, whereupon he ran the car back to the barn, and reported that it was no better; but the superintendent stated that the car would have to be used, and that the trouble would be remedied the next afternoon. The next morning the motorman took the car out, and was killed in an accident, due to the defective brakes. *Held*, that a finding that the

¹ Rehearing denied.

motorman continued to use the defective car in reliance on a promise to repair was warranted.

4. Where all the cars of a street railroad company were equipped with air brakes, and there were heavy grades on the road, in an action for the death of a motorman owing to a defective brake on a car which weighed 12 tons and which was carrying a load of 10 tons, a finding that the air brake was a necessary appliance was warranted.

5. Where an electric car ran down a grade, and on taking a curve a flange of the wheel broke, whereby the car was derailed, and the motorman killed, in an action for the death, if the jury believed that the rate at which the car was running was due to the defective air brake, they might find the defective brake to have been the proximate cause of the injury.

6. An instruction that it was the master's duty to exercise reasonable care and diligence to provide and maintain a "safe place" and safe appliances for deceased to use in performing his duties was not misleading, though the breach of duty alleged related only to appliances.

7. Where, in an action for the death of a servant, the court, in the first instruction given, charged that, before plaintiff could recover, she must prove by a preponderance of all the evidence all the allegations of her complaint, criticisms of instructions for failing to include the statement that the finding in plaintiff's favor upon various points therein enumerated required a preponderance of the evidence were without merit.

8. It is not error for the court to assume in instructions the existence of uncontroverted facts.

9. In an action for the death of a motorman owing to a defective air brake on the car, it was proper to admit evidence that the brake had been out of repair before deceased worked on the car, which had been three or four days.

10. Where, in an action for the death of a servant, the physician who attended deceased testified to the character of his injuries, and pending the examination defendant offered to admit that the death was caused by the injuries received in the accident in question, it was proper to overrule a subsequent objection of defendant to a question to the witness, since defendant might not in such manner limit plaintiff's method of making proof.

Appeal from Circuit Court, Vigo County; Jas. E. Piety, Judge.

Action by Anna M. Kiely against the Terre Haute Electric Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

McNutt & McNutt and Lamb & Beasley, for appellant. John A. Piety, Sqm. K. Duval, and Jas. L. Price, for appellee.

ROBY, J. This action is brought for the benefit of the widow and next of kin of Albert H. Kiely, deceased, who is averred to have left a widow and two children, aged two and seven years, respectively, who were dependent upon him. The administratrix avers in her complaint that appellant was a corporation operating a system of electric street railways in the city of Terre Haute, and also an electric interurban railway between said city and the town of Brazil; that among the cars used by it was one for the removal of cinders from its power house, which was known as car "No. 15"; that its

cars, including No. 15, were equipped with air brakes, which were necessary to the safe operation of said cars on said lines by reason of the many steep grades and hills traversed thereby; that decedent was on December 29, 1901, and long prior thereto, in appellant's employment as a motorman, and on December 27th had been placed on said cinder car in said capacity; that the air brakes thereon had become and were defective and out of repair, and that condition increased the danger and hazard to the motorman while going down steep grades; that decedent ran said car into appellant's barns on said day, and notified it that the brakes were out of repair, whereupon it promised to repair and replace the defective parts; that, relying upon said promise, and in accordance with its orders, decedent continued to work on said car on the 29th, and that about 11 o'clock a. m., when descending one of said steep grades, it became unmanageable because of said defective air brakes, and jumped the track, striking a bridge, throwing decedent to the ground, and inflicting injuries from which he died the same day; that "decedent's said injuries were occasioned and brought about wholly by said defects in said brakes and negligence of the defendant as aforesaid." Whereby, etc. The demurrer to this pleading for want of facts was overruled, and an exception reserved. The objections urged against it are that the defective condition of the brake is not shown to have made the car unsafe; that the character of the defects is not described, and that no direct allegation is made; that appellant negligently performed or omitted any duty owing to decedent. The relation of master and servant is disclosed. The existence of a defective appliance rendering the servant's work unnecessarily hazardous was a breach of the duty owing by the master. A promise to repair, and an injury caused by the defective appliance, made a prima facie case. *McFarlan Carriage Company v. Potter*, 153 Ind. 107, 53 N. E. 465. The character of the appliance is stated. Its purpose is a matter of common knowledge. An allegation that it was defective and out of repair was, as against a demurrer, sufficient to show a breach of duty. An answer in general denial was filed. Trial by jury, verdict for \$2,500, motion for a new trial overruled, and judgment on the verdict.

The evidence, taking that most favorable to appellee where there is conflict, shows: That the decedent ran car No. 15 on Friday, December 27th. That he reported the air brakes as defective, and that appellant promised to repair them. The brake was defective in permitting the air to escape. Repairs were made, and decedent took the car out on Saturday, but found that the trouble had not been remedied. He thereupon ran the car back to the barn, and told the superintendent that it was not any better. The latter replied that the fault must be in the

* 9. See *Master and Servant*, vol. 34, Cent. Dig. § 918.

compressor; "that he would have to use it the way it was, and he would put a new one in the next afternoon—a new air compressor." On the next morning decedent took the car out about 7 o'clock, in obedience to orders. Took one load of cinders away, and unloaded it. Returned to Terre Haute, loaded another load, and started east with it, reaching the hill at which the accident occurred at about 11 o'clock a. m. This hill was 1,140 feet long. The track descended to the east at a grade of 3 to 5 per cent. It was straight for about half the distance down. Thereafter it curved south 90 feet, ran straight 30 feet, curved north 100 feet, curved south, ending 20 feet above the bridge at which the accident occurred. The car started down this grade at the rate of four or five miles and hour, as appears from the testimony of a number of witnesses. Its progress was described by the conductor, who was the only person except the decedent aboard, as follows: "Well, it kept going faster and faster all the way down, and we got down to probably 60 or 70 feet from the bridge, I noticed a jostling—sort of a jar—on the back end. The front end of the car was then off the track, but I didn't know what it was. I just supposed the rate of speed was shaking the car on the track. About the time we hit the bridge I realized the car was off the track, and the next thing I remember I was standing out where Kiely was, on the guard rail on the bridge." The front wheels were off the rails. The car struck a trolley pole, breaking it down; then struck the bridge with great force, inflicting injuries upon decedent resulting in his death. The car gradually "picked up speed" during the entire descent. From the first mark of the wheels found on the ties to the place where the last mark was made was 123 feet 9 inches. About one foot west of the first mark two pieces of iron, broken from the flange of the large car wheel on the north and front of the car, were found. They lay inside of the north rail. One of them was five or six inches long, the other somewhat smaller. The iron was spongy and defective, owing to an imperfect cast. There were three appliances which could be used to check and control the speed of the car—the air brake, the hand brake, and the lever by reversing the power, thereby causing the wheels to move backward. No witness testifies, so far as we are advised, as to any use having been made by decedent, while descending the hill, of either the hand or the air brake. The power had been reversed, as shown by the position of the lever. It was fairly inferable from the evidence that decedent continued to use the defective car in reliance upon appellant's promise to repair it, and there is no room for doubt but that the superintendent making the promise had full power to represent the company in that behalf.

The insufficiency of the evidence to sus-

tain the verdict is urged upon the further grounds that it does not show that the air brakes were necessary to the safe operation of the car, that it affirmatively appears that such defective brakes were not the proximate cause of the injury. There is testimony to the effect that by the use of the hand brake the speed of the car could be controlled and regulated. There is also testimony to the effect that the air brake registered and carried a sufficient pressure to make it entirely effective. As to the latter proposition, there was an undoubted conflict. The verdict is therefore conclusive. The same conditions apply to the former one. There was no direct testimony that an air brake was necessary, but, in view of the fact that all of appellant's cars were thus equipped, in view of the unquestioned efficiency of such brakes, of the heavy grades over which this car was run, of its weight (12 tons) and the weight of the load carried (10 tons), of the complicated and expensive character of the appliance, it is not difficult to infer that it was a necessary one. Whether the defect complained of was the proximate cause of the injury was primarily a question for the jury. *C. I. & L. Ry. Co. v. Martin*, 31 Ind. App. 308, 65 N. E. 591. The verdict therefore includes a finding in appellee's favor upon that issue. In determining whether such finding was legitimately made, it may be conceded that the wheels of the car would not have left the rails except for the breaking of the flange and the defect therein. The breaking of the flange was a cause contributing to the injury. If it were shown that a brake became suddenly ineffective, whereby all control over the car was lost, and a race begun, ending at the bottom of the hill, a broken wheel and a defective casting would not be sufficient to show a break in the line of causation. If it appeared that decedent used all the instrumentalities at his command to control the car, but was unable to do so because of the defect complained of, the case would not differ in principle from the illustration. There does not appear to have been any direct testimony as to what was done by decedent. The position of the reverse lever is conclusive as to the fact that he exerted himself to some extent. The presumption is that the instinct of self-preservation is possessed and exercised. *Lawson's Presumptive Evidence*, rule 39, illustrations 1 to 5, and authority cited. The wheel had been used for a considerable time. Except for the high rate at which the car was moving and by which the defective flange was brought in violent contact with the rail at the curve, it is at least inferable that it would not have broken. That the flange of a car wheel should break under such circumstances as existed upon this occasion, attributable to the failure of duty relied upon, is not an unnatural sequence; and, if the jury believed that the rate at which the car was running when the

derailment took place was due to the defective air brake, it might properly find such condition to have been the proximate cause of the injury.

In the fourth instruction given the jury were told that it was the appellant's duty to exercise reasonable care and diligence to provide and maintain a safe place and safe appliances for decedent to use in performing his duty under its employment. In so far as appellant's duty is stated, the instruction is unexceptionable. *C. I. & L. Ry. Co. v. Tackett* (Ind. App.) 71 N. E. 524. While the breach of duty alleged related to appliances, the effect of a failure in that behalf was so nearly related to safety of the place where decedent was required to work as to make the reference in the instruction to the duty of furnishing a safe place neither misleading nor harmful.

Instructions 6, 7, 8, and 9 are criticised for failing to include the statement that the finding in plaintiff's favor upon various points therein enumerated required a preponderance of evidence. It was clearly and correctly stated in the first instruction given that, "before the plaintiff can recover in this action, she must prove by preponderance of all the evidence all the material allegations contained in her complaint." One clear and definite statement of the law upon this point was sufficient. Instructions are considered in their entirety, and undue prominence should not be given to any one proposition. *Mullen v. Bower*, 22 Ind. App. 294, 298, 53 N. E. 790; *Deilks v. State*, 141 Ind. 23, 40 N. E. 120. In the seventh instruction it was stated that "notice of defects given to the foreman having charge of the car barns, where cars of the defendant were taken for repairs, * * * and a promise to remedy such defects made by such foreman, * * * is in law a promise of the defendant." It is said: "While we do not question, for the purpose of this case, under the facts, that notice to Foreman Grosvenor of defects in the car was, in contemplation of law, notice to the defendant, yet we do not insist that the other element of the instruction, involving the promise of Grosvenor to repair, is not warranted by the law, or under the evidence. In the first place the authority of the foreman of the car barns and his jurisdiction were matters of proof, and not of law, and hence the instruction on the last proposition is fatally defective for that reason." The evidence is not conflicting as to the authority of Grosvenor in either respect indicated. It is not error for the court to assume the existence of uncontroverted facts. *Hunt, Receiver, v. Conner, Adm'r*, 28 Ind. App. 41, 55, 56, 59 N. E. 50.

Evidence was admitted over defendant's objection tending to show the air brake to have been out of repair before decedent worked on the car, which had been three or four days. The time was not so remote as to render the evidence inadmissible. Its

weight was, of course, for the jury. The physician who attended the decedent was allowed to testify relative to the character of his injuries and the resulting death. Appellant pending the examination, offered to admit that the death was caused by the injuries received in the collision. This offer was followed by an objection to a question, which was overruled. One may not thus limit his adversary's method of making proof.

There is no available error in the record. Judgment affirmed.

(34 Ind. App. 330)

BALTIMORE & O. S. W. R. CO. et al. v. QUILLEN. (No. 4,980.)

(Appellate Court of Indiana. Dec. 16, 1904.)

RAILROADS—CHANGE OF GRADE—INJURY TO LAND—ACTION—MEASURE OF DAMAGES—COMPLAINT—DESCRIPTION—SUFFICIENCY—INSTRUCTION.

1. The act of wrongfully making fills and cutting ditches on plaintiff's land in changing the grade of a railroad, so as to prevent water from flowing from and causing surface water and natural streams to flow on plaintiff's land, creating pools of standing water without means of escape, and thereby destroying plaintiff's land and creating a permanent nuisance, is actionable as against the railroad company and the contractors who did the work, though a right of way had been properly acquired by the railroad prior thereto.

2. That an alleged nuisance may be abated, and that there is no threat on the part of those creating it to continue the conditions giving rise to it, are facts going to the measure of damages the injured person would be entitled to receive for the damages already sustained and not to the sufficiency of a complaint for injuries caused thereby.

3. Complaint for injury to land, describing it as "in location 132" in a certain township and county of the state, is sufficiently descriptive to withstand a demurrer.

4. The owner of land is not compensated by an assessment of damages for a railroad right of way as to wrongful acts after the acceptance of the deed or the making of an appropriation.

5. The measure of damage to land caused by the deposit of barren earth thereon, resulting in a permanent injury thereto, is the diminution in the value of the land.

6. The measure of damages for injury to land by the collection and discharge of water in a body thereon is the difference in the rental value of the land before and after the injury.

7. In an action for injuries to land by the deposit of barren earth thereon and by the collection and discharge of water in a body thereon, a charge that if the jury found for plaintiff they should assess her damages at such sum as the evidence showed her land to have been damaged, and that the measure of damages, if any, would be the difference in the value of the land immediately before and immediately after the commission of the injuries complained of, if any, was erroneous, as not making any distinction in the character of the injuries, and not being applicable to the entire injury charged.

Appeal from Circuit Court, Daviess County; C. K. Thorp, Special Judge.

Action by Grace Quillen against the Baltimore & Ohio Southwestern Railroad Com-

¶ 6. See *Waters and Water Courses*, vol. 42, Cent. Dig. § 255.

pany and others. From a judgment for plaintiff, defendants appeal. Reversed.

Gardiner & Slimp, W. R. Gardiner, and Edward Barton, for appellants. Cullop & Shaw and Padgett & Padgett, for appellee.

COMSTOCK, C. J. This action was commenced in the Knox, and on change of venue was tried in the Dayless, circuit court. There were two trials. Upon the first the jury disagreed. Upon the second they gave a verdict in favor of appellee against all of appellants for \$1,185. The complaint is in two paragraphs. The material allegations of the first are that plaintiff is the owner of about 200 acres of rich and valuable land for farming and residence purposes in location 132 in Steen township, Knox county, Ind.; that prior to the grievances complained of said land was high and free from ponds, pools, etc.; that rainfall and surface waters and natural streams flowed from, instead of upon, said land; that during the months of May and June, 1900, the defendants were engaged in building a railroad, and in doing so made excavations and fills on, along, and across her land, and thereby covered two acres of the same with waste, and destroyed the same, and that said two acres were of the value of \$40 each; that defendants wrongfully made fills and cut ditches so as to prevent water from flowing therefrom, and to lead surface waters and natural streams which prior thereto flowed away to flow thereon, and to create pools of standing water, without means of escape, on her said land, and thereby and on account thereof to destroy 40 acres of her said land; that said 40 acres were, prior to said grievances, worth \$40 per acre, but because of said grievances are now wholly worthless; and because of the wrongs of said defendant she has been damaged \$1,000. The second paragraph alleges, in substance, that the plaintiff is, and has been for five years, the owner of 200 acres of land in location 132 in Steen township, Knox county, Ind., lying along defendants' railroad track; that defendants were about to change the position, location, and grade of said railroad track, and in doing so have placed on two acres of said land barren clay, which has destroyed the fertility of said 2 acres, and made it useless; that defendants have cut ditches and made embankments which will and have run onto 40 acres of the land large quantities of water, which, on account of natural drainage, would run away from said land; and has and will thereby create large pools of standing water, which will and have become stagnant, give off odors, create a nuisance, and will and have destroyed 40 acres of her land; that she has been damaged thereby in the sum of \$1,900. A demurrer for want of facts to each paragraph was overruled. Defendants filed an amended answer in three paragraphs, the first being a general denial. The second paragraph gives the date (1857) of the con-

struction of Ohio & Mississippi Railroad to the ownership of which the defendant, the Baltimore & Ohio Southwestern succeeded; recites the source of title of its right of way; avers facts to the effect that the acts of which plaintiff complains were necessary in the operation and maintenance of its said road, were done in an orderly and careful manner, all of which was done by the defendants Waddle and Fitch as contractors with said railroad company. The third paragraph is the same as the second, except that it gives a different source of title. A separate and several demurrer for want of facts to each of the said second and third paragraphs of answer was sustained. The cause was tried upon the issues joined on the complaint and general denial. The appellant the Baltimore & Ohio Southwestern and the appellants Waddle and Fitch each assigned as errors the action of the court in overruling the demurrer of said appellants to the first and second paragraphs of the amended complaint, respectively, and in overruling the motions for a new trial.

As to the first paragraph of the complaint, the position of appellant is that while it proceeds upon the theory that appellants were engaged in the construction of a railroad over appellee's land, it created a nuisance thereon, causing consequential damages thereto, but that it contains no averment of facts to justify the conclusion that the appellant railroad company had not, by proper proceeding, acquired the right to construct the railroad, or that the construction was wrongful; that it contains no averment that the consequential damages had not been fully compensated to the appellee; that the averments show that the alleged nuisance might be abated, and, as a consequence, the value of the land restored; that there is no averment of a threat or purpose on the part of appellant to continue the conditions described, or of any damage other than the entire destruction of the value of part of the lands of appellee; that there is no description of the lands alleged rendered of no value. Without separately taking up each of these objections, we think the paragraph is sufficient upon the ground that it charges that appellant "wrongfully made fills and cut ditches so as to prevent water from flowing from, and caused surface water and natural streams which prior thereto flowed away to flow thereon, and created pools of standing water without means of escape, on appellee's land, and thereby and on account thereof destroyed forty acres of her land, and thereby created a permanent nuisance." The acts charged are properly characterized as tortious injury to appellee's real estate, and not negligence. In the face of the averment that the acts complained of were wrongful, there could be no presumption that appellant had, by proper proceeding, acquired the right to commit the acts of which appellee complains, nor would the presumption arise that the consequential damages had been fully compensated. The appellant would have no right to collect

surplus water on its right of way, and discharge it in a body on the lands of appellee, to her injury. If the right of way had been properly acquired, plaintiff's right to be compensated for damages for water thereafter collected and discharged upon her land would not be affected. Such damages are not included in the price paid for the right of way. *Egbert v. Lake Shore R. R. Co.*, 6 Ind. App. 350, 33 N. E. 659; *Stodghill v. Chicago, etc., R. R. Co.*, 43 Iowa, 26, 22 Am. Rep. 210; *Hunt v. Iowa Central, etc.*, 86 Iowa, 15, 52 N. W. 668, 41 Am. St. Rep. 473; *Louisville, etc., R. Co. v. Hayes (Tenn.)* 47 Am. Rep. 291; *White v. Chicago, etc., R. R. Co.*, 122 Ind. 317, 23 N. E. 782, 7 L. R. A. 257. Conceding that the averments show that the alleged nuisance might be abated, and that there is no threat or purpose on the part of appellants to continue the conditions described, these are facts going to the measure of damages appellee would be entitled to receive for injuries already sustained. The land is sufficiently described to withstand a demurrer. *Shipler v. Isenhower*, 27 Ind. 36.

During the trial appellee's title seems not to have been questioned. It is agreed by the parties, as appears of record, that the plaintiff holds her title to the real estate described in the complaint as a remote grantor from the same party from which the defendant the Baltimore & Ohio Southwestern Company holds its title to the right of way. In the absence of a motion for a more particular description, and with the foregoing agreement, it is late to question the sufficiency of the description. What we have said applies to both paragraphs of the complaint. The theory of each is that the injury to the plaintiff's land was caused by the deposit of barren and waste earth upon appellee's land and the collecting and discharge of surface water by means of ditches dug by the defendants. In each paragraph it is alleged that the railroad corporation is a corporation duly organized and existing by virtue of the laws of the state of Indiana, and that the defendants Waddle and Fitch are partners doing business under the name and style of Waddle & Fitch, and all of said defendants are engaged in committing the wrongs complained of.

The purport of the second and third paragraphs of answer is that the appellant railroad company had the right to make necessary drains and ditches, collect water therein, and discharge it upon the lands of plaintiff. They show the theory of the defense. They do not show a right to inflict a consequential or direct injury to plaintiff's property without compensation. The appellant railroad company had the right to lower the grade of its track, and to dig ditches to convey waters off its right of way, but not to turn them upon the lands of plaintiff. That the acts of constructing the ditches were lawful, and were performed with care, would make no difference. *Conner v. Woodfill*, 126 Ind. 85, 23 N. E. 876, 22

Am. St. Rep. 568. The grant of a right of way does not carry the right to go beyond its limits, and the owner is not compensated by an assessment of damages for a right of way for wrongful acts after the acceptance of a deed or the making of an appropriation. *Egbert v. L. S. & M. S. Co.*, 6 Ind. App. 350, 33 N. E. 659; *Evansville, etc., v. Dick*, 9 Ind. 433. The case of *C. C., etc., R. Co. v. Huddleston*, 21 Ind. App. 621, 52 N. E. 1008, 69 Am. St. Rep. 385, cited by appellant, is distinguishable from the case at bar. The right to build a railroad includes the subsidiary right to make changes necessary for the proper construction and maintenance of the same. That question is not the controlling one in this case. "The principle upon which all the decisions proceed is that, if the owner of lands collects surface water into a body, he is bound to provide a means of discharge by drainage, and that, if he fails to do so, the owner of the lower lands has a cause of action." *Amer. & Eng. Ency. Law*, vol. 24, note, pp. 930, 931; *Cairo, etc., v. Stevens*, 73 Ind. 278, 38 Am. Rep. 139; *Township v. Hopkins*, 131 Ind. 142, 30 N. E. 896; *City of Evansville v. Decker*, 84 Ind. 325, 43 Am. Rep. 86; *Davis v. City of Crawfordsville*, 119 Ind. 1, 21 N. E. 449, 12 Am. St. Rep. 361; *Kelly v. Pittsburg, etc.*, 28 Ind. App. 466, 63 N. E. 233, 91 Am. St. Rep. 134. The rule applicable to a railroad company and an individual is the same. A railroad company has no right to gather surface water on its land or right of way into ditches and drains, and discharge it in a body on the lower lands of other persons, to their injury. 24 *Amer. & Eng. Ency. Law*, 953, and cases cited in note 4.

It is contended that the damages assessed are excessive. The evidence shows without conflict that all of the land covered with waste dirt beyond the line of the right of way, assuming the right of way to be but 80 feet, did not exceed 7 feet in width and 1,000 feet in length (about one-half acre) and that the land was worth not to exceed \$55 per acre. It is also claimed that the court erred in the admission of evidence and in the giving of certain instructions. The damage from water was only sustained upon the occasion of heavy falls of rain. The theory of the complaint is for permanent injury. Plaintiff thus assumed the burden of establishing the existence of facts showing that the encroachments were of a permanent character. If the evidence fails to show injury of such a character, the theory of the complaint is not supported, and the verdict is contrary to the law. *Louisville, etc., Ry. Co. v. Renicker*, 8 Ind. App. 404, 35 N. E. 1047; *C., C. & St. L. Ry. Co. v. Dugan*, 18 Ind. App. 435, 48 N. E. 238; *Equitable Ins. Co. v. Stout*, 135 Ind. 444, 33 N. E. 623. A nuisance which may be discontinued is not a permanent one. The law will not presume the continuance of a wrong. *C., C. & St. L. Co. v. King*, 23 Ind. App. 573, 55 N. E. 875;

Uline v. N. Y. O. & H. R. R. Co. (N. Y.) 4 N. E. 536, 54 Am. Rep. 661; *C. C. & St. L. Co. v. Kline*, 29 Ind. App. 390, 63 N. E. 483. When the injury is caused by a trespass upon the plaintiff's land, since the defendant cannot remedy the wrong without another trespass, the remedy is not continuous, but inflicted once for all, and full compensation is recovered by one action. *Sedgwick on Damages*, § 92; 3 *Sutherland on Damages*, § 1042; *Cumberland, etc., Co. v. Hitchings*, 65 Me. 140. The true rule deducible from the authorities is that when the cause of injury is of such nature as to be abatable by the expenditure of labor or money, the law will not presume the continuance of the wrong. *Atlanta, etc., Co. v. Higdon* (Tenn.) 76 S. W. 895; *City of Nashville v. Comer* (Tenn.) 12 S. W. 1027, 7 L. R. A. 400. In *C. C. & St. L. Co. v. King*, supra, many illustrative cases are collected. From the consideration of them, and many more, we think that it may be fairly said that, where damages have been allowed for prospective injuries, the nuisance was deemed to be permanent, although the courts have differed as to what was permanent or temporary injury. The deposit of barren earth, with its attendant results, may, under the decisions, be regarded as a permanent injury. As to such averment, there is evidence tending to support the finding. As to that part of appellee's claim, the measure of damages would be the diminution in the value of the land. The collection and discharge of water in a body upon appellee's land alleged is temporary, because it is abatable, and its continuance will not be presumed, and the damage occasioned thereby should be determined by another rule, namely, the difference in the rental value of the land before and after the injury. "Thus, in an action for flowing land or in polluting water compensation can only be had for loss accruing before the date of the writ." *Sedgwick on Damages*, § 91. Plaintiff was permitted to prove the difference between the value of her entire tract of land before and after the acts complained of. The question of the admissibility of such evidence was not reserved. That question is not, therefore, presented. The court gave of its own motion the following instruction: "If you find for the plaintiff, you will assess her damages at such sum as the evidence may show her land has been damaged. The measure of damages, if any, would be the difference in the value of the land immediately before and immediately after the commission of the injuries complained of, if any." To the giving of this instruction appellants duly excepted. The instruction was erroneous, as not being applicable to the entire injury complained of, not making any distinction in the character of the injuries.

For this reason the judgment is reversed. The consideration of other alleged errors is not deemed necessary, as they may not arise

*Rehearing denied. Transfer to Supreme Court denied.

upon a second trial. The trial court is directed to sustain appellants' motion for a new trial.

(36 Ind. App. 309)

COOPER v. MURPHY et al. (No. 4,963.)¹
(Appellate Court of Indiana, Division No. 1,
Dec. 15, 1904.)

**APPEAL—PARTIES WHO MAY TAKE APPEAL—
DISMISSAL.**

1. *Burns' Ann. St.* 1901, § 648, provides that in case of the death of any party to a judgment before appeal an appeal may be taken by the person in whose favor and against whom the action might have been revived if death had occurred before judgment; and section 282 provides that in all cases where actions survive they may be commenced by or against the representatives of the deceased, to whom the interest in the subject-matter of the action has passed. Section 8623 provides that the auditor of the county in which a sale of lands for taxes took place shall execute to the purchaser, his heirs or assigns, a conveyance of the real estate so sold; and by section 8634, in case of sale of lands for taxes, if the purchaser or his assigns die before a deed be executed, it may be executed in the name of deceased, or to his heirs at law or devisees, which deed shall vest the title in the heirs or devisees as if it had been executed to deceased previous to his death. Section 8640 provides for the development of a suit to quiet title brought by the holder of an invalid tax deed into a proceeding for the enforcement by payment of the amount due the complainant and the foreclosure of his lien thereon on the land. In an action to enforce a lien on real estate in favor of plaintiff for amounts accruing to him through the purchase by him at tax sales of the real estate of defendants, and the conveyance thereunder, invalid and ineffectual to convey title, and the subsequent payment of taxes by him to protect his interests, judgment was rendered for defendants, and before appeal plaintiff died, but an appeal was taken by his administrator. *Held*, that the appeal should be dismissed, since there was no cause surviving to the personal representative of plaintiff.

Appeal from Superior Court, Grant County; B. F. Harness, Judge.

Suit by Charles Johnson against Laura Murphy and another. From a judgment in favor of defendants, Charles M. Cooper, administrator of Charles Johnson, appeals. Appeal dismissed.

Oglebay & Oglebay, for appellant. Custer & Cline, for appellees.

BLACK, J. Suit was brought by Charles Johnson against the appellees, Laura Murphy and Miles E. Murphy, the complaint being in two paragraphs. In the amended first paragraph it was, in substance, stated that the appellees are husband and wife; that January 29, 1900, Ethan A. Huffman, acting as attorney in fact for the plaintiff, conveyed by quitclaim deed to the appellee Laura Murphy certain real estate described, in the city of Marion, Grant county, Ind., for the consideration of \$135, which deed was not delivered until in February, 1900, and it has never been placed on record; that it was executed and said money was paid and accepted under a mutual mistake of fact, in that the plaintiff's only interest or title in

the real estate was by virtue of a tax deed duly executed to him by the auditor of that county, and duly recorded in, etc., April 15, 1896, the consideration therefor being \$59.66, when in truth and in fact the plaintiff on January 29, 1900, held an additional tax deed on the premises for \$59.85, duly executed by said auditor September 1, 1898, and duly recorded in, etc., September 15, 1898; and he also, on January 29, 1900, held a tax certificate of purchase, duly issued to him for purchase of the real estate at county sale of said county for delinquent taxes, 1898, for \$51.58, and he also at the same time held a certificate of purchase of the real estate, duly issued to him for purchase at city of Marion sale, 1898, for \$96.53; that February 2, 1900, "the plaintiff paid thereon the city taxes, to the amount of \$77.64, the same being advertised for sale in his name," and on the same day he paid the county treasurer the state and county taxes on the real estate advertised in his name to the amount of \$136—the total sum due the plaintiff January 29, 1900, being \$650. It was alleged that said taxes were paid by the plaintiff February 2, 1900, without any notice or knowledge of the conveyance to appellee Laura Murphy, which was delivered afterward, and said conveyance was delivered by said Huffman without any notice whatever of the payment of said taxes as aforesaid; that immediately upon the discovery of said mistake, in the summer of 1900, the plaintiff demanded of the appellees that said mistake be corrected, and the proper amount be ascertained and paid; that the appellees admitted said mistake as alleged, and agreed to correct it, but failed and refused to correct the mistake and pay the sum so due the plaintiff; that December 14, 1901, the auditor of Grant county duly executed his deed to plaintiff for the real estate for \$51.85, duly recorded in, etc., on that day before delivery; that "said deed" was delivered to appellee Laura Murphy under the mutual mistake of fact that the plaintiff had no interest in or title to said real estate, except that held by his tax deed executed March 18, 1896, as aforesaid, and that \$135 was the correct amount due him under the law as penalty, interest, and charges, when in truth and in fact there was due the plaintiff the sum of \$700, and said deed would not have been made and delivered, or said sum of \$135 accepted therefor, except for such mutual mistake. It was further alleged that there was due the plaintiff on his tax deeds and purchases and taxes since paid the sum of \$1,100, and he asked that the deed executed by Huffman be set aside and held for naught, and that the plaintiff be given judgment for \$1,100, or such sum as the court should ascertain to be legally due the plaintiff after deducting the \$135 and interest thereon; and that the sum be declared a lien upon the real estate, and, if not paid within 30 days after judgment, that a certi-

fied copy of the decree be issued to the sheriff, commanding him to sell the real estate to pay the plaintiff's lien, and for all other relief. The second paragraph was in the customary short form of a complaint to quiet the plaintiff's title to the real estate, representing him as the owner thereof in fee simple. A supplemental complaint was filed, wherein it was alleged that since the filing of the complaint, at the tax sale to be held by the county treasurer of Grant county and the city treasurer of Marion, respectively, February 2, 1902, the real estate described was advertised for sale for delinquent taxes in the plaintiff's name; that February 1, 1902, he paid the state and county taxes legally due thereon in the sum of \$166.71, and paid to the city treasurer of Marion \$100, the sum of the taxes due and legally assessed against the real estate; and he asked that the sum so paid, together with the interest, penalty, and charges thereon, be added to the sum found due him on his tax deeds and purchases and payments theretofore made, and that he have judgment for \$1,200 and that the same be declared a first lien upon the real estate, and that it be ordered sold for the payment of the same, and for all other proper relief. No answer appears to have been filed, but it was agreed that all matters of defense might be given under general denial. Upon trial by the court there was a general finding for the appellees. The plaintiff's motion for a new trial was overruled, and judgment was thereupon rendered November 1, 1902, that the plaintiff take nothing by his action, and that the defendants recover of him their costs. The assignment of errors is made by "Charles M. Cooper, as administrator with the will annexed of the estate of Charles Johnson, deceased, appellant." The appellees have moved to dismiss the appeal, showing here that the plaintiff died testate between the rendition of the judgment and the bringing of the appeal, devising all his real estate to Nellie Cooper.

It is provided by section 630 of our Civil Code (section 648, Burns' Ann. St. 1901) that in case of the death of any or all the parties to a judgment before an appeal is taken an appeal may be taken by, and notice of an appeal served upon, the persons in whose favor and against whom the action might have been revived if death had occurred before judgment. By section 5 of the Code (section 282, Burns' Ann. St. 1901) it is provided that in all cases where actions survive, they may be commenced by or against the representatives of the deceased to whom the interest in the subject-matter of the action has passed. There is some contention between counsel as to the character of the action. One paragraph of the complaint presented a cause of action for the quieting of the title of the plaintiff. Upon his death the right of action would be in the real party in interest, the person to whom the title under cloud

had passed, the heir or devisee. It is claimed by the counsel for the appellant that the evidence, the sufficiency of which is attacked on appeal, showed the action to be one for the recovery of money, and to enforce a lien therefor upon real estate. The action was not, under either paragraph of the complaint, one to recover a personal judgment against the appellees upon their promise or agreement, express or implied, or because of their wrongful act or omission. The true purpose would seem to have been to enforce a lien upon real estate in favor of the plaintiff for amounts accruing to him through the purchase by him at tax sales of the real estate of the appellee Laura Murphy, and the conveyance thereunder, invalid and ineffectual to convey title, and the subsequent payment of taxes by him to protect his interest so acquired. If a conveyance for taxes does not convey title, but does transfer the lien of the state, such lien is "transferred to and vested in the grantee, his heirs and assigns," who are entitled to recover the amount of the taxes, interest, and penalty due at the time of the sale, with interest thereon and all taxes subsequently paid, with interest, and the claim therefor is a lien upon the lands, which are bound for the final payment thereof. See sections 8632, 8634, 8641, Burns' Ann. St. 1901. The right of action in such cases, if it exists, is one created by statute. In *Stephenson v. Martin*, 84 Ind. 160, the subject was discussed at length, and it was held, under similar statutory provisions, that the right to sue and enforce a lien upon the death of the purchaser belongs to his heirs or assigns, and not to his personal representative. Provision is made by statute (section 8640, Burns' Ann. St. 1901) for the development of a suit to quiet title, brought by the holder of an invalid tax deed, into a proceeding for the enforcement by payment of the amount due the complainant and the foreclosure of his lien therefor upon the land. Treating the cause as developed upon the trial, it is manifest that it was not one which would survive to the personal representative of the plaintiff.

Appeal dismissed.

(34 Ind. App. 324)

PITTSBURG, C., C. & ST. L. RY. CO. v. WILSON et al. (No. 4,973.)

(Appellate Court of Indiana, Division No. 1. Dec. 16, 1904.)

COVENANTS—CONVEYANCES OF RIGHT OF WAY—ERECTION OF CROSSING—CONSTRUCTION—CONDUCT OF PARTIES—BREACH—MEASURE OF DAMAGES—COVENANTS RUNNING WITH LAND.

1. An assignment of error questioning the action of the court in overruling, as to one paragraph of the complaint, a demurrer addressed jointly to two paragraphs, presents no question for decision.

2. A covenant by a railroad to erect and maintain a farm crossing, contained in a conveyance

of a right of way to it, runs with the land, and is available for the protection of the grantor or his remote grantee against a railroad claiming under the conveyance.

3. In determining whether a covenant by a railroad contemplated the maintenance as well as the making of a crossing, and whether the railroad accepted the conveyance, the nature of the subject-matter of the contract and the construction placed thereon by the parties may be considered.

4. Evidence held sufficient to show the acceptance by a railroad of a conveyance of land for a right of way which contained a covenant on its part to erect and maintain a farm crossing.

5. A covenant in a conveyance of land for a right of way that the railroad would "make and maintain" a wire fence on both sides of the land conveyed, "and also make" a farm crossing, in pursuance of which the railroad did supply, maintain, and keep in repair a crossing for a number of years, obligated the railroad not only to make, but also to maintain, the crossing.

6. A covenant in a conveyance of land for a right of way in which the railroad agreed to make a farm crossing for the grantor imposed on the railroad the duty of erecting approaches to the crossing.

7. Where a railroad covenanted in a deed for a right of way to erect a farm crossing, thereby impliedly covenanting to erect approaches thereto, the persons in whose favor the covenant existed were not bound to construct the approaches, on default of the railroad so to do, before resorting to their action against it.

8. In an action for breach by a railroad of a covenant in a deed for a right of way, whereby it agreed to erect a farm crossing, the measure of damages was the cost of the completion of the crossing, which the railroad had begun to make, but to which it had failed to build approaches, together with such sum as would compensate the covenantees for the loss of the use of their land by reason of the railroad's default during the period of such loss, and down to the time of trial.

Appeal from Circuit Court, Blackford County; E. C. Vaughn, Judge.

Action by James W. Wilson and another against the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company. From a judgment for plaintiffs, defendant appeals. Reversed.

G. E. Ross, for appellant. W. J. Houck, Waltz & Secrest, and W. M. Amsden, for appellees.

BLACK, J. In the first specification in the appellant's assignment of errors it is sought to question the action of the court below "in overruling the demurrer to the third paragraph of the amended complaint," and in the second specification the appellant assigns error "in overruling the demurrer to the fourth paragraph of the amended complaint." The court sustained a demurrer to the first and second paragraphs of the complaint. The demurrer which was overruled, omitting the title and the signature, was as follows: "The defendant demurs to the plaintiffs' third and fourth paragraphs of complaint, and, for cause of demurrer, says said amended paragraphs of complaint do not, nor does either paragraph thereof, state facts sufficient to constitute a cause of action." The demurrer was addressed to the two paragraphs jointly, and an assignment of error purporting to

¶ 2. See *Covenants*, vol. 14, Cent. Dig. §§ 65, 66; *Railroads*, vol. 41, Cent. Dig. § 174.

question the action of the court in overruling the demurrer as to one of the paragraphs does not present any matter for decision here.

It is also assigned that the court erred in overruling the appellant's motion for a new trial. The appellees, James W. Wilson and Catherine Crumley, sought damages for the destruction of a private crossing from the southern portion of their farm over the appellant's railway to the northern portion of the farm, basing their right to such crossing upon a provision in a deed of conveyance of the railroad's right of way, 80 feet in width, through the lands, to the appellant's grantor, another railroad company; the appellees holding, subject to the right of the railroad company, as tenants in common in equal shares; Catherine, one of the grantors in the deed, having her portion as an heir of her father, and James having his portion under a conveyance from another grantor in the deed, holding as heir of the same father. The land in question consisted of 120 acres, over which the railroad ran, dividing the land into portions about equal in size; the buildings being upon the portion south of the railroad, and the equal portion north of the railroad being the most fertile and valuable part of the land. By the deed executed in 1883 the grantors therein conveyed and warranted the strip of land 80 feet in width to the Chicago, St. Louis & Pittsburgh Railroad Company, its successors and assigns, forever. It purported to be made in consideration of \$1 in hand paid, and it contained the following: "Said company to make and maintain a good wire or other fence on both sides of the strip of land hereby conveyed; if wire, the same to have six wires with a board at top; and also to make for the grantors one farm crossing, together with all legal and equitable rights, claims and demands therein and thereto." At the time of the execution of the deed the railroad had been in existence for some years, having been constructed when the land was owned and occupied by the father of the appellees, and there was a good private farm crossing, constructed by the railroad company; the railroad being substantially upon a level with the immediately adjacent land, where it inclined downward toward the north. This crossing was provided with heavy planks between the rails, and adjoining them on the outsides, and with graded and graveled approaches. It was maintained in this condition by the railroad companies until June, 1901, when the appellant, for the purpose of improving and equalizing the grade of its railroad, raised the surface thereof; making for that purpose an embankment or fill throughout the course of the railroad across the land of the appellees, thereby destroying the private crossing. At the place where the crossing had been, the embankment was about 14 or 15 feet high, above the surface of the old crossing. The height

of the embankment varied, but at the lowest point was more than 6 feet. The appellant introduced no evidence, but it appeared in evidence that the appellant had planked a place at some distance eastward from the old crossing, and where the embankment was 7 or 8 feet high above the immediately adjacent ground, but that sides of the embankment were not graveled or properly graded, and no suitable approaches were constructed, and that the appellant did not provide a practicable crossing. It appeared in evidence that the one-half of the farm of the appellees, situated on the north side of the railroad, being much lower ground than the portion of the south side where the buildings were situated, was wholly surrounded by the lands of other farmers, and that no highway approached it, and there was no way by which the appellees could reach it with wagons and teams by means of any highway or otherwise, the embankment preventing such passage across the railroad, so that, under the conditions created by the appellant, the appellees had no opportunity of using the north one-half of their land for farming purposes in connection with the south portion, whereon they resided.

It is well settled that such a covenant in a deed of conveyance of a right of way to a railroad company runs with the land, and is available for the protection of the grantor owning the adjacent land, or his remote grantee, against the railroad company claiming and occupying under such conveyance, whether as the immediate grantee, or as remote grantee or successor. See *Toledo, etc., R. Co. v. Cosand*, 6 Ind. App. 222, 33 N. E. 251; *Lake Erie, etc., R. Co. v. Priest*, 131 Ind. 413, 31 N. E. 77; *Midland R. Co. v. Fisher*, 125 Ind. 19, 24 N. E. 756, 8 L. R. A. 604, 21 Am. St. Rep. 189; *Lake Erie, etc., R. Co. v. Griffin*, 25 Ind. App. 138, 53 N. E. 1042, 57 N. E. 722; *Elliott on Railroads*, § 1149.

There is some dispute as to whether the covenant provided for the maintenance as well as the making of the crossing by the railroad company, and it is contended that the evidence does not sufficiently show the acceptance of the deed of conveyance. On both these matters it is proper to take into consideration the nature of the subject-matter, and the construction placed upon the contract by the parties. It appears that the railroad had been constructed and the crossing had been made before the date of the deed. The crossing was maintained in good condition by the companies owning the railroad up to the time of its destruction by the appellant in 1901. It cannot be agreed that the railroad company would have satisfied its obligation under the covenant by making a crossing, and then destroying it immediately thereafter, or at any subsequent time while still occupying the right of way, and using it for the purposes for which it was conveyed. The action is not one for the re-

covery of damages for mere failure to keep the crossing in proper repair, but is one for the destruction of the crossing; the railroad company being bound by the covenant to supply a crossing and to keep it in repair, which obligation had been recognized by the conduct of the parties for many years. The deed was duly recorded, and the conveyance was beneficial to the appellant. It had not only recognized its obligation to provide the one crossing for many years, but, after it had destroyed it by the elevation of the grade, it still recognized its obligation by pretending to supply a crossing at another point, where it placed planks suitable for a crossing between the rails and at the sides of the track; and, having reference to this place, it notified the appellees that they had their crossing. As before stated, the appellant introduced no evidence. We cannot say that there was not any evidence tending to prove the complete execution of the deed of conveyance of the right of way. Nor can we consider the covenant as having been fully complied with by the mere making of a crossing and its maintenance up to the time of the destruction by the appellant, still enjoying its rights under the conveyance.

The appellees introduced evidence of the value of the farm with a suitable crossing, and on its value without a crossing, and the jury assessed their damages at \$2,850. We are not prepared to approve the measure of damages by which this result was reached. The change of grade which caused the destruction of the old crossing was a proper improvement of the railway for the better accomplishment of the legitimate purposes for which the strip of land was conveyed. Through such improvement, which the railway company had a right to make, the destruction of the old crossing was inevitable; but the company was bound by contract to make a farm crossing, and, as we think, to maintain one at all times while enjoying the use of the right of way. After the destruction of the old crossing, the company was still bound to provide a crossing for the appellees. The company did not deny this right of the appellees, or repudiate its obligation under the contract, but it prepared what it claimed to be such a crossing as it was bound to provide, but one which the evidence showed to be inadequate and impracticable for the proper and necessary uses of a farm crossing; and the appellees, by reason of the want of such crossing, had been losing the use and enjoyment of the land north of the railway. The so-called new crossing seems to have been properly constructed upon the top of the railway embankment, but it lacked a suitable approach on each side. Such approaches constitute necessary parts of a crossing. The obligation of the appellant was "to make for the grantors one farm crossing, together with all legal and equitable rights, claims and demands therein and thereto." It was not expressed that the

crossing should be made on and within the right of way. Whatever was necessary, to constitute a crossing was to be done by the railroad company, and it did not devolve upon the appellees to make or to pay for the approaches; nor were they bound to construct them before resort to their action against the company. It appears from the evidence that, while proper approaches to the new crossing will be somewhat expensive, yet approaches may be made, upon the construction of which the appellees will be supplied with a crossing which will answer the requirement of the contract, and that all that is necessary to prevent the permanent deterioration of the value of the farm is to make such a crossing as the evidence shows may be constructed. It would seem, then, that the proper measure of damages would be the cost of the completion of the new crossing, together with such amount as will compensate the appellees for the loss of use and enjoyment of their land during the period of such deprivation, down to the time of trial.

The judgment is reversed, with leave to the appellees, upon request, to amend their pleadings.

(24 Ind. App. 358.)

ARBAUGH et al. v. SHOCKNEY. (No. 4,678.)

(Appellate Court of Indiana, Division No. 2. Dec. 13, 1904.)

PRINCIPAL AND AGENT—TERMINATION OF CONTRACT—BREACH OF CONTRACT—"ADVANCES"—"DEBT."

1. Evidence in an action on a contract examined, and, *held* sufficient to authorize a finding that the provision for a written notice to terminate the contract was waived.

2. Plaintiff employed defendant as an insurance solicitor, agreeing to pay a specified commission for his services. The contract also provided that plaintiff might offset against any claim under the contract any and all debts or liabilities of defendant to plaintiff. A supplemental contract provided for advances by plaintiff to defendant of \$15 a week, which advances were to be a first lien on all commissions or renewals then due or that might thereafter become due; and plaintiff was authorized to deduct any advances made from any money received on premiums, which, under the primary contract, should be due to defendant. *Held*, that such advances did not create a debt on the part of defendant, and on failure of the venture to prove successful plaintiff could not recover the same of defendant.

3. A contract between plaintiff and his agent provided for advances to the agent to be repaid from commissions to be earned, and that the agent should remain in the employment so long as he was in debt to plaintiff. *Held*, that the use of the word "debt" with reference to advances implied no different mode of repaying than that provided for by the terms of the contract, and did not import personal liability.

On petition for rehearing. Overruled. For former opinion, see 71 N. E. 232.

ROBY, J. Appellant's testimony was in part as follows: "Well, he said, 'Mr. Arbaugh,' he said, 'I am at the point where I

am going to have to cut off this fifteen dollars a week expense. The business does not justify it, and I have got a big payment to make right here the middle of the month to the home office, and I cannot afford to pay this money any longer.' 'Well,' I said, 'Is it your idea that we cancel the contract?' He said, 'That is exactly the point.' And he says: 'I will make a contract on a strict commission basis. I will give you as good a contract as I have got.' I says: 'I don't want to stand in your way. If you are in that position, I will not hold you to the contract. You write up a new contract, and I will examine it.'" There is no doubt but the court was authorized to find that the provision for written notice to terminate the contract was waived. *Manufacturing Co. v. Busey*, 16 Ind. App. 410, 43 N. E. 987. To advance is "to supply beforehand," "to pay before the equivalent is received," "to pay before the proper time." *Powder Co. v. Burkhardt*, 97 U. S. 117, 24 L. Ed. 973; *Vail v. Vail*, 10 Barb. 69; *Gihon v. Stanton*, 9 N. Y. 462; *Balderston v. Rubber Co.*, 18 R. I. 338, 27 Atl. 507, 49 Am. St. Rep. 772. The term may be used to characterize a loan, or a gift, or money to be repaid conditionally. *Chase v. Ewing*, 51 Barb. 597, 613; *Northwestern Ins. Co. v. Mooney*, 108 N. Y. 118-124, 15 N. E. 303. An advance is something which precedes. It might be, as between these parties, made in anticipation of expected commissions, and in such event would no more create a debt than would an advancement made by a father to a son in anticipation of the expected inheritance by the latter. In *re Atwood* (Sup.) 88 N. Y. Supp. 838; *Gihon v. Stanton*, 9 N. Y. 476; *Balderston v. Rubber Co.*, supra. If the contract in terms contains a promise by the agent to repay the sums advanced, the transaction would amount to no more than a loan, and the right to judgment be undoubted. The primary contract contains no reference to any advances made or to be made. In the supplemental contract it is stipulated that "said advances shall be a first lien on all commissions or renewals then due you, or that hereafter may become due you, and that I am authorized to deduct any advancements made by me from any money in my hands due or to become due you, and that after deducting all money due to me for money advanced together with the net premium or premiums and internal revenue on any and all business reported by you, I will remit to you any balance on demand, except that I shall not be bound to pay any commission on any note taken by you for premiums until said note or notes become due and are paid by the makers thereof. It being understood and agreed that whenever there is any commission due the same shall constitute and form a part of the amount hereby agreed to be advanced. It is also agreed that if in any week the commissions earned and paid to you exceed fifteen dol-

lars, then only such sum shall be advanced in the following week or weeks as may be necessary to bring your total income up to the said sum of fifteen dollars per week from the date of this letter to that time. It being the intent of this proposition simply to provide you with ready money for current expenses, and it being specifically agreed that you shall remain in my employ at my option so long as you are in debt to me." The purpose of the proposition is also otherwise stated as: "In order to enable you to devote your entire time and energy to securing business as set forth in your contract." With deliberate care, appellee, in this letter written by himself, provides for every contingency which might prevent the application of earned commissions to the payment of advances, and stipulates that they shall be so paid with certainty and exactness, but wholly omits to mention any personal obligation on the part of the agent to repay such advances. If the intention was that the advances should constitute a loan, it is difficult to understand such omission. It is not only stipulated that the commissions earned shall be used to pay advances, but it is "specifically agreed that you shall remain in my employ at my option so long as you are in debt to me," a stipulation strongly tending to show an intention to rely upon the commissions to be earned to meet the advances, and inconsistent with the idea of personal liability. The use of the word "debt" is not contradictory of the preceding stipulations. "The word 'debt' is of large import, including not only debts of record, or judgments, and debts by specialty, but also obligations arising under simple contract to a very wide extent; and in this popular sense includes all that is due to a man under any form of obligation or promise." *Bouvier's Dict.* Its use with reference to advances does not imply any different method of repayment than is in terms provided for. As suggested by counsel for appellee the agent evidently had no funds, and no experience as a life insurance agent. He was to be paid by commissions, not likely to come at once. The business of both would suffer from the agent's lack of funds. The proposition to advance \$15 per week was made by appellee for his own advantage. He was not bound to continue such advances longer than his own interest dictated. The fund to be created by the agent's labor was the primary source from which both parties understood that the principal should be reimbursed. The agent risked the loss of all his time, the principal of \$15 a week. Had the venture succeeded, both would have gained; when it failed, they both lost. That the appellee cared anything about the personal promise of the agent is unlikely, and that the agent agreed to assume the entire risk of the enterprise is not shown.

Neither does an implied promise to pay arise upon the making of advances as shown

by the contract between these parties. *Lange v. Kaiser*, 84 Mich. 317-319; *North Western Ins. Co. v. Mooney*, supra. In the Michigan case above cited the defendant let a contract to the plaintiff for the making of tubs out of materials furnished by defendant. He gave evidence tending to show that he assisted in making the tubs, and sought to have credit upon the contract for the reasonable value of the services so rendered. The court said: "There was no evidence given by defendant tending to show that plaintiff had ever requested such assistance to be given, or that he had agreed to pay for the same. Now, whatever the rule may be as between strangers, where one performs valuable service for another, with his knowledge and assent, we think, in cases like the present, the relation existing between the parties precludes any implied promise to pay for such services, and that the charge of the court in this respect was correct." In the New York case suit was brought upon a bond given by an insurance agent, as in the case at bar, it being alleged that it had been agreed that the company should advance "to the said Mooney the sum of \$1,200, which was to remain a first lien upon all the business and renewal interest secured to said Mooney under the contract until repaid by said Mooney with interest at 7 per cent.;" and that the plaintiff did accordingly advance to him said sum, which he has not paid. It was said: "The plaintiff's contention in this action is that the clause relating to advances of money in the contract named provides for a loan to Mooney to be repaid by him absolutely and unconditionally." In reversing a judgment for the plaintiff the court said: "In the first place, there is no express agreement on the part of Mooney to pay back the money. There is no agreement that its advance shall create an indebtedness on his part; no words signifying that he is to be a borrower, nor that the plaintiff will lend to him any money. This omission in an agreement so fully and minutely defining the duties and contract obligations of the agent and the contract rights of the company are of great significance. It would have been much more natural to insert words signifying that to be the true character of the transaction, if it was so intended, than to omit them, and much easier to say directly that Mooney assumed a personal liability, if that were the fact, than to use words which require an extended argument on the part of counsel to satisfy a referee or court that such liability, although not expressed, may be inferred." Again: "But the contract goes further. It is added that the amount advanced is to remain a first lien upon all the business and renewal interest secured to the said Mooney under the contract until repaid with interest at 7 per cent." "These circumstances are not inconsistent with the view already expressed, nor are they inconsistent or in contradiction of the

meaning attributed to the promise of the company to make the 'advance.' They constitute an agreement that the advance made shall be a lien on the interest of the agent under the contract, but that involves no personal liability. It is an advance of money upon personal security, but not upon personal credit. * * * Nor, in this case, can the fact that the duration of the lien is provided for until the amount 'is repaid' allow a different conclusion. It is clear that it does not imply an agreement on Mooney's part to be personally bound for its payment. *Salisbury v. Phillips*, 10 Johns. 57."

This is an action founded upon a bond executed by Arbaugh as principal and by appellants Daniel Lesley and Joseph T. Gist as his sureties, in accordance with the provision of the primary contract that he should execute a satisfactory bond for the faithful performance of his duties and obligations as such agent. One of the conditions of the obligation is "that the principal shall pay over all moneys which he owes or may hereafter owe on account of advances made to him or otherwise." In determining whether such a default is shown upon the part of the principal as renders the sureties liable under the terms of the bond, they have the right to stand upon the strict terms of the contract, and their liability cannot be extended by implication. *Town of Salem v. McClintock*, 16 Ind. App. 661, 46 N. E. 39, 59 Am. St. Rep. 330. Proof of such default must be made. It does not follow that, because the terms of the bond are broad enough to include liability for a certain default, therefore such default is shown.

The petition for a rehearing is overruled.

(36 Ind. App. 6)

INDIANA TRUST CO. v. BYRAM. (No. 5,142.)¹

(Appellate Court of Indiana. Dec. 14, 1904.)

CLAIMS AGAINST DECEDENT'S ESTATE—BURDEN OF PROOF—PRINCIPAL AND AGENT—PROMISSORY NOTE—DELIVERY—EVIDENCE.

1. Under Burns' Ann. St. 1901, § 2479, regulating the trial of claims against decedents' estates, one claiming a note made by his agent and payable to claimant, found in the possession of the agent on the latter's decease, has the burden of showing the execution of the note.

2. For over 20 years, and until his death, decedent had been claimant's agent, and had authority to make investments and take notes and securities, and made annual statements which were claimant's only information as to the transactions and the amount due her. A note made by decedent in his own handwriting and payable to claimant was found, on decedent's death, in a box which had always been in his exclusive possession, and on this note indorsements of payments had been made, but the note had not been mentioned in any of the statements, and claimant had no previous knowledge of its existence. Held sufficient to show that decedent held the note as claimant's agent and hence claimant was entitled to recover the amount due thereon.

Wiley, J., dissenting.

Transfer to Supreme Court denied.

¹Rehearing denied, 78 N. E. 1094.

Appeal from Circuit Court, Marion County; H. C. Allen, Judge.

Sophronia A. Byram filed a claim against the estate of Norman S. Byram, deceased. From a judgment for claimant, the Indiana Trust Company, executor, appeals. Affirmed.

Quincey A. Myers and Chas. A. Dryer, for appellant. Jas. W. Noel, for appellee.

ROBY, J. Appellee filed her claim against the estate of Norman S. Byram, deceased. The case was tried in the Marion circuit court, special finding of facts made, conclusions of law stated thereon, and judgment rendered for the amount of the note which formed the basis of the claim. The findings of fact are in effect as follows: From 1878 to his death decedent was the agent of the appellee, who was his cousin, and loaned and reloaned, invested and reinvested, her money in the purchase of stocks, bonds, notes, and other securities, and upon such terms and conditions and at such times as to him seemed best, retaining such stocks, bonds, notes, and other securities in his exclusive possession and control during the whole time of such agency, acting without charge or compensation for his services, and rendering an annual statement on or about January 1st of each year to appellee concerning her property and business in his hands, which statement he transmitted to her in New York, where she resided, except that no statement was made for January 1, 1902, in the early part of which year he was taken ill, and departed life June 16th. Decedent kept the papers and securities aforesaid in his private safe in his private office, in a paper box on which were the letters and word "S. A. Byram." This box was, at all times prior to his death, in his exclusive possession and control. About six or eight weeks before his death, and while he was too ill to go to his office, he directed that the box be brought to his house, which was done. He did not leave the house after that, and after his death the box was found in a locked bureau drawer therein. It contained the instrument sued on, a promissory note dated at Indianapolis April 1, 1898, payable on demand to the order of S. A. Byram for \$738.67, payable at the Capitol National Bank of Indianapolis, with 6 per cent. interest from date and attorney's fees, value received, and without relief from valuation laws, and signed "N. S. Byram." On the face of said instrument the words "Certificate 30 as collateral" were written, and on its back was the following: "Paid on this note July 26, 1898, forty dollars (\$40.00); Feb. 1, 1899, paid one hundred fifty seven dollars (\$157.00)"—all in the handwriting of decedent. The instrument was folded in certificate No. 30 of a corporation named, which certificate was for 10 shares of \$100 each in said corporation. The certificate was dated April 23, 1898, and certified that N. S. Byram was the

owner thereof. No assignment or indorsement by said Byram was on said certificate. The instrument sued upon was made by the use of an ordinary printed form, the blanks in which were filled in decedent's own handwriting. The indorsements on said note and the signature thereto are also in his handwriting. Said box contained notes, stocks, bonds, and the instrument in suit, with copies of decedent's annual statements rendered to appellee from 1878 to 1901. The itemized statements aforesaid are included in the finding of facts. They refer to certain securities and money which decedent held in his possession belonging to appellee. Neither of them makes any reference to the instrument sued upon, nor to any note purporting to be executed by the decedent payable to appellee, nor do they show an indebtedness from him to her. The fourth and fifth findings of fact were in terms as follows: "(4) And the court further finds that at the time of the death of decedent said note was held by decedent as trustee and agent of claimant, and for her benefit, and not for the decedent individually. (5) That said Norman S. Byram as such agent had possession and control of said paper sued upon until the day of his death, and that, except as herein stated, he had never surrendered the same to claimant or to any other person for her use and benefit, and the claimant has never had any control or power over said paper, nor had the same in her possession or control; that afterwards all the papers, notes, stocks, and bonds in said box were turned over to said claimant upon the order of this court, at the request and petition of the executor, except the paper sued upon, and the copies of the annual statements made by decedent to claimant." The conclusions of law were that the note sued upon was executed and delivered by the decedent to appellee; that she was the owner and holder thereof, and entitled to recover thereon the sum of \$614.33; and judgment was rendered in accordance therewith. The special finding, excluding the fourth and fifth items, contains a fair resumé of the evidence. Appellant excepted to the conclusions of law, and filed a motion for venire de novo, based upon the absence of a finding as to the execution of the note in suit. This motion was overruled, as was also his motion for a new trial. Errors are assigned upon each ruling.

The burden of establishing the execution of the note rested upon appellee, by reason of the statute regulating the trial of claims against decedents' estates. Section 2479, Burns' Ann. St. 1901. There was no controversy as to the note having been written and signed by decedent, but execution includes delivery. *Nicholson v. Combs*, 90 Ind. 515, 46 Am. Rep. 229; *Smith v. James*, 131 Ind. 131, 30 N. E. 902. The actual controversy between the parties is as to whether or not the note sued upon was delivered. The

execution of a promissory note is an ultimate fact. *Smith v. James*, supra; *Vaughan v. Godman*, 103 Ind. 499-502, 3 N. E. 257. If it had been found that the note was "delivered," the other facts necessary to execution being admitted, such finding would have been effective, but it is not in terms made. The finding is therefore insufficient to sustain the conclusions and judgment, unless the evidentiary facts set out are such as that but one inference can be drawn from them, in which event the absence of the statement of the ultimate fact does not prevent the court, as a matter of law, from drawing the unavoidable inference. If the facts found leave room for a difference of opinion between reasonable men, then the ultimate fact must be determined by the court or jury trying the case. *Keller v. Gaskill*, 9 Ind. App. 670, 36 N. E. 303; *Cincinnati, etc., R. Co. v. Grames*, 136 Ind. 39, 34 N. E. 714. It appears from the finding that decedent was appellee's agent from 1878 until his death, and that he had authority of the most broad character to make investments and take notes and securities for her. Persons who gave notes to such agent cannot escape liability, when sued, because of the fact that appellee had never had the instruments in her own hands, and did not know of their existence or the existence of the makers. Delivery to the agent was delivery to the principal. *Skinner v. Baker*, 79 Ill. 496; *Fletcher v. Shepherd*, 174 Ill. 262, 51 N. E. 212; *Miller v. Irish*, etc., Ass'n, 36 Minn. 357, 31 N. W. 215; *Sowards v. Moss*, 58 Neb. 119, 78 N. W. 373.

It is, however, contended that an agent cannot act as such where his personal interest is or may be antagonistic to that of his principal, and that therefore decedent could not deliver his note to himself as the agent for appellee. The rule invoked is a wise and salutary one. It is designed to guard against the abuse of fiduciary duty, and all such transactions are void "as respects the principal unless ratified by him with a full knowledge of all the circumstances." It is supplemented by the further rule that all profits and advantages procured by the agent in the transaction of agency affairs inures to the benefit of the principal, and it matters not whether such profit or advantage be the result of the performance or of the violation of the duty of the agent. *Mechem, Agency*, 469; *Rochester v. Levering*, 104 Ind. 563, 4 N. E. 203; *McCormick v. Malin*, 5 Blackf. 509. The doctrine asserted would be applicable were the agent attempting to compel his principal to take his note in the final settlement of their affairs, instead of the money with which he had been intrusted. It is not applicable where the principal elects to enforce the note made by the agent, as in the case at bar.

It remains only to inquire whether the inference of delivery necessarily arises from the facts disclosed by the finding. The note

in suit is shown to have been written and signed by the decedent, and payments indorsed by him thereon. The business relation between him and appellee was one of extreme confidence upon her part. The annual statement constituted her means of information as to the investments made and the amount due. So far as those statements show, there was not due to her at any time the sum represented by the note in suit. The decedent, however, was not limited by the information contained in the statements made by himself. He knew the absolute and entire truth. What seems to us a discrepancy was no doubt a simple circumstance to him, but in any event it is impossible to explain his conduct with regard to the note upon any theory except that he intended it to be paid, such intention being carried down to the time when the box was brought to him at his residence, since otherwise it is not believable that the shrewd and intelligent man of affairs would have left the note, as he did, among the papers belonging to and connected with appellee's affairs and marked with her name. "The acts which constitute the delivery of a promissory note are not essentially different from those required to complete the execution of a deed." *Purviance v. Jones*, 120 Ind. 162, 21 N. E. 1099, 16 Am. St. Rep. 319; *Anderson v. Anderson*, 126 Ind. 62, 24 N. E. 1036. "To constitute delivery, there must be an intention to part with control over the deed as its owner." *Berry v. Anderson*, 22 Ind. 36; *Dearmond v. Dearmond*, 10 Ind. 191; *Vaughan v. Godman*, 94 Ind. 119. Where a father made a deed to his infant children, and held the same, never having caused it to be recorded, the jury were instructed that "it is sufficient if you find from the evidence, taking into consideration all the circumstances proved, as surrounding the transaction, that John Burkholder either delivered it to some one for them, or intended to or did hold same for the benefit of his children." In approving the transaction, the Supreme Court said: "We think there must be some act or declaration on the part of the grantor from which it may be inferred that he intended to part with title in the property, and this whether the grantees be infants or adults. * * * It may be delivered without being actually handed over, and, if once delivered, its retention by the grantor does not affect the title of the grantee." *Burkholder v. Casad*, 47 Ind. 418; *Nye v. Lowry*, 82 Ind. 316; *Vaughan v. Godman*, supra; *Fulton v. Fulton*, 48 Barb. 591. "No particular form is necessary to perfect the delivery of a deed. A deed may be delivered by any acts or words evincing the intention of the grantor to deliver it. Thus, in *Folly v. Van tuijl*, 9 N. J. Law, 153, Folly made a bond to his daughter, and, holding it up to her, said, 'Mary, this is your bond; what shall I do with it?' adding, 'I will take care of it for you.' He indorsed it 'Mary's bond,' and put

it away in his trunk. This was held to be a good delivery." *Mallett v. Page*, 8 Ind. 365; *Somers v. Pumphrey*, 24 Ind. 231-240. Where the grant is to a child and is beneficial, its acceptance is presumed, although the deed remains in the possession of the grantor. *Vaughan v. Godman*, 103 Ind. 502, 3 N. E. 257.

The second finding of facts is in part as follows: "That all indorsements on said note and the written portion of said note, including the signature, were made by and in the handwriting of said decedent, and were placed in said box for the purpose and with the intent to deliver the same to said claimant. The same was at the time of decedent's death left in said box, among the papers of said claimant, by said decedent for the use and benefit of said claimant." The possession of the instrument by the maker, acting as agent for the payee, does not prevent the application of the rule relative to delivery to a third person, as is shown by the cases above cited. Cases in which the grantor is treated as agent for the payee are very numerous. The following are a few of them: One member of a partnership made a deed to himself and the other partners, retaining possession of the deed. It was contended that there was no delivery because the deed had been retained by the grantor. The Supreme Court said: "It is fairly inferable from the allegations of the complaint that the property was purchased and held as partnership property, and, of course, the delivery of the deed to one partner would be a delivery to the partnership. If the complaint did not show partnership, there would be no force in appellant's argument, for delivery to one of several grantees would be valid and effective as to all." *Henry, Assignee, v. Anderson*, 77 Ind. 361; *Tucker v. Bradley*, 33 Vt. 324. The delivery of a chattel mortgage was held good although made to the agent for the mortgagee, who was also attorney for the mortgagor. *Fletcher v. Martin*, 126 Ind. 55, 25 N. E. 886. See, also, *Squires v. Summers*, 85 Ind. 252; *In re Reeve's Estate (Iowa)* 82 N. W. 912; *Munro v. Bowles*, 187 Ill. 346, 58 N. E. 331, 54 L. R. A. 865; *Stewart v. Weed*, 11 Ind. 92; *Blight v. Schenck*, 10 Pa. 285, 51 Am. Dec. 478. It is universally held that the absolute retention of control over the instrument by the maker is inconsistent with the intention to deliver. *Fifer v. Rachels et al.*, 27 Ind. App. 654, 62 N. E. 68; *Osborne et al. v. Elsinger*, 155 Ind. 351, 58 N. E. 439, 80 Am. St. Rep. 240. Cases of this class are distinguished from the one at bar in that the maker of the note sued upon here was the agent of the payee, expressly authorized to take and hold paper for her, while in those cited the person holding the instrument was the agent of the grantor exclusively. It was said by the Supreme Court in *Hatton, Ex'r, v. Jones*, 78 Ind. 466-472, that "we do not think that a person could ap-

point himself as such trustee and then make a valid delivery of his own property to himself as such trustee, or that an intention or promise to give would make a perfected gift so as to constitute the intender or promisor a trustee for the use of the promised or intended beneficiary." That case is distinguished from the one at bar in that the agency relied upon here is not self-created, nor does it arise out of the transaction in which the note was made.

That part of the fifth finding to the effect that appellee never had control or power over said paper was evidently intended to refer to physical control and manual possession. So construed, it is not inconsistent with the rest of the finding. Taking them together, it sufficiently appears that the note sued upon was held by decedent as the agent of appellee, and is therefore enforceable at her suit.

Judgment affirmed.

COMSTOCK, C. J., and BLACK, MYERS, and ROBINSON, JJ., concur.

WILEY, J. (dissenting). I am unable to agree with my associates either in the conclusion reached in the majority opinion, or in the reasoning leading thereto, and, owing to the importance of the question involved, I have concluded to express my views in a dissenting opinion.

The facts upon which the decision of the questions involved must rest are fairly and fully stated in the majority opinion, and need not be repeated here. To entitle appellee to a recovery it must affirmatively appear from the facts specially found that the note in controversy was in fact delivered. I do not need to pause to enlarge upon this elementary proposition, or to cite authorities in support of it.

Counsel for appellant have insisted, and argued at some length, that parts of the special finding of facts are conclusions merely, and not statements of substantive, issuable facts. I do not deem it important to determine whether or not some conclusions are stated as facts, for it is the rule in this state that, if the special finding contains sufficient facts to warrant the conclusions of law stated thereon, such special finding will not be deemed to be defective because it may state some evidentiary facts or conclusions of law. In such event the latter will be treated as surplusage. *Baldwin v. Threlkeld*, 8 Ind. App. 312, 34 N. E. 851, 35 N. E. 841; *City of Indianapolis v. Kingsbury*, 101 Ind. 200, 51 Am. Rep. 749; *Whitcomb et al. v. Smith*, 123 Ind. 329, 24 N. E. 199. The decisive question is to determine whether or not the ultimate facts found are sufficient upon which the conclusions of law rest, or, in other words, to determine whether or not the conclusions of law are warranted by the ultimate facts: If the facts show that there was a delivery of the instru-

ment sued on, either actual or constructive, then they are sufficient to support the conclusion of law that appellee is entitled to recover. On the contrary, if the facts do not show the execution of the note, which includes a delivery, then the conclusions of law are wrong. *Palmer v. Poor*, 121 Ind. 135, 22 N. E. 984, 6 L. R. A. 469; *Anderson v. Anderson*, 126 Ind. 62, 24 N. E. 1036; 2 Am. & Eng. Encyc. of Law (2d Ed.) p. 201, and authorities there cited.

As far as the special findings go on the question of the delivery is to the extent that it was the intention of the decedent to deliver the note to appellee, and that at the time of his death he left it in a certain box, among the papers of the appellee, for her use and benefit. In addition is the following: "And the court further finds that at the time of the death of the decedent said note was held by decedent as trustee and agent of claimant for her use and benefit, and not for the benefit of the decedent individually." The additional facts that have any bearing upon the question at issue are stated in the fifth finding, to the effect that the decedent, as an agent of appellee, had possession and control of the note until the day of his death, and that, "except as herein stated," he never surrendered the same to appellee or any person for her use and benefit, and that she never had any control or power over it, or had it in her possession. This finding must be construed in connection with those that precede it, in which it is stated that the decedent held the note as the agent and trustee of appellee, and placed it in the box for the purpose and intention of delivering it to her. Do these facts constitute a delivery of the note? This inquiry must be answered, in my judgment, in the negative. There is no finding that the decedent ever parted with the note, that he ever delivered it to the appellee, or that he ever delivered it to a third person for her use and benefit, or to be by such person delivered to her. These facts show that he never surrendered dominion over the instrument. This being true, he could have destroyed it at any time, for he had it in his possession to the hour of his death. Tiedeman on Commercial Paper, § 34, lays down the rule that so necessary is delivery to the life of a bill or note that, if it is found among the papers of the drawer or maker at his death, it cannot be sued on by the payee. He further states the rule to be in such case that the personal representative cannot make an effectual delivery of it. A case directly in point upon the first proposition above stated by Mr. Tiedeman is that of *Disher v. Disher*, 1 P. Wms. 204. See, also, the case of *Smith's Ex'rs v. Wyckoff*, 3 Sandf. Ch. 84. The findings show that the decedent was the agent for appellee for certain specific purposes, and these were that, as such agent, he had been for a number of years, and up to the time of his death, "loaning and reloaning, and investing and reinvesting, her money in the pur-

chase of stocks, bonds, notes, and other securities." This fixes and limits his authority as appellee's agent, and, so far as the findings show, he possessed no other power or authority whatever.

It is clear that there was not any delivery of the note to the payee, and, if there was in fact a delivery, it was delivered by the maker to himself, as agent or bailee for the use and benefit of appellee. This suggests the inquiry, can an agent deal with himself so as to make the delivery of his own note to himself, as agent, effective for the benefit of the payee? The authorities answer this inquiry in the negative. *Mechem on Agency*, §§ 66, 68, 375, 355, 367, 368; *Hatton, Ex'r, v. Jones*, 78 Ind. 466; *Reinhard on Agency*, § 54. In *Hatton v. Jones*, supra, the court said: "We do not think that a person could appoint himself as trustee and then make a valid delivery of his own property to himself as such trustee, or that an intention or promise to give would make a perfect gift so as to constitute the intender or promisor a trustee for the use of the intended or promised beneficiary." Upon the question of delivery, the Supreme Court in *Purviance v. Jones*, 120 Ind. 162, 21 N. E. 1099, 16 Am. St. Rep. 319, said: "That an instrument is not complete and effectual until it has been delivered, or until that has been done which is legally equivalent to a delivery, is elementary."

* * * To constitute a delivery, it must appear that the maker in some way evinced an intention to make it an enforceable obligation against himself, according to its terms, by surrendering control over it, and intentionally placing it under the power of the payee, or of some third person for his use. * * * The final test is, did the maker do such acts in reference to the deed or other instrument as evince an unmistakable intention to give it effect and operation, according to its terms, and to relinquish all power and control over it in favor of the grantee or obligee?" The rule there declared is decisive of this case. There is not a fact found that even tends to disclose that the decedent did any act or acts in reference to the note that evinced an unmistakable intention to give it effect and operation, or to relinquish all power and control over it in favor of the appellee.

In his discussion of the necessity of the delivery of a written instrument, so as to give it validity, Mr. Daniel, in his work on *Negotiable Instruments* (section 63, p. 82), declares the rule to be that, so long as a note remains in the hands of the maker, it is a nullity. *Bayley v. Taber*, 5 Mass. 286, 4 Am. Dec. 57; *Marvin v. McCullum*, 20 Johns. 268; *Freeman v. Ellison*, 37 Mich. 459; *Smith v. Foster*, 41 N. H. 215; *Dexter Savings Bank v. Copeland*, 77 Me. 269; *McFarland v. Sikes*, 54 Conn. 250, 7 Atl. 408, 1 Am. St. Rep. 111. Also that, even though it be placed by the maker in the hands of his agent for delivery, it is still undelivered as long as it remains in his hands and may be recalled; and, while

there, the payee has no right to it unless it be wrongfully withheld by the agent. The author cites many authorities in support of the proposition, to which reference is made. Daniel, Neg. Inst., *supra*. Again, the same author, *supra*, says, "So essential is delivery that it has been held that where a promissory note, the writing of which is unknown to the grantee, lay in the grantor's possession, and was found among his papers after his death, the payee could not claim or sue upon it; and though such a note should be found, accompanied by written directions to deliver it to the payee, the payee will still have no right of action unless the directions be valid as a testament." No pretense is made in this case that the payee of the note, appellee, knew that it was in existence until after the death of the maker, and she never had it in her possession, or exercised any control or dominion over it. Mr. Daniels also lays down the rule that, if the party who has signed or indorsed the instrument die before delivery, it is a nullity, and cannot be delivered by his personal representatives. Daniel, Neg. Inst. § 64. The following authorities support the text: Clark v. Boyd, 2 Ohio, 56; Clark v. Sigourney, 17 Conn. 511; Bromage v. Lloyd, 1 Exch. 32; Drum v. Benton, 13 App. D. C. 245. To constitute the delivery of a deed, there must be an intention of the vendor to part with the control over it as its owner. Berry v. Anderson, 22 Ind. 36. In Hotchkiss v. Olmstead, 37 Ind. 75, the court said: "To constitute delivery, there must be an intention to part with control over the instrument, and place it under the power of the grantee or some one for his use." A man signed and acknowledged deeds conveying his real estate to three sons, put the deeds in envelopes, and placed the envelopes in a box on a mantel in his room. He afterwards stated to a third person that he did not have any land, that he had conveyed it to his sons, and that one son had his deed, and that the deeds for the other two sons were in a box for them. After his death the deeds to his two sons were not found in the box where he said he put them. It was held there was no delivery. In Osborne et al. v. Esslinger, 155 Ind. 351, 58 N. E. 439, 80 Am. St. Rep. 240, the following facts were exhibited: A grantor signed and acknowledged certain deeds, and placed them in an envelope with her name and the words "Deeds to Children" indorsed thereon. She kept them in her possession for about two years, and then handed a package containing the deeds to an aged relative, who lived with her, and intrusted her to take care of the papers until after her death, and then deliver them to the one who was to settle her estate. She afterward took possession of the package, and placed them in a press in her house, saying to a relative: "In case I get sick, you take care of these papers, and when I die give them to the one who settles my estate." Soon afterward

she became sick, and called the relative to her bedside and asked her if she had taken charge of the papers, and, being informed that she had, said, "All right." The custodian of the package did not know what it contained, but after the death of the grantor delivered the deeds to the grantees therein named. The Supreme Court, upon these facts, held there was no delivery. See, also, Fifer v. Rachels, 27 Ind. App. 654, 62 N. E. 68.

It is clearly discernible from the authorities that, to constitute a delivery of a deed, there must be complete surrender and parting with control of the same by the grantor, and it must pass under the power and control of the grantee or some one in his behalf. The rule is equally as strict in regard to the delivery of promissory notes. In Palmer v. Poor, 121 Ind. 135, 22 N. E. 984, 6 L. R. A. 469, it was said: "Delivery is a part of the execution of a promissory note, and until delivery it is destitute of force." In Bean v. Bean (N. H.) 53 Atl. 907-909, securities were left by a decedent in an unsealed envelope in his wife's possession; on the envelope, in the handwriting of the decedent, was the statement, "The Property of Electa C. Bean [wife] and Emma R. Bean [daughter]"; the securities were certificates of stock and savings bank books, which they described in detail; the daughter knew nothing of the package until after the death of her father; the stocks and bankbooks were not assigned; the decedent had previously caused to be transmitted to his wife and daughter certificates of other corporations. Under these facts it was held that there was no delivery of the securities and hence no gift. In Cutting v. Gilman, 41 N. H. 147, the court said: "Delivery is essential, both at law and in equity, to the validity of a parol gift of a chattel; without actual delivery the title does not pass." In Streissguth v. Kroll, 86 Minn. 325, 90 N. W. 577, it was said: "The delivery of a written instrument is one of intention, and, to constitute a complete delivery thereof, it must be made in a manner evincing an intention to part presently and unconditionally with all control over the instrument, and thereby give it effect." The rule, as I understand it, is without variance that there can be no delivery, either actually or constructively, of a written instrument, without an intention to deliver on the part of the maker or grantor, for the essence of delivery is the intention of parties, and the intention must be clear that the maker or grantor intended to part with all control and dominion over the instrument. He must put it beyond his control. Mr. Tiedeman on Real Prop. (2d Ed.) § 813, lays down the rule as follows: "In determining what will constitute a sufficient delivery, it is found that the intention is the controlling element"—citing authorities. It is also held that an intention to deliver an instrument, not carried out by the maker,

will not be sufficient. In re Crawford, 113 N. Y. 560, 21 N. E. 692, 5 L. R. A. 71; Fifer v. Rachels, supra; Walls v. Ritter, 180 Ill. 616, 54 N. E. 565. So far as we are advised, the unbroken rule is that the retention of the instrument in the possession of the maker or grantor, and his absolute dominion over it, is inconsistent.

Again, the question of delivery is a question of fact. It is an ultimate fact, and in this case the burden was upon appellee to establish that fact. In Vaughan v. Godman, 94 Ind. 195, it was said: "The question of delivery is a question of fact to be determined by the evidence. In all disputes as to whether or not a deed has been delivered, the most important inquiry is to ascertain the intent of the grantor in the act or several acts which it may be claimed constituted a delivery. Did he intend to part with all control over the deed? Did he intend to divest himself of the title and lodge it in the grantee?" It is essential to delivery that the minds of both parties should assent, in order to bind them, and if, through inattention, infirmity, or otherwise, one does not assent, the act of the other is nugatory. Daniel, Neg. Inst. § 67; Ferguson v. Miles, 3 Gilman, 358, 44 Am. Dec. 702; Fonda v. Sage, 46 Barb. 123; Whyte v. Rosencrantz, 123 Cal. 634, 56 Pac. 436, 69 Am. St. Rep. 90.

To determine whether or not the facts specially found will warrant a judgment in favor of appellee, I must apply the rules of law which I have been considering to the facts found. The fact of delivery, as such, is not found. As far as the findings go in this regard is to show that the written part of the note, signature, and indorsements were in the handwriting of the decedent; that the note was left by decedent in a box, in which other papers, bonds, etc., belonging to appellee were kept by decedent; that the note was in a certificate of stock, and an indorsement that it was intended as collateral; that the note remained in his exclusive possession and control up to the time of his death, and that appellee never had possession of it or dominion over it; that the note was placed in the box by the decedent "with intent to deliver the same to claimant"; that decedent was the agent of appellee to loan and invest money for her; that he held such note "as trustee and agent of claimant and for her benefit, and not for the decedent individually"; that he had never, "except as herein stated," surrendered the same to "claimant or any other person for her use and benefit." It is also found as a fact that during all the years decedent was acting as appellee's agent he made annual statements to her of the business he had transacted for her as such agent, and the last three statements, covering the years since the date of the note, are set out in full. These statements speak for themselves, and it is a significant fact that neither of them make any mention of the

note in controversy, while all other transactions are itemized. In neither of the three last statements is the amount of the note required to balance the account between them. The statement of January 1, 1899, shows that he had securities and cash of hers, aggregating \$24,295; January 1, 1900, \$25,625, less cash overdrawn, \$404; and January 1, 1901, \$26,362, which included \$858 in cash. The statement of January 1, 1899, showed that he held for her 17 notes, that of January 1, 1900, 15 notes, and that of January 1, 1901, 13 notes. It is a strange coincidence that the decedent had the note in suit in his possession and considered it a binding obligation against himself, and never mentioned it when rendering to appellee an account of his stewardship. The fact is apparent that the decedent accounted for all the money and securities of appellee in his possession and under his control. There is but one finding that can possibly be tortured into a finding of the ultimate fact of delivery, and that is the fourth, and the effect of that is that decedent, as "trustee and agent," held the note for appellee. The word "trustee" adds no force to the finding, for not a fact is stated which constituted decedent a trustee. Under the statute appellant was entitled to prove all defenses to the action, except set-off and counterclaim, without answer. Section 2479, Burns' Ann. St. 1901. Under the statute, therefore, the plea of non est factum was in, and appellee was required to prove the execution of the note, and this includes delivery. As I have shown in a former part of this opinion, decedent could not constitute himself appellee's agent, for the purpose of delivering to himself as such agent his own individual note. He could not execute his own note to himself, as agent for appellee, without her knowledge or consent, and, as he could not, it was not executed. If appellee's theory is correct, then an agent who has authority to loan his principal's money and take notes for it could, sua sponte, execute his own note to himself, or, in other words, contract with himself, and thus use or dissipate his principal's money, and yet not be guilty of embezzlement, although utterly insolvent.

In addition to what I have said concerning the delivery of a note by an agent to himself for his principal, I cite the following: "If a bill or note is delivered to the personal agent of the drawer or maker, the delivery is not complete, so as to pass title, until the agent has in turn delivered it to the payee of his agent. Until such delivery, the maker or drawer can recall it from the agent." Section 26, Tiedeman on Bills and Notes, citing Devries v. Shumate, 53 Md. 211. In the case before us the fact is established that the decedent signed the note and delivered it to himself as appellee's agent. So far as its execution is concerned, he did no more. He was in absolute control and pos-

session of it. The payee was ignorant of its existence, so far as the facts show. No indebtedness is shown to have existed from decedent to appellee. He could have destroyed or recalled the note at any time before his death without doing any unlawful act or rendering himself liable for its destruction. The findings show that he intended the note for appellee, but an unexecuted intention is not effective. The special findings do not show a delivery of the note, and, as delivery was an essential fact in its execution, the findings are insufficient to support the conclusions of law. There can be no presumption in favor of appellee on the question of delivery, and, even if there could be, such presumption could not control the failure of the findings to show affirmatively a delivery, in the face of the burden resting upon appellee. *Galpin v. Page*, 18 Wall. 350, 21 L. Ed. 959.

The judgment should be reversed, and the court below directed to restate its conclusions of law and render judgment for appellant.

(212 Ill. 512)

LINGLE v. CITY OF CHICAGO.

(Supreme Court of Illinois. Dec. 9, 1904.)

MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENTS—CONFIRMATION—WRIT OF ERROR—NECESSITY OF AFFIDAVIT.

1. Under the act of 1897 providing that writs of error may issue from the Supreme Court on judgments of the circuit court confirming assessments for local improvements, provided that the application for such writ be accompanied by an affidavit that the applicant did not receive notice of the filing of such assessment for confirmation, or otherwise learn of its pendency, until within 10 days previous to an entry of applicant's default therein, a writ sued out without such affidavit will be dismissed.

Proceedings between Samuel B. Lingle and the city of Chicago in relation to a special assessment for local improvements. Motion by defendant in error to dismiss the writ of error. Writ dismissed.

Charles S. McNett, for plaintiff in error. Robert Redfield (Edgar Bronson Tolman, Corp. Counsel, of counsel), for defendant in error.

WILKIN, J. This is a motion on behalf of the city, the defendant in error, to dismiss the writ of error, on the principal ground that the writ of error was sued out without filing an affidavit, as required by statute, as to the time when notice came to the plaintiff in error of the delinquency and of the confirmation of the special assessment. The practice had grown up, especially in the city of Chicago, and perhaps other places where special assessments were made for paying local improvements, to sue out a writ of error at any time within the five years, and even after the improvement has been made and the principal part of the assessment collected, which resulted in loss to

parties, often, and confusion in the proceeding under which the improvement was made. In 1897 the Legislature saw proper to pass an act which required that, upon suing out a writ of error in such cases, the plaintiff in error should make an affidavit as to when notice of the delinquency came to him, and when he first received notice of the pendency of the proceeding for the confirmation of the assessment; and that statute came before the court in the case of *Hart Bros. v. West Chicago Park Com'rs*, 186 Ill. 464, 57 N. E. 1036, in which the constitutionality of the law was questioned, and considered by the court, and the validity of the act sustained. This case comes up at a later period without any such affidavit. There seems to be no excuse or explanation as to why the affidavit was not filed, and we think it is cause for dismissing the writ of error. Accordingly it is so ordered.

Writ dismissed.

(212 Ill. 475)

SWEENEY v. CHICAGO TELEPHONE CO.

(Supreme Court of Illinois. Dec. 13, 1904.)

CONDEMNATION PROCEEDINGS—REVIEW.

1. As section 12 of the eminent domain act (*Hurd's Rev. St. 1899*, p. 837, c. 47) provides for an appeal in proceedings thereunder, and there is no provision for prosecuting a writ of error, the proceedings, which are regulated entirely by the statute, cannot be reviewed except by appeal.

Error to Lake County Court.

Condemnation proceedings by the Chicago Telephone Company against Michael Sweeney. There was a judgment for petitioner, and defendant brings error. Writ dismissed.

Story & Story, for plaintiff in error. Holt, Wheeler & Sidley, for defendant in error.

CARTWRIGHT, J. In this case the plaintiff in error, Michael Sweeney, sued out a writ of error from this court to the county court of Lake county to review a proceeding in vacation before the judge of that court, on petition of the defendant in error, the Chicago Telephone Company, to condemn a right of way for its telephone line. The defendant in error has moved to dismiss the writ of error on the ground that the judgment cannot be reviewed by that means.

The proceeding was in vacation under the provisions of the eminent domain act (*Hurd's Rev. St. 1899*, p. 837, c. 47), and that act makes no provision for review of the record by means of a writ of error; neither is there any other statute which gives the right to a writ of error in such a case. Section 12 of the eminent domain act provides for an appeal to this court, and there is no provision for prosecuting a writ of error. That the omission was intentional is clearly shown by the provisions of the act. Upon the re-

¶ 1. See *Eminent Domain*, vol. 13, Cent. Dig. § 653.

turn of the verdict the petitioner may either dismiss the petition before judgment, or appeal therefrom, or make payment of the compensation within the time fixed by the order of the court. Section 13 provides that in case of appeal the petitioner shall have the right to enter upon the property and the use of the same, upon entering into a bond securing to the property owner the compensation to be finally adjudged in the case. If a writ of error is available to either party, it is necessarily available to both, and it would not be thought that the petitioner could enter upon the use of property condemned, and, after occupying it for any period within five years, sue out a writ of error to reverse the judgment. It is clear that the Legislature did not intend that the judgment should be reviewed except by appeal. Article 9 of the city and village act (Starr & C. Ann. St. 1896, c. 24, par. 130), and the local improvement act (Hurd's Rev. St. 1899, p. 368, c. 24, § 32), recognize the right to a writ of error in a condemnation proceeding; but whatever the effect of such recognition may be, it does not confer the right in this class of cases.

There being no statute which permits a party to a condemnation proceeding to have the record reviewed by a writ of error, if it can be prosecuted at all it must be because the right to a writ exists apart from any statute authorizing it. A writ of error is a writ of right in all cases which are prosecuted according to the course of the common law, but it is not a writ of right in any special statutory proceeding. The condemnation of private property for public use under the eminent domain act is a special, statutory, and summary proceeding. It may be prosecuted in vacation before the judge, or in term time, in accordance with the provisions of the act, which amount to a code of practice for that class of cases. The proceeding is regulated entirely by the statute, and is not governed, either as to pleading or practice, by the rules of the common law. The proceeding under the statute is summary, for the purpose of having the compensation ascertained, and having the property condemned appropriated to the public use without delay. Being of that nature, there is no right to a writ of error unless expressly given by statute. The motion will therefore be allowed, and the writ dismissed.

Writ dismissed.

(213 Ill. 99)

HEALY v. PROTECTION MUT. FIRE INS. CO.

(Supreme Court of Illinois. Dec. 22, 1904.)

TRUST DEEDS—FORECLOSURE—TENDER—SUFFICIENCY—SOLICITOR'S FEE—MASTER'S REPORT—FORM AND CONTENTS—CHARGES.

1. Where the amount of a tender made on behalf of defendant, after commencement of a suit to foreclose a trust deed, was placed in bank by the person making the tender, and

checked against until it was reduced below the amount of the tender, it was not kept good, and was ineffectual.

2. When a tender is made, after the commencement of suit to foreclose a trust deed, which provides for a solicitor's fee, the tender, to be effective, must include the amount of the solicitor's fee earned up to the time of making the tender, and it must be kept good.

3. While a solicitor's fee of \$250 for foreclosing a trust deed is a large one, the action of the chancellor in allowing it will not be interfered with; the testimony of a number of attorneys that the fee was reasonable being uncontradicted.

4. On foreclosure of a trust deed providing for the payment of an attorney's fee, it is proper to include the fee in the decree, and allow it to draw interest from the date of the decree.

5. A master's report should give an itemized statement of the services rendered and the fees allowed by statute, or, if no fees are fixed by statute, the action of the court as to compensation, and a charge of a lump sum for the master's services is improper.

6. A charge of \$125.20 by a master for taking testimony and reaching a conclusion as to the amount of attorney's fees to be allowed under a deed of trust providing therefor, the amount in dispute being only \$200, is excessive.

Appeal from Appellate Court, First District.

Action by the Protection Mutual Fire Insurance Company against Mary Healy. From a judgment of the Appellate Court (107 Ill. App. 632), affirming a judgment for plaintiff, defendant appeals. Reversed.

This was a bill in chancery, filed by the appellee in the circuit court of Cook county to foreclose a trust deed in the nature of a mortgage given to secure a series of promissory notes, upon which there remained due as principal the sum of \$5,300. After the bill was filed the appellant called upon appellee to ascertain the amount then due upon said notes and trust deed, including interest and costs, and the appellee delivered to the appellant a statement showing the sum of \$5,696.27 to then be due thereon, which included a solicitor's fee of \$150. The appellant thereupon tendered to the appellee the sum of \$5,596.27, or the amount then claimed to be due by appellee upon said notes and trust deed, together with court costs, the expense of the continuation of the abstract of title, and a solicitor's fee of \$50, which amount the appellee declined to accept in satisfaction of said notes and trust deed. An answer and replication were then filed, and the case was referred to a master to take the proofs and report his conclusion. The master found the amount due upon the trust deed and notes, which included a solicitor's fee of \$250, to be \$5,976.21, and recommended that a decree be entered for that amount, and that his fees as master be taxed at \$125.20; and, a decree having been entered in accordance with the recommendations of the master, an appeal was perfected to the Appellate Court for the First District by the defendant, where the decree was affirmed, and a further appeal has been prosecuted by her to this court.

Vocke & Healy, for appellant. Daniel F. Flannery, for appellee.

HAND, J. (after stating the facts). It is first contended by appellant that she is not liable for solicitor's fees under the provisions of said trust deed. The provisions of this trust deed with reference to solicitor's fees are, in substance, the same as the provisions of the trust deeds construed in *Cheltenham Improvement Co. v. Whitehead*, 128 Ill. 279, 21 N. E. 569, and *Fuller v. Brown*, 167 Ill. 20, 47 N. E. 202. It was held in each of those cases a solicitor's fee was properly included in the decree of foreclosure, and the rule there announced is conclusive of the right of the appellee to recover a reasonable solicitor's fee in this case.

It is next contended that, the appellant having tendered the appellee \$50 for its reasonable solicitor's fees, it was error to allow to appellee the amount recommended as a solicitor's fee by the master. The appellee suggests two reasons why this contention should not be sustained: First, that its solicitor had earned more than the amount tendered at the time the tender was made; and, second, that the tender was not kept good. As we are of the opinion the tender was not kept good, it will not be necessary to consider appellee's first proposition. The tender was made on behalf of appellant by her husband with his own funds. He afterwards placed them to his account in bank, and thereafter, by checking against the said amount, reduced it far below the amount of the tender. The rule in this state is that, when a tender is made after suit has been commenced to foreclose a trust deed or mortgage which provides for the payment of a reasonable solicitor's fee, to be effective, the tender should include the amount of the solicitor's fee earned up to the time of the making of the tender (*Fuller v. Brown*, supra), and that the tender must be kept good (*Crain v. McGoon*, 86 Ill. 431, 29 Am. Rep. 37; *Aulger v. Clay*, 109 Ill. 487).

It is further urged that a solicitor's fee of \$250 is an unreasonable amount for the services performed in this case. Eleven practicing attorneys residing in the city of Chicago testified that the amount allowed as solicitor's fees by the court was a reasonable sum for the services performed by the solicitor of the appellee in this case. Their testimony was uncontradicted. The testimony of the attorneys called by the appellant having been confined to the value of the appellee's solicitor's service up to the time of making said tender, in view of the testimony and the fact that the chancellor is presumed to have taken into consideration, in fixing a reasonable solicitor's fee, his own knowledge as to what the services performed by the solicitor were reasonably worth, we do not feel justified in disturbing the amount fixed in this case. We are impressed, however, with the conviction the fee allowed

was a large one for the services performed. In *Goodwillie v. Millmann*, 58 Ill. 523, on page 528, Mr. Justice Walker, in commenting upon the duty of the trial judge in fixing the fees of solicitors in foreclosure and similar cases, said: "In taxing such fees the chancellor should exercise his own judgment, and not be wholly governed by the opinion of attorneys as to the value of the services. He has the requisite skill and knowledge to form some idea as to what is a fair and reasonable compensation, and he should exercise that judgment. He should, no doubt, consider the opinions of witnesses and evidence of the sum usually charged and paid for such services, but should not be wholly controlled by the opinions of attorneys as to their value."

It is next urged that it was error to include the amount of the solicitor's fees in the decree, and to then provide that the entire amount of the decree draw interest from the date of the decree. We see nothing wrong in this. The trust deed provided for the allowance of reasonable solicitor's fees. When the fee was fixed by the court and included in the decree, it became merged in the decree with the balance of the debt, and the decree properly provided the amount found due the appellee should draw interest from its date.

It is finally urged as ground for reversal that the court erred in allowing a master's fee of \$125.20. In *Schnadt v. Davis*, 185 Ill. 476, 57 N. E. 652, on page 487, 185 Ill., page 656, 57 N. E., the proper method in which masters in chancery should present to the court the amount of fees and charges asked to be allowed in their favor was pointed out. It was there said: "The report in this case as to the fees and charges of the master is as follows: 'Master's fee this report, \$50.' This mode of reporting fees and charges can be easily made a cover for illegal and oppressive exactions. An itemized statement of services rendered, and the fees allowed therefor by the statute, should be made; and if services are rendered for which the fees are not fixed by the statute, but are left to be determined by the chancellor, the report should state such service, and the action of the court in the matter of the master's compensation therefor, and also should show whether such costs had been paid, and, if paid, by whom." The master in this case, in total disregard of the practice as there announced, indorsed upon his report, "Master's fee, \$125.20," and the decree taxed that amount against appellant as costs. From the statement indorsed upon the master's report we are unable to determine what services the master sought to have the court allow him compensation for. The solicitor of appellee, in defense of said charge, points out that the master charged \$50 for writing up the testimony, and spent 16 hours, at \$5 per hour, in reaching a conclusion in the case, and for which he says, under the prac-

tice in vogue in Cook county, the master was entitled to \$80, but that he had only charged therefor \$75.20. The question submitted to the master involved the allowance of a solicitor's fee in a foreclosure case, which he finally fixed at \$.250. The appellant had offered to pay a solicitor's fee of \$50, so that the matter in controversy was really only \$200, an amount within the jurisdiction of a justice of the peace. The statute does not contemplate that a master in chancery in counties of the third class shall for such a service arbitrarily fix the amount of \$75.20, or any other amount, as his fees, and then hotchpotch it with other charges, so that the litigant who is called upon to pay it, or a court of review that is called upon to review the action of the lower court in allowing such charge, cannot tell for what service the litigant is asked to pay. In the Schnadt-Davis Case, supra, it was said (page 487, 185 Ill., and page 655, 57 N. E.): "The master cannot arbitrarily fix upon an amount to be paid him as his compensation for examining questions of fact and reporting his conclusions; but, before he is entitled to demand the parties, or either of them, shall compensate him in any sum for such services, it is his duty to have the court determine the amount he is justly entitled to receive for such services." The report of the master was not proper in form and his charges were excessive.

The judgment of the Appellate Court and the decree of the circuit court will be reversed, and the case remanded to the circuit court for further proceedings in accordance with the views herein expressed.

Reversed and remanded.

(213 Ill. 268)

FISHER et al. v. CITY OF CHICAGO.

(Supreme Court of Illinois. Dec. 22, 1904.)

MUNICIPAL IMPROVEMENTS—SPECIAL ASSESSMENTS—OBJECTIONS—REVIEW—QUESTIONS NOT RAISED BELOW—EXCEPTIONS—JURISDICTION OF PERSON—JUDICIAL NOTICE.

1. Under Local Improvement Act, § 46 (Hurd's Rev. St. 1899, p. 372), providing that any person interested in any real estate to be affected by an assessment may appear and file objections, the objections must be made in such manner as to show the point on which a decision is asked, and to enable the opposite party to obviate the objections if possible.

2. Objections to a special assessment for local improvements, except that the court has no jurisdiction of the subject-matter, not made in the county court, as provided by Local Improvement Act, § 46 (Hurd's Rev. St. 1899, p. 372), cannot be made for the first time in the Supreme Court.

3. Where a landowner voluntarily appears and files objections to an assessment for local improvements, without objection to the jurisdiction of the person, he waives all questions as to such jurisdiction.

4. In order to present a question for review on appeal, an exception must be taken to the decision.

5. The questions whether the ordinance authorizing a local improvement would require further legislation in order to make it operative,

and whether the superintendent of special assessments was legally qualified to make an assessment, are questions which were proper to be presented to the county court for decision, and, not having been so presented, they cannot be reviewed by the Supreme Court on appeal.

6. A system of sewers in certain streets of the city and a sewage pumping station constitute a local improvement, for which a special assessment may properly be levied.

7. The objection, to a special assessment for local improvements, that the judge before whom the question of benefits was tried did not have jurisdiction of the subject-matter, is one that can be raised for the first time in the Supreme Court on appeal.

8. The Supreme Court will take judicial notice that the person who signed the decree appealed from was a county judge.

Appeal from Cook County Court; O. N. Carter, Judge.

Proceedings for special assessment for local improvements by the city of Chicago against Lucius G. Fisher, trustee, and others. From a judgment of confirmation, defendants appeal. Affirmed.

N. W. Hacker and William J. Donlin, for appellants. Robert Redfield and Frank Johnston, Jr. (Edgar Bronson Tolman, Corp. Counsel, of counsel), for appellee.

CARTWRIGHT, J. The county court of Cook county confirmed a special assessment against property of appellants, levied to defray the cost of constructing a sewage pumping station, including buildings, machinery, and appurtenances, and an extensive system of main sewers connected therewith, to be laid in the streets of a part of the city of Chicago, and from the judgment of confirmation this appeal was taken.

The errors assigned, which are relied upon in this court, are, in effect, first, that the estimate of the engineer submitted by the board of local improvements with the ordinance is not sufficiently itemized; second, that the ordinance fully describing the improvement varies from the estimate and includes some things not embraced in such estimate; third, that the ordinance does not sufficiently prescribe the nature, character, locality, and description of the improvement; fourth, that the ordinance will require future legislation of the city council to make it operative; fifth, that the improvement is not a local improvement for which a special assessment can be levied, but is one which must be paid for by general taxation; sixth, that the judge before whom the question of benefits was heard was without jurisdiction to hear the same; seventh, that the superintendent of special assessments, being an employé of the city, was an interested person, not legally qualified to make the assessment and to apportion benefits between the city and property owners, and that the act authorizing him to do so is void.

None of these objections was presented to the county court. The abstract contains no

* 6. See Municipal Corporations, vol. 26, Cent. Dig. §§ 1021, 1022.

merous objections, which, with two exceptions, could not possibly include any of the objections now made, and the remaining two were of the most general character, to the effect that there was no valid ordinance authorizing the assessment and that the proceedings were not in accordance with the statute, with no hint of any objection now raised. Section 46 of the local improvement act provides that any person interested in any real estate to be affected by an assessment may appear and file objections. By section 48 all objections, except as to benefits, are to be heard by the court; and by section 49, if there is an objection as to benefits, it is to be tried by a jury, unless a jury shall be waived. *Hurd's Rev. St. 1899*, pp. 372, 373. An appeal is allowed for the purpose of reviewing the decision of the county court upon the objections filed, and, if that court has jurisdiction of the subject-matter, the party appearing there must present his objections to that court. Objections must be made in such manner as to show the point on which a decision is asked, and to enable the opposite party to obviate the objection, if it can be done. The county court is not charged with the duty of searching for objections which are not pointed out, and an objection not made in that court must be regarded as waived, and cannot be made for the first time on appeal to this court. *Kelly v. City of Chicago*, 148 Ill. 90, 35 N. E. 752; *Chicago Terminal Transfer Co. v. City of Chicago*, 178 Ill. 429, 53 N. E. 361; *Fiske v. People*, 188 Ill. 206, 58 N. E. 985, 52 L. R. A. 291; 2 Cyc. 677. That rule applies to all objections which the county court has jurisdiction to hear and determine, but an objection that the court had no jurisdiction of the subject-matter is one that cannot be waived, and may be raised for the first time on appeal or writ of error. A judgment rendered by a court having no jurisdiction of the subject-matter is a mere nullity. Consent cannot give jurisdiction over subject-matter, and a court may take notice of a want of jurisdiction of its own motion. *Foley v. People*, Breese, 57; *Way v. Way*, 64 Ill. 406; 2 Cyc. 680. In this case there is no question of jurisdiction of the persons of appellants. Where a party voluntarily appears and files objections, recognizing the jurisdiction, he waives all questions as to jurisdiction over him. The objections now urged, not having been made in the county court, cannot be reviewed, except so far as they relate to jurisdiction over the subject-matter.

The objections argued here are all what are termed "legal objections" to the assessment, which were proper to be heard by the court. On the question of benefits, appellants waived a jury and offered no evidence, so that there is no question of that kind. When the legal objections were overruled by the court, no exception was taken to the ruling or decision, and it could not be reviewed for want of an exception. In order to

preserve a question for review on appeal, an exception must be taken to the decision. *East St. Louis Electric Railway Co. v. Stout*, 150 Ill. 9, 36 N. E. 963; *Trigger v. Drainage District*, 193 Ill. 230, 61 N. E. 1114; 2 Cyc. 714; 8 Ency. of Pl. & Pr. 163. All objections, therefore, which do not go to the jurisdiction of the county court over the subject-matter have been waived and cannot be considered on this appeal, even if they were embraced in objections filed.

There can be no doubt that the county court had jurisdiction to hear and determine most of the objections presented to this court. The estimate contained 33 items, and the objection to it is that portions of the improvement which should have been separately itemized were included in one item. The county court had jurisdiction to hear and determine that question. The same is true of the questions whether there was a variance between the ordinance and the estimate, and whether the ordinance sufficiently gave the nature, character, locality, and description of the improvement. It cannot be said that the ordinance contained no description of the improvement; but, on the contrary, it was very lengthy, with minute descriptions, embracing a great many details. Whether it contained something which was not embraced in the estimate the county court was authorized to decide, subject to review on appeal. The questions whether the ordinance would require future legislation in order to make it operative, and whether the superintendent of special assessments was legally qualified to make the assessment, are not questions affecting the jurisdiction of the county court, but questions which were proper to be presented to that court and decided by it. If appellants claimed that the provision of the local improvement act authorizing the superintendent of special assessments to act was void, they ought to have presented that question to the county court.

While we do not decide whether the jurisdiction of the county court over the subject-matter would be affected if it should be held that the improvement provided for is not a local improvement, we think it clear that the pumping station and system of sewers constitute a local improvement for which a special assessment may properly be levied. An improvement of a local character may be of some general benefit to the city at large, and the local improvement act contemplates that some portion of the burden may be laid upon the public; but it is clear that a large portion of the city would derive little or no benefit or advantage from the improvement. The substantial benefits to be derived from it are local in their nature, and a portion of the city, where the sewers are laid, will be specially and peculiarly benefited in the enhancement of property. The system of sewers and a sewage pumping station, although a benefit to a considerable area of the city, covers but a small part of the city, and is not a general

benefit to the whole. It is entirely different from a general waterworks plant or a plant for street lighting, which is of general utility to all the inhabitants of the municipality, as in the cases of *Hughes v. City of Momence*, 163 Ill. 535, 45 N. E. 300, *Hewes v. Glos*, 170 Ill. 436, 48 N. E. 922, and *Ewart v. Village of Western Springs*, 180 Ill. 318, 54 N. E. 478.

The objection that the judge before whom the question of benefits was tried did not have jurisdiction, and that the judgment entered by him was void, is one that can be raised on this appeal under the rules already stated. The placita at the commencement of the record shows that Orrin N. Carter is sole presiding judge of the county court. The record recites that the cause came on for hearing before him on the legal objections of appellants, and that he heard and overruled all such objections, and set the objection as to benefits down for trial at a future time. In pursuance of that order the objection relating to benefits came on for trial before Linus C. Ruth, acting judge of the county court of Cook county. County judges may hold court for each other and perform each other's duties. The record does not show whether Judge Carter was at the time holding court in Cook county; but, if he was, it would be no objection. *Pike v. City of Chicago*, 155 Ill. 656, 40 N. E. 567; *Wells v. People*, 156 Ill. 616, 41 N. E. 161. We will take judicial notice that Linus C. Ruth was judge of the county court of Du Page county (*Vahle v. Brackenseik*, 145 Ill. 231, 34 N. E. 524), and he could legally hold the county court in Cook county. This is not the same question raised in *Stubblings v. City of Evanston*, 156 Ill. 338, 40 N. E. 966, where it appeared from the record that one person was sole presiding judge of the court, and that another person presided during the trial.

The judgment of the county court is affirmed.

Judgment affirmed.

(213 Ill. 53)

DAY v. DAVIS et al.

(Supreme Court of Illinois. Dec. 22, 1904.)

EQUITY PRACTICE—PRESERVING EVIDENCE—PRESUMPTIONS IN FAVOR OF DECREE—APPEAL BOND—TIME TO FILE—COSTS.

1. A decree in chancery on a rule to show cause why a bid for property in the hands of a receiver should not be accepted must be supported either by a certificate of oral evidence heard, or by recitals in the decree of the facts found by the court.

2. In the absence of a complete record on error to review proceedings in chancery, where the decree does not contain a recital of the facts found, the presumptions are in favor of the regularity of the action of the chancellor, and that a certificate of the oral evidence was preserved.

3. Under Practice Act, § 67 (3 Starr & C. Ann. St. 1896, p. 3094, c. 110, par. 68), providing that a time which the court may fix within which an appeal bond must be filed shall not be less than 20 days, it is error to impose as a condition of an appeal that the bond be filed within 5 days.

4. Where a decree is partially reversed, the costs may be ordered paid as the reviewing court may, in its discretion, determine to be proper and just.

Error to Appellate Court, First District.

Bill by Carrie Davis and others against the Pacific Loan & Homestead Association for the appointment of a receiver. From an order directing the sale of the property, Thomas G. Day brings error. Affirmed in part, and reversed in part.

Edwy Logan Reeves, for plaintiff in error.
S. W. Swabey, for defendant in error Henry W. Wolseley.

BOGGS, J. The superior court of Cook county, under a bill in equity filed by Carrie Davis and others, entered a decree placing the Pacific Loan & Homestead Association in the hands of a receiver. During the course of the administration of the affairs of the association by the receiver the Assets Realization Company tendered to the receiver a bid of \$120,000 for the remaining assets and property of the association (except certain assets and property in the bid specified), and the court ordered the bid should be accepted unless good objections should be made within 15 days thereafter. Notice of the proposed sale of such assets so remaining in the hands of the receiver, and that objections thereto might be interposed within 15 days, was given by publication in a newspaper in the city of Chicago, and by notices thereof sent by mail to each holder of stock and each creditor of the association. The plaintiff in error appeared, and filed objections to the approval of the bid of the Assets Realization Company. On the hearing the objections were overruled, and an order was entered directing the receiver to sell the assets so specified in the bid of the Assets Realization Company, for the sum of \$120,000. The plaintiff in error prayed and was granted an appeal on giving an appeal bond in an amount fixed and within a time specified by the court. He did not comply with the conditions of the order granting him an appeal, but subsequently sued a writ of error out of the Appellate Court for the First District, and, to reverse an adverse judgment entered in that court on the hearing of such writ of error, has brought the record into review in this court by this writ of error.

It appears from the transcript of the record of the proceedings that the superior court heard oral evidence bearing on the question of the approval or disapproval of the bid of the Assets Realization Company for the property ordered to be sold to it. The record does not contain this oral evidence. The certificate of the clerk which is attached to the transcript of the record does not purport to certify that the transcript is a full and complete transcript, but only that it is full and complete as per the præcipe on file herein. The præcipe does not ask that a complete

¶ 4. See Costs, vol. 12, Cent. Dig. §§ 929, 935.

record should be made, but directs the clerk to make an authenticated transcript of part of the record of the above-entitled "cause," and "to insert therein the following." Then follows in the præcipe an enumeration of certain papers filed and orders entered, not including a certificate of evidence.

The proceeding being in chancery, the rule is that the decree must be supported either by a certificate of the oral evidence heard in the cause, or by recitals in the decree of the facts found by the court to be established by the evidence. The decree does not recite the facts established by the evidence. Whether a certificate of such proof is on file, and consequently a part of the record of the cause, we cannot know, for the plaintiff in error has chosen not to bring the entire record before us. We know, from so much of the record as we have, that the court heard oral testimony on the question whether it would be for the best interests of those interested that the bid of the Assets Realization Company should be accepted, and that the proofs thus heard operated to convince the mind of the chancellor that the bid should be approved, and the property disposed of accordingly. The proof may, for aught we know, have been incorporated in a certificate of evidence, and, if so, it composes a part of the record of the cause. While it was not the duty of the plaintiff in error to see that the oral proof was preserved either by a certificate of evidence or by a recital of findings in the decree, it was his duty to bring before us all that is in the record on that point before he can ask us to declare that the chancellor erred in ordering that the property should be sold. If we had a complete record of the cause before us, and it should not appear from it that the oral evidence had been preserved, then, unless the decree contained recitals of findings of fact sufficient to sustain the relief granted, the plaintiff in error might insist upon a reversal. In the absence of a complete record, no presumption of error obtains, but the presumptions are in favor of regular and correct action on the part of the chancellor.

The hearing of the objections of the plaintiff in the proposed sale of the assets was set for March 30, 1900. On March 29, 1900, one L. D. McCall, in open court, submitted a bid of \$130,000 for certain of the assets in the hands of the receiver, and tendered a certified check for \$5,000 as "earnest money" or as evidence of good faith in making the bid. The hearing of objections to the bid of the Assets Realization Company and consideration of the bid of McCall were continued until March 31st, and heard and disposed of together. The court ordered that the objections to the bid of the Assets Realization Company should be overruled, and that the property should be sold to the Realization Company. It is urged the court erred in rejecting the bid of McCall.

The bid of McCall was for what purports

to be the same property previously bid for by the Assets Realization Company, but has a number of conditions to the bid, and uses many general terms and expressions not contained in the latter bid, and thus leaves it doubtful, to say the least, whether his bid is for the same property, and no more, that is described in the other bid. His bid is also conditioned for the payment of taxes and special assessments of the years 1898 and 1899 by the receiver; that a merchantable title shall be conveyed to all the property, subject to certain liens specified in his bid; also that the titles of said property should be clear and free of all incumbrances, except as specified; that the interest in or liens upon said real estate should be exempt from legal entanglement; also, the bid is subject to numerous other conditions which are needless to be mentioned. Suffice it to say, they so involve the bid that we are unable to determine, and it is scarcely conceivable that the chancellor could have told with any certainty, whether the bid was any more favorable than the one which was accepted. The record discloses that the creditors of the association, 22 in number, the total of whose claims aggregated the sum of \$163,802.02, desired that the bid of the Assets Realization Company should be accepted and approved by the court, and that the plaintiff in error was the only objector thereto. The record is insufficient to establish that the court erred in ordering the sale of the property to the Realization Company.

The plaintiff in error urges that the court erred in prescribing the amount of the appeal bond and in fixing the time in which the bond should be given. The order granting an appeal was on condition that the plaintiff in error should, within five days thereafter, file an appeal bond in the sum of \$50,000, with sureties to be approved by the court. The proceeding in which the receiver was appointed was instituted under the provisions of an act entitled "An act to enable associations of persons to become a body corporate to raise funds to be loaned only among the members of such association," in force July 1, 1879. Hurd's Rev. St. 1899, p. 450, c. 32. Section 25 of the act (page 458, par. 91p) authorizes petitions to be filed for the appointment of receivers for such associations, and provides that proceedings under such petitions shall "proceed as other causes in equity." We do not find in said act any special provisions for appeals from the orders or decrees entered in such proceedings. The order of the court herein was final and appealable. Section 67 of the practice act (3 Starr & C. Ann. St. 1896, p. 3094, c. 110, par. 68) afforded the plaintiff in error the right to appeal from the order or decree of the court, and prescribe the conditions which the court might impose as a prerequisite to the exercise of the right of appeal. The time in which an appeal bond shall be filed is one of the conditions which this statute regulates,

and the statute provides that the time which the court may fix within which the bond must be filed shall not be less than 20 days. In the case at bar the appeal was granted on condition that an appeal bond should be filed in 5 days. This restriction as to the time in which the bond should be filed, contained in the order granting the appeal, was in violation of the express provision of the statute, and was therefore erroneous, and is reversed.

The plaintiff in error has enjoyed the right to present his case herefor review to the Appellate Court and to this court as fully as if he had brought the record in review by appeal, and, as he has failed to make it appear the superior court erred in ordering the property to be sold to the Assets Realization Company, the decree, in all respects other than as to the order limiting the time for presenting an appeal bond, should be and it is affirmed. This judgment of affirmance determines the case upon the merits, and to that extent concludes the plaintiff in error. A reversal of that portion of the order of the superior court which erroneously limits the time for presenting an appeal bond to five days would be barren of any benefit to the plaintiff in error. The reversal of a decree in part does not necessarily entitle the plaintiff in error to a judgment for all or any part of the costs by him expended, or to be relieved from the liability to pay costs incurred by his adversary. The costs may, in case of partial reversal, be ordered paid as the reviewing court may, in its discretion, determine to be proper and just. *Moore v. People*, 108 Ill. 484; *Romberg v. McCormick*, 194 Ill. 205, 62 N. E. 537.

Proofs submitted by the defendant in error, receiver, in support of the motion heretofore entered by him to dismiss the writ, discloses that the plaintiff in error did not sue out this writ until September 10, 1901—about 1½ years after the assets of the association had been disposed of under the order of the court that he desired to have reversed, and more than 8 months after the receiver had presented his final report and had been discharged from further duty in the premises, as the plaintiff well knew. The plaintiff in error procured the writ of error to issue only against Carrie Davis and Henry W. Wolsley. The former was one of the petitioners in the bill asking for the appointment of a receiver for the association, and the latter was the receiver. No service was had on Mrs. Davis, and no reason could be suggested for taxing costs to her had she been served. It would be unjust, under all the circumstances, to tax costs to the receiver, or to deny to him recovery of costs which he may have been forced to pay.

The order and decree of the superior court are affirmed in part and in part reversed. The costs will be taxed to and paid by the plaintiff in error.

Affirmed in part, and in part reversed.

(213 Ill. 83)

CLEVELAND, C., C. & ST. L. RY. CO. v.
POLECAT DRAINAGE DIST.

(Supreme Court of Illinois. Dec. 22, 1904.)

DRAINAGE DISTRICTS—VALIDITY OF ORGANIZATION—COLLATERAL ATTACK—RIGHT OF WAY—CONDEMNATION PROCEEDINGS—CONSTRUCTION OF STATUTE—TAKING PRIVATE PROPERTY WITHOUT COMPENSATION.

1. The use of lands for the purpose of constructing thereon a ditch of a drainage district organized under the drainage and levee act of 1879 (Hurd's Rev. St. 1899, c. 42) is a public use, within Eminent Domain Act, § 2 (Hurd's Rev. St. 1903, c. 47), and such drainage district having the right under Const. 1870, art. 4, § 31, as amended November 28, 1878 (L. Starr & C. Ann. St. 1896, p. 138), and laws in pursuance thereof, to construct their ditches "across the land of others," it may avail itself of the provisions of the eminent domain act to obtain a right of way for a ditch.

2. The legality of the organization of a drainage district under the drainage and levee act (Hurd's Rev. St. 1899, c. 42) cannot be questioned in proceedings under the eminent domain act (Hurd's Rev. St. 1903, c. 47) for the condemnation of a right of way for a ditch over the land of another.

3. In proceedings to condemn a right of way for a ditch across a railroad right of way in two places where bridges already stood, a civil engineer testified in behalf of the railroad company that he had examined the bridges several times when passing over the road on a train, but he never stopped and inspected them, and then gave his estimate of the expense that would attend the changes made necessary by enlarging the channel below the bridge; this being all the evidence as to such expense. *Held* error to instruct the jury that they "are not bound to believe the testimony of any witness as to cost of railroad or other bridges who testifies that he is not acquainted with the location of the proposed bridges, and never saw the location or the bridges that are now there, but should give the testimony such weight, if any, to which you may, from all the evidence in the case, believe such witness' testimony may be entitled."

4. The third proviso of section 55 of the drainage and levee act (Hurd's Rev. St. 1899, p. 682) provides that "full power and authority is hereby given the drainage commissioners to remove such bridges or culverts, for the purposes aforesaid, if they, in their judgment, find it necessary." Section 56 makes it the duty of railroad companies, "when any ditch or drain or other work of enlarging any channel or water-course is located by the commissioners on the line of any natural depression or water-course, crossing the road of any railroad company where no bridge or culvert or opening of sufficient capacity to allow the natural flow of water of such ditch or water-course is constructed," to construct such bridge or culvert according to the requirements of the commissioners. *Held*, that such provisions are void in so far as they conflict with Const. 1870, art. 2, § 13, which declares that private property shall not be taken or damaged for public use without just compensation.

Appeal from Coles County Court; T. N. Cofer, Judge.

Condemnation proceedings by the Polecat Drainage District against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company. From a judgment for petitioner, defendant appeals. Reversed.

H. A. Neal, R. G. Hammond, and F. K. Dunn, for appellants. A. C. Anderson and Edward C. Craig, for appellee.

BOGGS, J. This was a petition filed by the appellee drainage district, under the provisions of the eminent domain act, for the condemnation of the right of way for the ditch of the drainage district in the bed of a natural water course across the right of way of the appellant company at two points. The appellant filed a cross-petition asking for an assessment in its favor for damages to property not taken. A hearing resulted in an order granting the relief prayed for in the petition, at petitioner's cost, on the payment to the appellant company of the sum of \$40 for the property taken, and the sum of \$1,000 damages to property not taken.

The appellee district was organized under the provisions of an act of the General Assembly adopted May 29, 1879, familiarly known as the "Drainage and Levee Act" (Laws 1879, p. 120), which act constitutes paragraphs 1 to 74, inclusive, of chapter 42 of Hurd's Revised Statutes of 1899. The contention of the appellant company that the said act provides a mode of procedure for the condemnation of the lands of others for use as a right of way of the drainage ditch, and that, as the statute which gives the right of condemnation provides the remedy, such remedy is exclusive, and no other can be availed of, is not sound, for the reason that the remedy provided in the said act is in violation of constitutional guaranties of the citizen, as we held in *Wabash Railroad Co. v. Coon Run Drainage District*, 194 Ill. 310, 62 N. E. 679; and that being true, in legal effect, the act provided no remedy whatever for the condemnation of the lands of others. Section 2 of said act of May 29, 1879, under which the appellee district claims corporate existence, authorized drainage districts formed thereunder to construct drains or ditches "across the lands of others." Laws 1879, p. 120. This enactment was adopted in pursuance of the provisions of section 31 of article 4 of the Constitution of 1870, as amended November 28, 1878 (1 Starr & C. Ann. St. 1896, p. 138), and which authorized the General Assembly to pass laws to provide for the organization of drainage districts with power to construct drains, ditches, and levees "across the lands of others."

The question first arising is, as the remedy for condemnation provided by the act has proven inoperative and void, may such districts avail themselves of the eminent domain act in order to procure the right to construct their ditches across the lands of others? The power of eminent domain can only be exercised when the property to be taken is to be devoted to a public use. A public use means public usefulness, utility, advantage, or benefit. It is not essential that the entire community or people of the state, or any political subdivision thereof, should be benefited or share in the use or enjoyment thereof. The use may be local or limited. It may be confined to a particular district, and still be public. 10 Am. & Eng.

Ency. of Law (2d Ed.) 1063. If local or limited, the use must be directly beneficial to a considerable number of the inhabitants of a section of the state, and the property to be taken must be controlled by law, for the advantage of that particular portion of the community to be benefited. Private property cannot be condemned by a person or corporation on the ground the general prosperity of the state or community would be promoted thereby, if the title to the property so taken is to be vested in such person or corporation as private property, to be used and controlled as other private property. To be public, the use must concern a community, as distinguished from an individual or any particular number of individuals; and then, to authorize the condemnation of private property, the law must control the use to be made of the property after it has been condemned, to the end that it shall be devoted to the public purpose which alone could justify the taking of the same from the owner without his consent. Tested by these observations, and in view of the amendment to the Constitution authorizing drainage districts to construct their drains across the lands of others, the use of lands for the purpose of constructing thereon the ditch of a drainage district organized under the said statute is a "public use," and such ditch dug for that purpose is to be regarded as a "public work," within the meaning of those words as used in section 2 of the eminent domain act (Hurd's Rev. St. 1903, c. 47). Having the right, by virtue of the Constitution and the laws made in pursuance thereof, to construct their ditches "across the lands of others," and the use to be made of such ditches being a public use, we entertain no doubt of the power of drainage districts to avail of the provisions of the eminent domain act to enable them to obtain the legal right to the right of way through and over the lands of others for their ditches.

The question whether the appellee drainage district had been legally organized did not and could not arise in the proceeding for the condemnation of a right of way for the ditch across the lands of the appellant company. A petition to the Coles county court for the entry of an order creating the district and a final decree or order of the said county court establishing the district were produced in evidence. The statute invested the county court of that county with jurisdiction to entertain petitions for the formation of drainage and levee districts, and to enter final order establishing such districts. Jurisdiction and power were therefore vested in the county court to determine whether the petition bore the signatures of the requisite number of qualified petitioners, and was in other respects in compliance with the statute. Whether it correctly exercised such power or jurisdiction could not be considered in this, a collateral proceeding. The final order of the court having jurisdiction

of the person and subject-matter cannot be inquired into and impeached in a collateral proceeding. *Figge v. Rowlen*, 185 Ill. 234, 57 N. E. 195. The legality of the organization of a drainage and levee district can be attacked and brought under judicial review only in a direct proceeding by quo warranto. *Osborn v. People ex rel.*, 103 Ill. 224. The trial court therefore properly refused to consider the issue sought to be introduced by the appellant company, whether the petition for the formation of the drainage district contained the number of qualified petitioners required by section 2 of the act of 1879.

The petition asked the condemnation of two separate strips of land, each 66 feet in width and 100 feet in length, across the right of way of the appellant company. Polecat creek ran through and crossed the right of way of the railroad, and returning again crossed the right of way, and the railroad company had a bridge over the stream at each crossing. The drainage district proposed to widen and deepen the bed of the stream at each of the crossings, thereby making a ditch 30 feet in width at the top at both places. The appellant company claimed that this would necessitate the tearing away of all or a portion of each of the bridges and rebuilding the same, and by its cross-petition sought an assessment of the damages and expense thereby to be occasioned. In support of this claim the appellant company introduced as a witness Charles Fisk, assistant civil engineer of the appellant company, who testified that the damage which would thereby be occasioned at the more westerly bridge would range from \$2,000 to \$3,000, and from \$3,200 to \$3,500 at the more easterly crossing. On cross-examination the witness stated that he had examined the bridges several times when passing over the road on a train; that he never stopped and inspected the bridges, or either of them; that the east bridge was not an old wooden bridge. He admitted that it would not be necessary to tear out the bridges if the drainage district could and would lift the dredgeboats over them; that he had had no experience in dredgeboat work, but had never heard of lifting a dredgeboat and carrying it over a railroad track. There was no other proof relative to the damages that would be occasioned to the appellant company, or as to the expense which would be entailed upon it, by the construction of the ditch across the right of way, and under its tracks and bridges. The jury allowed \$1,000 as damages to land not taken. Appellant contends that this finding is contrary to, and wholly irreconcilable with, the testimony of Mr. Fisk, the only witness who was examined on that branch of the case. The testimony of Mr. Fisk was merely by way of estimates—not made upon any careful personal examination of the bridges—and, in view of the fact that the jurors visited and inspected the bridges, we

would be loath to interfere with the verdict if the jury had been left free to exercise their own judgment as to the weight and value of the testimony of Mr. Fisk. Instruction No. 12 given to the jury at the request of the appellee district improperly interfered with the province and duty of the jury to fairly and correctly consider and weigh the testimony of that witness. It read as follows: "(12) The court instructs the jury that they are not bound to believe the testimony of any witness as to cost of railroad or other bridges, who testifies that he is not acquainted with the location of the proposed bridges, and never saw the location or the bridges that are now there, but should give the testimony such weight, if any, to which you may, from all the evidence in the case, believe such witness' testimony may be entitled." As no other witness than Mr. Fisk testified on behalf of either party as to the cost of the bridges, or the expense of rebuilding or partially rebuilding them, the instruction must of necessity have been intended and understood by the jury to apply only to his testimony. This witness did not, as the instruction told the jury, testify that "he was not acquainted with the location of the bridges, and had never seen the location or the bridges," but, on the contrary, he testified he had examined them several times when passing over them on trains. He testified he was a civil engineer, had seen the bridges, denied that the more easterly bridge was an old wooden bridge, and gave his estimate of the expense that would attend the changes made necessary by enlarging the channel below the bridges. By the instruction the testimony of the witness was incorrectly stated, and the erroneous statement declared sufficient to warrant the jury in refusing to believe his testimony. It was for the jury, not the court, to determine as to the credibility of the witness. True, the instruction, in the closing part thereof, told the jury that they should give to the testimony of the witness such weight, if any, which they might believe, from all the evidence in the case, his testimony was entitled to have; but the whole instruction, considered together, carried it to the jury as the view of the court that the witness was not worthy of belief, or his testimony entitled to any weight. The instruction was an unwarranted invasion of the province and duty of the jury to fairly consider and weigh the testimony of the witness. It was error to give it, and the effect certainly prejudiced the cause of the appellant company, possibly to the extent of depriving it of any benefit whatever from the testimony of the witness.

Counsel for the appellee insist the judgment should not be reversed for this error, for the reason the only damages claimed under the cross-petition were for the expense of enlarging, constructing, reconstructing, replacing, or repairing the bridges, embankment, and grade on the line of a natural wa-

ter course, and that the third proviso to section 55 of the drainage and levee act aforesaid, and section 56 of that act, require that the railroad company shall defray all such expense, and that therefore no award for damages whatever could have lawfully been made in favor of the railroad company, and hence that the appellant company had no legal right to recover because of anything testified to by the witness Fisk. Said amended section 55 provides (Laws 1885, p. 132), in effect, that when any ditch, drain, or levee will benefit any public or corporate road or railroad, the commissioners shall apportion to the county, state, or free turnpike road, to the township if a township road, to a company if a corporate road or railroad, "such portions of the cost and expenses thereof as to private individuals," and in case such apportionment is resisted the matter shall be submitted to the jury. The first proviso to the section authorizes the drainage commissioners and "the corporate authorities of the county, state, or free turnpike, township road, corporate road, or railroad, or any of them," to stipulate as to the amount of such benefits. The second proviso is, "that the amount so assessed against any railroad company or private corporation shall" become a lien, and provides for the collection and for the payment of assessments against public corporations. The third proviso to the section is as follows: "And provided further, that the sum assessed against either of said corporations shall not include the expense of constructing, erecting or repairing any bridge, embankment or grade, culvert or other work of the roads of such corporations, crossing any ditch or drain, constructed on the line of any natural depression, channel or water-course; but the corporate authorities of such road or railroad, are hereby required, at their own expense, to construct such bridge, culvert, or other work, or to replace any bridge or culvert temporarily removed by the commissioners in doing the work of such district. Full power and authority is hereby given the drainage commissioners to remove such bridges or culverts for the purposes aforesaid, if they, in their judgment, find it necessary." Hurd's Rev. St. 1899, p. 682. Section 56 of the act (Laws 1885, p. 133) makes it the duty of railroad companies, "when any ditch or drain or other work of enlarging any channel or water-course is located by the commissioners on the line of any natural depression or water-course, crossing the road of any railroad company where no bridge or culvert or opening of sufficient capacity to allow the natural flow of water of such ditch or water-course is constructed," on notice given by the commissioners, to construct such bridge or culvert according to the requirements of the commissioners.

Section 13 of article 2 of the Constitution of 1870 declares that private property shall not be taken or damaged for public use without just compensation; and if the third pro-

viso to said section 55 and section 56 are in conflict with this constitutional guaranty, in that they purport or have operation to authorize the taking or damaging of the property of the appellant company without just compensation, they must, of course, be deemed inoperative and void.

The appellee drainage district filed the petition herein, averring that it possessed the legal right to construct its drains and ditches across the right of way of the appellant company and the lands of other property owners, defendants to the petition, on payment of just compensation; that it had been unable to agree as to the compensation to be paid to the appellant and the other property owners, defendants to the petition; that it desired to take, for the purposes of "widening, straightening, deepening, and enlarging a ditch and water course," two strips of land, each 66 feet in width, across the right of way of the appellant company, and prayed that the just compensation to be paid for the same should be assessed "in accordance with the law." The appellant company filed a cross-petition, in which it claimed damages to property not taken, in addition to just compensation for that to be taken. A jury was impaneled, and the evidence as to the value of the land to be taken and as to the damages to lands not taken—that is, to the bridges and embankments—was submitted; no question being raised relative to the duty of the railroad company, under said third proviso to section 55 and section 56 of said drainage act, to enlarge the opening in its embankment, and remove and enlarge its bridges, etc. Nor do we find anything in the proof to indicate that the drainage district claimed a right of way for its ditch as an easement of a water way, or without compensation, or that the notice required by section 56 had been given.

Neither the suggestion of counsel that under said proviso to section 55, and under said section 56, the appellant company can recover nothing, either as compensation for lands taken, or as damages to lands not taken, or the supposed conflict between said proviso to section 55 and said section 56 and the constitutional guaranty hereinbefore mentioned, is presented by the pleadings in this record for our consideration. On the record before us, the judgment must be reversed, and the cause will be remanded for such other and further proceedings as to law and justice shall appertain.

Reversed and remanded.

(213 Ill. 160)

IRWIN et al. v. SAMPLE.

(Supreme Court of Illinois. Dec. 22, 1904.)

CONVEYANCES—FIDUCIARY RELATIONSHIP—
FRAUD—ADMINISTRATORS—PERSONAL
PROPERTY—SURRENDER

1. Where the relation between complainant and his brothers-in-law was exceedingly intimate, and the trust and confidence reposed by

him in them was such that he regarded his property and interests as entirely safe in their hands, such relation was fiduciary in character, so as to preclude the brothers-in-law from retaining the benefit of a voluntary conveyance which they induced complainant to execute to them immediately following the death of his wife, when he was prostrated physically and mentally, though not disqualified to transact business of an ordinary character.

2. Evidence that at one time complainant was indebted to his wife for a part of the money invested in land conveyed to him, without proof that she owned any interest in the land so purchased, was insufficient to entitle her heirs to any part of the land.

3. Where one of defendants was appointed administrator of complainant's deceased wife, and as such was in possession of her personal estate at the time complainant sued to set aside a deed to certain lands made by him after his wife's death to defendants, who were his brothers-in-law, and to recover such personal property, it was error for the court, on setting aside the conveyance, to also require the administrator to surrender the personal property to complainant; the administrator being required to account for such personal property only in the course of administration.

Error to Circuit Court, Logan County; Geo. W. Patton, Judge.

Bill by Andrew Sample against Andrew Irwin and others. From a decree in favor of complainant, defendants bring error. Reversed in part.

This was a proceeding in chancery, brought in the circuit court of Logan county, by Andrew Sample, the defendant in error, against Andrew Irwin and other heirs at law of Lydia Jane Sample, deceased, plaintiffs in error, to set aside a deed to 85 acres of land made by said Andrew Sample to William J. Irwin, Andrew Irwin, Robert Irwin, and George C. Irwin, hereinafter, for the sake of brevity, referred to as the "four Irwin brothers," and for a partition of said land among the parties hereto; also for the return of certain personal property, aggregating \$5,000 in value, which was left by Lydia Jane Sample, deceased, and which had been delivered by Andrew Sample to Robert Irwin after the death of Lydia Jane Sample. A decree was entered granting the relief prayed for in the bill, and this writ of error is prosecuted by the defendants below to reverse that decree.

The bill represents that Lydia Jane Sample died on January 22, 1902, intestate, leave her surviving Andrew Sample, the complainant, her husband, the four Irwin brothers and John Irwin, her brothers, and Lydia Jane Watson, the only daughter of a deceased sister, as her only heirs at law; that the four Irwin brothers were all residents of Logan county; that John Irwin and the niece were residents of Ireland; that she left personal property of the value of \$6,000 and 85 acres of land in Logan county; that Lydia Jane Sample, for a number of years prior to her death, was an invalid, and for five years immediately preceding her death required the greater part of complainant's time in caring for her; that by reason thereof his health became affected, and the death of his wife was

a severe shock to him mentally and physically, and incapacitated him for some time from intelligently transacting business of any kind; that on the day after his wife's funeral, which occurred on Friday, the Irwin brothers, whose relations with complainant and deceased had been and were of the most cordial and confidential character, came to complainant's residence and represented to him that under the law they owned all the personal property left by deceased, and demanded the same of him, stating that complainant would be protected in all his rights in the property; that he thereupon turned over to them all of said personal property; that on Monday, two days later, William J. Irwin came to complainant's house with a notary public named Houser, and represented that it was necessary to administer upon the estate of his wife, and that the four Irwin brothers under the law had certain rights in the land left by deceased and also in a certain tract of land owned by complainant, and that the interest of the Irwin brothers in complainant's land was equal to the interest of complainant in the real estate left by the deceased; that thereupon William J. Irwin proposed to complainant that the Irwin brothers would quitclaim all their interest in the land owned by complainant if he would quitclaim to them all his interest in the real estate left by deceased; that William J. Irwin also represented that an attorney named Foley, who had been the legal adviser of complainant in all his legal business, had instructed him to say to complainant that he (Foley) was attending to complainant's interests in the estate, and that Foley had prepared a paper, which William J. Irwin then submitted to complainant for him to sign, and represented that Foley had sent word that it was necessary for him to execute it in order to secure to him his rights in his wife's property and to settle the estate; that, without knowing the contents or legal effect of the document, complainant signed it; that thereafter the Irwin brothers executed and delivered to the recorder of deeds of Logan county a quitclaim deed to complainant for the land already owned by him, and had it recorded, after which it was mailed to him by the recorder. The bill further avers that complainant has partially recovered from his mental and physical prostration and has learned that the instrument he signed was a quitclaim deed to the real estate, and a release and conveyance of the personal property left by his wife, and a relinquishment of his right to administer upon his wife's estate. The bill charges that all the representations made by William J. Irwin were false and untrue, and were deliberately made in pursuance of a conspiracy among the Irwin brothers to cheat, defraud, and swindle complainant out of his legal rights and interest in his wife's estate, and that the conveyance executed by complainant was without any consideration. The interests of the parties in the real estate left by deceased are set

out, and the bill contains a prayer that the conveyance executed by complainant and delivered to the four Irwin brothers be set aside, and the land partitioned, and that defendants be ordered to return the personal property to complainant.

Two amendments were made to the bill. The first of these avers that complainant was ignorant of his right to administer upon the estate, and requested Robert Irwin to take charge of the personal property and to consult with Foley as to what was necessary to be done in the administration of the estate; that Robert Irwin did see Foley, but falsely and fraudulently represented to him that complainant had given to the Irwin brothers his interest in the real and personal property left by deceased, and desired to transfer such property to them, and that thereupon Foley prepared the document which complainant signed; that William J. Irwin came to complainant's house and represented that Robert Irwin had consulted with Foley in regard to the administration of the estate, and that Foley was acting as the complainant's attorney in the matter, and had sent word for complainant to sign the paper, which he did on account of the said representations, being ignorant of his rights in the property. By the second amendment it is averred that, when William J. Irwin came to complainant's house and obtained his signature to the instrument, complainant was taken by surprise, and had no opportunity to advise with friends or counsel with an attorney. It is charged that a confidential and fiduciary relation existed between complainant and the Irwin brothers, which was abused in procuring complainant to make the conveyance of his interests in his wife's estate.

All of the defendants joined in an answer specifically denying the material allegations of the bill. The complainant filed a replication to the answer. An answer was filed to the bill, as amended, by the four Irwin brothers alone. The specific averments of the answers, aside from the denials, so far as material, are hereinafter set out in the opinion of the court. The cause was referred to the master to take the evidence. Upon the coming in of the master's report, the decree was entered finding the facts substantially as set out in the amended bill.

The material averments of the bill find support in the proof offered by complainant, while the evidence adduced by defendants below tended to show that an 80-acre tract of land, on which the Samples lived at the time of the death of the wife, the title to which is in the husband, had been purchased in part with his funds and in part with moneys realized by him from conducting farming operations in his own name upon the farm owned by the wife which is involved in this suit; that she in her lifetime and the four Irwin brothers upon her death claimed an interest in the tract held by the husband;

that the wife had exacted from the husband a promise that in the event of her death her property, held in her name, should go to her brothers and niece, provided they released to him their interest in the tract which stood in his name; and that the conveyances mentioned in the bill were made for the purpose of carrying out that arrangement. Andrew Sample denies that any such arrangement was made with him by his wife, and denies that she ever claimed any title or interest in his land.

Plaintiffs in error insist that the decree is against the manifest preponderance of the evidence, and that the court erred in ordering Robert Irwin to turn over to the complainant personal property which he held as administrator.

Beach, Hodnett & Trapp, Hoblit & Smith, and Blinn & Harris, for plaintiffs in error. King & Miller and Baldwin & Stringer, for defendant in error.

SCOTT, J. (after stating the facts). The evidence warrants the conclusion that the relation between Andrew Sample and the four Irwin brothers was fiduciary in its character at the time of the transaction under investigation in this cause. They were his brothers-in-law, and lived in the same neighborhood with him, and had been frequently at his home, especially during the long illness of his wife, immediately preceding her death. George Irwin lived within a quarter of a mile of Andrew Sample, and had assisted him in the transaction of his business. The relations between them and him were exceedingly cordial and intimate, and the trust and confidence reposed by him in them was such that he regarded his property or his interests as being entirely safe in their hands. Immediately following his wife's death, he was in a condition of great prostration, both physically and mentally, and, while not disqualified to transact business affairs of an ordinary character, was yet, on account of the weakness of his intellect, consequent upon his great exhaustion, unfit to care for his own rights in dealing with persons desirous of furthering their own interests at his expense. Mrs. Sample died on Wednesday, the 22d day of January, 1902. On the day following, the four brothers were at the Sample home, where there was some discussion among them as to who should administer upon the estate of the deceased. The funeral occurred on Friday, and on that day Andrew Sample requested them to return on Saturday, and at that time it was agreed that Robert Irwin should act as administrator. Sample then delivered to Robert the personal property of the estate, and, as the brothers were leaving, adjured them to treat him "right in this thing"; and he says they assured him that they would do so, and his testimony in that regard is not denied. On the succeeding Monday William J. Irwin came to Sample's home, accompanied by an

attorney, Paul Houser, who was also a notary public. William's purpose was to secure Sample's signature to a conveyance which transferred to the four Irwin brothers his interest in the real estate of the deceased, which also recited that he thereby transferred his interest in his wife's personal property to the grantees in the deed, and waived his right to administer her estate. The four Irwin brothers contended that they had some interest in the 80 acres of land which stood in the name of Andrew Sample, and they proposed to quitclaim that to him as a consideration for the execution of the instrument above mentioned, which was to be signed by him. Sample had in the past occasionally employed Stephen A. Foley, an attorney residing at Lincoln, in Logan county, in whom he had great confidence, and he had suggested to Robert that he take Mr. Foley's advice about the manner of administering the estate. According to the testimony of Paul Houser, William J. Irwin secured Sample's signature to this instrument by stating that he had brought it there to be signed according to Mr. Foley's instructions, and that in accordance with its terms Robert Irwin was to be appointed administrator. Mr. Houser says, however, that he does not remember the exact words that William used. Sample states that Irwin further said to him on that occasion that "Mr. Foley sent out word to me that he was tending to my business and everything would be done right." Mr. Foley testified that he was not acting as Sample's attorney, that he did not send any such message by William J. Irwin, and that he did not send any instruction to Sample in reference to signing the instrument in question. The deed from the four Irwin brothers to Sample had then been signed by three of the grantors named therein, and Sample was assured by William that it would be signed by the remaining grantor. Under these circumstances, relying, as he says, upon the pretended message conveyed to him from Mr. Foley, Sample signed and acknowledged the instrument which had been prepared for his signature. The notary's presence on that occasion was secured by William, so that Sample's acknowledgment might be taken. Mr. Houser did not know the purpose of the visit until after they were in the house. He testifies that Sample was in a dazed and stupid condition, and that he was not fully satisfied that Sample understood what he was doing when he executed the conveyance.

In our judgment, the evidence warrants the finding that the execution of this instrument was induced by the unfounded claim which the four Irwin brothers set up to the 80 acres of land owned by Andrew Sample, and by the false statements made to him by William J. Irwin in reference to the message sent by Mr. Foley to Sample. His confidence and trust in these four brothers-in-law and his weakened mentality contributed to make him

the victim of their wrongdoing. The following, from section 947, vol. 2, of Pomeroy on Equity Jurisprudence, has several times received the approval of this court: "The term 'fiduciary or confidential relation,' as used in this connection, is a very broad one. It has been said that it exists, and that relief is granted, in all cases in which influence has been acquired and abused—in which confidence has been reposed and betrayed. The origin of the confidence and the source of the influence are immaterial. The rule embraces both technical fiduciary relations and those informal relations which exist whenever one man trusts in and relies upon another. The only question is, does such a relation in fact exist?" Likewise, language from section 956 of the same volume, which reads: "It is settled by an overwhelming weight of authority that the principle extends to every possible case in which a fiduciary relation exists in fact, in which there is confidence reposed on one side and the resulting superiority and influence on the other. The relation and the duties involved in it need not be legal. It may be moral, social, domestic, or merely personal." *Roby v. Colehour*, 135 Ill. 300, 25 N. E. 777; *Thomas v. Whitney*, 186 Ill. 225, 57 N. E. 808; *Walker v. Shepard*, 210 Ill. 100, 71 N. E. 422. The court below properly applied this principle to the transaction involved in this proceeding.

We are not unmindful of the testimony of the four Irwin brothers, and of the son and daughter of William J. Irwin, that at the time of the meeting at the Sample home, on the Saturday after the funeral, Andrew Sample stated that, in accordance with the request of his wife, he desired to transfer to her five brothers and her niece, the daughter of the deceased sister, being all her heirs other than himself, the property owned by her and held in her name at the time of her death, in exchange for a deed from them conveying to him all their interest in the 80 acres which had been conveyed to him. We are disposed to the view that this contention is an afterthought on the part of the four Irwin brothers. The original answer of defendants stated that the instrument executed by Andrew Sample was upon a "good and sufficient and valuable and ample consideration for the said acts and conveyances, and for each of them, and that said transaction was and is an honest, open, and fair business transaction between man and man." This averment is wholly without support in the evidence. On the contrary, there is no basis in the proof for any conclusion that there was any consideration whatever for the conveyance of about \$10,000 worth of property by Sample, except the execution of a quitclaim deed to him, which conveyed nothing. On the 21st of December, 1903, after the trial of the cause, and on the same day that the final decree was entered, in their answer, filed on that day, to the amended bill, the four Irwin brothers state that

the instrument in question "was signed by complainant of his own free will, and understanding the legal effect of said deed, signed the same for the purpose of carrying into effect the previous arrangement and understanding by which he had agreed to carry into effect the request of his wife, and relinquish all right, title, and interest in the personal property and real estate held by her to her brothers and niece living in Ireland." This defense had not been theretofore disclosed by answer. The conveyance which the bill seeks to set aside transferred the property to the four Irwin brothers alone. When they took that deed, had they been attempting to carry out any such arrangement as they testify existed, and as they set up by this answer to the amended bill, the instrument taken should have provided in some way for passing one-sixth of this property to John Irwin and a like portion to Lydia Jane Watson, the brother and niece residing in Ireland; so that, in any event, the conveyance taken did not carry out the arrangement which the grantees therein swear it was made to effectuate, and the instrument which they themselves had prepared and executed indicates that their testimony is untrue and their defense without merit.

If, however, the preponderance of the evidence showed Andrew Sample's purpose to be that stated by these grantees, we think it should be attributed to the unfounded claim set up by them to an interest in the real estate owned by him; and the fact that the same claim may have been made by his wife in her lifetime does not lend it sanctity and does not better their standing in a court of equity. So far as disclosed by this record, it was without merit, whether asserted by her or by them. The most that the evidence tends to prove in this regard is that at one time he owed her for a part of the money invested in his land. There is no contention that she ever owned any interest of any character in the land purchased by him. Under such circumstances, in view of the relations existing between the parties, it is manifest that the conveyance should not stand.

The decree of the court below, however, is erroneous in one respect. Robert Irwin is administrator of the estate of the deceased, and is now in possession of the personal property left by her. The decree orders that he surrender to Sample all the personal property received by him belonging to her estate. The bill does not seek to affect his status as administrator. The conveyance made by Andrew Sample was properly canceled and set aside, but it was not proper to direct the administrator to turn over the personal assets to defendant in error. The conveyance being for naught held and esteemed, if Robert Irwin shall continue to act as administrator until the estate is finally closed, it will be his duty at that time to pay and deliver to Andrew Sample, as heir

of his deceased wife, all the personal assets of the estate. Should he be removed as such administrator, and another appointed in his stead, then these assets should be surrendered to his successor.

The decree of the circuit court, in so far as it directs Robert Irwin to account for and pay over to Andrew Sample the personal assets at this time, is reversed. In all other respects it is affirmed. The costs of this court will be adjudged one-half against plaintiffs in error and one-half against defendant in error.

Defendant in error has filed an additional abstract of the record, and moves that the expense thereof be taxed as costs. We think the necessity for the additional abstract appears, and the motion will be allowed.

Decree affirmed in part, and reversed in part.

(212 Ill. 569)

HINCHLIFF v. RUDNIK.

(Supreme Court of Illinois. Dec. 22, 1904.)

MASTER AND SERVANT—INJURIES TO SERVANT—ACTIONS—LIMITATIONS — DECLARATION—DEMURRER—INVOLUNTARY NONSUIT—NEW ACTION—COMMENCEMENT.

1. Limitation Act, § 25 (2 Starr & C. Ann. St. 1896, pp. 2642, 2643, c. 83), provides that if the plaintiff be nonsuited, and the time limited for the bringing of the action shall have expired during the pendency of the suit, plaintiff may commence a new action within one year after such judgment reversed or given against plaintiff, and not after. *Held*, that where a demurrer was sustained to plaintiff's original declaration, on the ground that it failed to state a cause of action with certainty only, and plaintiff suffered an involuntary nonsuit by reason thereof, he was entitled to file a new suit within a year after such nonsuit, though the time within which the action could have been brought originally had expired during the pendency of the original action.

2. Where, in an action for injuries to a servant by the alleged negligence of defendant's foreman, defendant claimed, and introduced proof, that the negligence was that of employes of another, such issue presented a question of fact, not reviewable by the Supreme Court.

3. Where, in an action for injuries, defendant's counsel, in their brief in the Supreme Court, did not discuss a point as to whether the negligence alleged was that of defendant's servants or of a third person, as such point was discussed in their brief before the Appellate Court, it would be assumed that the point was abandoned.

4. Where the Appellate Court decided that a declaration did not state a cause of action with sufficient certainty, and remanded the case, it was not a decision that the declaration did not state any cause of action, so as to be conclusive on second appeal.

Error to Appellate Court, First District.

Action by Joseph Rudnik against George Hinchliff. From a judgment in favor of plaintiff, affirmed by the Appellate Court, defendant brings error. Affirmed.

This is an action on the case, originally begun on August 15, 1887, in the circuit court of Cook county, by the defendant in error against plaintiff in error and his partner, one Edward Harlan, to recover damages result-

ing from injuries received by defendant in error on December 4, 1886, while working for plaintiff in error and said Harlan as a bricklayer upon the walls of a gas-tank holder, then being constructed by said firm in Chicago near the intersection of Division street and Elston avenue. The declaration in the suit, as thus originally begun, was filed at the April term, 1888, and consisted of one count, which was the same as the first count of the declaration, subsequently filed on April 7, 1893, as hereafter stated. The suit, as thus begun, was pending until May 17, 1892, at which time an involuntary nonsuit was entered against the defendant in error (the plaintiff therein). On March 29, 1893, defendant in error commenced a second suit in said court, and the declaration therein was filed on April 7, 1893, and consisted of two counts. To this declaration the plaintiff in error and his co-defendant, Harlan, filed the general issue and the plea of the statute of limitations. The defendant in error filed to the plea of the statute of limitations a replication, setting forth that the first action was commenced against the defendant within two years after the right of action accrued, and that the plaintiff was nonsuited, and that the present action was brought within one year after the entry of the nonsuit. The defendant in error also filed an amended replication to the plea of the statute of limitations, stating the date of the nonsuit and setting out the record. On February 19, 1896, the plaintiff in error and his co-defendant, Harlan, rejoined nul tiel record. Upon the issues thus joined, a trial was had on March 25, 1896, resulting in a verdict for the defendant in error (plaintiff below) for \$5,000.

On April 4, 1896, the circuit court granted a new trial, and on October 24, 1896, a second verdict was rendered in said cause for defendant in error for \$6,300. Upon the latter verdict, judgment was rendered, and an appeal was taken therefrom to the Appellate Court. On May 6, 1897, the Appellate Court reversed the judgment, and remanded the cause to the circuit court. The order of the Appellate Court, reversing the judgment and remanding the cause, was filed in the circuit court on August 5, 1897.

On December 11, 1899, by permission of the court, defendant in error filed seven additional counts to the declaration. To these counts the defendants, plaintiff in error and Harlan, filed the plea of general issue and the plea of the statute of limitations. Defendant in error filed a replication to the plea of the statute of limitations, setting up the commencement of the first suit, the nonsuit entered therein, and the commencement of the present suit within one year from the entry of the said nonsuit, and that the additional counts, filed on December 11, 1899, were but restatements in various forms of the cause of action for which the first suit was brought. The plaintiff in error filed a rejoinder to such replication, alleging that

there was no such record as referred to therein. On October 6, 1900, the death of Edward Harlan was suggested, and the suit was dismissed as to his representatives, who had specially entered their appearance. The suit thereupon proceeded against the plaintiff in error alone. A third trial was then had, and, as a result thereof, a third verdict was rendered in favor of the defendant in error on September 27, 1902, for \$16,000. The defendant in error remitted \$6,000 from the verdict, and thereupon a new trial was denied, and on October 4, 1902, judgment was entered in favor of defendant in error for \$10,000, and costs. From this judgment for \$10,000 an appeal was taken to the Appellate Court, and the Appellate Court has affirmed said judgment of the circuit court for \$10,000. The present writ of error is sued out from this court for the purpose of reviewing the judgment of affirmance, so entered by the Appellate Court.

The material facts are substantially as follows: Plaintiff in error, Hinchliff, and Harlan, were partners and contractors, engaged in building a gas-tank holder near the intersection of Division street with Elston avenue in Chicago, and, to that end, in making an excavation and constructing a foundation for the gas tank. They had been engaged in this work for over two months prior to December 4, 1886, and defendant in error was on said last-mentioned day a bricklayer in their employ. Defendant in error and others were laying brick upon the wall of the tank holder, then being constructed, at a point about 25 feet below the street level. The trench was about 50 feet deep, and more than 200 feet in diameter, about 10 feet wide at the bottom, and 25 or 30 feet wide across the top. The wall in the trench was at the bottom about 8 feet wide, and at the top about 5 feet wide, and had been built at the time of the accident to about 25 feet below the street level. The evidence tends to show that, in preparing the trench for the brick walls, the dirt had been thrown and hauled up on the banks of the outside of the work, forming a hill or slope, so that from the top of the elevation the ground slanted towards the center of the gas-tank holder. There was a bridge across the ditch in which the wall was being constructed, which was used by teams that brought cement and other material by way of Elston avenue, the hole for the excavation for the tank being in an angle made by the intersection of Division street with Elston avenue. This bridge ran from the side of the tank excavation to about the center of the excavation, and started from the outside, so that its inner end was lower than its outer end. The teams, in delivering material for the work, were driven upon this bridge. The edges of the excavation for the tank were not barricaded, and there was no protection sufficient to prevent materials from slipping into the excavation. The evidence tends to show that, while defendant in er-

ror was working for plaintiff in error and his partner, their foreman, a man called Chris, about 4:45 in the afternoon of December 4, 1886, when defendant in error was about 50 feet from the bridge, came to him and told him to come over and finish this work—that is to say, to go down into the trench and lay brick upon the wall north of and near the bridge—and showed him where to work, and that, in pursuance of such direction by the foreman, he went to work under the bridge, when in a short time a pipe fell down, and struck and broke his leg. The evidence also tends to show that it was from 25 to 30 feet from the ground level to the place where the defendant in error was working when hurt. The iron pipe which caused the injury had been used by the teamsters to lock the wheels of their wagons by inserting it through the spokes to arrest the speed of the wagons while going down the slope to the bridge where the teams were usually stopped, and the pipe was pulled out and thrown upon the ground. The pipe was about 8 or 9 feet long and 4 inches thick, and was made of iron, though there is testimony tending to show that it was about 6 inches thick and 8 feet long. At the time of the injury the pipe had been taken from the wheels and left on the bank, and, after being taken out of the wheels, was thrown down onto the bank, and rolled thence upon the defendant in error. There is evidence tending to show that upon this occasion this pipe was pulled out from the wheels by the foreman, Chris, and thrown down upon the bank or slope, from which it fell into the trench upon the wall where defendant in error was working, breaking his leg, crushing his ankle, and permanently injuring him. There is evidence tending to show that one of the foremen in the service of the defendant saw the pipe fall, but gave no alarm.

Edwin F. Abbott, for plaintiff in error.
James R. Ward, for defendant in error.

MAGRUDER, J. (after stating the facts). In this case no errors are assigned as to the giving or refusal of instructions, or the admission or exclusion of evidence, except the refusal of a written instruction asked of the court, requiring the jury to find for the defendant for the reason hereinafter stated. Inasmuch as three juries have found the facts the same way, it seems to be eminently proper that there should be an end of the controversy, so far as the facts are concerned. *Parmly v. Farrar*, 204 Ill. 38, 68 N. E. 433, and cases there cited. The contention of the plaintiff in error is that the declaration filed on April 7, 1893, did not state a cause of action, and that the additional counts, filed on December 11, 1899, were filed after the statute of limitations had barred recovery on the cause of action stated therein.

Section 25 of the limitation act provides that, in any of the actions specified therein, "if the plaintiff be non-suited, then, if the

time limited for bringing such action shall have expired during the pendency of such suit, the said plaintiff, his or her heirs, executors or administrators, as the case shall require, may commence a new action within one year after such judgment reversed or given against the plaintiff, and not after." 2 Starr & C. Ann. St. 1896 (2d Ed.) pp. 2642, 2643, c. 83. It has been held that this statute does not apply to voluntary nonsuits. *Holmes v. Chicago & Alton Railroad Co.*, 94 Ill. 439. It appears from the statement of the facts preceding this opinion that an involuntary nonsuit was entered against defendant in error, but that within a year after such nonsuit, to wit, on March 29, 1893, a second suit was begun, and the declaration filed therein on April 7, 1893. It is not contended by counsel for plaintiff in error, in the argument filed, that a cause of action is not sufficiently stated in the additional counts filed on December 11, 1899. The only objection made to such additional counts is based upon the claim that they were filed after the statute of limitations had barred a recovery on the cause of action therein stated. It is true that at the time the additional counts were filed, on December 11, 1899, more than two years had elapsed since the accident took place. Therefore, if the declaration filed on April 7, 1893, failed to state a cause of action, and by the additional counts or amendments filed on December 11, 1899, a new cause of action was sought to be introduced, the same was barred, and the plea of the statute of limitations thereto should have been sustained. *Foster v. St. Luke's Hospital*, 191 Ill. 94, 60 N. E. 803; *Schueler v. Mueller*, 193 Ill. 402, 61 N. E. 1044. The material question, then, is, did the declaration filed on April 7, 1893, state a cause of action? If the latter declaration merely stated a cause of action defectively, the cause of action stated in the additional counts is not barred by the statute of limitations, such additional counts being but a restatement of the cause of action set out in the declaration filed on April 7, 1893; and the running of the statute of limitations was arrested by the commencement of the suit on August 15, 1887, and of the second suit on March 29, 1893, within one year from the date of the nonsuit entered in the action first commenced. *Chicago, Burlington & Quincy Railroad Co. v. Jones*, 149 Ill. 361, 37 N. E. 247, 24 L. R. A. 141, 41 Am. St. Rep. 278; *Swift & Co. v. Madden*, 165 Ill. 41, 45 N. E. 979.

As we understand the argument of counsel for plaintiff in error, it is conceded that the objection to the declaration of April 7, 1893, is that "it fails to state with certainty a cause of action." The declaration filed April 7, 1893, is said to be "faulty because it is uncertain." The fault thus found with the declaration of April 7, 1893, is one which, under the common-law practice and the statutes of the state, should be availed of by

special demurrer, and is cured by verdict. "The want of a certainty and an ambiguous expression in a declaration are cured by verdict." 1 Chitty's Pl. marg. p. 236. "It may here suffice to observe that the want of sufficient certainty is generally aided by verdict at common law." 1 Chitty's Pl. marg. p. 261. Where no title or ground of action is set out, the declaration will not be aided by verdict, but, where a declaration or other pleading sets forth a good title or ground of action defectively, it will be cured by verdict. 1 Chitty's Pl. marg. p. 673. "Where there is any defect, imperfection, or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet, if the issue joined be such as necessarily required, on the trial, proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection, or omission is cured by the verdict." 1 Chitty's Pl. marg. p. 673. "In general, uncertainty is only a matter of form, and * * * will consequently be aided * * * after verdict * * * by the statutes of jeofails." 1 Chitty's Pl. marg. p. 677. Clauses 5 and 9 of section 6 of the act in relation to amendments and jeofails provide that no judgment shall be arrested or stayed after verdict, and no judgment upon verdict shall be reversed "for any mispleading, insufficient pleading," etc., or "for the want of any allegation or averment on account of which omission a special demurrer could have been maintained." 1 Starr & C. Ann. St. 1896 (2d Ed.) p. 390, c. 7.

Therefore, it appearing here that the objection made to the declaration is that it "fails to state with certainty a cause of action," and not that it fails to state any cause of action at all, it follows that the present judgment cannot be reversed on account of such defect. There is here merely a defective statement of a cause of action, and not a statement of a defective cause of action; and, while the latter will not be assisted by verdict, the former is always aided by the verdict of the jury. *Chicago & Alton Railroad Co. v. Clausen*, 173 Ill. 100, 50 N. E. 680; *Chicago City Railway Co. v. Jennings*, 157 Ill. 274, 41 N. E. 629; *Cribben v. Callaghan*, 156 Ill. 549, 41 N. E. 178; *Chicago & Eastern Illinois Railroad Co. v. Hines*, 132 Ill. 161, 23 N. E. 1021, 22 Am. St. Rep. 515; *Joliet Steel Co. v. Shields*, 134 Ill. 209, 25 N. E. 569; *Keegan v. Kinnare*, 123 Ill. 280, 14 N. E. 14.

It is said that the declaration filed on April 7, 1893, does not state a cause of action, because it is in the alternative and disjunctive form, and does not allege material facts from which it can be inferred that there is any liability on the part of plaintiff in error; and because it does not allege that the defendant in error was in the employ-

ment of the plaintiff in error, or that he was in the position where he was injured by the direction of the plaintiff in error; and because it does not allege that the alleged dangerous conditions were known to the plaintiff in error, or ought to have been known by him. It is unnecessary for us to set out and comment upon all the different allegations of the declaration filed April 7, 1893, for the purpose of showing that it is not subject to the objections here urged against it. Such a course would swell this opinion to an inordinate length. It is sufficient to say that, after a careful examination of the declaration in question, we are of the opinion that, although it may have been held to have been defective upon demurrer, yet the defects alleged against it are not of such a character that they were not cured by the verdict. It has been held by this court that, "if the declaration contains terms sufficiently general to comprehend, by fair and reasonable intendment, any matter necessary to be proved, and without proof of which the jury could not have given the verdict, the want of an express statement of it in the declaration is cured by the verdict." *Chicago & Alton Railroad Co. v. Clausen*, supra. In the declaration here under consideration, while it may have been justly subject to demurrer for the want of an express statement of the matters referred to in the objections of counsel, yet it contains terms sufficiently general to comprehend, by fair and reasonable intendment, such matters, embraced within the scope of the objections, as it was necessary for the defendant in error to prove. Consequently, we concur in the following statement, made by the Appellate Court in their opinion deciding this case, to wit: "There is a manifest difference between not stating any cause of action and not stating a cause of action with certainty. We have examined the original declaration, and are of the opinion that it states a cause of action, and that there are no defects in it insusceptible of cure by verdict. *Illinois Central Railroad Co. v. Simmons*, 38 Ill. 242; *Toledo, Peoria & Warsaw Railway Co. v. McClannon*, 41 Ill. 238; *Demmesmey v. Gravelin*, 56 Ill. 93; *Barker v. Koozler*, 80 Ill. 205."

One of the defenses interposed by plaintiff in error was that some time in the afternoon of December 4, 1886, the People's Gaslight & Coke Company had sent its teams to the place where the accident occurred, and was engaged in hauling cement and material, intending to stop plaintiff in error and his partner from completing the work, and that the wagon used at the time to draw the load of cement, which was brought down the slant from the top of the hill by the use of the iron pipe as a brake, was a wagon belonging to the gas company, and in charge of one of its employes, and that therefore the plaintiff in error was not liable. This was a question of fact, which was submitted to the jury

by proper instructions, and has been found against plaintiff in error. It is not subject to review by this court. In addition to this, counsel in their brief do not discuss this point, as it was discussed in the brief before the Appellate Court, and it is therefore to be assumed that it has been abandoned in this court.

Something is said in the brief of plaintiff in error to the effect that the decision of the Appellate Court, reversing the judgment and remanding the cause, in May, 1897, was conclusive upon that court, and that therefore it was error both in the circuit court and the Appellate Court afterwards to disregard such decision. This objection proceeds upon the assumption that the Appellate Court decided that the declaration of April 7, 1893, did not state any cause of action. But the decision of the Appellate Court was merely that the declaration in question failed to state a cause of action with certainty. For this reason the point as to the alleged conclusiveness of the first decision of the Appellate Court is not well taken.

After a careful examination of the record in this suit, which has now been pending in the courts of this state for more than 17 years, we see no good reason for reversing the judgments of the lower courts. Accordingly, the judgment of the Appellate Court is affirmed.

Judgment affirmed.

(213 Ill. 228)

JONES et al. v. JONES et al.

(Supreme Court of Illinois. Dec. 22, 1904.)

FRAUDULENT CONVEYANCES—PROSPECTIVE MARRIAGE—INCHOATE DOWER—HOMESTEAD—TITLE OF DECEDENT—EVIDENCE—WITNESSES—COMPETENCY.

1. A grantor may make a voluntary conveyance of his property without regard to children who are neither purchasers nor creditors.

2. Where a conveyance is made by a father to a child prior to his prospective marriage, and he has sufficient property remaining, so that the rights of the wife arising from her inchoate dower will not be prejudiced, it is not in fraud of her rights.

3. Where a father conveys property to a child prior to his marriage, the burden is on the prospective wife to show that, considering the entire estate of the father, the conveyance was prejudicial to her inchoate dower rights.

4. Where a father conveyed property to a child, and, with her consent, resided on the land after his subsequent marriage, making improvements thereon, his widow acquired no homestead interest therein, as the land was occupied by her husband as a tenant at will, and the person through whom a homestead is claimed must have such an interest in the property at his death as could be sold on execution.

5. The claim of a homestead through a decedent because he had acquired title by adverse possession is not supported where the evidence fails to show that he occupied the land, or any part of it, for 20 years after his conveyance of it.

6. Where a father conveyed land to his child, any title received by him after he had delivered

his deed with warranty inured to the benefit of the title he had made, and such conveyance could not be relied on by him as color of title, nor by any person claiming in privity with his estate.

7. Where all the material facts testified to by a witness, except the delivery of certain deeds which she was properly in possession of, are established by other competent evidence, the question of her competency is unimportant.

8. Where the interests of defendants were hostile and adverse to their codefendant, that they were made defendants does not prevent their testifying for such codefendant.

Appeal from Circuit Court, Wayne County; J. R. Orelight, Judge.

Bill by Millie Jones and others against Matilda Jones and others. From a decree dismissing the bill, complainants appeal. Affirmed.

Organ & Elliott, for appellants. John R. Holt and William T. Bonham, for appellees.

RICKS, C. J. A bill in chancery for partition and assignment of dower and homestead was exhibited in the circuit court of Wayne county by Millie Jones, Mabel Jones, and Sarah Jones (the latter two being minors and appearing by next friend) against Matilda Jones, George C. Jones, Lewis S. Jones, William D. Jones, John A. Jones, Jane Riggs, and Mary Scott, and to set aside two certain deeds made by John G. Jones to said Mary Scott. The bill alleges that John G. Jones died November 19, 1902, seised of the east half of the northwest quarter of section 24, township 1 north, range 9 east of the third principal meridian, and other lands; that the land above specifically described was the homestead of said decedent at the time of his death, and that he derived title to said homestead tract by purchase, and by open, notorious, exclusive, continued, actual possession as the homestead of himself and family, and claiming to be the owner thereof, and the payment of taxes for seven years, and by possession for twenty years; and further alleging that after the death of the decedent the defendant Mary Scott placed of record two deeds purporting to convey to her the said tract of land in controversy; alleging that said deeds were never delivered by the grantor in his lifetime, and that no consideration was given for them, and that they were fraudulent and void, and a cloud upon the title of said decedent and his legal heirs; avers that each of the heirs, parties complainant and defendant to the suit, is entitled to a one-ninth interest in the lands, subject to the dower and homestead rights of Millie Jones, the widow; that after the making of said deeds the said grantor for many years continued to occupy said lands, and used and treated the same as his own, and made lasting and valuable improvements thereon, and that shortly after the making of the last of said deeds, dated October 2, 1886, he married appellant Millie Jones; that he secretly withheld from her the knowledge that such deeds were made; and that said

¶ 1. See Descent and Distribution, vol. 14, Cent. Dig. § 208.

last-named deed was a fraud upon her rights. All of the defendants to the bill except Mary Scott defaulted. Mary Scott answered the bill, denying that her father, John G. Jones, died seised of the tract of land particularly described hereinabove, and which is the only land in controversy in this proceeding, and averring that at the time of his death she was the owner in fee of said land; that the deeds were regularly made and delivered to her, and that the consideration therefor was her personal services rendered to the grantor, as his housekeeper, for seven years, between the time of the death of his second wife, in 1879, and the marriage to appellant Millie Jones, and also the educating, rearing, and clothing the children of the said grantor after his marriage to the said Millie Jones; that appellant Millie Jones knew, at the time of her marriage that said John G. Jones did not claim title to the lands in question, and that at that time he had his homestead on other lands which were actually occupied by him, and which were afterwards traded for a mill, in the conveyance of which appellant Millie Jones joined; and that said mill property was afterwards traded for a large amount of lands in the state of Kansas; and denying all manner of unlawful combination, confederacy, or fraud. To this answer, replication was filed, and the cause was heard in open court before the chancellor, who entered a decree finding the title to the property in controversy in Mary Scott, and dismissed the bill as to that tract, and decreed partition and the assignment of dower as to the remainder of the property. From this decree, complainants below prosecute this appeal, and insist that the decree is contrary to the evidence, and that the court admitted improper evidence.

It appears from the evidence that the decedent, John G. Jones, was married three times, and had children by each wife; that appellee Mary Scott was a child of his first wife, and that there were other children of that wife; that said Mary Scott had been married to one Phelps, and was a widow on January 31, 1879, the date of the death of the second wife of her father; that at that time decedent owned a number of tracts of land; that by the death of his second wife the decedent was left with some four or five minor children; that one of these was a little boy, George, about three years of age, and another a daughter, Tillie, who was six years of age, and there were two sons, John and William, who were still older, there being five children at home with the father besides appellee Mary Scott; that Mary Scott upon the death of the mother became his housekeeper, and kept house for him for seven years or over, and until his marriage with appellant Millie Jones. On the 17th of February, 1879, and shortly after the death of his second wife, decedent gave to Mary Scott, duly executed and acknowledged, a warranty deed for the south 40 acres of the

tract in question. At that time Mary Scott had a horse and some little personal property, which were sold, and with the proceeds and money belonging to decedent during the year 1879 a house was built upon this 40 acres that had been deeded to her, and the decedent and said Mary and the children moved into this new house and occupied it until 1885, when it burned down, and they then moved onto a farm of the decedent, known as the "Fishel Place," where they remained until the decedent married appellant Millie Jones on November 7, 1886. On October 24, 1886, the decedent made and delivered to Mary Scott, by the name of Mary E. Phelps (her then name), a deed to the north 40 acres of land, which was about two weeks prior to his marriage with appellant Millie. The latter had three children by a former marriage, and, for reasons that seemed sufficient to the decedent, he arranged with Mary Scott to take his two smaller children, George and Tillie, to the little town of Mt. Erie, within two or three miles of the farm, and rear them; and she did take these two children, and took possession of an old dilapidated house on a town lot in that village, and with her own means and earnings fixed up the house, and kept, clothed, fed, and schooled these two children, and a considerable portion of the time kept one or both of the older sons of the decedent. The daughter Tillie was in delicate health, and could not work, and was given not only an education in the ordinary branches, but was given a musical education. It is also shown that at various times Mary Scott paid money to creditors of her father, and loaned and gave him money for various purposes. Soon after his death she placed the deeds of record. A number of years before his death, having traded his other lands for a mill, the decedent moved onto the lands of Mary Scott, and occupied them with his family until the time of his death. He seems to have received all the rents or income from the lands, and to have paid the taxes and put certain improvements on them, namely, a house worth \$150, a barn worth \$300, a granary worth \$50, and \$12 worth of fence, and did some clearing upon the land. That was the extent of the improvements, as appears from the evidence, made by him during the time he occupied it, which was some eight years. The south 40 is shown to have been of the value of about \$600 at the time of the conveyance of it. We are unable to determine from the record the value of the north 40 at the time of the conveyance of it in 1886. Both deeds are general warranty deeds, and the one to the south 40 states a consideration of \$500, and the one for the north 40 states a consideration of \$600. There is no evidence in the record as to the value of the lands retained by the decedent at the time of his marriage, although the evidence shows that he owned two or three other tracts of land.

With reference to the rights of the children of the decedent, it may be said that they could only set aside these deeds by showing that they were obtained by the fraudulent practices or undue influence of appellee Mary Scott; that she in some manner took advantage of the grantor, and thereby induced and obtained the deeds. So far as they are concerned, they are neither purchasers nor creditors of decedent, and he could, as to them, make a voluntary conveyance of all his property to any person he pleased. It is a well-established rule that neither the grantor, nor those in privity in estate with him, can set aside deeds made by him where he acts fraudulently. Nor is there any evidence in this record—not even the slightest—that appellee Mary Scott obtained the deeds of which she is in possession through any fraud or fraudulent practice. All the children of the decedent that were old enough to know anything about his affairs knew and understood that the property in question was the property of Mary Scott. It is not even attempted to show that, as to the grantor, Mary Scott practiced any fraud or exercised any undue influence in obtaining the deeds; but, on the contrary, the decedent stated to various persons that he had made the deeds to her, and for the purpose of compensating her for the services she had rendered him. These services are shown to have been worth from \$3 to \$3.50 per week for the 7½ years between the death of decedent's second wife and his marriage to appellant Millie Jones; and the care, custody, and support of each of the children during their minority, and for which he was liable, except through the arrangements he made with Mary Scott, are shown to have been worth from \$2 to \$3 per week; so that, so far as the value, as shown by the consideration expressed in the deeds or any evidence allunde, is concerned, the decedent received full value for these two tracts of land. We have, then, the conveyances for a legal and substantial consideration.

If the conveyances were purely voluntary and without any consideration, and for the sole purpose of vesting the title to the property in the appellee Mary Scott, no one concerned in this litigation could complain except the widow, Millie, and she could only complain as to the north 40, which was conveyed shortly before her marriage to decedent; and before she can complain, or before the sale can be set aside simply upon the ground that the conveyance was made close to the time of her marriage, it must reasonably appear from the evidence that the conveyance was made in fraud of her rights. Such a conveyance cannot be deemed to be in fraud of the rights of the prospective wife where a fair consideration is shown to have been paid for the conveyance, because, if the prospective husband, who conveys, receives the value of the property conveyed, the wife has lost nothing, as he still

has its representation in money or money's worth. Moreover, we think it was incumbent upon the appellant Millie Jones to show that, taking into consideration the entire estate of the decedent at the time of the marriage, the conveyance of this property was prejudicial to her rights. She has not done this. Although the record discloses other property in the decedent at the time of the marriage, she has made no effort to show the value of it, or its extent; and, failing to show any express fraud, the implication of fraud, or the fraud that arises, in law, from the mere conveyance, will not be presumed by simply proving the conveyance to a child, which he might properly do if it did not seriously deplete his estate. *Daniher v. Daniher*, 201 Ill. 489, 66 N. E. 239. But as we have said, we think there was a sufficient consideration, and that this case does not depend wholly upon the failure of appellant Millie Jones to show that by this conveyance the estate of the decedent was materially lessened or affected to her injury. The law also recognizes that children are the natural objects of the bounty of the parent, and a conveyance from a father to his child, where he has reasonable property remaining, so that the rights of the wife arising from her inchoate dower will not be prejudiced thereby, is not a fraud upon her rights. *Daniher v. Daniher*, supra. Of course, if the evidence showed that the conveyance was for the purpose of defrauding the wife, and that the grantee in the conveyance accepted it with this understanding, a different question, so far as the widow is concerned, would be presented, but there is not the slightest evidence in this record tending to show any such state of case.

As has been stated, the house in which decedent died was located on the south 40, which was the tract that was conveyed in 1879. It is insisted now that appellant Millie Jones and her children have a homestead right in the land. We think not. She could not, it seems to us, obtain the homestead right or the homestead estate in land that did not belong to the husband, and that was held by him as a tenant at will and in which he had no right of homestead. By the delivery of the deed to appellee Mary Scott without any restrictions or reservations in it, she became entitled to the possession *eo instante*. If decedent occupied the premises other than by her mere consent, there is nothing in this record to show it; and, as he does not appear to have had any lease for any of the time, he would be, under such state of facts, a mere tenant at will. The fact that he put certain improvements on this property, amounting to about \$500, in eight or more years' occupancy of it, does not vest the title in him, nor does it give to appellants a homestead in the property. The test seems to be that, before the right of homestead can attach, the husband or person through whom the right is claimed must have had such an

interest in the property at the time of his death as could be sold on execution to pay his debts. 15 Am. & Eng. Ency. of Law (2d Ed.) 556; *Deere v. Chapman*, 25 Ill. 610, 79 Am. Dec. 350; *Conklin v. Foster*, 57 Ill. 104. If this test be applied, it is clear that the decedent had no such estate in the property in question as that the homestead could attach to it.

The contention that the statute of limitations has run, and that the decedent had a title adverse to appellee Mary Scott by virtue of possession, is not supported by the evidence. There is no evidence that he occupied the land, or any part of it, for 20 years after these conveyances. The south 40, which was occupied by Mary Scott and her father, was vacated in 1885, when the house burned, and he moved to other lands. At that time Mary Scott was in possession with him, and it cannot be said that he was then holding hostile to her right. Since that time 20 years have not elapsed, and, as the deed of 1886 was made less than 20 years ago, of course the supposed 20 years' possession could not be urged in that case.

It is said, however, that in 1875 decedent conveyed this land to one of his sons, John R. Jones, and that in 1880 John R. Jones reconveyed the same property to the decedent, and that thereby he acquired color of title and paid taxes under the same for 7 years. Both of these conveyances were before the conveyance of the last tract from decedent to appellee Mary Scott, and the conveyance from John R. Jones back to the decedent was after the conveyance by the decedent of the south 40 to Mary; and any title received by the decedent after he had made and delivered to her a deed with covenants of general warranty would inure to the benefit of the title he had thus made, and such conveyance could not be relied upon by him as color of title, and cannot be by any person now claiming in privity with his estate.

It is insisted that Mary Scott was not a competent witness. All of the material facts that she testified to, except the delivery of the deeds, were established by other competent evidence. She was in possession of the deeds, and there is no evidence in the record tending to show that she came in possession of them in any improper way.

The objection that the brothers and sisters of Mary Scott were not competent witnesses as against these appellants is not well taken. Their interests were identical with those of the appellants. If the deeds to Mary Scott were set aside, they would share in the division of the estate the same as the appellants; and, so far as the questions here under consideration are concerned, their interests were hostile to the interests of Mary Scott. The fact that they were made defendants by appellants does not prevent their testifying for Mary Scott, their codefendant, if their interests were in fact adverse to her interest.

In this case the abstract is not indexed, nor is there an index to the original bill of exceptions contained in the record; and we have been obliged, in order to get any understanding of the case, to give the appellants the benefit of the failure to observe our rule, and to assume unnecessary and extended labors on our part. We could have properly, and in many cases have, refused to consider appeals where these requirements are not complied with. We have, however, read the abstract carefully, and the greater portion of the record, to ascertain, if we could, if the trial court had fallen into error prejudicial to these minor appellants; and we are unable to say that the conclusions of the chancellor, who tried the case in open court and saw the witnesses, are against the weight of the evidence, but, rather, are impressed that the decided weight of the evidence is for the appellee Mary Scott. The decree of the circuit court is affirmed.

Decree affirmed.

(212 Ill. 590)

CITY OF CHICAGO et al. v. ROTHSCHILD & CO. et al.

(Supreme Court of Illinois. Dec. 22, 1904.)

MUNICIPAL CORPORATIONS — ORDINANCES — STREETS—STRUCTURES—AUTHORITY TO MAINTAIN—FRANCHISES—FREEHOLD—WRIT OF ERROR—SUPREME COURT—JURISDICTION.

1. Where a city ordinance granted the right to maintain an elevated passageway connecting a store building with an elevated railroad, and limited the right to maintain such elevated road to a term of 50 years, such right was neither a franchise nor a freehold interest; and hence a writ of error, in a suit to restrain the city from interfering with the construction of the passageway, was not issuable direct from the Supreme Court in the first instance.

Error to Circuit Court, Cook County; L. Honore, Judge.

Bill by Rothschild & Co. and another against the city of Chicago, in which the Northwestern Elevated Railroad Company was joined, and prayed similar relief to that demanded in the bill. From a decree in favor of complainants and the railroad company, the city brings error. Dismissed.

This is a bill in chancery filed by Rothschild Co. and Edward Morris, a taxpayer, in the circuit court of Cook county, to enjoin the city of Chicago and its mayor and commissioner of public works from interfering with the construction of, and from removing when constructed, a certain elevated passageway about to be constructed by Rothschild & Co. and the Union Elevated Railroad Company to connect the platform of the station of the elevated road known as the "Union Loop," located at the intersection of Van Buren and State streets, with the second story of the store building of Rothschild & Co., situated upon the northeast corner of said Van Buren and State streets. The Northwestern Elevated Railroad Company was made a party, as well as all the other

elevated railroad companies using the loop. Answers and replications were filed, and the Northwestern Elevated Railroad Company filed a cross-bill alleging it had succeeded to the rights of the other elevated railroad companies in the loop, and that under the ordinances of said city authorizing the construction of said elevated railroads, and especially the elevated road on Van Buren street, it had the right to erect and maintain said passageway, and principally relied, as the complainants in the original bill also did, upon an ordinance passed by the city council and approved by the mayor, bearing date June 29, 1896, which ordinance authorized the construction and maintenance, for the period of 50 years, of an elevated railroad in Van Buren street between Wabash avenue and Market street, with necessary stations, etc. A trial was had before the court, and a decree was entered in accordance with the prayer of the original and cross bills, and the city of Chicago has sued out a writ of error from this court to review said decree.

Edwin White Moore (Edgar Bronson Tolman, Corp. Counsel, of counsel), for plaintiffs in error. Clarence A. Knight and William G. Adams, for defendant in error Northwestern Elevated Railroad Company. Dupree, Judah, Willard & Wolfe and Willis E. Thorne, for defendants in error Rothschild & Co. and Edward Morris.

HAND, J. (after stating the facts). We are of the opinion the writ of error to review the record in this case should have been sued out from the Appellate Court instead of from this court. The ordinance relied upon as authorizing the construction of said passageway does not create a perpetual right to erect and maintain an elevated road in Van Buren street, but such right, by the terms of the ordinance, is limited to 50 years. No freehold was therefore involved in the determination of said suit. *Village of Harlem v. Suburban Railroad Co.* 198 Ill. 337, 64 N. E. 1010. And this court has repeatedly held that a franchise is a privilege which emanates from the sovereign power—that is, in a case like this, from the state—and that the power conferred upon a railroad company, by ordinance, to locate and maintain a railroad in the streets of a city, is a license, which, after the road is built, may be irrevocable, but that such ordinance does not create or confer upon the railroad company constructing the railroad in the street a franchise. *Chicago City Railway Co. v. People*, 73 Ill. 541; *Metropolitan City Railway Co. v. Chicago West Division Railway Co.*, 87 Ill. 817; *Board of Trade of Chicago v. People*, 91 Ill. 80; *Mills v. Parlin*, 106 Ill. 60; *Chicago Municipal Gaslight & Fuel Co. v. Town of Lake*, 130 Ill. 42, 22 N. E. 616; *City of Belleville v. Citizens' Horse Railway Co.*, 152 Ill. 171, 38 N. E. 584, 26 L. R. A. 681; *People v. Central Union Telephone Co.*, 192 Ill. 807,

61 N. E. 428, 85 Am. St. Rep. 338; *Rostad v. Chicago Suburban Water & Light Co.*, 211 Ill. 248, 71 N. E. 978.

In *Chicago City Railway Co. v. People*, supra, on page 547, it was said: "A 'franchise,' according to the definition given by Blackstone, is a royal privilege or branch of the king's prerogative subsisting in the hands of the subject, and, being derived from the crown, must arise from the king's grant. 2 Blackstone, 17. Corporate franchises in the American states emanate from the government or the sovereign power, owe their existence to a grant, or, as at common law, to prescription, which presupposes a grant, and are vested in individuals or a body politic. The grant or license given by the ordinance comes within no definition of a franchise. Besides, a municipal body, it is understood, possesses no power to confer a franchise. *Davis v. The Mayor*, 14 N. Y. 506, 67 Am. Dec. 186. Being a mere license, under the franchises conferred by the state to the railway company to construct its road within a given period, upon ground over which the city had exclusive control, it could waive a strict performance of the condition as to time. The license granted by the ordinance is no more a franchise than would be a grant of the right of way by a private citizen to the company to construct its road over his lands, and it is as competent for the city as for a private owner to extend the time of performance, or to amend, modify, or annul the contract by mutual agreement."

In *Board of Trade of Chicago v. People*, supra, the court defined a franchise to be a privilege emanating from the sovereign power of the state, owing its existence to a grant, or, as at common law, to prescription, which presupposes a grant, and which privilege is invested in an individual or a body politic, and held the word "franchise," in the statute of this state providing for appeals or writs of error to this court direct, was used in that restricted sense. On page 82 the court said: "*In Bank of Augusta v. Earle*, 13 Pet. 579 [10 L. Ed. 274], it was said by the court: 'It is essential to the character of a franchise that it should be a grant from the sovereign authority, and in this country no franchise can be held which is not derived from a law of the state.' As was said in *City of Bridgeport v. New York & New Hampshire Railroad Co.*, 36 Conn. 255 [4 Am. Rep. 63], the 'term "franchise" has several significations, and there is some confusion in its use; but, when it is used in a statute, or elsewhere in the law, it is generally, if not always, understood as a special privilege conferred by grant from the state or sovereign power, as being something not belonging to the citizen of common right.' In *Morgan v. Louisiana*, 93 U. S. 217 [23 L. Ed. 860], the court very justly remarked that much confusion of thought had arisen from 'attaching a vague and undefined meaning to the term "franchise."' It must have been in

this restricted sense the term 'franchise' was used by the General Assembly in the statute we are considering, and not in that broad sense contended for. No doubt the word 'franchise' is sometimes used as synonymous with privileges and immunities of a personal character, but in law its appropriate meaning is understood to be something which the citizen cannot enjoy without legislative grant."

In *Mills v. Parlin*, supra, a bill was filed by a property owner to enjoin the defendants from using or operating a steam railroad in front of his dwelling house in the city of Canton, under an ordinance passed by the city council of said city. An appeal was taken to the Appellate Court, where the decree granting the relief prayed for was reversed. On a further appeal to this court, as well as in the Appellate Court, objection was made to the jurisdiction of the Appellate Court on the ground that a franchise was involved. The court, on page 63, said: "The bill was simply to test the authority of defendants to use a public street in front of complainant's residence for the use of their railroad track. The right or title or the validity of a franchise was in no way involved, and the appeal was properly taken to the Appellate Court in the first instance."

As it clearly appears that no freehold or franchise is involved in this suit, this court is without jurisdiction to hear and determine the same. The writ of error will therefore be dismissed.

Writ dismissed.

(212 Ill. 632)

GLOS v. MCKERLIE.

(Supreme Court of Illinois. Dec. 22, 1904.)

TAXATION—TAX SALES—VALIDITY—TAX DEED—
CANCELLATION—ADMISSION OF EXISTENCE—TITLE OF PLAINTIFF.

1. Under Hurd's Rev. St. 1903, c. 120, § 194, providing that on the day advertised for tax sale the clerk shall make a certificate showing the amount due, etc., a tax sale under a certificate issued before the day on which the sale was made is void.

2. Objections not urged against the admissibility of a plat when it was offered in evidence cannot be considered on appeal.

3. Where a bill specifically described the tax deed sought to be set aside, and the answer admitted that defendant had derived some interest in the premises by the tax deed, and alleged that the deed described in the complaint was valid; the existence of the deed was admitted, and it was unnecessary for plaintiff to offer it in evidence.

4. In a suit to cancel a tax deed to two lots and a private court and alley, the deed conveying the property to plaintiff only purported to convey an easement in the court and alley, and the evidence showed that they were used by plaintiff in common with the owner of other lots abutting thereon. Held, that a decree declaring plaintiff the owner of the court and alley, and setting aside the tax deed as a cloud on his title thereto, was erroneous, and should, with respect to the court and alley, have set aside the deed only so far as it affected the interest therein which the deed to plaintiff purported to convey.

Appeal from Superior Court, Cook County; Theo. Brentano, Judge.

Action by William McKerlie against Jacob Glos. From a judgment for plaintiff, defendant appeals. Reversed in part.

This is an appeal from a decree of the superior court of Cook county setting aside as a cloud upon complainant's title a tax deed to two lots and an adjoining court in the city of Chicago, which deed had been issued to appellant, Glos, by the county clerk of Cook county. The bill alleges that the complainant is the owner of the property and in possession thereof; that Jacob Glos, the appellant, claims title thereto by virtue of a tax deed issued to him by the county clerk of Cook county as the purchaser at a sale for taxes of 1894, but that said tax deed is void for the reason that the certificate of the county clerk, constituting the process and precept under which the sale was made, was dated July 10, 1895, and the sale was advertised to take place on August 5, 1895. By his answer Glos admitted that he had obtained some interest in the premises by virtue of tax sales and deeds issued thereunder, and alleged that the tax deeds through which he derived title are valid and regular, and conveyed the fee-simple title to him, and denied that McKerlie, the appellee, is the owner of or in possession of the property.

Appellee introduced in evidence a warranty deed to himself from Howard H. Gross and wife, conveying these lots, with others, together with all easements and ways appurtenant thereto, and providing, with regard to such easements and ways, "reference being specially had to a private alley and court," as shown by a certain plat, which is described in the deed. He also introduced in evidence a copy of that plat, which is a plat of the subdivision in which the lots and court involved in this suit are located. This shows that immediately south of these lots, which lie side by side, is a space marked as a court, and leading south from this court to the street is an alley marked "private alley." From the evidence it appears that this alley and court are used by persons desiring access to the property abutting thereon, and that the court, which is considerably wider than the alley, was made so that vehicles coming in through the alley could turn around in the court and pass out through the alley.

The evidence further shows that the complainant owns a building divided into flats on two other lots of the subdivision, but that neither of the lots on which his building is situated adjoins the lots which are involved in this suit. The complainant testified that, after getting the deed from Gross, he laid a concrete pavement on part of the court; that there was a barn on one of the lots in question, but no building or fences on the other; and that the latter was used by his family and tenants as a place on which to dry clothes from the wash, and that he used the

alley and court in passing to and from his property.

The grounds urged for reversal are (1) that the complainant failed to prove ownership of the premises, (2) that he did not prove that he was in possession, (3) that the copy of the plat was improperly admitted in evidence, and (4) that the existence of the tax deed was not shown; wherefore there was no proof that such deed constituted a cloud upon the title.

Jacob Glos (John R. O'Connor, of counsel), for appellant. Franklin P. Simons, for appellee.

SCOTT, J. (after stating the facts). The tax deed involved in this suit is invalid for the reason that the clerk's certificate required by section 194 of chapter 120, Hurd's Rev. St. 1903, was made, not on the day fixed by the advertisement for the sale, but on an earlier day. *Glos v. Randolph*, 138 Ill. 268, 27 N. E. 941; *Glos v. Gleason*, 209 Ill. 517, 70 N. E. 1045.

The appellee offered in evidence an examined and sworn copy of the plat referred to in the deed from Gross. This is now objected to on the ground that it does not show that the plat was ever properly approved by the city council of the city of Chicago, does not show that it was made by any surveyor, does not show that it was acknowledged by the owner of the subdivision, or that it was recorded in the recorder's office of Cook county. The copy was offered for one purpose alone, viz., to show the location of the lots and of the court. None of the objections now urged were made at the time of its introduction, and it is therefore unnecessary to determine whether they would have been good had they been made at that time. Had they been there pointed out, appellee would have had an opportunity to attempt to obviate them, had he desired to pursue that course.

It is also urged that the failure of appellee to offer in evidence the tax deed to appellant is fatal to the decree. The bill described the tax deed which is averred to be a cloud, giving its date, the date when it was recorded, and the document number which it bears, and charges that it is null and void. The answer admits that the defendant has derived some interest in the premises by virtue of tax sales and deeds issued thereunder, denies that such deeds are null and void, and the answer then continues: "This defendant says that the tax deeds issued upon the premises or any part thereof described in said bill of complaint, and through or by which this defendant derives title, are in all respects valid and regular, * * * and did convey the fee-simple title of the premises therein described." In this state of the pleading it was unnecessary to offer the tax deed in evidence. We think the answer

amounted to an admission of the existence of the tax deed mentioned in the bill.

The appellee claims title under a deed from Howard H. Gross and wife to himself, dated July 1, 1901, and filed for record in the recorder's office of Cook county, Ill., on August 15, 1901, which describes the property thereby conveyed as follows: "Lots 1, 2, 4 and 5 of H. H. Gross' Subdivision, * * * together with all ways, lights, easements, rights and appurtenances to the said premises or any part thereof belonging or therewith now or heretofore held or enjoyed, reference being specially had to a private alley and court, as shown by a plat of H. H. Gross' said subdivision, * * * situated in the city of Chicago," etc. The bill avers that appellee is the owner, seised in fee simple, of said lots "1 and 2 and private court south and adjoining same." The tax deed purports to convey the real estate last described, and the decree finds that appellee is the owner thereof, and adjudges that the tax deed be set aside as a cloud upon his title. The private court in question is connected by a private alley leading south therefrom to Sixty-Fifth street. That alley and court are enjoyed in common by appellee and by the owners of lots 6 and 7 in the same subdivision, both of which lots abut on the court. The evidence satisfies us that appellee was properly held to be in possession of lots 1 and 2 and in the enjoyment of an easement in the court; that is, he used the court for ingress and egress to and from his property in common with other persons owning property abutting on that court.

We have frequently held that in a suit to set aside a tax deed as a cloud upon the title proof that the complainant, at the time the bill was filed, was in possession of the property, claiming in good faith to be the owner thereof under a deed purporting to convey the same to him, is sufficient proof of title. *Glos v. Randolph*, supra; *Glos v. Gleason*, supra. But the deed to appellee in this case does not purport to convey to him the court in fee simple, nor does the evidence show that he has any possession thereof except such possession as is necessary to enjoy his easement therein. The decree is therefore erroneous in so far as it sets the tax deed aside as to any interest in the court except the interest therein which the deed from Gross to appellee purports to convey.

The decree of the superior court will be affirmed in so far as it affects lots 1 and 2, above mentioned, and in so far as it affects such right, title, and interest in the court as the said deed from Gross and wife purports to convey to appellee. As to all right, title, and interest in that court which the deed last mentioned does not purport to convey to appellee, the decree is reversed. Each party will be adjudged to pay one-half the costs of this court.

Affirmed in part and reversed in part.

(213 Ill. 338)

PALTZER v. JOHNSTON.

(Supreme Court of Illinois. Dec. 22, 1904.)

JUDGMENT—AMENDMENT.

1. The chancellor has power, after directing the preparation of a decree dismissing a cross-bill for want of equity, to allow the cross-complainant to dismiss without prejudice.

Appeal from Appellate Court, First District.

Action by Charles Paltzer against Martha J. Johnston. From a judgment of the Appellate Court (114 Ill. App. 493) affirming an order denying a motion for the entry of a decree as of the date of an oral direction for its preparation and granting a motion to dismiss defendant's cross-bill without prejudice, complainant appeals. Affirmed.

Willis Smith and Henry L. Wallace (James E. Munroe, of counsel), for appellant. Masterson & Haft, for appellee.

BOGGS, J. On the 17th day of March, 1898, the Illinois Trust & Savings Bank filed in the superior court of Cook county a bill to foreclose a trust deed, and in April of the same year one James Johnston, testator of appellee, filed a cross-bill to foreclose a second trust deed on the same real estate, which latter trust deed, and the note secured thereby, were signed by one Alexander McIntosh and Charles A. Paltzer, the appellant herein. Such proceedings were had under the original bill filed by the Illinois Trust & Savings Bank that a sale of the real estate was made, but the proceeds of the sale were not sufficient to pay the amount due under the first trust deed, and a deficiency decree was entered therein. Said James Johnston having departed this life, the appellee executrix was substituted as party to the proceedings, and she, by leave of the court, filed an amended and supplemental cross-bill. Answers were filed thereto by said McIntosh and the appellant, and replications to the answers. Proofs were heard in the cause on behalf of the respective parties, and on the 30th day of January, 1903, the cause was submitted to the chancellor. On that day the chancellor proceeded orally to declare his findings from the evidence submitted, and concluded the oral deliverance by saying, "Let a decree be prepared dismissing the cross-bill for want of equity." No minute or memorandum was made by the chancellor, or by the clerk of the court, showing what the direction of the chancellor was, and no decree was prepared or entered in accordance with such oral direction of the chancellor. On February 3, 1903, being one of the days of the February term of said court, the cross-complainant moved the court to dismiss her amended and supplemental bill without prejudice. The hearing of said motion was continued to the 4th day of February, and again continued to the 5th day of said month, on which day appellant

presented a cross-motion, whereby he asked the court "to enter of record nunc pro tunc as of the 30th day of January, A. D. 1903, a final decree in this cause finding that the equities of this cause are with the defendants, and ordering that the amended and supplemental cross-bill of Martha J. Johnston, executrix of the last will and testament of James Johnston, deceased, be dismissed for want of equity, in accordance with the decision and findings of the court rendered and given on said 30th day of January, A. D. 1903, after hearing all the evidence offered by the parties, and in accordance with the order of the court on said last-mentioned date to 'let a decree be prepared dismissing the cross-bill for want of equity.'" The chancellor, after having heard the arguments of counsel for the respective parties, granted the motion of the cross-complainant (appellee herein) and denied the cross-motion of the appellant, and thereupon entered a decree dismissing the cross-bill of appellee without prejudice, and at her cost. Upon an appeal to the Appellate Court for the First District the decree was affirmed, and this further appeal of the appellant brings the record before this court for review.

But a single question is presented, viz. whether the chancellor erred in denying the motion of appellant for the entry of a decree nunc pro tunc in accordance with the oral findings and directions for a decree and in granting the motion of the cross-complainant to dismiss her cross-bill. Under the repeated decisions of this court we must hold the action of the chancellor was free from error. In *Hughes v. Washington*, 65 Ill. 245, this court said (page 248): "It is contended that, inasmuch as the chancellor had heard the evidence, and had announced what his decision would be, and had written out a statement of the grounds for the decision, it must be considered that the case was finally decided, and nothing remained but the formal matter of drawing and passing the decree. This is manifestly not the correct view of the question. * * * The decree is inchoate until it is approved by the chancellor and filed for record. * * * The mere oral announcement of the chancellor of his decision and the grounds upon which it is based, or the reducing them to writing, is no more than the minutes taken in the English practice. The whole matter is completely under the control of the chancellor until the final decree has been filed or recorded." The same doctrine is announced in *Purdy v. Henslee*, 97 Ill. 389, in which case the chancellor orally announced his conclusions after hearing the proofs of the parties, but before the final decree was entered the complainants asked leave to dismiss their bill, which was granted, and the bill dismissed. It was there expressly held that the complainants had the legal right, under such circumstances, to dismiss their

bill. This doctrine is also recognized in *Blair v. Reading*, 99 Ill. 600, *Gage v. Bailey*, 119 Ill. 539, 9 N. E. 199, and *Reilly v. Reilly*, 139 Ill. 180, 28 N. E. 960, it being said in the latter case (page 184, 139 Ill., page 961, 28 N. E.): "It would therefore seem that in this state, at least, the rule is well settled that, where no cross-bill has been filed, the complainant has the right, at any time before final decree, to dismiss his bill on payment of costs." The judgment of the Appellate Court is affirmed.

Judgment affirmed.

(213 Ill. 36)

TORREY v. DICKINSON et al.

(Supreme Court of Illinois. Dec. 22, 1904.)

FRAUDULENT CONVEYANCES—CONVEYANCE FROM HUSBAND TO WIFE—CREDITORS' BILL—EVIDENCE—SUFFICIENCY.

1. Where a husband for many years held the legal title to land, dealt with it as his own, leased it, erected buildings thereon, and mortgaged the same, subsequent conveyances to his wife and to those who conveyed to her were prima facie fraudulent as to his creditors.

2. A married woman may make her husband her agent for the management of her property, and he may perform ordinary and usual services for her without compensation, without subjecting her property to the claims of his creditors.

3. In a suit to subject to the debts of the husband lands the legal title to which had been in him, and which he had conveyed to his wife or to persons who subsequently conveyed to her, the wife testified that she knew practically nothing about the transactions, but understood that the property was purchased in some way with her money, and was placed in her husband's hands so that he could handle it more readily. She did not know the amount paid for any property, nor the amount of rents, taxes, or assessments against the same, but testified that her husband received her money and took care of it, and she did not know whether money of her husband or any of the profits of his firm went into any of the property. During the time the property was acquired her husband was in receipt of a very large income, and his insolvency was wholly unexplained. There were no books showing the source from which the property came. *Held*, that the conveyance by the husband to the wife, except of certain property clearly and satisfactorily proven to belong to the wife, would be set aside as in fraud of the husband's creditors.

Error to Appellate Court, First District.

Creditors' bill by Willard C. Torrey against Theodore G. Dickinson and others. Decree dismissing the bill was affirmed by the Appellate Court (111 Ill. App. 524), and complainant brings error. Reversed.

Flury B. Smith, for plaintiff in error. Lincoln & Stead, Wm. Bennett Moore, and Duncan, Doyle & O'Connor, for defendants in error Theodore G. Dickinson and Mary B. Dickinson.

RICKS, C. J., delivered the opinion of the court: On June 14, 1899, Willard C. Torrey, the plaintiff in error, obtained a decree in the superior court of Cook county against Theodore G. Dickinson, Edgar M. Snow, and Henry H. Fuller, three of the defendants in

error, for \$9,025 and costs of suit. The objections of Dickinson to an adverse report of the master in chancery in that case were overruled on May 20, 1899. On June 7, 1899, two quitclaim deeds were filed for record, dated May 25, 1899, and acknowledged the same day, executed by said Dickinson to his wife, Mary B. Dickinson, one of the defendants in error, each conveying, for an expressed consideration of \$1, several lots in the city of Chicago. The master's report was confirmed on June 14, 1899, and the decree was entered as above stated. Executions were issued to the sheriffs of Cook and La Salle counties, which were returned, after demand made upon the defendants, wholly unsatisfied, no property being found. On February 10, 1900, plaintiff in error filed in said superior court his creditors' bill against the defendants in error, alleging that said Theodore G. Dickinson, on and prior to the date of said quitclaim deeds, was the owner in fee simple of the several lots described therein; that said deeds were made upon no consideration, for the purpose of placing said lots beyond the reach of an execution, and that they were fraudulent as to complainant. The bill also alleged that on December 19, 1893, the said Theodore G. Dickinson was the owner and held title of record to certain other lots in Chicago, described in the bill, and on that day, by quitclaim deed, conveyed the same to David Campbell, who, by quitclaim deed of the same date, conveyed the premises to said defendant Mary B. Dickinson for the expressed consideration of \$20,000; that said conveyances were without actual consideration, and made to hinder and delay complainant in the collection of the indebtedness to him, and that said Theodore G. Dickinson remained the beneficial owner of said lots. The bill further alleged that on October 28, 1895, said Theodore G. Dickinson was the owner of another lot in Chicago, therein described, and on that day conveyed the same by warranty deed, for an expressed consideration of \$5,000, to Chester C. Barton; that on April 14, 1899, the said Chester C. Barton and wife conveyed the said lot to Mary B. Dickinson; that said two conveyances were merely colorable and without consideration, and made to hinder and delay the complainant, and that Dickinson was still the beneficial owner of said lot. The defendants Theodore G. Dickinson and Mary B. Dickinson, his wife, by their answers denied that any of said transfers were colorable or made with a fraudulent purpose, and alleged that all of said pieces of property were purchased with the money of the defendant Mary B. Dickinson; that the titles to the same were taken in the name of her husband, Theodore G. Dickinson, in trust for her, and that the subsequent conveyances to her were made for the purpose of placing in her the legal title to property of which she was already the equitable owner. The issues were referred to a master in chan-

cery, who took the testimony and filed his report of the same, with his conclusions that no part of the funds of Theodore G. Dickinson was used in the purchase of said property; that all of it was purchased with the funds of the defendant Mary B. Dickinson; and that, although the legal title was in him, she was all the time the equitable owner. He recommended a decree dismissing the bill for want of equity. Exceptions of the complainant to the report were overruled, and a decree was entered dismissing the bill. On writ of error from the Appellate Court for the First District, the decree was affirmed. The writ of error in this case was sued out to review the judgment of the Appellate Court.

The material facts are as follows: The defendants Theodore G. Dickinson and Mary B. Dickinson were married in June, 1880. At different times after the marriage Mary B. Dickinson received from the estates of her father and brother sums of money, aggregating \$8,000. She paid \$1,500 so received for a lot on Division street, and in a couple of years sold the lot at an advance of \$2,500. With the proceeds of that sale and money so received from said estates she bought other property on Division street, and, by incumbering it, erected a row of apartment buildings, known as the "Belleville Flats." She rented the Belleville flats and held title thereto until November, 1899, when she exchanged that property for lots described in the bill of complaint, known as the "North Clark street property," which was incumbered for \$12,000. The exchange was an even one, subject to the incumbrances on the respective properties, and the title to the North Clark street property was taken in the name of the husband, Theodore G. Dickinson. Both Mr. and Mrs. Dickinson testified that the title was taken in his name for the purpose of getting a larger mortgage on the property, and because it was easier for a man to obtain a large loan than a woman. There were stores upon the front of the property which were leased for \$3,600 per annum, and it was contended by the defendants, and Mr. and Mrs. Dickinson both testified, that this property, which was paid for with property of Mrs. Dickinson, was the beginning and source from which all the rest of the property involved in the litigation afterward grew. Mr. Dickinson was engaged in the real estate business from 1883 or 1886 to 1892, during all the time that the various pieces of property were acquired, first with Edgar M. Snow, and afterward with Snow and Henry H. Fuller. From the time that said deed was made to Mr. Dickinson he assumed the entire control and management of the property thereby conveyed and of all the property subsequently acquired. He managed the property in every respect as his own, except that he and his wife both testified that he advised with her as to what was best to be done. The firm in which Mr.

Dickinson was a partner secured options on various pieces of property under agreements by which such property was subdivided and the title conveyed to Fuller, one of the partners, who executed separate notes and mortgages on each lot, and conveyed the lots to purchasers, subject to the mortgages. If they were able to dispose of the lots in that way, they availed themselves of the option and received the difference between the sales and the option price as their profit. All the other property involved in the suit was obtained in carrying out these option deals. The first of these transactions was in September, 1890, when the title to a lot numbered 14 was conveyed to Mr. Dickinson, and it was subsequently divided into a number of lots. He testified that the lot was purchased by him for his wife, subject to a mortgage of \$6,000; that he paid \$2,300 in cash of her money for the lot; that she had had the income from the North Clark street property at the rate of \$3,600 per annum for 10 months, and had collected rents previously for the Belleville flats. This property was on Prairie avenue, and it stood vacant for a number of years, when money was borrowed with which the previous incumbrance was paid, and eight small houses were erected. Mr. Dickinson signed the papers, had charge of the erection of the buildings, and the contracts were made by him. For several years Mr. and Mrs. Dickinson lived in one of these houses, and she collected rents for a time, but afterwards that business was placed in the hands of a real estate firm. There are separate mortgages on these lots. One of them was sold by Dickinson to Chester C. Barton in 1895, and was conveyed to him. He held the title until April, 1899, when, being unable to meet the payments, he conveyed the lot to Mrs. Dickinson.

The next transaction related to the State street and Cloud court property, which property was acquired in June or July, 1891, from one of the options by which the firm could take property at an advanced price, and, upon finding purchasers, had the excess above the option price for their own profit. This property was on State street and Cloud court, and included with other property in the option, and the title was taken by Mr. Dickinson. It was vacant property, and was all subject to a mortgage of \$26,000, and \$3,900 cash was paid for the equity. Mr. and Mrs. Dickinson both testified that this property was bought exclusively with the money of Mrs. Dickinson, and the title taken in the name of Dickinson in trust for Mrs. Dickinson. Not long after the purchase Mr. Dickinson made a lease to the property for 99 years, with a condition that the lessee should construct a building upon it of the value of \$40,000, and that the lessor would advance \$18,000 for use in the building, the money thus advanced to be returned by an increase in the scale of rents. The building was constructed, and after two

or three years the lease was forfeited. During the time it was held under that lease the evidence discloses that the rents were collected by Mrs. Dickinson. In order to procure the \$18,000 to be advanced toward the building, a loan of \$40,000 was obtained upon this property in November, 1892, and with that loan the mortgage debt previously existing against the property was paid off, and the balance, with additional funds furnished by Mrs. Dickinson, was used in the \$18,000 advancement to the tenant who was constructing the building. This \$40,000 mortgage remained on this property until a judgment for \$20,000 was obtained against Mr. Dickinson and his partner in 1893, which Mr. Dickinson had to pay. In order to pay that judgment, \$90,000 was borrowed upon what is termed the "State street and Cloud court property, the Sixty-Third street property, and the Clark street property." When this judgment was obtained, Mrs. Dickinson claims to have become apprehensive about leaving her property in her husband's name, and on the 10th of December, 1893, the Sixty-Third street property was conveyed to her, and on the 23d of December, 1893, the property now under consideration was conveyed to David G. Campbell by Mr. and Mrs. Dickinson, and by Campbell on the same day reconveyed to Mrs. Dickinson, and she has held and controlled that property and received the rents from that time.

In the fall of 1891 a piece of property on Sixty-Third street, which was included in another of the firm's option deals, was purchased and conveyed to Mr. Dickinson. It was 125 feet square, comprising 5 lots. The property in that option was sold out, so that the firm made a profit of \$5,000 in the whole deal. Mr. Dickinson testified that, in order to close the transaction, his partner, Fuller, retained these lots without the payment of any cash, subject to the incumbrance, and that he bought them afterward from Fuller for \$10,000 or \$11,000 in cash, which he paid with his wife's money. Fuller testified that the incumbrance was pretty near the amount the corner stood for in the option deal; that there was some balance, but he could not say how much; and, according to his recollection, he and Dickinson took them in closing the transaction, and applied a balance of the profits from the sale of the other property as a cash payment. Snow, the other partner, testified that the cash payment was made out of the profits of the business of the firm. The property was vacant when purchased, but it is now covered by buildings constructed by Mr. Dickinson. Subsequently this property was mortgaged with the State street and North Clark street property, and with the proceeds the other incumbrances were paid and the judgment against Mr. Dickinson for \$20,000 was settled. The State street property and Sixty-Third street property are the ones which were conveyed to Campbell on December 19 and 23, 1893, and which

Campbell conveyed to Mrs. Dickinson. A judgment had been obtained against Mr. Dickinson which was a lien on the property, and Mrs. Dickinson testified that the property was conveyed to her through Campbell to prevent further liens on her property which she would be compelled to pay.

In February, 1892, another loan of \$5,000 was obtained on the North Clark street property, and with this money, or the rents, or both, Mr. Dickinson erected flats upon the rear of said property. He testified that these flats on the rear of the North Clark street property were erected with moneys which came either from revenues or from mortgages, but he was unable to state which. All of said property, except that on Sixty-Third street and the Barton lot, was conveyed to Mrs. Dickinson by the quitclaim deeds just before the decree against Mr. Dickinson was entered. The value of the property in Dickinson's name at the time of the conveyance to his wife is not shown, the master not permitting evidence on that subject to be given. It appears, however, that the aggregate amount of loans secured upon the property is about \$150,000, and on the usual basis of loans of money the property is of great value. The property was all acquired between November, 1889, and the year 1892. Mr. Dickinson was engaged in the real estate business during this time, and the evidence shows that the net income of his firm for the year 1889 was \$50,000, for 1890 \$100,000, and for 1891 \$47,000, of which he was entitled to $\frac{9}{16}$, his net income from that business being about \$28,000 in 1889, \$56,000 in 1890, and \$26,000 in 1891. The rentals of the pieces of property went into the hands of the firm, and payments on the investments were made with their checks. Certain books of the firm were produced, but they contained no account showing the facts. Mr. Dickinson testified that the accounts were not kept in the name of his wife, but in the names of the different properties; that he had looked for other books of the firm, but did not find them; that there were memorandum books in which items were set down, but not all of them; that he did not know where the books were, and had not searched for them; that his wife kept a bank account at different times with different banks, which he named; that there were no books kept which would show whether the buildings were the proceeds of the rents or income, except the memorandum books; and that all the funds his firm collected from Mrs. Dickinson's property were put in the firm's bank account and checked out on her order. Mrs. Dickinson testified that she kept no bank account, but saved her income, and her husband took charge of it; that it was all received by him and taken care of by him for her, and she could not tell whether it went into his bank account or not.

The quitclaim deeds made just before the entry of the decree against Mr. Dickinson

were without consideration, and he and his wife agreed in testifying that they were made for the purpose of preventing a possible decree or judgment against him becoming a lien on the property. He held the legal title, and had held it for many years. He had dealt with the property as his own, leased it, erected buildings on it, and mortgaged it, and executed the notes secured by the mortgage. To all appearances he was the legal owner, and the conveyances were prima facie fraudulent. It devolved upon the defendants to prove that Mrs. Dickinson was the real owner of the property, that the alleged secret trust existed, and that the conveyances, confessedly made to prevent the collection of a possible judgment, were merely made to place in her the legal title to property of which she was already the equitable owner. The transactions were between husband and wife, where the greatest opportunities for fraud exist, and such transactions are to be closely scrutinized. Clear and satisfactory proof was required to establish the fact that property so held, managed, and controlled by the husband was in fact the property of his wife. The evidence and explanation as to the North Clark street property were of that character, but as to subsequent transactions the evidence was both general and indefinite. It is not in the common experience that a moderate sum of money should develop in a few years into so much property and of so great value.

In considering the testimony of Mr. and Mrs. Dickinson, it can make no difference that she was called as a witness by complainant. She was an adverse witness, and was not any the less testifying in her own interest, or less influenced by such interest, because she was called and examined by complainant. Her explanation of the reason for the conveyance to her of the Sixty-Third street property on December 19, 1893, and the State street property on December 23, 1893, does not seem to be the correct one, for the reason that at the same time Mr. Dickinson held the title to all the other property which she now claims belongs to her, and a judgment would be an apparent lien upon it. She testified that that property was conveyed to her to prevent further liens on her property which she would be compelled to pay. If that had been the reason, it seems that the rest of the property would also have been conveyed to her, unless at the time she did not consider herself the owner of it. It does not appear, however, that the conveyance of those properties impaired the ability of Mr. Dickinson to pay his debts. The indebtedness on which complainant's decree was based accrued from 1892 to 1894, but apparently he still had property sufficient to meet all his obligations. At any rate, there is no evidence to the contrary. The evidence would not justify a conclusion that the conveyances in 1893, if regarded as voluntary, were fraudulent as against the complainant.

Except as to the Sixty-Third street property and the North Clark street property and the State street property, we think the decree was wrong.

Mrs. Dickinson testified, in a general way, that, as she understood it, the property was all bought with her funds, but she knew practically nothing about any of the transactions. She testified that the property was taken in trust by her husband, and that it was paid for, as she understood, in some way with her money, or with income from rents and mortgages on her property, and that the title was placed in her husband so that it could be handled better and larger mortgages could be made. She testified that her husband dealt in tax titles for her and made money for her in that way, but she did not know how much; that he bought tax titles and handled the business, and that she left everything to his care; that she did not know how much money she had at the time any of the purchases were made; that she did not know the amount paid for any piece of property, the cost of any improvement, the amount of rents, or the taxes, assessments, or carrying charges against the property. She said that her husband received her money and took care of it, telling her from time to time the amount she had; that she did not know whether money of her husband or any of the profits of his firm went into any of the property or not; and that all she knew was that the property was bought and improved from amounts saved from her income and raised by mortgages on her property.

A married woman may make her husband her agent for the management of her property, and he may perform ordinary and reasonable services for her without compensation, without subjecting her property to the claim of his creditors. *Mali v. Spencer*, 186 Ill. 363, 57 N. E. 1033. If this agency is actual and bona fide, he may lease her property, collect rents, or invest her money or change her investments by her authority, without subjecting the property to his debts. On the other hand, she cannot, under the guise of an agency, appropriate to herself the results of the time, labor, and skill of her husband to the exclusion of his creditors. *Wortman v. Price*, 47 Ill. 22. Manifestly, whether the whole of the husband's time is so devoted, or a substantial part of it is not decisive of the question, if the increase, growth, or profits are the result of his skill, labor, and industry. It is beyond doubt that the unusual accumulation of property in this case from small beginnings was to a large extent the result of the skill, experience, and diligence of Mr. Dickinson during the years in which the property stood in his name and while he managed it ostensibly as his own, even if he did not put any of his own money into it. He did not confine himself to acting as the agent of his wife or under her authority, but transacted all the business as if

acting for himself, seeking new investments and making them, while she had no knowledge of what is now alleged to be her own business, except in the most general and indefinite way. His business experience, knowledge of real estate, and management of the business, with the opportunities afforded him through his firm, contributed a material part of the increase and growth of the property, if not the greater part of it. During the time the property was acquired he was in receipt of a very large income, and his subsequent insolvency is wholly unexplained. The clear and satisfactory proof required of the defendants was not made. If any books were kept showing the transactions and the sources from which the property came, and that none of his money went into the property, they were not produced, and neither was any bank account shown. Mr. Dickinson, in his testimony, said nothing about the tax-title business which his wife said he carried on for her and with her money. He testified that when he took the title to property he made out a little slip of paper showing that his wife was the owner of the property, which he either gave to his wife or put with the deeds. Mrs. Dickinson testified that she did not know of any such writing, and none was found.

Our conclusion is that the conveyances of property to Mrs. Dickinson, except the North Clark street property, the State street and Cloud court property, and the Sixty-Third street property, are fraudulent as against the rights of the complainant, and should be set aside, and the property subjected to the payment of the decree in favor of complainant. The judgment of the Appellate Court and the decree of the superior court are therefore reversed, and the cause is remanded to the superior court with directions to enter a decree in accordance with the views herein expressed.

Reversed and remanded, with directions.

(213 Ill. 81)

GLOS et al. v. TALCOTT et al.

(Supreme Court of Illinois. Dec. 22, 1904.)

REGISTRATION OF TITLE—EVIDENCE—ABSTRACTS OF TITLE—ADMISSION—PRELIMINARY PROOF—OBJECTIONS—TAX DEEDS—INVALIDITY—BURDEN OF PROOF.

1. On an application for the registration of title, abstracts of title are inadmissible without preliminary proof that the original conveyances abstracted were lost or destroyed, or that it was not in the power of petitioner to produce them, or that the abstracts had been made in the ordinary course of business, as required by Hurd's Rev. St. 1903, c. 30, § 36, and chapter 116, §§ 23, 24.

2. On an application for the registration of title, objections of defendant to the erroneous admission of certain abstracts of title in evidence were properly preserved by objections and exceptions to the examiner's report, which were overruled.

3. In a proceeding for the registration of title, the burden is on defendant to show the validity of tax deeds under which defendant claimed an interest in the property.

Error to Circuit Court, Cook County; R. W. Clifford, Judge.

Application by Harvey H. Talcott and others for the registration of title to certain land, in which Jacob Glos and another filed answers, claiming title through certain tax deeds. A judgment was entered overruling objections and exceptions to a master's report in favor of petitioner, and objectors bring error. Reversed.

On September 9, 1901, the defendant in error Harvey H. Talcott filed his application to register the title to a certain lot located in the city of Chicago, under the provisions of the "Act concerning land titles," alleging that he was the owner in fee and in possession by a tenant, and that the plaintiff in error Jacob Glos had some interest therein under two alleged tax deeds. Subsequently Emma J. Glos was made a defendant. The defendants, Jacob Glos and Emma J. Glos, filed answers, admitting, as alleged, that they claimed title under two tax deeds, and neither admitting nor denying the other allegations contained in the application. The examiner found the title to said lot to be in the defendant in error Talcott in fee, returned the evidence with his report, and recommended that the tax deeds held by Jacob Glos be set aside on the payment to him of \$26.84, and that the title to said premises be registered in fee simple in the name of Harvey H. Talcott. Objections and exceptions were overruled to the examiner's report, and a decree was entered in accordance with his recommendations, and this writ of error has been sued out to review said decree.

Jacob Glos (John R. O'Connor, of counsel), for plaintiffs in error.

HAND, J. (after stating the facts). The only evidence offered by the applicant in support of his claim of title was a master's deed of the premises in question to him, dated August 22, 1899, and proof that he was in possession of the premises by a tenant, and certain printed abstracts of title purporting to show abstracts of the record of a number of conveyances of said lot. Said abstracts of title were admitted in evidence by the examiner over the objection of plaintiffs in error, without preliminary proof that the original deeds which appeared in the alleged abstracts were lost or destroyed by fire or otherwise, or that it was not in the power of the defendants in error to produce them, or that the abstracts of title had been made in the ordinary course of business—in other words, without requiring a compliance with the requirements of either section 23 or 24 of chapter 116, or of section 36 of chapter 30, of the Revised Statutes (Hurd's Rev. St. 1903). The objections of the plaintiffs in error to the admission of said abstracts of title in evidence were properly preserved by the plaintiffs in error by objections and exceptions to the examiner's

report, which were overruled. The admission of said abstracts of title in evidence without a proper foundation for their admission having been laid, under the authority of *Glos v. Hallowell*, 190 Ill. 65, 60 N. E. 62, and *Glos v. Cessna*, 207 Ill. 69, 69 N. E. 634, constituted reversible error.

The contention of plaintiffs in error that it was incumbent on the defendants in error to affirmatively establish the invalidity of plaintiffs in error's tax deeds is not well taken. *Glos v. Hoban*, 212 Ill. 222, 72 N. E. 1.

The decree of the circuit court of Cook county will be reversed, and the cause remanded.

Reversed and remanded.

(213 Ill. 597.)

SCOTT et al. v. SCOTT.

(Supreme Court of Illinois. Dec. 22, 1904.)

WILLS — PROBATE — ANNULMENT — UNDUE INFLUENCE — WANT OF MENTAL CAPACITY — RELIGIOUS BELIEFS — EVIDENCE — SUFFICIENCY — REVIEW.

1. In a proceeding to set aside the probate of a will creating a remainder in testator's estate after life estate to his son and surviving wife for the use of a publishing society for the promulgation of certain theological writings, the evidence considered, and held insufficient to show that its execution was secured by undue influence either of testator's wife or the publishing society.

2. A testator's belief in Swedenborgianism and his enthusiasm in the propagation of the faith is no evidence of monomania.

3. In a suit to set aside an instrument admitted to probate as a will, the evidence considered, and held insufficient to show that testator was not of sound mind and memory when he executed the will.

4. The Supreme Court, on an appeal in a proceeding to set aside the probate of a will on proper assignments of error, reviews the facts, and will reverse a decree manifestly against the weight of the evidence.

Error to Circuit Court, St. Clair County; B. R. Burroughs, Judge.

Bill by Luther T. Scott against Mary A. Scott and others. From a decree for complainant, defendants bring error. Reversed.

Albert B. Ogle, Dill & Wilderman, and Percy Werner, for plaintiffs in error. Wise & McNulty (M. W. Schafer, of counsel), for defendant in error.

SCOTT, J. Luther T. Scott, son and only surviving descendant of John C. Scott, deceased, filed a bill in the circuit court of St. Clair county to set aside an instrument which had been admitted to probate as the last will and testament of his father. Such proceedings were had that the jury returned a verdict finding the purported will was not the last will and testament of the deceased, and, after overruling a motion for a new trial, a decree was entered by the court at the January term, 1904, in accordance with the prayer of the bill, and defendants to that bill prosecute this writ of error.

John C. Scott died on February 21, 1902. The instrument which was admitted to probate as his last will and testament was executed on January 27, 1902. By the first clause he bequeathed to Luther T. Scott his stock in the Scott Printing Company, a corporation which had been organized by him and was engaged in business at East St. Louis; also "the presses, type, motors, paper cutter, imposing stones and all other material belonging to said corporation"; also certain other personal property, enumerating it—all the personal property so bequeathed being estimated by the testator as of the value of about \$5,500. By the same clause he devised to the son a dwelling house and the parcel of ground upon which it stands in East St. Louis, estimated by the testator to be of the value of \$4,000, for the term of his natural life, and, if any child or children shall be born to the son in legal wedlock, then to such child or children in fee; but, if the son die without issue, then the remainder in said realty is bequeathed in fee simple "to the American Swedenborg Printing & Publishing Society, located in the city of New York, for the sole use and purpose of publishing and circulating the theological writings of Emanuel Swedenborg." The second clause gives to his wife, Mary A. Scott, the remainder of his personal property; also four dwelling houses and the parcel of land whereon they stand, in the city of East St. Louis, estimated by the testator to be of the value of \$14,000, for her natural life, or so long as she remains his widow, with remainder in fee to the American Swedenborg Printing & Publishing Society (hereinafter, for the sake of brevity, referred to as the "Publishing Society"), for the same purposes as that for which the property devised to it by the first clause was to be used. By the last clause Mary A. Scott is nominated executrix. To the bill filed by Luther T. Scott, Mary A. Scott and the publishing society were made defendants. The bill charges that John C. Scott, at the time of executing the instrument, was not of sound mind and memory; and further represents that its execution was secured by the undue influence of the defendants Mary A. Scott and the publishing society. The defendants answered separately, each denying the allegation of lack of mental capacity and the allegation of undue influence.

It is urged that the verdict was against the manifest weight of the evidence, and that the court erred in overruling the motion for a new trial. The verdict was a general one to the effect that the writing in question was not the will of the deceased. It is impossible to ascertain from the record upon which of the grounds stated in the bill, or whether upon both, the jury based their verdict. At the time of his death the deceased was 67 years of age. He was then residing in East St. Louis. He had been for about 25 years a traveling agent in Southern Illinois for the

introduction of school books for the American Book Company and its predecessors in the same line of business. Prior to that time he had been for several years a county superintendent of schools in Richland county, in this state. He was a man of good education, of unusual attainments, and excellent business capacity. During the War of the Rebellion he was a soldier in the Union army, and thereafter was commonly referred to as Capt. Scott. He was a member of a society, located at Olney, of the New Church, established by Emanuel Swedenborg. His moral standard was very high, and he led an exemplary life. His family consisted of the son, born of his first wife, who had been dead several years, and of Mary A. Scott, his second wife. The extent of his real estate appears from the foregoing recitals from the will. The personal property, aside from that devised to the son, was in value but a few hundred dollars, so far as appears from the inventory of his estate. That devised to the son consisted principally of 78 shares of stock in the Scott Printing Company, of the par value of \$50 per share. It appears that the presses and other property of like character bequeathed to the son, and which the will recites is the property of the Scott Printing Company, was in fact the property of that corporation, but that it had been bought by the testator upon his individual credit in January preceding his death, and transferred by him to the Scott Printing Company; upon what terms does not appear. Whether his act in bequeathing that property to his son indicates any lack of ability to comprehend the extent of his own property cannot be determined. If the corporation had not, at the time the will was drawn, fully paid him for this property, the language of the will would, we think, be thereby explained, as it was written by the testator himself, who was not familiar with the language one skilled in legal phraseology would have used for the purpose he had in view. The other personal property bequeathed to the son consisted of a desk and office furniture, a shotgun, watch and chain, and wearing apparel. It is also shown by the evidence that his unsecured indebtedness is sufficient in amount to consume a great part of his personal estate, and that the real estate devised to the son was incumbered by a mortgage securing an indebtedness of \$1,100. Fifteen hundred dollars of this indebtedness is a part of the purchase price of the property bought on his credit and transferred to the Scott Printing Company.

There is in this record no evidence whatever in support of the charge that the execution of the will was secured by the exercise of undue influence. It does not appear that either of the defendants knew that John C. Scott had executed a will until after his death, or that either of them had ever suggested to him that he make a will, except that the publishing society, which is a corporation

organized for the "sole object of printing, publishing, and circulating the theological works and writings of Emanuel Swedenborg for charitable and missionary purposes," had circulated a printed pamphlet in the year 1900, which is designated a "memorial," and which is a history of the publishing society, describing the work in which it has been engaged, containing a copy of its articles of incorporation and of its constitution and by-laws, a list of donations, amounting to \$171,000, which had been made to it during the first 50 years of its life from 1850 to 1900, together with a statement showing in what manner these donations were invested; containing also a list of books published by the society, and various other information of importance to persons interested in the Swedenborgian faith, and containing directions for the guidance of persons desirous of making provision by will for the uses of the society, with forms to be used for bequests or devises of various kinds of property, both real and personal. One of these memorials was found among the effects of the deceased after his death.

In the year 1901 he had written the secretary of the publishing society, stating that he had the memorial, and inquiring whether the society could change its purpose by amending its by-laws, and, if so, what surety there was of the permanence of the society. In response he received a letter from the secretary, quoting from the certificate of incorporation the paragraph designating the objects of the society's existence, and stating that that purpose could not be changed or altered, and calling attention, as evidence of the permanence of the society, to the amount of funds that had been bequeathed and the manner of their investment as shown by the memorial, and saying that the question was not whether the opportunities of the society to carry on the work will be diminished, but whether they will be increased "by means of as free and cordial support from New Churchmen in the present and future as it has had in the past." Capt. Scott's letter does not suggest the possibility of his making a gift or devise, nor does the letter request that he do so. So far as is shown by the evidence, this is the extent of the communications that had taken place between the publishing society and the deceased. It cannot be said that the publishing society, nor any one on its part, had even requested the execution of this instrument; much less used any undue influence to cause the deceased to make any devise therein contained.

It was contended by the contestant, and stated by the bill in support of the other charges therein contained, that the testator in the later years of his life had become a believer in the religious doctrines of Emanuel Swedenborg, and upon that subject was a monomaniac, wholly irrational, and that he had an insane delusion that he ought to

give all his property to the publishing society. The evidence shows that he had been a member of the New Church, founded upon the teachings of Swedenborg, for many years, and that he was an enthusiastic believer in its doctrines, and was quite zealous in promulgating its theories among persons with whom he came in contact. It is shown that his son had led a somewhat dissolute life, which had been a source of great anxiety to the father. Money had been obtained by the father from his second wife to pay gambling debts of the son. Capt. Scott nevertheless retained an unusually warm affection for his son, and was very anxious to establish him in the printing business in East St. Louis, and was very hopeful that the son would be able to make a success of that business there. This desire he frequently manifested in conversations both before and after the execution of the will, stating, according to some of the witnesses, that the son was to have all his property eventually. From the testimony of others it appears, however, that he had for several years contemplated a devise or bequest of a part of his property for the purpose of spreading the teachings of the theological writer who had founded the church of which he was a member, and that he consulted with persons who were members of the same church in regard to the best method of carrying out his purpose.

The great majority of civilized human beings believe in the existence of a life beyond the grave. Based upon that belief, many religious creeds, differing widely, have been established. The fact that an individual holds any particular belief in regard to a future state of existence cannot, of itself, be evidence of an insane delusion or of monomania. An insane delusion is a belief in something impossible in the nature of things, or impossible under the circumstances surrounding the afflicted individual, and which refuses to yield either to evidence or reason. *Riggs v. A. H. M. Society*, 35 Hun, 658; *State v. Lewis*, 20 Nev. 333, 22 Pac. 241; *Rush v. Megee*, 36 Ind. 80. We have heretofore said that "insane delusion consists in the belief of facts which no rational person would have believed." *Schneider v. Manning*, 121 Ill. 376, 12 N. E. 267; *Nicewander v. Nicewander*, 151 Ill. 156, 37 N. E. 698. Such a delusion does not exist unless it is one whose fallacy can be certainly demonstrated, for, except such demonstration can be made, it cannot be said that no rational person would entertain the belief. Consequently, no creed or religious belief, in so far as it pertains to an existence after death, can be regarded as a delusion, because there is no test by which it can be tried and its truth or falsity demonstrated. *Gass v. Gass*, 3 Humph. 278; *Orchardson v. Cofield*, 171 Ill. 14, 49 N. E. 197, 40 L. R. A. 256, 63 Am. St. Rep. 211; *Buchanan*

v. Pierie, 205 Pa. 123, 54 Atl. 583, 97 Am. St. Rep. 725. It follows, therefore, that a belief in Swedenborgianism, and enthusiasm manifested in propagating that faith, furnish no evidence of monomania, insane delusion, or insanity. While the evidence of several witnesses indicates strenuous efforts on the part of the deceased to bring other persons to his way of thinking about religious matters, it does not show any greater zeal on his part than frequently characterizes those of orthodox faith whose sanity cannot be doubted. The testimony of far the greater number of witnesses who testified on the subject is to the effect that he discussed religion in a quiet and temperate manner, as he discussed any other topic in which he was interested, and that if the person to whom he addressed himself disagreed with him, and had fixed views, he dropped the matter, and did not again refer to it.

On the day of his death he was at Vandalia, in this state, attending a teachers' institute, and during the afternoon he delivered an address to an audience of about 150 persons—teachers and others. The subject was "child study," to the preparation of which he had then recently given considerable time. He was taken ill while speaking, and died that night of apoplexy.

The witnesses in this case, both for the proponents and contestants, were of much more than average intelligence. Eleven witnesses testifying on the part of the proponents stated that the deceased was of sound mind and memory up to the time of his death. Among these were persons of a wide experience in the affairs of their respective communities, which peculiarly qualified them to exercise an intelligent judgment in determining whether or not the testator was sane. Some of them had for many years sustained close business and social relations with him, and had enjoyed the best of opportunities to form correct conclusions in regard to the matters about which they testified. They and other witnesses testifying on the part of proponents related circumstances and recounted occurrences in great detail which indicate very strongly that up to the day of his death Capt. Scott transacted business, and passed among his friends and acquaintances discussing literature, agriculture, and current events precisely as he had done for many years; that he was fully cognizant of the nature, extent, and value of his property, of his obligations to his son and wife, and of their claims upon his bounty, and that he was entirely sane. Two letters written by the deceased were also offered in evidence on the part of the proponents, both addressed to his employer. The first is dated January 25, 1902—two days before the execution of the will—and written from Carlisle, Ill. It recites that he is there to attend a "quarterly meeting" of the Clinton County Teach-

ers' Association, and advises the book company of the condition of its business and its interests in that town and county. The next is dated February 17, 1902, and was written from East St. Louis. It is a communication of some length, and states that he had attended the "quarterly meeting" of the Madison County Teachers' Association on the preceding Saturday, and discusses with intelligence and coherence the advisability of certain work that he had in view for the company. Both letters indicate a mind entirely sound.

But six witnesses testified that he was not of sound mind and memory. We have carefully considered their testimony. In point of intelligence they were, we think, the equals of those who testified for proponents, but, on the whole, not as well qualified by knowledge and experience to judge of the sanity of another. A consideration of the reasons given by them as a basis for their opinions leads us to the conclusion that by far the greater weight of testimony was upon the side of proponents. It does appear from the testimony that the deceased had been in ill health for several years; that he had undergone an operation for a bladder difficulty; that thereafter he had been deficient in nervous strength; that he was more easily exhilarated or depressed than in earlier years; that he lacked the ability to apply himself continuously to his business that he had formerly possessed; that his memory was not as good as it had been; that on account of his ill health he had been relieved by his employer of a portion of his duties and responsibility, and was in receipt of a much lower salary than he had formerly commanded; but all these things may be attributable to physical ills and advancing years, and are not inconsistent with sanity. Only two of the witnesses for the contestants related any circumstances which seem to us a sufficient basis for their conclusion that he was not of sound mind and memory, and, being opposed by a much greater number of witnesses of equal intelligence, candor, and fairness, with equal opportunities of knowing the condition of mind of the deceased, and equally disinterested, and whose conclusions appeal to us as the more reasonable, we think a new trial should be awarded.

In contests of this class, which come directly to this court from the court of original jurisdiction by appeal or writ of error, this court, upon a proper assignment of error, reviews the facts; and where, as here, the verdict is against the manifest weight of the evidence, the decree should be reversed. *Bradley v. Palmer*, 193 Ill. 15, 61 N. E. 856; *Schmidt v. Schmidt*, 201 Ill. 191, 66 N. E. 371. The decree of the circuit court will be reversed, and the cause will be remanded to that court for a new trial.

Reversed and remanded.

(213 Ill. 318)

ROWE v. TAYLORVILLE ELECTRIC CO.

(Supreme Court of Illinois. Dec. 22, 1904.)

DEATH FROM ELECTRICITY—NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE—WIRES IN PUBLIC STREET—INSULATION.

1. A telephone employé fell from a pole on which he was at work on receiving a shock from a current of electricity, caused by the wire which he was handling coming in contact with a live wire of an electric company. His neck was broken by the fall, but if he had used a safety strap, with which he was supplied, to fasten himself to the pole, he would not have fallen. *Held* that, if the shock was sufficient to kill him, it was immaterial whether he fell or not, and that the court would not have been justified in directing a verdict on the ground that he was negligent in that respect.

2. While the duty of an electric company to maintain perfect insulation does not extend to its entire system, it extends to wires strung 25 feet above ground in a street where telephone employés are likely to come in contact therewith while attending to their duties.

3. Where the wires of an electric company were not properly insulated, and an employé of a telephone company was killed by the turning on of the current without the warning which the electric company was accustomed to give its own employés who were at work about its wires, it was not liable for his death, in the absence of evidence of an agreement between the companies as to signals, or any knowledge on the part of the electric company that the telephone men were relying thereon.

Appeal from Appellate Court, Third District.

Action by Amy Rowe, widow and administratrix of Albert Rowe, deceased, against the Taylorville Electric Company, for the death of plaintiff's intestate. There was a judgment for defendant, and on a writ of error from the Appellate Court, the judgment was affirmed. The Appellate Court thereupon granted a certificate of importance and an appeal to the Supreme Court. Judgment affirmed.

Sharrock & Grundy and Lane & Cooper, for appellant. Percy Werner (J. E. Hogan, of counsel), for appellee.

CARTWRIGHT, J. Albert Rowe was employed by the Central Union Telephone Company in the city of Taylorville. On January 4, 1902, the appellee, the Taylorville Electric Company, owned and operated an electric light plant in said city, which had been in operation about eight years. The telephone company had secured a license to erect telephone poles, with wires, on the streets of said city, and on said day Rowe and five other employés of that company were at work stringing wires on poles in North street. The poles were set on the same side of the street as those of the electric company, but were higher. The poles of the electric company were 25 feet high and those of the telephone company 30 feet, so that the telephone wires would be about 5 feet above the electric wires. When the electric wires were not carrying any current of electricity,

there was no danger in working above them, but when the current was turned on it was dangerous. They were calculated to carry a current of 1,000 volts, and 500 volts would be fatal to one coming in contact with them. In stringing the telephone wires one of them broke, and Rowe went down a pole and brought it up again. He was on the pole about 25 feet from the ground, stretching the wire, when it came in contact with the parallel electric light wire in which there was a current of electricity, and he received a shock causing him to fall from the pole upon the frozen ground. His hands were badly burned, his neck was broken, and he was dead when his companions reached him. His widow and administratrix, the appellant, sued the appellee in the circuit court of Christian county for damages resulting from his death. In the first count of her declaration she charged defendant with negligence in permitting its current of electricity to escape and be transmitted to the telephone wire which the deceased was handling. The second count charged defendant with negligence in turning on the current of electricity without giving a customary warning by a whistle from its engine. The third alleged that the defendant knew that the employees of the telephone company only did their work when the current was not turned on, and, notwithstanding this knowledge, neglected to give warning of its intention to turn on the current. The fourth charged negligence in using imperfectly insulated wires. The fifth charged negligence generally in constructing, maintaining, managing, and operating the electric light plant. An additional count set forth that it was the custom of defendant to sound a whistle five minutes before turning on its current, and that the telephone employees relied upon such custom, and it charged negligence in turning on the current without warning. The plea was not guilty. At the conclusion of all the evidence the court, at the instance of the defendant, directed the jury to return a verdict of not guilty. A verdict was returned accordingly, upon which judgment was entered. Upon a writ of error from the Appellate Court for the Third District the judgment was affirmed. The Appellate Court granted a certificate of importance and an appeal to this court.

The question to be determined is whether the court erred in not submitting the issue to the jury and in directing a verdict of not guilty. That depends upon whether there was evidence fairly tending to prove a cause of action against the defendant. The evidence tended to prove the following facts: The defendant had operated its electric light plant in the city of Taylorville for eight years, and the wire at the place of the accident was secondhand when it was put up. The insulation of the wire was old and worn generally, and it was off and the wire was

bare at a place called a "joint," where the accident occurred. The electric light current was not turned on at all times, but was turned on at different hours in different seasons and on clear or cloudy days. When it was dark and cloudy, it was kept on all day, and on clear days, at the time of year this accident occurred, it was turned on about 4 o'clock in the afternoon. The day of the accident was clear and bright. It had been the custom of the defendant to blow its whistle about five minutes before turning on the current, to notify its employees, so that if they were doing anything about the wires they would finish it and get away before the current was turned on. The accident occurred about 15 minutes before 4 o'clock, according to the watch of one of the men, who looked at it at the time. The telephone men did not expect that the electric current would be turned on the wires until 4 o'clock, and they expected to get through before the current started. There was no signal given before turning on the current on this occasion. Sometimes the telephone men would telephone the electric light plant or secretary and treasurer to learn what time the current would be turned on, but they also depended on hearing the whistle, and were governed as to the time to quit work by that signal. Rowe had been working for the telephone company about six months, and was experienced in the business. When the telephone men knew that the electric wires were carrying the current, they had means, by the exercise of extra care, of keeping the telephone wires off the electric wires, and they all understood the danger from having the wires come in contact with each other. It was known to the manager of the defendant that telephone wires were being put up in the streets, and about three-quarters of an hour before the accident the engineer of defendant passed near where the telephone men were at work, and in view of them; but there was no evidence that the defendant or any of its employees knew that the men were still at work at the time the current was turned on. The telephone men had no intention of continuing their work when the electric current was on the wires, and they were watching for the signal of the whistle, and also looking at their watches to learn the time of day. One of the gang of men had just looked at his watch, and put it back in his pocket, when the accident occurred. Rowe was supplied with a safety strap, by which to fasten himself to a pole when working with both hands, and he was not using it at the time of the accident.

It is contended that the uncontradicted evidence proved Rowe to have been guilty of negligence in not using the strap to fasten himself to the pole when using both hands with the wire. If he had used it, he would not have fallen, and his neck was broken by the fall of 25 feet upon the frozen ground:

but there was evidence tending to prove that the electric shock was fatal. If the shock was sufficient to kill him, it was immaterial whether he fell or not. The court would not have been justified in directing a verdict on the ground that he was guilty of contributory negligence in not using the strap.

The other question is whether the evidence tended to prove actionable negligence on the part of the defendant, and the first question discussed by counsel is whether the condition of the electric wires, as to insulation, tended to prove such negligence. Counsel for appellee say that the duty to maintain perfect insulation does not extend to the entire system of wires, but only to places where the defendant might reasonably anticipate that persons would go for work, pleasure, or business; that the duty did not extend to wires strung 25 feet above the ground simply because there was a possibility that some person in pursuit of his own business would bring himself in contact with a wire; and that there was no duty to keep wires in safe condition as to telephone employes entering upon the premises on their own business. Electricity is a silent, deadly, and instantaneous force, and one who uses it for profit is bound to exercise care corresponding to the dangers incident to its use. One duty is the insulation of its wires, but that duty does not extend to the entire system. No duty of that kind is imposed on the owner on his own premises as to trespassers or bare licensees, who are neither invited upon the premises nor there for purposes of business with the owner. The defendant was not bound to assume that persons would come upon its private premises who were not invited there or brought there by business, and thereby expose themselves to injury. But the streets of the city were not the private premises of defendant. The streets belong to the public, and the public, generally, have a right to use them. As a matter of fact, the defendant must be held to have anticipated that the public would use the streets as they had a right to do, and also the employes of the telephone company would be working in the streets in the business of that company, and might come in proximity to its wires in attending to their duties. The defendant was not an insurer of the safety of the public, but it was bound to know the dangers incident to the use of the streets by it, and to guard against such dangers by the exercise of care commensurate with them.

Counsel rely upon the decision in *Hector v. Boston Electric Light Co.*, 101 Mass. 558, 37 N. E. 773, 25 L. R. A. 534, as sustaining the doctrine contended for, but it clearly does not. We explained in *Commonwealth Electric Co. v. Melville*, 210 Ill. 70, 70 N. E. 1052, that in the case referred to the plaintiff received his injuries while on a roof of a building, where he had no right to be, and was neither invited nor licensed to be, and we decided that a company operating wires

carrying a dangerous current of electricity owes a duty to exercise reasonable care to prevent injury to others, wherever they have a right to go. The duty extends to every place where persons have a right to be, whether for business, convenience, or pleasure. The condition of the electric wire as to insulation tended to prove negligence on the part of the defendant, which would give rise to a cause of action for an injury to one not aware of the danger, who had a right to rely upon the wire being properly insulated. The evidence, however, was that the telephone men were familiar with the danger, and had no intention of working when the electric current was on the wires. The evidence was uncontradicted that they were not relying upon the performance of any duty to insulate the wires, and fully knew and understood the dangers arising from the defective insulation. If they knew that the electric wire was carrying a deadly current, and Rowe, with full knowledge of the conditions and dangers, allowed the telephone wire to come in contact with the electric wire, there could be no recovery on the ground that the insulation was defective. It was only on account of his ignorance of the current having been turned on that the accident occurred.

The only question, therefore, is whether the failure of the defendant to blow the whistle before turning on the current rendered it liable in the case. The signal which the defendant was in the habit of giving by blowing the whistle was for the benefit of its own employes, so that, if they were at work about the wires, they would hurry, and get through before the current was turned on. There was no evidence tending to prove any agreement between the companies with respect to giving signals, or any knowledge on the part of the defendant that the telephone men were relying upon them. Neither was there any evidence of notice to the defendant that the telephone men were at work at that time. If there was a duty of the defendant to give a warning, it was one which extended to everybody, and required the blowing of the whistle to give general notice that it was about to start up the plant. It would not be contended that there was such a duty as that, or that the defendant would be guilty of negligence in failing to give such notice to the public at large. The telephone men did not expect the plant to start until 4 o'clock, and they were calculating to finish their work before that time, although they also expected to hear the whistle before the current was turned on. In the absence of any proof tending to show an agreement or understanding that the signal would be given for the benefit and safety of the telephone men, or that the defendant knew they were relying upon the whistle as a warning, we do not think there was a duty to give the warning. If there was no duty, the telephone men had no legal right to rely upon notice by the whistle, and a failure to give

it did not charge the defendant with negligence. It follows that the court did not err in giving the instruction. The judgment of the Appellate Court is affirmed.

Judgment affirmed.

(213 Ill. 22.)

GLOS et ux. v. MILLER.

(Supreme Court of Illinois. Dec. 22, 1904.)

QUIETING TITLE—PLEADING AND PROOF—EVIDENCE OF TITLE.

1. Where ownership was alleged in the bill in a suit to remove a tax deed as a cloud on complainant's title, it was necessary to prove it, though it was neither admitted nor denied.

2. A deed from a third person to complainant in a bill to remove a cloud from title, without further proof as to possession or title, does not establish title.

3. To remove a cloud from title it must not only be alleged that complainant is the owner of the premises, but also either that complainant is in possession at the time of filing the bill, or that they are vacant and unoccupied when it is filed.

4. In a suit to remove a cloud from title, evidence that the premises were vacant two years before the bill was filed is insufficient to show that they were vacant at that time.

5. In a suit to remove a cloud from the title to vacant and unoccupied premises, evidence that complainant paid taxes thereon for some seven years does not show that title was acquired thereby, where it is not shown that they were vacant and unoccupied during all of that time, or that possession was taken thereafter.

Appeal from Superior Court, Cook County; M. Kavanagh, Judge.

Bill by James A. Miller against Jacob and Emma J. Glos. From a decree in favor of complainant, defendants appeal. Reversed.

Jacob Glos and John R. O'Connor, for appellants. H. M. Matthews, for appellee.

MAGRUDER, J. This is a bill, filed on January 9, 1904, in the superior court of Cook county by the appellee against the appellants to remove a tax deed as a cloud upon certain lots in Cook county, alleged to be owned by the appellee. Answers were filed by the appellants, to which replications were filed. Upon a hearing of the cause the court below entered a decree declaring the tax deed void, and setting it aside upon certain conditions, and also setting aside a conveyance from Jacob Glos, holder of the tax title, to Emma J. Glos, his wife. The present appeal is prosecuted from the decree so entered.

The bill in this case avers that appellee, the complainant therein, is the owner of the property charged to be clouded by the tax deed sought to be removed. The record shows that the allegation of ownership, as made in the bill, was denied by both of the appellants (defendants below) in their answers. Counsel for appellee seeks to distinguish this case from the case of *Hewes v. Glos*, 170 Ill. 436, 48 N. E. 922, by stating that there the ownership of the complainant was denied by the defendant, but that in

the case at bar the ownership of the complainant is not denied by either defendant. Counsel, however, is mistaken in this statement. In the record the answer of Emma J. Glos contains the following: "She denies that said complainant is the owner of or in possession of the premises in said bill described." The record also shows the following statement in the answer of Jacob Glos, the other appellant and the other defendant below, to wit: "He denies that said complainant is the owner of or in possession of the premises in said bill described."

Inasmuch as ownership is alleged in the bill, and denied in the answers, it was necessary for appellee to prove such ownership, and it would have been necessary to prove it if it had been neither admitted nor denied. The only proof of ownership introduced is a warranty deed dated November 5, 1889, executed by William H. Jacobs and his wife, and conveying the premises in question to appellee. There is no proof that appellee was ever in possession of the premises in question. A deed from a third person to the complainant in a bill to remove a cloud from the title, without further proof as to possession or title, does not establish title. Proof of possession under claim of ownership is prima facie evidence of such ownership in the claimant so in possession, and a deed from a grantor in possession may be sufficient prima facie evidence of ownership; but it is held by this court that a deed alone, without such possession, is not sufficient to establish title. *Hewes v. Glos*, 170 Ill. 436, 48 N. E. 922; *Glos v. Huey*, 181 Ill. 149, 54 N. E. 905; *Harland v. Eastman*, 119 Ill. 22, 3 N. E. 810; *Glos v. Perkins*, 188 Ill. 467, 58 N. E. 971. In a bill to remove a cloud from title it must not only be alleged that the complainant is the owner of the premises, but also either that the complainant is in the possession of the premises at the time of filing the bill, or that the premises are vacant and unoccupied when the bill is filed. *Glos v. Randolph*, 133 Ill. 197, 24 N. E. 426; *Glos v. Perkins*, supra; *Glos v. Kemp*, 192 Ill. 72, 61 N. E. 473. The bill in the present case alleges that the premises were vacant and unoccupied at the time it was filed, and it was necessary for the appellee to prove that the premises were so vacant and unoccupied at the time the bill was filed. The evidence shows that the lots in question were vacant and unoccupied at a period several years anterior to the filing of the bill, but there is no testimony to show that they were so vacant and unoccupied at any time less than two years prior to the filing of the bill. It was not sufficient to show that the premises were vacant two years before the bill was filed. In *Glos v. Perkins*, supra, it was held that evidence that property was vacant and unoccupied some years before the filing of a bill to cancel tax deeds as clouds upon complainant's title does not support an allegation that the property was vacant and unoccupied,

¶ 3. See *Quieting Title*, vol. 41, Cent. Dig. §§ 73, 74.

since it cannot be presumed from such proof that the property remained unoccupied up to the time the bill was filed; it being said in that case, "There is no fixed or continuing condition of property as to being vacant or unoccupied." It thus appears that appellee failed to prove by satisfactory evidence not only the allegation in his bill that he was the owner of the property, but also the allegation therein contained that the property was vacant and unoccupied at the time of the filing of the bill.

This case is distinguishable from the case of *Glos v. Randolph*, 138 Ill. 268, 27 N. E. 941, upon which counsel for the appellants relies. In the case of *Glos v. Randolph*, supra, testimony was introduced orally upon the hearing that the complainant in the bill was the owner of the land, but such testimony, though incompetent, was introduced without objection. Here, however, the record shows that when appellee, Miller, testified upon the hearing below that he was the owner of the lots in question, counsel for appellants objected to that testimony, and upon his motion the testimony was stricken out.

There is testimony to the effect that appellee paid taxes upon the premises for some seven years, but it is not shown that they were vacant and unoccupied during all of the seven years, nor that possession was taken thereafter; hence no title was acquired by that means.

For the reasons above stated, we are of the opinion that the decree of the court below is erroneous. Accordingly, the decree of the superior court of Cook county is reversed, and the cause is remanded to that court for further proceedings in accordance with the views herein expressed.

Reversed and remanded.

(213 Ill. 186)

PINKSTAFF v. ALLISON DITCH DIST. NO. 2 OF LAWRENCE COUNTY.

(Supreme Court of Illinois. Dec. 22, 1904.)

DRAINS—ASSESSMENT OF BENEFITS AND DAMAGES.

1. An assessment roll of benefits and damages to lands within a drainage district, prepared by a jury who went on the land, is prima facie evidence that the lands will receive the amount in benefits assessed by them.

2. In proceedings to correct an assessment roll of benefits and damages in a drainage district, the jury were properly instructed, as to a certain 40-acre tract, that they must consider and allow as proper elements of damages the inconvenience of cultivation because of the difficulty of access to its different parts by reason of being severed by the ditch thereon, and also the damages for injury caused by throwing dirt therefrom on the land, and the damages caused by constructing a bridge across the ditch, if the jury should find a bridge to be necessary. *Held*, that the proof being undisputed that a new ditch was to be constructed across such tract, of such size that, when completed, the dirt excavated therefrom would form a substantial embankment along its sides, and render necessary a bridge, in order that the owner might have

full access to his lands, a finding by the jury that the tract would not be damaged in any amount was contrary to the law and the evidence, and the court erred in confirming the assessment roll in so far as it referred to such tract.

Appeal from Circuit Court, Lawrence County; J. D. Madding, Judge.

Proceedings for the assessment of benefits and damages in the Allison Ditch District No. 2 of Lawrence County. From a judgment confirming the corrected assessment roll, Charles Pinkstaff appeals. Affirmed in part, and reversed in part.

This is an appeal from a judgment of the county court of Lawrence county confirming the corrected assessment roll of benefits and damages returned by the jury in Allison Ditch District No. 2—a district organized under the levee act, and comprising lands located in said county—so far as it applies to the lands of appellants. The district was organized for the purpose of widening, deepening, and extending certain ditches situated within the boundaries of the district, which prior to the organization of Allison Ditch District No. 2 had been constructed by Allison Drainage District No. 1, which last-named district, prior to the organization of District No. 2, had been dissolved by an order of the county court of said county under the provisions of section 47½ of the drainage act of 1889 (Hurd's Rev. St. 1899, c. 42, § 122a). The new district contains 11,500 acres of land, and the estimated cost of the proposed drainage system is \$25,000. The appellant owns 480 acres of land located within the district, and the benefits to his lands were assessed at \$1,194.75. The assessment roll and a map of the district were introduced in evidence, and it was admitted the engineer's report showed a necessity for deepening and widening the old ditches within the district in order to furnish an outlet for the waters of the district. No further proof was introduced on behalf of the appellee. The proof of the appellant tended to show his lands were high and dry, or were amply drained by ditches constructed thereon at his own expense prior to the organization of the new district; that the outlet for the drainage of his land through said ditches was ample; that on 40 acres of his land a new ditch was to be constructed; that the dirt taken from the new ditch would be piled along the sides of the ditch; and that it would be necessary to bridge said new ditch to connect the portions of appellant's lands which were severed by its construction. The jury, upon the final hearing, made no change in the original assessment roll so far as it applied to appellant's land, and over his objection the corrected assessment roll was confirmed by the court.

W. F. Foster, for appellant. S. B. Rowland and C. J. Borden, for appellee.

HAND, J. (after stating the facts). The record in this case is meager and imperfect-

ly abstracted. We understand therefrom, however, that the money raised by the assessment in question will be expended mainly in widening, deepening, and extending two or more ditches located within the district, into which the landowners of the district may drain the waters from their lands, and which, when connected by laterals into one main ditch, will carry the accumulated waters of the district into the Wabash river, into which the main ditch empties. The lands of the appellant are located in the part of the district which is situated most remotely from the river, and the waters, therefore, from his lands, will flow a longer distance before reaching the river than the waters which flow from the lands situated in the district located near the river; and it is apparent the old drains constructed by appellant upon his lands will be of little value, if any, for drainage purposes, unless the waters carried therein can find an outlet by means of which they will be carried away from his lands. The jury went upon the lands of the district, including those of appellant, and the assessment roll prepared by them is prima facie evidence that the lands of the district, including those of appellant, will receive the amount in benefits assessed by the jury against the several tracts located within the district, from the construction of the system of drainage proposed within the district. *Trigger v. Drainage District No. 1*, 193 Ill. 230, 61 N. E. 1114.

The proofs by which the prima facie case made by the introduction of the assessment roll was sought to be overcome was confined almost wholly to the testimony of appellant. From a reading of the testimony of appellant and the witnesses called by him, as abstracted, we think the court did not err in confirming the action of the jury as to the lands of appellant located within the district, with the exception of the southwest quarter of the northwest quarter of section 28, township 4, range 10 west, which 40 acres is the tract of land upon which a new ditch is proposed to be constructed. The court upon the hearing instructed the jury "that in correcting their assessment roll of the southwest quarter of the northwest quarter of section 28 in township 4 north, range 10 west, belonging to Charles Pinkstaff, that the jury must consider and allow as proper elements of damage the inconvenience of cultivation by reason of difficulty of access to the different parts of his land by reason of being severed by the digging of the ditch thereon, and also the damages for injury caused by throwing dirt from the ditch on said land, and the damages caused by the construction of a bridge across the ditch, if the jury should find a bridge to be necessary." In *McCaleb v. Coon Run Drainage & Levee District*, 190 Ill. 549, 60 N. E. 893, the elements of damage pointed out in this instruction were recognized as proper elements to be taken into consideration by the

jury in assessing damages to lands to be assessed within a district organized under the levee act. The proof shows, without question, that a new ditch was to be constructed across said 40-acre tract; that the tract would be severed thereby; that the ditch was of such size that, when completed, the dirt excavated therefrom would, when piled along the side of the ditch, form substantial embankments; and that it would be necessary to bridge the ditch in order that appellant might have full access to his lands located upon either side of said ditch. The statute required the jury, in the assessment roll, to state in separate columns the amount of benefits assessed, the amount of damages allowed, and the excess of either benefits or damages. The jury stated in the assessment roll, in the proper column, that the benefits to said 40-acre tract will be \$170, and expressly found that the tract will not be damaged in any amount. This finding was contrary to the law and the evidence, and the county court erred in confirming the assessment roll so far as it applied to said 40-acre tract. The judgment of the county court confirming the assessment roll as to the southwest quarter of the northwest quarter of section 28, township 4 north, range 10 west, will be reversed. As to the other lands of appellant embraced in the assessment roll, the judgment of the county court will be affirmed, and the case will be remanded to the county court for further proceedings in accordance with the views herein expressed. The parties will pay their own costs in this court.

Affirmed in part and remanded.

(213 Ill. 119.)

ONASCH v. ZINKEL et al.

(Supreme Court of Illinois. Dec. 22, 1904.)

RESULTING TRUSTS—EVIDENCE—SUFFICIENCY—PURCHASE OF LAND IN WIFE'S NAME—PAYMENT—CONTRIBUTION BY ADULT AND MINOR CHILDREN AND HUSBAND AND WIFE.

1. A resulting trust will not arise in favor of one paying a part of the price of land conveyed to another unless it is shown that he paid some definite part of the consideration.

2. Evidence in a suit by a husband to declare a resulting trust in property held in the name of his deceased wife, and paid for out of a fund to which the husband and wife and adult and minor children contributed from their earnings while they lived together as a family, examined, and held insufficient to prove what proportion of the fund was earned by the father and minor children, and hence insufficient to create a resulting trust.

Appeal from Superior Court, Cook County; Theo. Brentano, Judge.

Suit for partition by Auguste Zinkel and another against Johan Onasch and others. From a decree granting the prayer for partition, defendant Johan Onasch appeals. Affirmed.

This was a proceeding brought in the superior court of Cook county by Auguste Zinkel and Albertine Boldt, children of A. K. Zinkel.

tine Onasch, deceased, to partition a certain lot in the city of Chicago, the legal title to which had been in said Albertine Onasch at the time of her death. She left, her surviving, Johan Onasch, her husband, Auguste Zinkel, Albertine Boldt, and Adeline Weichman, her children, and Lillie Onasch, the daughter of Charles Onasch, a deceased son, as her only heirs at law. The bill averred that Johan Onasch is entitled to dower in the premises, and that the children and grandchildren are each seised in fee simple, by inheritance from Albertine Onasch, of an undivided one-fourth part of the premises subject to said dower. A cross-bill was filed by Johan Onasch, which, with the answer thereto and the replication to the answer, presented the issue whether or not there was a resulting trust in the premises for the benefit of Johan Onasch, the legal title being held by Albertine Onasch, and this was the only contested question in the case. The master, to whom the cause was referred to take the evidence and report his conclusions to the court, found that there was no resulting trust, but that Johan Onasch was entitled to an estate of homestead in the premises, and recommended that homestead and dower be set off to him, and that the prayer of the bill for a partition be granted. A decree was thereupon entered in accordance with the master's report. This appeal is prosecuted by Johan Onasch.

The controlling facts are as follows: Johan Onasch and family prior to 1882 lived in Germany. During that year Auguste and Albertine, daughters, and Charles, a son, left Germany and came to Chicago, where they obtained work. Auguste was then 20 years of age, Albertine 22, and Charles 15. In the spring of 1884 these children sent their parents the money necessary to pay the passage of the remainder of the family to Chicago. The parents and Adeline and August, children, arrived in that city during the month of April, 1884. Adeline was then 13 years of age, and August, who predeceased his mother, was 10 years of age. The parents had no money or property whatever. The family rented a house and commenced housekeeping. The mother kept the purse and managed the affairs of the family, and the children and Johan Onasch turned over all the money earned by them to her. Albertine had \$65 and Auguste \$20 saved when their parents arrived in Chicago, and they turned those amounts over to their mother. Albertine, the daughter, lived with the family until October, 1884, when she was married to Carl Boldt. During this time she was earning from \$5.50 to \$6 per week. Auguste's wages amounted to from \$3 to \$5 a week until some time in 1887, when she was married to Albert Zinkel. During this period she did not take her meals with the family, but received her board in addition to the wages for her work. Charles Onasch earned from \$6 to \$12 per week until 1889,

when he was married. He died in 1891, leaving a daughter, Lillie Onasch, who was a party defendant below. Adeline also commenced work in 1884 as a nurse girl, and earned \$1 per week at first, but her wages gradually increased until she was earning \$7 per week prior to her marriage to William Weichman in 1891. There is evidence that August Onasch also earned money up to the time of his death, which occurred about 1891. Johan Onasch, the appellant, had suffered the loss of one of his arms. He obtained employment in August or September following his arrival in Chicago, carrying newspapers, which is the only occupation he had up to the time of his wife's death. The evidence is conflicting as to the amount earned by him at his work. During the earlier years it was \$3 to \$4 per week. Later his wages were higher. Each member of the family, including the father, turned his or her wages over to the mother each week. During the first year of their life in Chicago, Mrs. Onasch engaged in sewing for any who would employ her, and her earnings were added to those of the other members of the family. On January 14, 1886, Albertine Onasch, the mother, purchased the lot in question for \$650, and took title to herself, paying \$125 down, and the balance in installments, out of money saved from the sources above enumerated. About a month after purchasing the lot, a small frame cottage was purchased for \$150 and moved upon the lot; the contract for the purchase being taken in the name of Johan Onasch, but the house being paid for out of the funds held by his wife. In 1889 a brick house was erected on the lot, the contract for the same being made in the name of Johan Onasch. Part of the money used in building this house was paid by Mrs. Onasch out of the savings from the wages of her husband and children which had been turned over to her, and the balance was borrowed, and subsequently repaid by her with money saved in the manner above mentioned, and from rents received from the buildings on the lot. Taxes were paid from the fund held by her, and the tax receipts were taken in her name. Evidence was introduced tending to show that Albertine Onasch had made statements before her death to the effect that the property belonged to her husband. Other witnesses testified that she said that the property had been paid for with money saved from the children's wages.

Albert W. May, for appellant. August Marx, for appellees.

SCOTT J. (after stating the facts). Appellant, by his answer, admits that the title to the property was held by his wife at the time of her death, but avers that the property was in fact owned jointly by himself and wife. By his cross-bill he sets up an inconsistent claim, which is that the property was purchased and paid for with his

funds, and the title taken to the wife, wherefore a trust resulted, by virtue of which he is the equitable owner of the whole of the property. Onasch and wife came to this country in April, 1884. The deed for the property was made January 14, 1886. In the meantime the wife had been the custodian of the funds earned by the various members of the family, except that the daughter Albertine was married in October, 1884, and thereafter paid nothing to the family fund. This fund to which all contributed was used by the mother, who incurred and paid the various household and family expenses, and out of these earnings the real estate was purchased by her, with title to herself. On the authority of *Skahen v. Irving*, 206 Ill. 597, 69 N. E. 510, appellant urges that the earnings of the minor children, contributed to the purchase, should be regarded as the property of the father. Whether that be true where, as here, the mother is virtually the head of the family, and the wages of the minor children are paid directly to her, with the father's knowledge and consent, and without passing through his hands, it is unnecessary to now determine. The fund resulted principally from the earnings of the daughters, Albertine, Auguste, and Adeline, and the son, Charles. Each of the two daughters Albertine and Auguste had reached her majority before the parents came from Germany. The son and the remaining daughter were minors until after the purchase of the property. Adeline in 1884 was but 13 years of age, and worked as a nurse girl at first for \$1 per week. It is manifest that she could have contributed but little to the fund. Appellant's earnings also went into the family purse, but the preponderance of the evidence shows that during the greater part of the time after his arrival, and up to the date of the deed, he earned but \$3 or \$4 per week, and never, up to that time, more than \$7 per week. The evidence also shows that the wife, during her first year in Chicago, did sewing for persons not members of her family, and that her earnings were used in common with those of her husband and children.

If it be conceded that the money earned by the minors should be treated as the property of the father, there is still no basis upon which that earned by the mother and the two adult daughters could be so regarded. These two daughters came from Germany about 18 months before their parents, and were in the employ of strangers, and collected their own wages. No presumption that this money belonged to the father arises from the fact that they paid it to their mother, and, while the daughter Albertine contributed to the family treasury for a period of only about 6 months after the parents came here, yet when the mother reached Chicago she received from this daughter \$65, which the latter had accumulated from her

wages prior to that time, and such sums as were paid out of her wages during the 6-months period were in addition to that amount. It is impossible to determine by this record what amount or what proportion of the fund that went into the purchase of this property was earned by the minor children and by the father. The cross-bill charges that the property was paid for with funds belonging solely to appellant, and avers that he is therefore the owner of the entire property. A trust will not result to one who pays or furnishes a part only of the purchase money of land conveyed to another, unless it be some definite amount or some definite part of the whole consideration, as one-half, one-third, or the like. *Reed v. Reed*, 135 Ill. 482, 25 N. E. 1095; *Stephenson v. McClintock*, 141 Ill. 604, 31 N. E. 310; *Pickler v. Pickler*, 180 Ill. 168, 54 N. E. 311; *Devine v. Devine*, 180 Ill. 447, 54 N. E. 336; *Cline v. Cline*, 204 Ill. 130, 68 N. E. 545.

Applying this rule to the record before us, it is manifest that the decree of the court below should not be disturbed, and it will accordingly be affirmed. Decree affirmed.

(213 Ill. 249)

DAVIS v. PFEIFFER.

(Supreme Court of Illinois. Dec. 22, 1904.)

VENDOR AND PURCHASER—CONTRACT—SPECIFIC PERFORMANCE—PARTIES PLAINTIFF.

1. Where a contract for the purchase of real estate recites that the real estate has been sold to two persons, and the conveyance is to be made to both, a bill for specific performance cannot be maintained by one of the vendees to compel the vendor to convey the entire title to complainant.

Appeal from Circuit Court, St. Clair County; R. D. W. Holder, Judge.

Suit by G. W. Davis against Anthony Pfeiffer. From a decree for defendant, complainant appeals. Affirmed.

W. L. Coley and D. J. Sullivan, for appellant.

SCOTT, J. This was a bill filed in the circuit court of St. Clair county by Davis to reform a written instrument, which he regards as a contract for the sale of real estate, and to compel the specific performance of the contract as reformed. Pfeiffer was the sole defendant. A hearing was had before the chancellor upon bill, answer, and replication. The bill was dismissed for want of equity, and Davis appeals.

The instrument in question, as signed, is in the words and figures following, to wit:

"East St. Louis, May 21, 1903. Received of G. W. Davis and H. A. Vrooman \$200, to be applied to part payment of the purchase price of the following described real estate, situated in St. Clair county, Illinois, to wit: The S. W. quarter of the N. E. quarter and W. half of N. W. quarter of N. E. quar-

ter of Sec. (28), containing 60 acres, lot 16a containing 34.63 acres, acquired by Francis Parady, by deed recorded * * * lot 15 containing nine acres; lot 17, containing 30 acres * * * all of said lots being in the south half of section 28, as platted and recorded, plat book A, 256; lot 1 or 2 in the division of Nick Toupenot's land, as platted in the office of the circuit clerk of said county, chancery record 'F,' 341, being part of the S. W. quarter of said Sec. 28; * * * also the N. W. fractional quarter of Sec. 33, containing 22.88 acres; all of said land being in township 2 north, range 9 west, aggregating about 162 acres. At the price of \$15,000, on the following terms, namely: \$800 in thirty days, and \$1,000 in ninety days thereafter; balance of \$13,000 to be secured by mortgage on said property with satisfactory release clauses. Mortgage to run three years from date at five per cent. Present rents or crop to be adjusted to June 1. The purchaser to pay taxes of 1903. Title being good, failure of said purchaser to make payments as above required, this contract to be void and the above payment to be forfeited, time being the essence of this contract, and upon a failure of the undersigned to deliver good title to the said property within the time above specified, then the above payment shall be returned. Anthony Pfeiffer, G. W. Davis."

The bill, which was filed by Davis alone, avers that the word "or," which we have above italicized in the instrument, was written therein, by a mistake of the scrivener, instead of the word "and," which should have been there written. The reformation sought is the substitution of the word "and" for that word "or."

The bill represents that Davis made tender at the proper place and times of the \$800 which was to be paid in 30 days, and of the \$1,000 which was to be paid in 90 days, but that Pfeiffer was not present, nor was any one present representing him, to receive the money so tendered, and that, after the time of the making of the second tender, Pfeiffer refused to carry out the terms of the written instrument; and the bill tenders into court \$1,800, the first two deferred payments, and prays that Pfeiffer be decreed to convey the premises to Davis by a good and sufficient deed of conveyance, and the complainant offers by the bill to specifically perform the agreement on his part.

In considering this case, we have not had the assistance of brief or argument on behalf of appellee. There is difficulty in determining from this contract whether Pfeiffer, individually and alone, agreed to convey any real estate. The document recites the payment by Davis and Vrooman of \$200, and provides that, upon the failure of the "undersigned" to deliver good title within the time fixed, then the above payment shall be returned. Pfeiffer and Davis both sign it, and are both comprehended by the word "under-

signed." It therefore appears that Davis and Vrooman have paid \$200 to Pfeiffer and Davis, and Pfeiffer and Davis agree that, if they fail to deliver good title, then they will return to Davis and Vrooman the payment made. Other uncertainties appear on the face of this document, but we prefer to place the decision of the cause upon another ground. The instrument does not expressly provide to whom the title is to be conveyed, or who the purchasers are; and, not being definite in that respect, we can only infer from its language that the purchasers were Davis and Vrooman, and that the title was to be conveyed to both. There is nothing in the terms of the writing from which any conclusion can be drawn that they did not contribute equal amounts to the payment of the \$200 that was paid down, or that they were not equally bound for the payment of the deferred payments; or that they were not equally interested as purchasers in the transaction. It is too plain for argument that where a contract for the purchase of real estate recites that the real estate has been sold to two persons, and that the conveyance is to be made to both, a bill cannot be maintained by one to compel the vendor to convey the entire title to that one. The decree of the circuit court will be affirmed.

Decree affirmed.

(213 Ill. 61)

ZEIGLER et al. v. CITY OF CHICAGO.

(Supreme Court of Illinois. Dec. 22, 1904.)

MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—SPECIAL ASSESSMENT—CONFIRMATION—RESOLUTION—SUFFICIENCY—STATUTES—CONSTRUCTION—APPEAL—QUESTIONS FOR REVIEW.

1. Objections in a proceeding to confirm a special assessment for street improvements that the resolution passed by the board of local improvements should specify in terms whether the improvement is to be made by special assessment or special taxation, or partly by special assessment or partly by special taxation, and that the estimate which is required to be itemized and made a part of the resolution should be incorporated in the record of the resolution over the signature of the engineer of the board, are broad enough to cover the matters so as to present the questions for review on appeal.

2. A resolution passed by the board of local improvements for a proposed street improvement need not include a statement of the manner in which the improvement shall be paid for, there being no such requirement in the local improvement act (Hurd's Rev. St. 1903, p. 390, c. 24).

3. Under Hurd's Rev. St. 1903, p. 392, c. 24, § 7, providing that a resolution of the board of local improvements, originating a scheme for a street improvement, shall contain an estimate of the cost, to be made in writing by the engineer over his signature, a special tax is not invalidated merely because the signature of the engineer was omitted, especially in view of section 9, providing that, if a variance be shown on the proceedings in the court, it shall not affect the validity of the proceeding unless the court deem the same willful or substantial.

Appeal from Cook County Court; L. C. Ruth, Judge.

Proceeding by the city of Chicago against Garrett K. Zeigler and others to confirm a special assessment for street improvements. From the judgment, defendants appeal. Affirmed.

Taylor & Martin, for appellants. Robert Redfield and Frank Johnston, Jr. (Edgar Bronson Tolman, Corp. Counsel, of counsel), for appellee.

RICKS, C. J. This appeal is from the judgment of confirmation of the county court of Cook county of a special assessment levied for the improvement, by curbing, grading, paving, etc., of Champlain avenue, from Forty-Sixth street to Fiftieth street, in Chicago.

Two grounds for objection are urged, viz.: "(1) The resolution passed by the board of local improvements should specify, in terms, whether the improvement is to be made by special assessment or special taxation, or partly by special assessment or partly by special taxation. (2) The estimate which is required to be itemized and made a part of the resolution should be incorporated in the record of the resolution, over the signature of the engineer of the board of local improvements."

The appellee questions the sufficiency of the objections made in the court below to raise the points here urged. We will not enter into a discussion of them from this point of view, but deem it sufficient to say that we deem them broad enough to cover said matters.

This proceeding was under the local improvement act of 1897, and the amendments thereto. Hurd's Rev. St. 1903, p. 390, c. 24. Section 5 of the act is as follows: "No ordinance for any local improvements, to be paid wholly or in part by special assessment or special taxation, shall be considered or passed by the city council or board of trustees of any such city, village or town, unless the same shall first be recommended by the board of local improvements provided for by this act."

Section 7, so far as material to the matters here under consideration, provides: "All ordinances for local improvement to be paid for wholly or in part by special assessment or special taxation, shall originate with the board of local improvements. Petitions for any such public improvement shall be addressed to said board. Said board shall have the power to originate a scheme for any local improvement, to be paid for by special assessment or special tax, either with or without a petition, and in either case shall adopt a resolution describing the proposed improvement, which resolution shall be at once transcribed into the records of the board. Whenever the proposed improvement will require that private property be taken or damaged, such resolution shall describe the property proposed to be taken for that purpose. Said board shall, by the same resolution, fix a day

and hour for the public consideration thereof, which shall not be less than ten days after the adoption of such resolution. Said board shall also cause an estimate of the cost of such improvement * * * to be made in writing by the engineer, * * * over his signature, which shall be itemized to the satisfaction of said board, and which shall be made a part of the record of such resolution."

Section 8 provides for the public hearing on three subjects only—the necessity, the nature, and the estimated cost of the proposed improvement—and then authorizes the board, upon objections to the proposed improvement, to pass a new resolution abandoning the scheme, modifying the same, or adhering thereto, and concludes: "Thereupon, if the said proposed improvement be not abandoned, the said board shall cause an ordinance to be prepared therefor, to be submitted to the council or board of trustees. * * * Such ordinance shall prescribe the nature, character, locality and description of such improvement and shall provide whether the same shall be made wholly or in part by special assessment or special taxation of contiguous property; and, if in part only, shall so state."

Section 9 provides for the presentation of the ordinance to the council and the recommendation of the board, and concludes: "The recommendation by said board, shall be prima facie evidence that all the preliminary requirements of the law have been complied with, and if a variance be shown on the proceedings in the court, it shall not affect the validity of the proceeding, unless the court shall deem the same willful or substantial."

Section 10 requires that the ordinance and recommendation of the board, and an itemized estimate of the cost of the improvement of the engineer, over his signature, and certifying that in his opinion the cost of the improvement will not exceed the estimated cost, shall also be transmitted to the council.

The above are all the sections and provisions of the act that could in any manner apply to the questions here presented. We find in no place in these provisions the requirement that the board of local improvements shall include in the first, or any, resolution to be entered by it, the statement of the manner in which the improvement shall be paid for. The requirements of the first resolution are expressly mentioned and specified in section 7, supra. Those requirements are, (1) that it shall describe the proposed improvement; (2) if private property is to be taken or damaged, it shall describe such property; (3) it shall "fix a day and hour for the public consideration thereof"; (4) and the itemized estimate of the cost of the improvement shall be made a part of the record of such resolution.

It is admitted by appellants that the reso-

lution contains all the foregoing specified matters except the report of the engineer, which, they insist, shall be incorporated at large, including the signature, in the resolution. They admit that the estimate is included in the resolution, but urge that the omission to include the signature is a failure to comply with the statute and is fatal to the proceeding. Appellants also urge that the logic and reason of the law require that the board should state in the resolution whether the improvement is to be paid for by special assessment or special taxation, because the taxpayer has a right to know the cost to him of the improvement, and that, as by special taxation the cost would all fall upon the contiguous property, and under special assessment it might include property benefited but not contiguous, he cannot estimate the cost to him until he knows the method adopted for adjusting the cost.

To this it might be replied that, if the method of special assessment is to be adopted, the property owner would not ascertain the cost to him until the assessor has designated the property which he deems benefited by the improvement, and the assessment is confirmed by the court; and, if special taxation is the method chosen, he could not tell if it is upon the basis of value or proportionate frontage, but might determine the cost to him in the single instance of taxing the whole cost of the improvement to the property opposite to it, which is only one of the three methods authorized to be used in special taxation.

But we think appellants are in error in their contention that the property owner is entitled to be advised, by the first resolution, as to the cost of the improvement to him. The estimate required is as to the cost of the improvement—not to the individual, or any number of them less than the whole—and on the public hearing he is entitled to object to the cost, the necessity for, and the nature of the improvement. By the report of the engineer the property owner is advised of the total estimated cost of the improvement, and by the resolution and the estimate he is advised of the character and kind of materials that enter into the improvement, and the estimated cost of each item thereof. Having this before him, and objecting to the cost of the improvement, he may show, if he can, that the materials specified in the resolution and contained in the estimate, or either of them, are under the control of a monopoly, and that therefore the cost and the estimate thereof are higher or greater than they should be, and than would be the cost of a similar amount of similar material bearing a different name or obtained from a different source; or he may show, if he can, that, taking the location and the purpose of the improvement into consideration, the stage of improvement in the district along which it is to be made, the uses to which it is to be put,

taking its cost into consideration, it is unsuited for the purpose and place designated, or that the cost of the improvement will exceed the benefits. But surely it was not intended that the property owner, by objecting that he was possessed of a single lot along the line of a long improvement, and that his lot would not be benefited by and did not need and could not utilize the improvement proposed, could claim that the cost of the improvement would be too great, and the improvement for that reason should not be made; and yet such contention would be as reasonable as to contend that at the preliminary hearing the individual owner should be allowed to urge the cost to him as a ground for defeating the improvement. Questions of that character would properly arise when the question of benefits came to be considered. The proceeding being a purely statutory one, and the act being treated as valid, the courts are not authorized to read into the act matters which they think ought to be, but are not, there.

The first time the method of raising the funds for payment of the improvement is required to be provided for or appear in the proceeding is in the ordinance for the improvement. This ordinance must originate with the board of local improvements, and be forwarded by it to the council, with its recommendation and the estimate of the engineer. In this case the ordinance complies with the statute, and, as the board of local improvements in each step complied with the statute in the matter of time and manner of determining the method of fixing the charge of the cost of the improvement upon the property, it must be sustained.

Nor do we think a reasonable construction of the statute, or the plain reading of it without construction, requires that the entire report of the engineer, including the general remarks and signature, shall be incorporated in the resolution or recorded as a part of it. The particular thing the statute names is the itemized estimate of the cost of the improvement, and we have sustained many cases since *Bickerdike v. City of Chicago*, 203 Ill. 636, 68 N. E. 181, without more appearing. The resolution states that it contains or is followed by the estimate of the engineer. It is not contended that no estimate was made, or that the estimate as made does not correctly appear in the resolution; and, if the language of section 7 should be so construed as to hold that the entire report of the engineer should be incorporated in the first resolution, under the saving clause quoted from section 9 of the statute we would be disposed to regard it as but a variance in the record that did not affect the validity of the proceeding, and was not willful and substantial, in which case the provision is that it shall not affect the proceeding. The judgment of the county court is affirmed.

Judgment affirmed.

(212 Ill. 806)

GREENBERG et al. v. STEVENS.

(Supreme Court of Illinois. Dec. 22, 1904.)

SHERIFFS — EXECUTION — LEVY ON STRANGER'S PROPERTY — REPLEVIN — ERRONEOUS JUDGMENT — HARMLESS ERROR.

1. Where an execution debtor, his wife, and stepdaughter lived together as members of a family, and a constable, who called at the house to levy an execution, was advised by the stepdaughter that certain property in the house belonged to her, and she warned him not to seize it, but he did so, it was not necessary for the stepdaughter to make a demand for a return as a condition precedent to bringing replevin to recover the property.

2. Where the goods of a stranger to an execution are so intermingled with goods of the execution debtor that they cannot be distinguished, and the stranger to the execution does not designate his goods, and the officer levies on the whole, a demand by the stranger for the return of his property is a condition precedent to an action against the officer by the stranger.

3. Where an officer, on calling at the residence of an execution debtor for the purpose of levying under the writ, was informed by the execution debtor's stepdaughter that certain property, consisting of parlor furniture, beds, bedding, a table, lady's scarf, jackets, etc., belonged to her, but he seized them, together with property of the debtor, consisting of the apparel of a man, a pipe, and a chain for a man's watch, a contention, in replevin, brought by the stepdaughter, that her goods were so intermingled with the debtor's that, having failed to point out her property specifically, a demand for her particular articles was essential to the maintenance of the action, was without merit.

4. Where, in replevin, the judgment was that plaintiff have the property and recover a specified sum as damages, no property having been found and none taken by the writ, the error in the judgment in awarding both damages and a return of the property was harmless.

Appeal from Appellate Court, First District.

Action by Agnes Stevens against Louis Greenberg and others. From a judgment of the Appellate Court affirming a judgment for plaintiff, defendants appeal. Affirmed.

Edward H. Morris, for appellants. Thornton & Chancellor (James D. Andrews, of counsel), for appellee.

BOGGS, J. This was an action in replevin, with a count in trover, instituted by the appellee against the appellants. The writ of replevin was returned with an indorsement that the property therein described could not be found. The appellant Greenberg, a constable, held an execution against the goods and chattels of one O. W. Freese, by virtue whereof he levied upon and seized the goods and chattels described in the declaration. The appellee, claiming to be the owner, brought this action to recover the articles, or their value. The cause was tried before the court and a jury, and judgment was entered in the trial court in her favor in the sum of \$660. The Appellate Court, on appeal, affirmed the judgment. A certificate of importance was granted, and this appeal was perfected.

The appellee did not, before instituting the action, demand that the constable should sur-

render the property, and for that reason it is urged the trial court should have sustained the motion entered by the appellants to direct the jury to return a verdict in their favor. The execution debtor, O. W. Freese, was stepfather to the appellee. He, his wife (the appellee's mother), and the appellee lived together as members of a family in a house which belonged to appellee. It appeared without dispute that the goods sought to be replevined, which consisted of parlor furniture, beds, bedding, a table, lady's scarf, jackets, etc., belonged to appellee. They were in use, in part, as household goods, but it was proven, and not denied, that the appellee was present when the officer came with the execution, and that she notified him, before he made the levy, that the property belonged to her, and was not the property of the debtor; that the officer said "he did not care what she claimed; that he was going to take the property"; that "she was a liar, and that he did not care who claimed the property"; that "he was going to take the law into his own hands and be the judge of the matter himself." It was further proven, and not denied, that appellee's mother at the same time told the officer that the property did not belong to her husband, but belonged to the appellee, and also told him how the daughter came to be the owner of the property, and that bills and receipts showing that the property had been purchased by and paid for by the appellee were tendered to the officer; that he threw the bills and receipts on the floor, and threatened to put handcuffs on appellee's mother, and finally knocked her down and seized the property by force. It was at least a controverted question of fact whether the property was in the possession of the appellee; and if it was in her possession, and was taken from her possession by the constable, no demand was necessary, and for that reason the court should have submitted the case to the jury. The defendant in the execution was not present when the levy was made, nor was there any proof tending to show that he had or claimed the right to have possession of the property, save such presumption as might arise from the facts he resided in the house where the property was in use as household furniture and goods, and was the apparent head of the family. But the constable was notified of facts which tended to rebut any such presumption. *Reeves v. Webster*, 71 Ill. 807. He was distinctly advised that the property belonged to the appellee; and was in her possession, and warned not to seize it; and having taken possession of it with full notice of the appellee's title, no demand, under all of the circumstances, was necessary. 14 Am. & Eng. Ency. of Law (2d Ed.) 508.

Among other articles levied upon and seized by the constable was a suit of men's clothing, a gold watch chain, and a pipe. These articles belonged to the defendant in the execution. It is urged that these goods of the execution debtor were mixed or confused with

the goods of the appellee, and that the appellee failed to point out specifically the articles belonging to her, and that for that reason a levy upon all the property was lawful, and that demand for the particular articles belonging to the appellee was essential to the maintenance of an action of replevin or trover. When the goods of a stranger to an execution are so intermingled and confused with goods belonging to an execution debtor as that they cannot be distinguished, it is the duty of such stranger to the process to designate to the officer the goods which are not subject to the execution, and, if such designation is not made, the officer may levy upon the whole, and demand would be requisite to the maintenance by the stranger of replevin or trover. In the case at bar it can hardly be said the articles belonging to the execution debtor were so intermingled with the property of the appellee as that they could not be readily distinguished. The property belonging to him was not such as would be supposed to belong to a woman, being the apparel of a man, a pipe, and a chain for a man's watch. The appellee sought to notify the officer as to the articles of property which belonged to her, and tendered to him written instruments disclosing the same, but he refused to look at such writings or to consider her claims. The appellee did all that was in her power to do to point out the articles that belonged to her, and the actions of the officer were those of a reckless and oppressive wrongdoer, against whom no demand was requisite.

Instruction No. 9 asked by the appellants was properly refused. It sought to charge the jury that a presumption of law absolutely obtained that the property in question was the property of the stepfather. The presumption was rebuttable, and there was evidence tending to rebut it, and this the instruction entirely ignored.

Instruction No. 12 asked by appellants, and refused, is as follows: "The jury are instructed that if they believe from the evidence that the defendant Louis Greenberg was an acting constable in and for the town of North Chicago, and that as such constable the execution shown in evidence came into his hands to be executed by him, and that while the property in dispute was in the possession and under the control of the defendant O. W. Freese, in said execution, said constable levied the execution upon the property in controversy as the property of O. W. Freese, such taking and levy would not be unlawful as to the plaintiff, Agnes Stevens; and in such case, unless the jury believe from the evidence that a demand for the property was made before bringing this suit, the defendant would not be guilty of a wrongful taking or a wrongful detention, and they should find the defendant not guilty." Had this instruction been given, the jury would have been misled to understand that demand was necessary to the maintenance of the action, notwithstanding it appeared from the proofs that the

appellee notified the constable that the articles sought to be replevined belonged to her, and were not the property of the execution debtor, and notwithstanding it might be that the conduct of the officer was such as to make him a trespasser. This instruction was properly refused.

It is contended that the judgment entered in the trial court is so erroneous as to require reversal of the cause. It reads as follows: "Therefore it is considered by the court that the plaintiff do have and retain the property replevined by virtue of a writ of replevin issued in said cause, and do have and recover of and from the defendants the said sum of \$660, together with her costs and charges, and that execution issue therefor." The appellee could not at the same time be entitled to the property and also to an assessment of damages for the value of the same property. Nor does that judgment have that legal effect. It awards the appellee the right to "have and retain the property replevined by virtue of a writ of replevin issued in the cause," but, as no property could be found, and none was taken by virtue of the writ, the appellee takes nothing by force of this provision of the judgment. That portion of the judgment does not benefit the appellee or injure the appellants. The error in the judgment is harmless. This view is entirely consistent with *Mattingly v. Crowley*, 42 Ill. 300. That was an action in replevin. The plaintiff was defeated in the trial court, and judgment there entered that he make return of the property described in the writ. The writ described a steer, but the animal could not be found by the officer, and consequently did not come into the possession of the plaintiff. Nevertheless, the judgment required him to return the steer, and was for that reason held erroneous and harmful. In the case at bar the judgment was that the plaintiff in replevin should have and retain the property delivered to her under the writ, but, as no property had been taken under the writ or delivered to her, the error was not prejudicial to the appellants. The judgment is affirmed.

Judgment affirmed.

(213 Ill. 67)

ILLINOIS, I. & M. RY. CO. v. POWERS et al.
(Supreme Court of Illinois. Dec. 22, 1904.)

EMINENT DOMAIN—ASSESSMENT OF DAMAGES—
APPEAL—REVIEW—VERDICT—UN-
CERTAINTY AS TO AMOUNT.

1. The Supreme Court, in passing on the question whether a verdict is sufficiently certain and specific in amount to support the judgment, may look into the entire record; and if, from other portions thereof, any uncertainty as to amount is rendered certain and specific, the judgment should be sustained.

2. In condemnation proceedings the jury returned a verdict fixing the damages to land not taken at "the sum of (\$2,600.00) twenty-six and no-100 dollars." When it was returned into court the judge read it to the jury as though it was written, "Damages to the land not taken, \$2,600," and thereupon inquired if the verdict

as read was their verdict, to which all assented. *Held*, that the action of the court and the reply of the jury removed the uncertainty from the verdict as to the amount allowed.

Appeal from De Kalb County Court; W. L. Pond, Judge.

Action by the Illinois, Iowa & Minnesota Railroad Company against Mary Powers and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

This was a proceeding under the eminent domain act, commenced in the county court of De Kalb county by the appellant to acquire a right of way across the farm of appellees. The appellees filed a cross-petition claiming damages to lands not taken. The jury returned a verdict in writing, fixing the value of the land taken at \$563.75, and the damages to land not taken at "the sum of (\$2,600.00) twenty-six and no-100 dollars." The bill of exceptions shows that when the verdict was returned into court the judge read the same to the jury as though it was written, "Damages to the land not taken, \$2,600," and thereupon inquired of the jury if the verdict as read was their verdict, to which they all assented.

Murphy & Alschuler (D. J. Carnes and A. W. Fisk, of counsel), for appellant. Cliffe & Cliffe, for appellees.

HAND, J. The only reason urged in this court as a ground for a reversal is that the verdict is too uncertain to sustain the judgment.

In *Griffin v. Larned*, 111 Ill. 432, which was assumpsit upon a promissory note, the jury returned a verdict for "fourteen hundred and sixty-seven and eighty-eight cents." The verdict, upon its return into court, was read by the clerk to the jury "fourteen hundred and sixty-seven dollars and eighty-eight cents," and the court then and there inquired of the jury if the verdict as read was their verdict, and the jury, through their foreman, replied it was; and it was held the verdict as read by the clerk was the verdict of the jury, and was sufficient to support a judgment in favor of the plaintiff and against the defendant for \$1,467.88. That case differs from this case in this: In a condemnation proceeding the statute provides the verdict of the jury shall be in writing, while in an assumpsit suit it is not necessary that the verdict should be in writing, but the same may be announced by word of mouth, in open court, by the foreman of the jury. We think, however, this court, in passing upon the question whether a verdict is sufficiently certain and specific in amount to support the judgment rendered thereon by the trial court, may look into the entire record, and, if from other portions of the record any uncertainty as to amount in the verdict is rendered certain and specific, the judgment should be sustained. In the case of *West v. Americus Bank*, 63 Ga. 230,

the verdict was for the plaintiff for "eighteen 1800 dollars," and the defendant contended that the word "eighteen" qualified the word "dollars," and that the verdict should be read leaving out the figures "1800." The pleadings showed that \$1,800 was the sum sued for, and it was held proper to read the verdict in the light of the pleadings, and to enter a judgment for \$1,800.

In the case at bar, upon its return the verdict may be conceded to have been uncertain as to amount. The judge, however, then and there read the verdict to the jury in accordance with the amount stated therein in figures, and inquired of the jury if the verdict as read by him was their verdict, to which they replied affirmatively. The action of the court and the reply of the jury removed from the verdict what before had made it uncertain, and made it certain and specific as to amount; and the court having rendered judgment upon the verdict for the amount stated by the jury in open court to be the amount of damages allowed the appellees for land not taken, and the court having preserved a record of its action and that of the jury at the time the verdict was returned into open court, by bill of exceptions, the verdict as to the amount allowed for damages to land not taken no longer was uncertain, but was thereby rendered certain and specific.

The authorities relied upon by the appellant are cases where the amount of a verdict as stated in figures did not agree with the amount stated therein in words, and the record contained no fact or facts which rendered the verdict certain as to amount. Those cases differ from this case materially, and are not in point.

We are of the opinion the action taken in court at the time the verdict was returned, as shown by the bill of exceptions, cured any uncertainty in the amount of the verdict, and that the county court did not err in rendering judgment thereon in favor of the appellees for damages to lands not taken for the sum of \$2,600. The judgment of the county court will be affirmed.

Judgment affirmed.

(212 Ill. 566)

DAVIES et al. v. BROOKS et al.

(Supreme Court of Illinois. Dec. 22, 1904.)

APPEAL—WANT OF CONTROVERSY—DISMISSAL.

1. Where on appeal there is no contest as to law or facts, both parties desiring affirmance, the appeal will be dismissed.

Appeal from Circuit Court, Platt County; W. C. Cochran, Judge.

Suit by Nellie Brooks and others against Edward C. Davies and others. From a judgment for complainants, defendants appeal. Appeal dismissed.

W. G. Cloyd, for appellants. M. R. Davidson, for appellees.

CARTWRIGHT, J. The appellees filed their bill in the circuit court of Platt county as heirs at law of Edmund Davies, deceased, to contest his will, alleging a want of testamentary capacity and the exercise of undue influence by certain of the legatees and devisees and the executors. The executors, who were also trustees under the will, and all parties interested, were made defendants. One of the adult defendants was insane, and several of them were minors. One of the executors was appointed guardian ad litem for the insane and infant defendants. Answers and replications were filed, and an issue was formed as to the validity of the will. After a trial, which resulted in a disagreement of the jury, a supplemental bill was filed, in which complainants alleged that on the trial 25 different witnesses testified to the competency of the testator, and an equal number testified to the contrary; that the jury, during all their retirement, were equally divided on the question; that after the trial complainants and the adult defendants agreed upon a settlement and compromise of the controversy, by which complainants were to receive \$9,000 in cash, and the will was to be confirmed as the last will and testament of Edmund Davies, deceased; that the guardian ad litem accepted and agreed to the settlement on behalf of the insane and infant defendants, provided the court had jurisdiction to decree the settlement, and found it for the best interest of the minors; that it would be necessary for the executors and trustees to borrow money and mortgage real estate of the testator to procure funds to carry out the settlement, and that the settlement was for the best interests of all parties. Complainants prayed for a decree in accordance with the terms of the settlement. The adult defendants, including the parents of the infant defendants, filed answers admitting the facts stated in the supplemental bill, and consenting to and praying for a decree enforcing the settlement as being in their interest and that of their minor children. The guardian ad litem answered, also admitting the allegations of the supplemental bill, and that he had accepted the proposition and settlement provided the court had jurisdiction to carry it out by a decree, and it should be considered for the best interests of the insane and infant defendants. He alleged that the result of another trial would be uncertain and doubtful, and that it would be for the best interests of the defendants to carry out the settlement, and he submitted to the court the rights and interests of the parties he represented. The court thereupon entered a decree in accordance with the prayer of the supplemental bill, confirming the settlement, and authorizing the executors and trustees to borrow money and mortgage lands of the estate to pay existing mortgages and the \$9,000 which complainants were to receive. From that decree the guardian ad litem took

this appeal, and assigned as error the entry of the decree.

The purpose of this appeal is not to obtain a reversal of the decree, but to have it affirmed. There is no controversy of fact or law to be decided. There is no evidence in the record, and the decree was rendered upon the bill and the answers admitting its averments. Counsel for appellants says that the record shows that all parties accepted the settlement, and asked that it be confirmed and carried into effect; that the parents of the minors advised and suggested to the court that it should be done; that it is the wish of all parties that the settlement should be made without exhausting or impoverishing the estate; and that the case of *Williams v. Williams*, 204 Ill. 44, 68 N. E. 449, is authority for upholding and enforcing such a compromise, which secures and promotes the interests of defendants incapable of acting for themselves. Although questions are suggested by counsel, it is plain that the desire and intention is to have the decree affirmed. Counsel for appellees agree fully with counsel for appellants, both as to the fact and the law. There is no actual controversy, and the appeal will be dismissed. 2 Cyc. 533. Accordingly the appeal is dismissed.

Appeal dismissed.

(213 Ill. 633.)

CLEVELAND, C. C. & ST. L. R. CO. v. PEOPLE ex rel. **BARTER**, County Collector.

(Supreme Court of Illinois. Dec. 22, 1904.)

DRAINAGE ACT—DUTIES OF TAX ASSESSOR—CONSTITUTIONAL LAW.

1. Drainage Act (Hurd's Rev. St. 1899, c. 42), § 200, requires persons owning land in the state to remove annually all impediments to the flow of water in the bed of any stream, etc., with the proviso that streams less than 15 feet wide and the rivers shall not be included, and that the act shall not interfere with fencing, flood gates, bridges, culverts, etc. Section 201 provides that, in case of failure to comply with the above section, the tax assessor shall, when he assesses the land of any such owner, inquire whether or not the act has been complied with, and that, if it has not by the 1st day of May each year, the assessor shall note the fact on the assessment book opposite the land of such owner, and that the county clerk shall extend \$10 drainage tax against each 40-acre tract, or fraction thereof, as a penalty for such failure, to be collected as other taxes, and paid into the school fund. *Held*, that the duties thus attempted to be imposed on the assessor are repugnant to Const. art. 8, dividing the powers of government into three departments, and providing that no person of one department shall exercise any power properly belonging to the other.

2. Such duties are also repugnant to Const. art. 2, § 2, providing that no person shall be deprived of his property without due process of law.

Appeal from Saline County Court; John L. Thompson, Judge.

Proceeding by the people, on the relation of Sam Barter, county collector, to subject bonds of the Cleveland, Cincinnati, Chicago & St. Louis Railroad Company to pay-

ment of a drainage tax. From a judgment for the plaintiff, defendant appeals. Reversed.

This is an appeal from the judgment of the county court of Saline county, rendered against the lands of appellant, and ordering the same sold for the payment of a drainage tax or penalty of \$10 assessed against the land under the provisions of sections 200 and 201 of chapter 42 of Hurd's Revised Statutes of 1897.

The facts are as follows: The north fork of the Saline river crosses the right of way of appellant's railroad, and about 1894 the company, for the purpose of making a pool from which to obtain a water supply for its locomotives, placed, about 100 feet below its right of way, loose, flat stones across about 50 feet of the stream. These stones were from 18 to 24 inches high. This dam was not within any drainage district. Upon the assessor's book for the town of Rector for the year 1903 he marked opposite the tract in question the words, "Drift," "The Big Four dam," and from this notation the county clerk extended against appellant's land a drainage tax or penalty of \$10, besides the other legal taxes. All taxes against the land except this drainage tax were paid by appellant, and it filed its objections to the \$10 assessment, which were overruled by the court, and a judgment entered accordingly.

C. S. Conger, for appellant. H. J. Hamlin, Atty. Gen., for appellee.

WILKIN, J. (after stating the facts). Section 200 of the drainage act (Hurd's Rev. St. 1897, c. 42), provides that "all persons owning land in this state shall clean annually any and all brush, trees, logs and other impediments to the flow of water in the bed of any stream, however small, and extending from the top of one bank to the top of the opposite bank of any such stream, as far as any such stream shall run or border the land of any owner, and when any stream shall run between the lands of two or more owners, each party shall clean his part of such stream: provided, that streams or runs less than fifteen feet wide, and the rivers of this state, shall not be included herein, and this act shall not interfere with fencing, flood-gates, bridges, culverts," etc. Section 201 provides that, "in case of failure to comply with the above section of this act, the tax assessor shall, when he assesses the lands of any such owner, inquire whether or not section 1 of this act has been complied with by any such land owner, and if such land owner has failed to have complied with the requirements of this act by the first day of May of each year, the assessor shall note the fact on the assessment book opposite the land of such owner, and the county clerk is hereby required to extend \$10 drainage tax against each forty-

acre tract or fraction thereof, as a penalty for such failure, and \$5 on each such tract shall be added each successive year, and extended by such clerk on the tax books until this act shall be complied with by each land owner or owners. Said money to be collected as other taxes, and paid into the school fund of the town wherein the land is, and used in the school district where the land is situated."

Appellant insists that the statute is unconstitutional for three reasons: First, because the subject-matter of the act is not expressed in the title; second, because the tax is not levied in proportion to value, and is not a tax on any occupation, calling, privilege, or franchise; and, third, because the tax is nothing more or less than a penalty or fine, and can only be inflicted by the judicial power of the state after trial according to law. We deem it necessary to consider the last point only.

Under article 3 of the Constitution the powers of the government of the state are divided into three distinct departments—the legislative, the executive, and the judicial. Each of these departments has a well-defined and well-recognized function and power. The legislative department makes the laws, the executive department enforces them, and the judicial department interprets or construes them. The same section of the Constitution which distributes the powers of government into these three classes also provides that no person or collection of persons, being one of these departments, shall exercise any power properly belonging to either of the others, except as afterwards expressly directed and permitted. Assessors of taxes and county clerks are ministerial officers, and while in some respects their acts may be construed as judicial, yet they are not "judicial officers," as that term is used in the Constitution. They have no power to inflict penalties for violation of laws, or to determine when a law has been violated, and adjudge persons guilty. The statute in question imposed a duty upon persons owning land on the borders of certain streams. If the owner does not comply with the statute, he is to be punished. This punishment is not a tax imposed upon his land, but is a penalty for the violation of law. This is apparent from the wording of the statute, which expressly stated that a penalty shall be inflicted, and that the amount assessed is to go into the school fund of the district. Before the property owner can be found guilty, there are several things to be determined, namely, that the offense has been committed, that the offender is the owner of the land, that the stream or run is more than 15 feet wide, and is not a river of the state; and the provisions of the act do not interfere with fencing, flood gates, bridges, culverts, etc. All of these questions must be determined before the penalty can be in-

flicted. They are clearly questions for determination by the judicial power of the state. To hold otherwise would be to permit the assessor to levy a penalty and deprive the offender of his property without due process of law, as provided in section 2 of article 2 of the Constitution. It is no answer to say that the property owner can object to the tax in the county court, and there have these questions judicially determined, for the reason that if the assessor has the power to impose the penalty, and the county clerk has the power to extend the taxes, there is nothing left for the county court but to overrule the objection, as the question of violation has been previously determined by these officers.

This statute is clearly in violation both of section 2 of article 2, and of article 8 of the Constitution. The so-called "delinquent tax" was absolutely void, and the court below erred in overruling the objections. Its judgment will be reversed, and the cause remanded, with directions to sustain the objections.

Reversed and remanded, with directions.

(213 Ill. 134)

HAHL v. BROOKS.

(Supreme Court of Illinois. Dec. 22, 1904.)

VENDOR AND PURCHASER—INCUMBRANCES—FALSE REPRESENTATIONS—ACTION FOR DAMAGES—EVIDENCE—ADMISSIBILITY—TRIAL—APPEAL—QUESTIONS REVIEWABLE.

1. Plaintiff desired to purchase unincumbered land, and was told by one, to whom the grantor referred him, that the land was unincumbered save by taxes, and when the deed was handed plaintiff he asked the vendor's agent to read it, plaintiff not being able to read well. The agent read it, but did not read anything about a mortgage, to which the deed was made subject, and thereafter the grantor read it to plaintiff in the same way. Held to show that plaintiff relied on the false representations and was deceived by them.

2. Where a vendee of land was deceived by false representations of the vendor that the land was not incumbered, he could recover in an action for the deceit, although he had not removed the incumbrance, and although his title had not been swept away by it.

3. In an action by the vendee of land against the vendor to recover damages for false representations of the vendor that the land was unincumbered, the measure of damages was the amount of the incumbrance, if less than the value of the land.

4. One cannot object on appeal that a fact was not proved by the other party, where the proof was prevented by appellant's own objection.

5. Where the vendor of land referred the vendee to a third person for information as to the state of the title, the vendor was responsible to the vendee for fraudulent representations on the part of the one to whom the vendee was referred.

Appeal from Appellate Court, Third District.

Action by B. E. Brooks against C. W. Hahl and another. From a judgment of the Appellate Court affirming a judgment in favor of plaintiff, defendant Hahl appeals. Affirmed.

A. C. Anderson and Chas. C. Lee, for appellant. Craig & Kinzel, for appellee.

CARTWRIGHT, J. B. E. Brooks recovered a judgment in the circuit court of Coles county against C. W. Hahl and T. H. Montague for the amount of an incumbrance on 605 acres of land in Harris county, Tex., in an action on the case for fraud and deceit in representing the land to be unincumbered. Upon a writ of error from the Appellate Court for the Third District the judgment was affirmed, and C. W. Hahl appealed from the judgment of the Appellate Court.

The defendant Montague appeared, but did not plead to the action, and the defendant Hahl filed a plea of not guilty. After the plaintiff had introduced his evidence, the defendant Hahl asked the court to give an instruction directing the jury to return a verdict of not guilty, but the court denied the motion. No evidence was offered by the defendants, and the question whether the court was right in refusing to give the peremptory instruction and submitting the issue to the jury is the only one in the case.

The evidence on the part of the plaintiff was to the following effect: Plaintiff, a resident of this state, went to Texas with the defendant Montague, and was shown the land in question by Montague, as agent for Hahl. Plaintiff offered to trade three horses which he had at home to Hahl for the land, and to give a note and mortgage for \$1,040 on the north 800 acres. He was to have a warranty deed and perfect title. The offer was accepted, and plaintiff went to find Mr. Hayes, an attorney from Illinois, to examine the title. He did not find Mr. Hayes, and came back and told Hahl that he would have to be assured by some good man that the title was all right. An abstract was to be furnished, and Hahl said that it was with L. B. Moody, who was a good, reliable man; that he could go to Moody, and he would tell him the facts. Plaintiff went to Moody, who told him that he had examined the abstract before, but would examine it again. He pronounced the title good, and told plaintiff the land was unincumbered except by taxes. Moody held the title to the land in trust for Hahl, and a deed was made out from Moody to plaintiff. It was getting late, and the deed was handed to plaintiff in a rather dark room. He could not read well, and asked Hahl to read the deed. He read it, but did not read anything about a mortgage. Plaintiff then handed the deed to Montague and asked him to read it, and Montague read it in the same way. The land was subject to a purchase money mortgage of \$2,117.50, and the deed was made subject to that mortgage. Whether the deed was misread, or the clause with reference to the incumbrance was inserted afterward, does not appear. Plaintiff gave his note for \$1,040, secured by trust deed, and executed a bond for \$2,000 to deliver the horses at his home.

It is contended that the evidence did not fairly tend to prove the cause of action, because it did not show that the plaintiff relied upon the false representations and was deceived by them. Such a proposition as that cannot be sustained. Plaintiff made the trade for unincumbered land, and depended upon the false representations of the defendants and Moody, the agent and trustee for Hahl.

It is also argued that the plaintiff could not recover until he had removed the incumbrance or his title had been swept away by it. We know of no authority for that proposition. Plaintiff suffered damages to the amount of the incumbrance if the land was sufficient security for it. The amount of the damages was fixed and determined, and the right of action accrued at once.

But it is said that plaintiff failed to show the value of the land, and that it was not more than the incumbrance; that it was necessary to prove the value of the land, because otherwise it could not be determined how much the damage was. Plaintiff attempted to prove the value of the land, but the defendants objected, and the objection was sustained. It would have been proper to prove the value, for the reason that the measure of damages is the amount of the incumbrance if less than the value of the land. 14 Am. & Eng. Ency. of Law (2d Ed.) 185. But appellant cannot be heard to object that a fact was not proved where the proof was prevented by his objection.

Appellant, Hahl, was responsible for the false and fraudulent representations made by Moody within the scope of his agency, and because he referred the plaintiff to Moody for information as to the state of the title. He was as much responsible for the falsehood and fraud as if he had been guilty of them personally. 14 Am. & Eng. Ency. of Law (2d Ed.) 156. The evidence also proved that he was directly guilty of fraud himself in either falsely reading the deed or making an addition to it afterward.

Appellee moves the court to award damages because the appeal was taken for delay, and that motion will be allowed. We cannot see how there could have been any hopes of obtaining a reversal of the judgment, and 10 per cent. on the amount of the judgment will be assessed as damages. The judgment of the Appellate Court is affirmed.

Judgment affirmed.

(213 Ill. 124)

PEOPLE, etc., ex rel. HANBERG, County Collector, v. STEARNS.

(Supreme Court of Illinois. Dec. 22, 1904.)

SIDEWALKS—ORDINANCE FOR CONSTRUCTION—PROVISION FOR PAYMENT.

1. An ordinance for construction of sidewalks on several disconnected streets, and providing that "the whole cost thereof be levied on the

lots * * * touching on the line of said sidewalk, in proportion to their frontage on said sidewalk," is void, as providing that each party shall pay a pro rata proportion of the cost of all the sidewalks according to his frontage on the streets where they are to be built.

Appeal from Cook County Court; O. N. Carter, Judge.

Application by the people, on the relation of John J. Hanberg, county collector of Cook county, for judgment of sale on a special sidewalk tax warrant. Judgment was refused, and the county collector appeals. Affirmed.

Enoch J. Price, for appellant. George A. Mason, for appellee.

RICKS, C. J. This is an appeal by the county collector from an order of the county court of Cook county refusing judgment of sale upon a special sidewalk tax warrant, known as "Warrant No. C1," of the village of Morgan Park.

Appellee filed 118 objections, the only one relied upon being: "(9a) Said improvement ordinance provides for a 'system' of sidewalks, and is therefore void." Under this objection counsel for objector offered in evidence the copy of the ordinance for the improvement, and, under stipulation, a map showing the portion of the village in which sidewalks are ordered by the ordinance in question.

The ordinance introduced in evidence states upon its face that it is under "An act to provide additional means for the construction of sidewalks in cities, towns and villages," approved April 15, 1875, in force July 1, 1875 (Acts 1875, p. 63), and names and describes nine different streets to be improved by the building of sidewalks, and the map introduced in evidence discloses that eight of the streets are disconnected, being in entirely different parts of the village, some of the streets being a mile or more apart. The ordinance provided for payment for the sidewalks as follows: "And that the whole cost thereof be levied on the lots or parcels of land touching upon the line of said sidewalk, in proportion to their frontage upon said sidewalk." No other construction could be placed upon this provision of the ordinance than that each party should pay a pro rata proportion of the cost of all the sidewalks provided for in the ordinance, according to his frontage upon the streets where the walks are to be built. The case of *People v. Latham*, 203 Ill. 9, 87 N. E. 403, holding a similar ordinance void, is conclusive in this case. No sufficient reason is shown for receding from our views therein expressed, nor is it necessary to extend this opinion to any greater length. For the reasons stated in the *Latham* Case, supra, the judgment of the county court will be affirmed.

Judgment affirmed.

(213 Ill. 332.)

DINGMAN et al. v. BEALL et al.

(Supreme Court of Illinois. Dec. 22, 1904.)

TRUSTS—CREATION—SALE BY TRUSTEE—BONDS—TIME—INADEQUACY OF PRICE—STATUTES—APPLICATION—ACTION TO VACATE—PLEADING—AMENDMENT.

1. Where testator bequeathed real estate to his executor in trust to sell the same and invest the proceeds for the benefit of certain cestuis que trust, a sale of such real estate should be construed as having been made by the executor in his capacity as trustee, and not as executor, though the clause of the will containing directions for the sale referred to testator's representative as "executor" instead of trustee.

2. Where a will appointing a trustee did not require the giving of a bond by the trustee as a prerequisite to his right to sell the property for the creation of a trust fund, the sale was not invalidated by failure to give a bond.

3. Hurd's Rev. St. 1903, c. 8, § 7, providing that all executors and administrators, unless exempted by will, shall give bond before entering on their duties, does not apply to a trustee administering a trust created by will.

4. Trust estates and trustees are subject only to the jurisdiction of a court of chancery, and county and probate courts have no jurisdiction.

5. Where certain land was devised to a trustee for the purpose of creating a special trust fund for the benefit of testator's wife and children, and the trustee was directed to sell at the best price reasonably attainable, he was not required to make such sale within any specific time.

6. Where a trustee under a will was not bound to sell land devised for the creation of a trust fund at any specific time, and there was no necessity for haste, a sale made by him at a time when he knew a contest of the will was pending, whereby the land sold for a grossly inadequate sum, constituted such misconduct on the trustee's part as authorized a vacation of the sale at the suit of the cestuis que trust.

7. Where, in an action to set aside a sale of land by a trustee, complainants applied to file a trial amendment alleging that on a certain 40 acres of the land a cemetery was maintained containing from 6 to 10 acres, and though at the time of the sale the trustee announced that the cemetery was reserved, yet in fraud of complainants' rights the trustee conveyed the cemetery tract to the purchaser of the other lands, and there was evidence supporting such allegations, such amendment was germane to the case made by the bill, and hence the court's refusal to allow the same was reversible error.

Error to Circuit Court, Macon County; Solon Philbrick, Judge.

Suit by Richard R. Dingman and others against Hillary Beall and others. From a decree dismissing the bill, plaintiffs bring error. Reversed.

C. C. Le Forgee, I. A. Buckingham, and Jack & Deck, for plaintiffs in error. Nelson & Whitley, Mills Bros., and Redmon & Hogan, for defendants in error.

RICKS, O. J. This is a bill filed in the circuit court of Macon county by a portion of the heirs of James Dingman, deceased, to set aside a certain sale, made by the executor or trustee appointed by the will of James Dingman, of certain real estate under the terms of the will.

James Dingman died testate on August 14, 1900, and at the time of his death left sur-

viving him his widow, 6 children, and 25 grandchildren, all of whom are parties to this suit, either as complainants or defendants. It appears from the evidence that at the time of his death he was the owner of about 1,000 acres of land. The will was dated June 16, 1897, and three codicils were afterwards made, one dated June 16, 1898, the second dated September 1, 1899, and the third November 23, 1899. By his will all of the real estate except about 320 acres was disposed of among his heirs. This 320 acres not specifically devised was placed in trust under the following conditions:

"Seventeenth—To the executor of this my will, hereinafter nominated, and to his properly appointed successor and successors in trust, I give and devise in fee simple all the lands not herein specifically devised of which I may die seized and possessed, in trust, nevertheless, for the uses and purposes hereinafter declared and set forth, and none other; and I hereby give and bequeath to said executor and his successors in trust all of my personal estate of every description not hereinbefore specifically bequeathed, in trust, nevertheless, for the uses and purposes hereinafter declared and set forth, and none other.

"Eighteenth—As soon after the probate of this will my said executor or his successor in trust shall in his discretion, from time to time, in parcels or as a whole at one time, sell the land devised in item 17 of this will upon best terms and for best price reasonably attainable, but not for less than one-third of purchase price to be paid in hand and the remainder on credit not exceeding five years, to be secured by note of purchaser and first mortgage on premises, with interest at six per cent per annum, payable annually, the whole to become due and payable upon default in payment of any interest. Such sale may be either public or private, in the discretion of said executor. Said executor is hereby fully empowered to make conveyance of said lands by deed or deeds, and may in his discretion postpone sale and lease said lands for a term not exceeding one year.

"Nineteenth—The funds, principal and interest, from sale of lands, and rents, if any, and personalty, shall constitute a common fund, which said executor shall keep at the best attainable rate of lawful interest, upon real estate first mortgage or invested in bonds of the cities and counties of the State of Illinois or of said State or the United States of America, however always selecting loan or investment at best rate of lawful interest on best available security. Said executor shall collect said interest annually, and upon collection annually divide said interest into eight parts, should my said wife at such time be in life, and pay one equal part to each my said wife and my said sons and daughters."

On September 13, 1900, William J. Law-

ton was by the county court of Macon county duly appointed executor of said will, and qualified as such, and executed a bond in the sum of \$12,000, as executor, conditioned for the faithful performance of his duties as such. No other bond was ever given by Lawton in connection with the estate. It appears that on the 28th day of March, 1901, the said William J. Lawton, after giving 30 days' notice, sold the land devised to him in trust, at public auction, to Hillary Beall and John F. Beall, who are also made defendants to this suit, they being the highest bidders, for the sum of \$7,400.

Three amendments to the bill were filed, the first one on February 19, 1903, and a second on October 27, 1903. A third amendment was made on December 11, 1903. The second amendment was demurred to, and the demurrer sustained. The cause was tried in January, 1904, and near the close of complainants' testimony they again asked leave to amend their bill, which was refused by the court. At the close of complainants' evidence the defendants demurred to the same. The court sustained the demurrer, and rendered a decree dismissing complainants' bill, and this writ of error is prosecuted from said decree dismissing the bill.

Numerous errors are alleged, part only of which have been argued by the respective parties.

The first alleged error argued by plaintiffs in error is that Lawton sold the land, under the provisions of the will, as executor, and, not having given a bond for the faithful performance of the sale, the same was void; and that even if the sale was made as trustee, unless an additional bond was given the sale was void, and therefore the demurrer should have been overruled.

We are of the opinion that this sale was made, as it should have been, by the trustee. While it is a question, sometimes, where the trustee is also the executor, when the title ceases to be in the executor as such, and title as trustee begins, yet where there is a separate and distinct part of the estate set apart in trust, as was done in this case, we see no good reason why the trustee could not act in the dual capacity of executor and trustee, holding the personality as executor, and the real estate devised to the trustee, and the proceeds of the sale of the same, in the capacity of trustee, the same as if two separate and distinct persons had been appointed. At common law, executors, as executors, had no estate in or power over the real estate of their testator, and, if an executor has any power, right, or interest in respect to the real estate, it must be by virtue of some statute or of the provisions of the will itself. *Gammon v. Gammon*, 153 Ill. 41, 38 N. E. 890. And, while the word "executor" is used in the clauses of the will where directions are made for the sale of the property, the directions, as given, were for the purpose of disposing of a trust estate separate from any

other part of the estate, the fee being willed to Lawton in trust, and it was his duty, as trustee, to take charge of the same upon the death of the testator and carry out the trust imposed upon him, independently of his duties as executor, and the acts of the trustee need not be void simply because another title is given him other than that of trustee. The sale, having been made by the trustee as provided for by the will, cannot be held to be void because no bond as trustee was given, as no bond was required by the will, and none is required by the statute.

We are of the opinion that section 7 of the statute on administration (chapter 3, Hurd's Rev. St. 1903) has no application, as this section only applies to administration of estates. And, further, county and probate courts have no jurisdiction over trust estates and trustees, they coming under the jurisdiction of a court of chancery, and for this reason it cannot be held the above section of the statute applies to trustees handling trust property.

But the testator, by his will, set aside the lands in controversy for the purpose of creating a special trust fund that should be held for the benefit of his wife and children during their lives, but which, by section 20 of the will, is directed ultimately to rest in his grandchildren. The direction to sell is for reinvestment in mortgage security or municipal bonds. The trustee is directed to sell at the best price reasonably attainable, and is not required to make the sale at any particular or stated time. He was authorized to sell in single tracts or en masse, and the direction as to time is as soon after the proof of the will as in his discretion is deemed proper, with power to lease the lands for a year, and a postponement of the sale, in his discretion, and to make the sale either public or private. Under these provisions the trustee is not limited to a specific time, nor is he required to make the sale within a year. Provisions, such as are contained in this will, as to the time of sale, are held to be directory only, and the sale and good title could be made after the lapse of one year. *Perry on Trusts*, § 490, p. 771; *Pierce v. Gardner*, 10 Hare, 287; *Smith v. Kinney*, 33 Tex. 283. As the purpose was reinvestment for the creation of what may be termed a permanent fund, there was nothing in the purpose or object of the sale calling for haste.

The trustee had been advised that the will under which he was acting would be contested, and also knew that the proposed contest was of public notoriety. Knowing, then, these matters, he must, as a reasonable man, be held to have known that such proposed contest, and the publicity thereof, would necessarily, or at least reasonably, depreciate the market value of the lands, whether sold at public or private sale, until such dispute or contest was terminated. The trustee also knew that any contest of the will

must be had within two years from its probate, and, as he was executor as well as trustee, his relation to the heirs of the testator was such, his information as to the proposed contest being derived from them directly, that he must also have reasonably known that the beginning of the contest would not be postponed until the expiration of the time allowed by statute to bring it, and the bill shows that the contest was in fact begun very shortly after the sale. It was the duty of the trustee to sell the land for the best price attainable, and it was his duty to not sell the land, when there was nothing calling for haste, at a time when he knew it would not bring what it was reasonably worth, but that its sale value would be affected by the threatened contest. Under such conditions he must have known that the land would only bring such a price as a buyer was willing to pay, taking into consideration the hazard of losing the benefit of his purchase as the result of the contest. It must be further borne in mind that, although Lawton advertised the land and received bids therefor at the time fixed by the advertisement, he was still under no obligation to make the sale. It was not a judgment sale, but was the sale of the trustee, and the fact that he made advertisement of the sale and proposed to make it public did not change its character or make it other than his sale as trustee, nor require him to accept what he knew to be an inadequate bid.

Upon the question of the inadequacy of price, the witnesses varied. The time of the sale was taken as the measure, and the trustee fixed the value at \$9,900, while most of the witnesses fixed the value at from \$10,500 to \$14,000, one witness placing it as high as \$16,090. The case was disposed of upon a demurrer to the evidence, and it was the duty of the court, in considering the demurrer, to take as true that evidence most favorable to complainants. If that be done, then the record shows the land did not sell for half its value. With such glaring inadequacy in the price, if the sale, for that reason alone, should not be held a fraud upon the cestuis que trust, it at least calls for great scrutiny upon the part of the court on the acts of the trustee in making the sale. Before the sale the trustee had been offered \$8,640 for the land, and the party who made the offer testified that he regarded the land then worth \$12,000. The witnesses who testified as to value were residents in the vicinity of the lands. It was the duty of the trustee to inform himself of the value of the property, and, if he had gone among these witnesses and made inquiry, it cannot be presumed that he would have failed to receive such information as would have prompted him to withdraw the property from sale when the bids made therefor were so disproportionate to its value. It has been

held a breach of trust to sell property at a disadvantageous time when there is no immediate necessity for such sale. Perry on Trusts, § 771, and authorities cited under note 5. Here there was no emergency. The time was manifestly disadvantageous, and the fact known to the trustee.

Before the close of the evidence for the complainants a motion was made upon their behalf to amend the bill. The proposed amendment alleged that on a certain 40 acres of land in controversy there was a cemetery, fenced, and containing from 6 to 10 acres; that about $2\frac{1}{2}$ acres of said cemetery tract had been deeded by the testator in his lifetime, and that the balance of said cemetery tract belonged to the testator at the time of his death; that at the time of the sale the trustee announced that the cemetery was reserved from the sale, and like announcement was made in the public announcement of the sale, and that the trustee, in fraud of the rights of complainants and other heirs, legatees, and devisees of the late testator, conveyed to the Bealls the said cemetery tract, in addition to the lands offered and sold to them. There was evidence in the record supporting these allegations. Defendants in error did not offer any evidence in the case, and, if the allegations of this proposed amendment were true, a fraud was perpetrated upon those interested in this land, which was a part of the trust estate. The subject-matter before the court was a controversy relating to a trust; which it is the special province of a court of equity to guard and enforce, and while it is true that the allowing of amendments must be, and is generally, largely committed to the discretion of the court, yet where it is apparent, as in the record before us, no injury can be done the opposing party by allowing the amendment, and where the matter proposed to be introduced by the amendment is of a material character and germane to the suit, the court will not be warranted in denying leave to amend simply because previous amendments have been allowed, and the action of the court in such case is open to review upon error. We think the amendment should have been allowed, and that, taking into consideration the disadvantageous time at which a sale was made, the inadequacy of the price, and the manifest wrong shown by the proposed amendment, which would all be considered together in the final determination of the case, the failure to allow the amendment was such an error as should work a reversal of the decree.

The decree will be reversed, and the cause remanded to the circuit court of Macon county with directions to allow the amendment to the bill offered, and for such further proceeding as to law and justice shall appertain.

Reversed and remanded, with directions.

(213 Ill. 70)

WENOM v. FOSSICK et al.

(Supreme Court of Illinois. Dec. 22, 1904.)

PLEADING—DEMURRER—JUDGMENT—FORM AND CHARACTER—ERROR.

1. Where a judgment overruling a demurrer, by which plaintiff elected to abide, only directed that defendant have judgment for costs, without reciting that plaintiff "take nothing by her writ, and that defendants go hence without day," or words of similar import, the judgment was interlocutory only, and insufficient to sustain a writ of error.

Error to Appellate Court, Fourth District.

Action by Lizzie Wenom against Henry Fossick and another. Judgment for defendants. A writ of error was dismissed by the Appellate Court, and plaintiff brings error. Affirmed.

B. H. Canby, for plaintiff in error. Burton & Wheeler, for defendant in error Henry Fossick.

SCOTT, J. On March 27, 1903, defendants in error recovered a judgment against plaintiff in error in the circuit court of Madison county for costs of suit. For the purpose of having that judgment reviewed, plaintiff in error sued out a writ of error from the Appellate Court for the Fourth District. That court dismissed the writ, assigning as a reason therefor that the judgment in question was not a final judgment, and the cause comes to this court upon a writ of error.

Lizzie Wenom, the plaintiff in error, brought suit against Henry Fossick and Julius Rosenberg, defendants in error, in trespass. Her declaration, which was filed on April 24, 1902, contained but one count, and charged defendants in error with having broken and entered her house. Each of the defendants filed a plea of the general issue, and such proceedings were had in the cause that on March 27, 1903, in addition to the pleas of the general issue, defendants had on file certain special pleas, which may be designated as Rosenberg's second amended plea, Fossick's second amended plea, Fossick's third special plea, and the joint and additional plea of both defendants. On that day the plaintiff interposed a general demurrer to all of these special pleas, which were the only special pleas on file. The court overruled this demurrer, the plaintiff elected to abide the demurrer, and the following judgment was entered:

"On this day come the parties by their attorneys, and the court hears argument of counsel on demurrer to two pleas as amended, and to additional pleas, and, being sufficiently advised, overrules said demurrer, and plaintiff by attorney excepts, and elects to stand by demurrer. It is therefore considered and ordered by the court that the defendants have judgment for and recover of and from the plaintiff their proper costs in this behalf expended, and have execution therefor. Plaintiff prays an appeal to the Appellate Court, Fourth District of the state

of Illinois, which is allowed upon her entering into bond in the sum of \$100 with security to be approved by the clerk of this court. Bond and bill of exceptions to be filed in thirty days."

It will be observed that this judgment did not dispose of either plea of the general issue, and did not in terms dispose of the rights of the parties. To make it a final judgment it should, according to the authorities, have contained a statement that "it is considered by the court that the plaintiff take nothing by her writ, and that the defendants go hence without day," or other words of similar import, disposing of the entire subject-matter of the litigation. Freeman on Judgments (2d Ed.) § 16; Black on Judgments, § 31; Scott v. Burton, 6 Tex. 322, 55 Am. Dec. 782; 11 Ency. of Pl. & Pr. p. 925; Dusing v. Nelson, 7 Colo. 184, 2 Pac. 922.

It may be conceded that when the defendant's plea goes to bar the action, if the plaintiff demurs to it, and the demurrer is determined in favor of the plea, and plaintiff abides the demurrer, final judgment should be entered in favor of the defendant, even if one or more issues of fact raised by other pleadings stand undetermined in the cause. Ward v. Stout, 32 Ill. 399. The question here is not whether final judgment should have been entered against the plaintiff, but was it so entered? We think, under the authority of Zimmerman v. Zimmerman, 15 Ill. 84, that a judgment which disposes of or finds all the issues in the cause in favor of the defendant, and awards the costs against plaintiff, may be regarded as a final judgment, even though not strictly in proper legal form; but here the two pleas of the general issue are not disposed of at all, and under such circumstances we do not consider a judgment for costs against the plaintiff as a final determination of the cause.

It follows, therefore, that the judgment of the circuit court set out above is interlocutory, and that the cause must be regarded as still pending in that court. The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

(212 Ill. 554)

DELAHOYDE v. PEOPLE.

(Supreme Court of Illinois. Dec. 22, 1904.)

RECEIVING STOLEN PROPERTY—EVIDENCE—INSTRUCTIONS—REQUEST TO CHARGE—APPEAL—RIGHT TO ALLEGE ERROR—OBJECTIONS—PREJUDICE.

1. Evidence held sufficient to sustain a conviction for receiving stolen property, knowing the same to have been stolen.

2. Where defendant was charged with receiving stolen goods during the continuance of a partnership of which he was a member, the exclusion of a bill showing a sale of goods to defendant by the alleged owner of the stolen goods after the firm had been dissolved was not error.

3. In a prosecution for receiving stolen goods, the refusal to permit defendant to show the at-

titude assumed by two of his partners when defendant made to them certain wrongful propositions, for the purpose of obtaining the goods, was harmless.

4. Where accused objected to a witness' answer as a conclusion, he was not entitled to complain on appeal that the question was objectionable as leading.

5. Where the answer of a witness was not directly responsive, and was not objected to, accused was not entitled to complain on appeal that it was hearsay.

6. Where accused testified to a certain entry in a book kept by a firm of which he was a member, and recognized a part of the writing as his own, and the witness, who produced a sheet taken from the book, testified that the entry on the sheet was in accused's handwriting, and that the name of a person contained in such entry was an alias to conceal the identity of the real person charged, the admission of such sheet was not error.

7. Where defendant was accused of receiving stolen goods, and it was established that he went to P.'s house and got a particular package of the goods, evidence of a witness that defendant "knew it was there" (referring to his knowledge that the package was at such house) was not objectionable as a conclusion.

8. Where the jury was charged in other instructions that it was necessary, in order to convict defendant of receiving and aiding in concealing stolen property, etc., that he should have received the property described in the indictment, or some part of it, the failure of other instructions to contain such requirement was immaterial.

9. Where accused was indicted under certain counts charging aiding and abetting embezzlement, and also for the receiving of stolen goods, an instruction that if defendant advised and encouraged R. to procure D. to steal or embezzle, as charged in the indictment, and D. did steal, as the result of R.'s so procuring, defendant was guilty, should be construed to apply to the embezzlement counts only, and was not therefore objectionable as authorizing a conviction for receiving stolen property without charging what was necessary for a conviction of such offense.

10. A reasonable doubt, which a jury may consider, as entitling accused to an acquittal, is a doubt which the jury entertains as to accused's guilt on the whole evidence, and not on any particular fact in the case.

11. Where an instruction charged that the jury must be satisfied of defendant's guilt beyond a reasonable doubt, in order to convict him, and another instruction charged that, if the jury believed defendant took no part in the crime charged, he should be acquitted, another instruction was not objectionable for failure to require the jury to be satisfied that defendant committed the crime charged in the indictment.

12. Where the jury had already been amply and fully instructed on reasonable doubt, a specific instruction was not objectionable for failure to require that the jury should be convinced beyond a reasonable doubt on all of the points necessary to be proved, in order to warrant a conviction.

13. In a prosecution for receiving stolen goods, the fact that the person who received the goods knew them to have been stolen may be proved by circumstances.

14. Where the fact that defendant received goods alleged to have been stolen was abundantly proved, and practically conceded by him, he was not harmed by the fact that one of the instructions erroneously assumed such fact.

15. It is not error for the court to refuse accused's instructions, the substance of which was contained in other instructions given.

Error to Criminal Court, Cook County; Axel Chytraus, Judge.

Ernest M. Delahoyde was convicted of receiving stolen property, knowing the same to have been stolen, and he brings error. Affirmed.

Blake & Feely, for plaintiff in error. H. J. Hamlin, Atty. Gen., Charles S. Deneen, State's Atty., and Frederick L. Fake, Jr., Asst. State's Atty., for the People.

RICKS, C. J. On October 21, 1903, the grand jury of Cook county returned an indictment in 10 counts against Ernest M. Delahoyde, the plaintiff in error, and Edward Dipple and Blaine Roth. The first eight counts of the indictment charge the defendants with larceny and embezzlement, and with aiding, abetting, and assisting in the commission of said crime. The ninth count charges the same defendants with the larceny of certain goods. The tenth count charges that the said defendants did buy, receive, and aid in concealing certain property therein specifically enumerated, of Rogers, Thurman & Co., knowing the said goods to have been feloniously stolen, etc. At the November term of the criminal court of Cook county the plaintiff in error was tried; the chief witnesses against him being his codefendants, Dipple and Roth. The jury found the plaintiff in error guilty of receiving stolen property knowing the same to have been stolen, in manner and form as charged in the indictment, and fixing the value of the property so stolen and received at the sum of \$100. The plaintiff in error successively asked and was refused an instruction directing the jury to find him not guilty, a motion for a new trial and arrest of judgment, and was at the conclusion sentenced to the Illinois State Reformatory at Pontiac; and, on a refusal of the court to set aside said sentence, the plaintiff in error sued out this writ of error.

Fifty-five assignments of error are made, but those chiefly relied upon are the insufficiency of the testimony to sustain the verdict, the reception and exclusion of testimony, and the giving and refusal of instructions.

A brief summary of the facts necessary to a consideration of this case is as follows: In the summer of 1903 the corporation of Rogers, Thurman & Co. was engaged in the wholesale jewelry business in Chicago; Charles F. Elmore being the manager of the firm. Up to October, 1903, Edward Dipple was employed by the firm as an office boy. During the same summer Mrs. Sarah Paul and her daughter, Hattie Paul, resided at 2330 State street. Hattie Paul had a brother by the name of William, or, as he was called, Willie. About the latter part of April, 1903, the plaintiff in error, E. H. Miller, and Blaine Roth formed a copartnership under the name of Delahoyde, Miller

¶ 13. See Receiving Stolen Goods, vol. 42, Cent. Dig. § 13.

& Roth, for the purpose of manufacturing and selling jewelry and engraving and selling glassware. In their business they traveled from place to place, vending their wares. The partnership continued until about the 4th of July, 1903, when it was dissolved, the venture having proved unsuccessful, and the plaintiff in error continued in the glass engraving business for himself. It is said by Elmore, manager for Rogers, Thurman & Co., that during the summer of 1903 he missed large quantities of goods, amounting in all to nearly \$300. In September, 1903, he received a letter from plaintiff in error casting suspicion upon Miller and Roth, the former partners of the plaintiff in error. Several letters were exchanged between Elmore and the plaintiff in error, and as a result Elmore had an interview with Edward Dipple, one of the parties indicted with plaintiff in error, in which conversation Dipple admitted having taken the goods that had been missed; stating that Roth and Delahoyde had told him to take the goods and give them to them. After this conversation Dipple was arrested, and an officer was sent for Roth, who was at Danville. After an interview with Roth, an officer was dispatched to Terre Haute, Ind., for Delahoyde, the plaintiff in error. After the arrest of Roth a portion of the goods that had been missed were recovered. Delahoyde, the plaintiff in error, is said to have been a man about 30 years of age, and whose career had been somewhat varied. For a number of years he had worked as a wire artist and glass engraver, and had been purchasing goods of Rogers, Thurman & Co. Blaine Roth, a codefendant, was about 19 years of age, and for 6 years had been in the employ of Rogers, Thurman & Co.; starting as an office boy, and being advanced to the position of confidential clerk. Edward Dipple, the other codefendant, was about 17 years old, and worked as office boy for Rogers, Thurman & Co.; his position with that firm having been procured by Roth. E. H. Miller was about 31 years of age, and had been a dentist, but, on account of failing eyesight, had to give up that profession. He and Roth were planning to embark in the wire business, when plaintiff in error, who had been introduced to Miller by Roth, suggested that he be taken into the venture, as he had experience on the road, and urged that he be taken into the proposed partnership as a glass engraver, and that the proceeds of the partnership be divided equally among the three. The conclusion of the matter was the formation of the partnership between the three; Miller advancing the capital invested, being about \$400.

Miller testified: That before going out on the road they purchased from Rogers, Thurman & Co. about \$125 worth of goods. That about the 10th of April they had a conversation at Roth's house relative to getting other

goods than what they had already received. That Delahoyde asked Roth how much stuff they had. That Roth showed him, stating it was goods left over out of material Elmore had given him to bring home to work up, and Delahoyde stated: "You are a damn fool. If I had been working there as long as you have, I would have as much stuff in this house as Elmore has down in his store." That witness stated that they wanted more stuff, and Delahoyde said, "What is the use of buying all this stuff when we can get it in an easier way?" and, on being asked how, he replied, "Well, we can get somebody down at Elmore's to get it for us." That witness replied that that would not be right; that they had better pay for what they got. Miller further stated that he was the only one that put any money into the business. That Delahoyde further said: "We can get Eddie. Eddie works down there, and it is easy for him to get out stuff, and he can carry all the stuff we want. There is no need of us buying all that stuff. We better put the money into glass. There is more money in glassware than there is in jewelry." He further stated that the "Eddie" referred to was Edward Dipple. Miller further stated that they had another conversation the next day, or the day following, at Roth's house, and Delahoyde said: "There is no use in going down and paying out any more money. There is no need in getting beat of our money if we can get it in an easier way. I know Eddie will get it. We will pay Eddie for getting it, and he will get anything we want. We have got enough of stuff now." Miller said that he and Roth were both opposed to getting the stuff in that way. That Roth said: "No; it is not right to get it that way. Mr. Elmore has always treated me right, and I don't want to do anything like that." Miller further said that he was never present at Rogers, Thurman & Co.'s when any goods were got that were not paid for. That goods were received while they were on the road. That they got a parcel at Quincy, but that he thought it came in Roth's name. That they also got a package at Springfield. That one time Delahoyde got a package, saying he got it at Mrs. Paul's house.

Edward Dipple testified that he had a conversation with Roth and Delahoyde about three days before they started on the road, in the latter part of April or the first of May. He said: "I talked with Blaine Roth. Delahoyde was standing about five or six feet away, within the sound of my voice. Blaine asked me to get some shells. He said: 'Will you get us some shells—some stuff—and we will pay you for them? Will you get us some shells out of the store? We will pay you for them.' He did not mention what articles. I said, 'All right.' Up to that time I had not stolen anything from Rogers, Thurman & Co." On being asked what, if anything, he took and gave to either Delahoyde,

Blaine Roth, Hattie Paul, or her brother, he said: "The first package was about the beginning of May"—and describing, in a general way, what was in the package. "I took about four packages altogether. This first package was taken about the first of May, and the second about a week. I was going home, and met Hattie's brother, and gave it to him, and told him to take it up in the house. I didn't tell Elmore or anybody else about taking the stuff. That is the stuff I stole. I had no arrangement with Blaine, Roth, and Delahoyde as to what I was to get out of that stuff that was taken." On being asked what they told him to do with what he got, he said: "They told me to bring it up to Paul's house." Witness further said: "I gave this first lot of stuff that I took to Hattie Paul's brother, Will, and he brought it to the house. I took the next lot about the third week in May [describing what it contained]. The third package was about the middle of June [describing its contents]. The fourth time I took anything from Rogers, Thurman & Co. was about the latter part of June [describing the contents of the package]." And continuing, he said: "I didn't have any arrangement with Blaine Roth or Delahoyde in reference to the money I should receive for these. I received in all about \$12 or \$15 from them for these at different times. I received it from Hattie, I think, or Blaine. I think it came through the mail to Hattie, and she gave it to me."

Hattie Paul testified: "I seen the contents of one of the packages that my brother got. It was a lot of shells and a little wire; some little packages and some other kinds of shells and some gold stones. I received four packages in that way at four different times. I received the first one the last part of May; the second in June some time; the third I got in June again; and the fourth, that was in July. That is all of them. I gave Delahoyde one. I conversed with Delahoyde when he came in. He said they would not let Blaine come. I asked him what he came for. * * * He said he came to get a package, and I said, did Blaine send him? and he said 'Yes.'" She further testified that the other packages she received she sent to Blaine Roth by express.

Blaine Roth testified: "I had a conversation with Delahoyde about stealing goods before I left Rogers, Thurman & Co.'s employ. He used to come in the store every week to buy goods, and he asked me if there was any way I could get him goods out of the store. I said 'No.' I was working there at the time, and never thought of such a thing. He said: 'There is a chance for you to make quite a bunch of money. I will take all you get, and get rid of them. If you get the goods, I will see that I get rid of them, and you will make a bunch of money out of it.' I said 'No.' I never stole any of their property during the time I was in the employ of Rogers, Thurman & Co. I had

a talk with Delahoyde nearly every day from about the 25th to the 28th of April of this year with reference to getting goods. He said, 'There is a boy working down at Rogers, Thurman & Co. that you can approach and get goods out of there.' He says: 'Now, you know him. You got him the job. You go down and speak to him, and tell him we can use all the goods he gets, and we will pay him for what he gets.' I did not want to do it for about a week, and then he kept at me so much I gave in, and went down and told the boy. I went with Ernest Delahoyde. The boy I mean was Eddie Dipple. When I was talking with Dipple, Delahoyde was within six feet of me; just exactly six feet—the length of a show-case. I told Eddie: 'If you can get any goods out of here, Eddie, we can use them. We are going on the road, and use all the goods you get. If you get them, we will pay you for them.' Eddie says: 'I can get the goods out.' After that I says: 'If you get the goods, you take them to Miss Paul's house and leave them in a bundle, and I will send for them, and nobody will know what they are,' which he did. After that I had a talk with Delahoyde about the talk I had with Eddie. I told him what I said. Delahoyde was within hearing of this conversation, if he wanted to hear. After I left Rogers, Thurman & Co. that morning, I told him I spoke to him, and he says: 'I heard you talking.' He says: 'That is all right. We can use anything he gets out of there.' I received property after that. The first package I received was at Quincy, Illinois. The first one was the last part of May, received at Quincy, Illinois. I received about four packages altogether. * * * The second package was brought to me by Ernest Delahoyde on the 15th day of June, and was received at Springfield, Illinois. When he brought it to me he says: 'I called at Hattie's house and got the package. It was out there for us.' * * * After he came back with the package he said, 'This is the biggest package we have gotten so far.' * * * We dissolved partnership one week after the 4th of July, or a month at the outside. Delahoyde said he didn't see any way to make any money, the way he was going along there, and thought best to dissolve. We received the last package after we dissolved partnership, and the other three before we dissolved partnership. * * * The money paid to Edward Dipple amounted in the book to \$12. We kept a list of all expenses. Delahoyde paid the most of it. I didn't pay a cent, because I didn't have any."

We deem it unnecessary to go into further detail in regard to this testimony. We have carefully examined the record before us, and it is replete with evidence which we think, to the unprejudiced mind, conclusively shows plaintiff in error to have been guilty of the crime charged in the tenth count of the indictment, on which he was convicted. We are unable to adopt the con-

tention of counsel for plaintiff in error that the evidence does not sufficiently show that plaintiff in error received the goods actually taken from Rogers, Thurman & Co. To our minds, the evidence conclusively shows that plaintiff in error was the instigator of a scheme to steal property from Rogers, Thurman & Co.; that Edward Dipple was induced to take property from said firm; that the identical packages of goods taken by Dipple were delivered to Hattie Paul or her brother; that at least one of these packages was delivered to plaintiff in error in person, and others were received by him through the agency of Roth and the express company. The evidence is also ample to support the jury's finding as to the value of the property. We think the evidence in this case brings it well within the rule laid down by the cases invoked by the counsel for plaintiff in error to support their contention that, in order to sustain a conviction in cases of this character, it is necessary to prove that the property described in the indictment has in fact been stolen, that the accused received it with such knowledge, and that the jury must find the value of the property so stolen.

Counsel for plaintiff in error contend that the court improperly refused admission in evidence of a certain bill purporting to show the sale of goods to plaintiff in error in September, 1903, on the ground that it was not cross-examination. This was after the dissolution of the partnership between Miller, Roth, and Delahoyde—after the goods testified to as having been stolen were taken. Besides, it was nowhere contended that plaintiff in error had any of the stolen goods at the time of his arrest or afterwards. So the testimony offered could have no bearing upon the issue being tried, and its exclusion was proper.

Counsel for plaintiff in error next contend that there was error in the court's refusal to permit them to elicit from the witness Miller, in their cross-examination of him, all of certain conversations had with plaintiff in error about which the witness testified. All that the matter sought to have been brought out tended to show was the attitude assumed by Miller and Roth when the wrongful propositions of plaintiff in error were made to them. We do not see how the matters sought could have any bearing upon the defendant's guilt, and think he was not prejudiced by the action of the court.

It is also objected that Hattie Paul was allowed to state that her brother got the packages she received from him from Eddie Dipple, and that she further testified that her brother said he got the packages from Edward Dipple. It is contended that the first answer was a conclusion, as the witness had no personal knowledge of the fact testified about, and that the second was the giving of hearsay testimony. On this point the record is as follows: "Q. And those packages he got

from Eddie Dipple? A. Yes, sir. (Objected to by counsel for the plaintiff in error.) Counsel for the People: If you know—do you know? (Objected to by counsel for the plaintiff in error. Objection overruled.) Counsel for the People: Do you know where your brother got them from? A. He said he got them from Eddie Dipple." To this last answer no objection appears. It will thus be seen that the criticism of counsel for plaintiff in error is untenable. The first question was leading, but it is not objected to on that ground; and, even if it were, the error is only slight. The contention as to the second question cannot now be insisted upon, since the answer of the witness was not directly responsive, and was not objected to.

It is next objected that a certain exhibit was wrongfully admitted in evidence. The exhibit referred to was what was claimed to be a sheet from the original account book kept by the firm of which plaintiff in error was a member, and the particular item was: "Sent to Chicago, to Harry, \$1.50." The criticism made is that the proper proof as to the book account was not made. Plaintiff in error, however, afterwards testified to the same entry, and recognized at least a part of the writing as being his own. The witness who produced the sheet containing the item testified about stated that the money paid to Edward Dipple "amounted in the book to \$12"; that they kept a list of all expenses; that the slip produced was a part of the book; that the plaintiff in error kept the book; that the entry was in his handwriting, and that he could find no more of the book; that the name "Harry" referred to Edward Dipple; that the name "Harry" was used so it would not be known who was meant. We think, under the circumstances shown, the admission of this sheet was not improper.

It is further insisted that it was error for the witness Roth to testify that "he knew it was there"—referring to Delahoyde's knowledge of the package which he went to Hattie Paul's house for, in Chicago—it being insisted that this was but the expression of a conclusion. It is established that Delahoyde did go to Hattie Paul's house and get this package. So we cannot say that the assertion of the witness Roth was merely a conclusion.

Some other objections are urged as to the admission of certain evidence, but we regard them as of minor importance, and take the view that no harmful errors were committed in such admissions.

Objection is next made as to the giving and refusal of certain instructions, the first objection being the refusal to direct the jury to find the defendant not guilty. This assignment needs no further consideration, as we have already expressed the opinion that the record is sufficient to support the conviction.

The second instruction given for the people is objected to, and it is claimed "that it should have told the jury that it was necessary, in order to convict Delahoyde under the

tenth count, that he should have received the property, or some part of it, described in the indictment." The jury were told this in other instructions, and we think they could not have been misled by not having it also included in this instruction.

It is complained that instruction 4 given for the people "leaves the jury free to convict Delahoyde under the tenth count of the indictment, but it does not tell the jury what is necessary for conviction under that count." As we read this instruction, it is plain that it could not be construed as in any way applying to the tenth count of the indictment; and it did inform the jury what was necessary in order for them to find defendant guilty under the embezzlement counts, charging aiding and abetting, to which it did apply. In this instruction the jury are told: "If you believe, beyond a reasonable doubt, that the defendant Ernest M. Delahoyde advised or encouraged Blaine Roth to procure Eddie Dipple to steal or embezzle in manner and form as charged in the indictment, and that Eddie Dipple did steal as a result of Roth's so procuring, then in such case you should find defendant Ernest M. Delahoyde guilty."

Of the twelfth instruction given for the people, it is said: "The jury are told that the reasonable doubt, under the influence of which they should acquit, must be as to the guilt of the accused on the whole evidence, whereas they should have been told that, if they have a reasonable doubt as to the proof on any material point in the case, then it would be the duty of the jury to acquit the defendant." This criticism is not supported by the rule heretofore laid down by this court. This court has held in a number of cases that the reasonable doubt the jury is permitted to entertain must be in regard to the guilt of the accused on the whole evidence, and not on any particular fact in the case. *Mullins v. People*, 110 Ill. 42; *Davis v. People*, 114 Ill. 88, 29 N. E. 192.

Instruction 15 given for the people is objected to by the plaintiff in error because it does not tell the jury that they must be satisfied that defendant committed the crime charged in the indictment. The instruction does tell the jury that they must be satisfied of the guilt of the defendant beyond a reasonable doubt, in order to convict him; and, in instruction 5 given for the defendant, the jury were told that, if they believed from the evidence that the defendant took no part in the crime charged in the indictment, he should be acquitted. This instruction is also objected to upon the ground that it does not tell the jury that, in order to find a conviction, it is necessary that the circumstances be such as to so convince the jury that they would have no reasonable doubt upon any of the points necessary to be proved. Upon the question of reasonable doubt the jury were amply and fully instructed in numerous instructions given both for the people and the

defendant, and what has already been said as to instruction 12 might be reiterated here as to the objection urged.

Objection is also made to instruction 16 given for the people. We have examined that instruction, and think it was not improper. The first objection made to this instruction is that it told the jury that, in order to convict one of receiving stolen goods, the fact that the person who received the stolen goods knew the same to have been stolen might be proved by circumstances. This court has held this to be the law in *Huggins v. People*, 135 Ill. 243, 25 N. E. 1002, 25 Am. St. Rep. 357, and the instruction was not erroneous in this regard. It is next objected to this instruction that it assumes plaintiff in error to have received the goods in question. This criticism is perhaps true, but, under the proof, it could do no harm to plaintiff in error, for the reception of the goods by him, in our judgment, was abundantly proven, and, we think, practically conceded by plaintiff in error.

As to the complaint made because of the refusal of certain instructions offered by the plaintiff in error, we think it is without merit, as the substance of those instructions was contained in others given.

Upon a review of the whole record, we are satisfied that no such error has intervened as would warrant a reversal. The judgment of the criminal court of Cook county is affirmed. Judgment affirmed.

(213 Ill. 307.)

ILLINOIS CENT. R. CO. v. SWIFT.

(Supreme Court of Illinois. Dec. 22, 1904.)

MASTER AND SERVANT—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—RES IPSA LOQUITUR—ACTIONS—LIMITATIONS—PLEAS—DE—MURDER—PEREMPTORY INSTRUCTION—DENIAL—WAIVER.

1. Where defendant excepted to the denial of a motion for a peremptory instruction, the ruling was not waived by his subsequently requested instructions, which in effect conceded that there was evidence tending to establish plaintiff's case on the issues presented.

2. Where a servant was given a general order to perform certain work, and left to his own discretion as to the method, and it appeared that the work could have been done in a safe way, the master was not liable for injuries to the servant caused by his selection of an unsafe way of doing the work, either through heedlessness, or because it involved less exertion.

3. In an action for injuries to a servant by the falling of a pile driver while he was removing a piece of tackle and pulley therefrom, evidence held insufficient to show that plaintiff was in the exercise of due care at the time of the injury.

4. Plaintiff was directed by his foreman to go to a pile driver and detach certain tackle from the top thereof. The guy ropes holding the pile driver in an upright position at the time plaintiff approached it were sufficient, but he removed one-half of such ropes, after which he climbed up the pile driver, which was then in a leaning position; and while he was on the same it fell, and plaintiff was injured. Held, that since the accident did not result from the condition of the pile driver, in which defend-

¶ 2. See *Master and Servant*, vol. 24, Cent. Dig. §§ 632, 702, 745.

ant placed and left it, plaintiff could not recover under the doctrine of *res ipsa loquitur*.

5. It was not error for the trial court to sustain a demurrer to a plea of limitations filed to all of certain additional counts in a declaration, where it did not present a defense as to all of such counts.

Appeal from Appellate Court, First District.

Action by James F. Swift against the Illinois Central Railroad Company. From a judgment in favor of plaintiff, affirmed by the Appellate Court, defendant appeals. Reversed.

This was an action on the case, brought in the circuit court of Cook county on September 25, 1897, by James F. Swift, the appellee, against the Illinois Central Railroad Company, appellant, to recover damages for a personal injury received by appellee on November 10, 1896, on account of the falling of a pile driver through the alleged negligence of appellant. On January 7, 1898, a declaration consisting of one count was filed, in which it was alleged that on November 10, 1896, the plaintiff was in the employ of the defendant, engaged in repairing a bridge across the Illinois river at La Salle, Ill.; that near the bridge was a pile driver, upon and fastened to a boat or float; that on the day aforesaid plaintiff's foreman ordered plaintiff to go down to the pile driver, climb to the top thereof, and bring to said foreman a piece of tackle and pulley which was fastened to the top of the pile driver; that the defendant carelessly and negligently caused the pile driver and float to be so arranged and constructed that when the plaintiff, with due care, ascended to the top of the pile driver to remove the tackle, the fastenings which bound the pile driver to the float gave way, and the pile driver fell and precipitated the plaintiff into the river, whereby he was injured. Appellant filed the general issue to this declaration. Afterwards, on June 27, 1901, the plaintiff filed seven additional counts to his declaration. The first of these counts charged the negligence of the defendant to have consisted in not having the pile driver secured or fastened to the boat or float; the second and third, negligence in permitting the pile driver to be insufficiently and improperly secured and fastened to the float; the fourth, negligence in failing to prevent plaintiff from going upon or ascending the pile driver; the fifth and sixth, the same negligence as the original declaration; and the seventh, negligence in permitting the pile driver to become and remain unsafe and insecure. On June 28, 1901, the defendant filed the general issue to the additional counts, and on September 27, 1902, filed a plea of the statute of limitations to all the additional counts. A demurrer was interposed to the last-mentioned plea, and was sustained. A trial was had before a jury, and a verdict was returned for \$20,000 damages, upon which judgment was rendered, and an appeal was taken to the Appellate Court for

the First District. The Appellate Court affirmed the judgment of the circuit court, and the railroad company appealed to this court.

The facts, as shown by the evidence, are substantially as follows:

On November 10, 1896, while working for the defendant on a bridge crossing the Illinois river near La Salle, plaintiff, who was employed as a bridge carpenter, was directed by the superintendent in control of the workmen to go with a fellow workman, named Morpew, to a scow or flatboat, near the north bank of the river, and about 150 feet east of the bridge. The superintendent's order, according to Swift's testimony, was in these words: "I want you to go down to the river and get a pair of sheave blocks that hang on the top of the pile driver that sits on the barge." The scow or barge was standing in the water, and extended lengthwise in an easterly and westerly direction. The pile driver stood on the east end of the scow. Formerly an engine used to operate the pile driver had occupied the west end, but it had been removed some time prior to the date of the injury. The west end of the scow rested on the bank of the river, while the east end was in deeper water, and the scow and pile driver were inclined to the east.

The pile driver consisted of two large upright timbers, 36 feet in length, resting in the east ends of two timbers known as "bed sills," and at right angles with said bed sills. Two other timbers extended from the top of the upright timbers diagonally down to the other ends of the bed sills—the bed sills being 12 feet long—constituting a support for the upright timbers. A ladder leading from the scow to the top of the pile driver was constructed on the diagonal timbers. The eastern extremity of the bed sills extended to the eastern edge of the scow, and the upright timbers extended directly up from this eastern edge. The pile driver weighed about 5,000 pounds, was 36 feet high, and not more than 12 feet across at the base from east to west. The timbers of the base were fastened to the scow by drift bolts and strips of iron to keep the base from shifting its position. Two sets of ropes and sheave blocks, referred to by the witnesses as "falls," had been installed to prevent the pile driver from tipping and falling over. As the pile driver stood on the scow prior to the time of the injury, the falls extended from either side of the pile driver at the top down to ropes attached to posts or timber heads on the scow west of the pile driver. Each set consisted of two sheave blocks and the necessary rope to form four strands when in position on the pile driver, and a hauling line by means of which the strands could be loosened or tightened, and the distance between the sheave blocks increased or diminished. One sheave block of each set of falls was fastened or hooked to the top of the pile driver, and the other to a rope,

referred to as a pennant line, which was fastened to the timber head or post on the scow west of the pile driver. The hauling line was fastened to the bed sill of the pile driver. In order to unfasten the sheave block from the top of the pile driver or from the pennant line, it was necessary to first release the hauling line from the bed sill, whereby the ropes of the falls would become slack.

Upon reaching the scow the plaintiff immediately started up the ladder of the pile driver, without having had any conversation with Morpew concerning the work to be done by either in taking down the sheave blocks. While plaintiff was ascending the ladder, Morpew unfastened the hauling line of the south set of falls. Plaintiff, upon reaching the top of the pile driver, unfastened the sheave block of that set of falls, and Morpew, standing on the scow, detached the sheave block of the same set from the pennant line which connected it with the timber head. Plaintiff brought the sheave block removed by him down the ladder to the scow, and he and Morpew, by pulling on the ropes, brought the two sheave blocks removed by them together, and Morpew carried them from the scow to the land, and proceeded to prepare a guy line to replace the falls which had just been removed, while plaintiff again ascended the ladder to remove the other sheave block which was attached to the pile driver. A strong wind was blowing and the scow was rocking at this time. When Swift reached the top of the pile driver, and while attempting to detach the sheave block from its fastening, the pile driver tipped and fell over to the east into the river, carrying the plaintiff with it, and he received the injuries complained of.

After the injury it was found that the hauling line of the north or remaining set of falls had been unfastened from the bed sill, or that the line had broken, and this had allowed the rope to run back through the sheave block, and had prevented the falls from holding the pile driver. Plaintiff and Morpew were the only persons on the scow, and both denied having released the hauling line from the bed sill. The testimony of appellee indicates that the line broke, thus permitting the fall of the pile driver. After removing the first set of falls, no lines, ropes, or other supports were fastened to the pile driver to take its place. The bolts fastening the pile driver to the scow pulled out of the timbers of the scow when the pile driver fell into the river.

Plaintiff had never worked on the pile driver in question, had never seen it in operation, and had not been on the scow prior to the time he was injured; nor had he received any information concerning the pile driver or its fastenings, other than what he observed on this occasion. He had seen pile drivers before, and had worked around

them. Prior to this time he had worked for the Wabash Railroad for a period of eight months, during all of which time the train which he accompanied had a pile driver attached to one of its cars. He had also worked about pile drivers for the Rock Island Railroad, and a few weeks previous to the time he was injured had worked for the defendant at another place where a pile driver was being used.

At the close of plaintiff's evidence in chief, and again at the close of all the evidence in the case, the defendant moved the court to instruct the jury to find the issues for defendant, which motion in each instance was accompanied by a peremptory instruction in writing. The court refused each instruction, and its action in so refusing the peremptory instruction at the close of all the evidence is assigned as error. The action of the trial court in sustaining the demurrer to defendant's plea of the statute of limitations is also assigned as error.

W. A. Howett (J. G. Drennan, of counsel), for appellant. Francis W. Walker and Albert G. Welch, for appellee.

SCOTT, J. (after stating the facts). Appellant duly excepted to the action of the court in overruling its motion made at the close of all the evidence for a peremptory instruction directing the jury to find for the defendant, and now seeks to present to this court the question whether there is in this record any evidence which, with the inferences reasonably to be drawn therefrom, is sufficient to warrant a verdict for the plaintiff. Appellee urges that this question is not now open for consideration upon this record. His position in that regard, and the views of the Appellate Court for the First District upon that subject, are concisely stated in the following language from the opinion of that court in this cause: "At the request of the appellant's counsel the court gave nineteen instructions, which, in differing language, submitted as questions of fact to be determined by the jury every contested issue in the case, including the assumption of risk, contributory negligence of appellee, and the negligence of appellant. This being the state of the record, appellant cannot now be heard to say that there was error in submitting the cause to the jury on either of these questions. The instructions referred to conceded, in effect, that there was evidence tending to establish the plaintiff's case on these issues, and appellant is precluded from asserting the contrary in this court." This view of the law is incorrect. The motion for a peremptory instruction presents a pure question of law, and in the event of an adverse ruling an exception preserves that question of law for the consideration of an appellate tribunal. After that adverse decision the defendant may argue to the jury that its guilt is not shown by a preponderance of the evidence, which is purely a ques-

tion of fact; and the submission of that question of fact to the jury by instructions offered by the defendant does not waive the question of law already passed upon by the court, where the defendant's rights have been properly preserved. This has been the universal practice in this state for many years, and will not now be disturbed. The language used by this court in each of the cases of *Consolidated Coal Co. v. Haenni*, 146 Ill. 614, 35 N. E. 162, and *Chicago Terminal Railroad Co. v. Schmelling*, 197 Ill. 619, 64 N. E. 714, in so far as inconsistent with the views herein expressed, was not necessary to the disposition of the question then before the court.

In support of this motion it is urged that the evidence fails to show that plaintiff was in the exercise of due care. A careful examination of the proof leads us to the conclusion that it lacks in this respect. Considering only the evidence favorable to appellee, it appears that the pile driver, 36 feet in height, stood upon the east end of the scow, which was depressed by the weight, and that depression caused the structure to lean to the east. It did not fall eastward prior to the time appellee first climbed thereon, for the reason that it was guyed by ropes passing through the sheave blocks near the top of the pile driver, and attached to posts or timber heads on the scow west of the pile driver. It appears from the testimony of appellee that his knowledge of pile drivers was such that, had this pile driver been standing on the ground, he would have known that guy lines were necessary to keep it in an upright position, but that he supposed, as it stood upon the scow, they might not be necessary. No reasonable ground for such supposition is shown. The pile driver was in fact not otherwise secured, except by bolts and plates designed exclusively to keep it from working back and forth, or from side to side, while in use on the scow. Under these circumstances, without attaching other lines to keep the pile driver from falling, the appellee detached one of the sheave blocks, and with it the lines on that side of the pile driver, and says: "I discovered when I went up to unhook the first block that the waves and water caused the barge to rock around some; the driver being pretty high up made it wave around"—and then, having taken away one-half the lines which kept it in an erect position, he remounted the leaning pile driver and attempted to detach the sheave block carrying the remaining lines, and, while so engaged, observed what he says was the end of a broken rope passing through the sheave block, found the pile driver falling to the east, and his injury followed consequent upon the fall. Any person of intelligence, accustomed to working about pile drivers, would know that this one, already leaning to the east and rocked by the winds and waves, would be liable to topple over unless supported by lines or braces. The falls consisted of four lines on each side, passing

from sheave blocks at the top of the structure to posts on the scow west of the west end of the bed sills. These lines were plainly visible. It would seem they could not be overlooked, and the most casual observation would show that they were necessary to the support of the pile driver. Appellant had the right to assume that appellee, a man of mature years, was possessed of ordinary mental faculties, the usual powers of observation, and such knowledge as is acquired by common experience. *Ruchinsky v. French*, 168 Mass. 68, 46 N. E. 417. Such a man, exercising his senses, in broad daylight, in the situation in which appellee was, with his familiarity with pile drivers, would perceive that this particular pile driver was in danger of falling if the lines were removed. Failure to discover so obvious a danger could result only from negligence.

In support of the action of the trial court in refusing to direct a verdict for the defendant, it is urged by appellee, in the language of this court in *Illinois Steel Co. v. Schymanowski*, 162 Ill. 447, 44 N. E. 876, "The master is liable where the servant is injured by a temporary peril to which he is exposed by the positive negligent act of the employer, without any negligence on the part of the servant;" and it is stated that recovery is sought on the principle that the master must not expose the servant to danger. The place in which, and the appliances with which, appellee was directed to perform the service in question, were not dangerous. The danger was created by the manner in which the servant performed the task. Here the superintendent was not present when the work was done. The command was given at a considerable distance—at least 150 feet—from the place where the duty was to be performed; and the servant was at liberty, when he reached the scow, to go about the performance of the task in the manner that seemed to him best. Ropes were lying upon the scow which could have been used to secure the pile driver before either sheave block was removed. In fact, it appears that appellee's fellow workman, to whose attention the danger was not called as sharply as it should have been to that of appellee, for the reason that the duty of ascending the pile driver devolved upon the latter, contemplated attaching a guy line to the pile driver before an attempt was made to remove the last sheave block.

Where the servant is specifically directed by his superior to do the work in a dangerous manner, and injury results, he may recover, unless, indeed, the danger was so imminent that a reasonably prudent man would not have incurred it. *Illinois Steel Co. v. Schymanowski*, supra; *Chicago Anderson Pressed Brick Co. v. Sobkowiak*, 148 Ill. 573, 36 N. E. 572; *West Chicago Street Railroad Co. v. Dwyer*, 162 Ill. 482, 44 N. E. 815; *Illinois Steel Co. v. Wierzbicki*, 206 Ill. 201, 68 N. E. 1101. Where, however, the employé is not

directed to do the work in a specific manner, but is given a general order to perform the task, and is himself left to use his own discretion as to the manner in which the work shall be done, and there exists a safe way and a dangerous way, which are equally open to him, if he selects the unsafe method through heedlessness, or because it involves less exertion on his part, and injury to his person results, he cannot recover. *Pennsylvania Co. v. Lynch*, 90 Ill. 333; *Illinois Central Railroad Co. v. Sporleder*, 199 Ill. 184. 65 N. E. 218.

It is further suggested, however, that the breaking of the rope in the left-hand set of falls was the proximate cause of the injury, and that the doctrine of *res ipsa loquitur* applies. The meaning of this term is that the thing itself speaks; that is, that the accident itself raises a presumption of negligence on the part of the defendant, which he must rebut by showing that he took reasonable care to prevent the happening of the accident. The doctrine only applies, however, where the machine, appliance, or other thing from which the injury results is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those in control use proper care. 1 *Addison on Torts*, § 83; *North Chicago Street Railway Co. v. Cotton*, 140 Ill. 486, 29 N. E. 899; *Chicago City Railway Co. v. Barker*, 209 Ill. 321, 70 N. E. 624. The doctrine does not apply here for the reason that the accident did not result from the condition in which the defendant placed and left the pile driver. The ropes that held it, as it had been left prior to the time the appellee approached it, were sufficient to maintain it in an upright position. Had the ropes broken and the pile driver fallen while appellee was ascending the first time, and before either of the sheave blocks had been removed, there would have been some ground for invoking the doctrine; but here the person injured had removed one-half the lines which the defendant had attached to the pile driver for the purpose of sustaining it in an upright position, and after doing that he climbed again up the leaning pile driver, which, deprived of one-half the support which the defendant had provided, with its tendency to fall to the east, in which direction it was leaning, increased by the weight of appellee, fell, and the injury resulted. As between plaintiff and defendant, the pile driver was not under the sole control or management of the defendant. On the contrary, the plaintiff was himself engaged in altering the condition in which it had been placed by the defendant. Under this state of the proof, it is not to be presumed that the rope was old and rotten, or otherwise defective, and that the defendant had actual or constructive notice of that fact.

We are constrained to hold that the accident was the direct consequence of two acts of the appellee, viz., removing the sheave

block and the lines which it carried, and thereafter climbing upon the structure without first attaching another guy line or otherwise giving support to the pile driver, and that in doing these acts he did not exercise ordinary care for his personal safety.

The plea of the statute of limitations seems to have been interposed as to all the additional counts of the declaration. It did not present a defense to all of them, and we are therefore unable to say that the court erred in sustaining the demurrer to that plea. The judgment of the Appellate Court and the judgment of the circuit court will be reversed, and the cause will be remanded to the circuit court.

Reversed and remanded.

(213 Ill. 114.)

ZUCKERMAN v. PEOPLE.

(Supreme Court of Illinois. Dec. 22, 1904.)

EMBEZZLEMENT—ACCOUNTING—EVIDENCE—
CONFESSION—INSTRUCTIONS.

1. On a preliminary question whether a confession is admissible in evidence, the court may hear evidence from both parties as to the circumstances under which it was made.

2. In a prosecution for embezzlement, a confession of embezzlement is properly submitted to the jury under an instruction as to the consideration and credit to be given it, and directing the consideration of all the evidence respecting it, including its character and the manner in which it was obtained.

3. In a prosecution for embezzlement, an instruction stating the law where an agent, by his employment, is required to pay over his collections, and wait for his commissions until the profits have been ascertained, is not erroneous as assuming that accused's contract of employment was arbitrarily fixed, where there was evidence that the terms of the employment were as stated in the instruction.

4. An argumentative instruction is properly refused.

5. An employé who retains his employer's money without accounting for it is not to be presumed innocent of the intent implied by his act, or to have no intent to defraud his employer.

6. An instruction requiring the jury to find accused not guilty unless the evidence generated a full belief as to his guilt is properly refused.

7. Failure of the jury to return an instruction with their verdict was not cause for reversal, where accused was not prejudiced thereby.

8. In a prosecution for embezzlement, evidence that accused had drawn his weekly wages as agreed, and had retained other money collected by him without any settlement, which was necessary to determine whether anything was to be due him above his weekly wages, is sufficient to sustain a conviction.

Error to Criminal Court, Cook County; Jos. E. Gary, Judge.

Emanuel Zuckerman was convicted of embezzlement, and he brings error. Affirmed.

John E. Kehoe and E. F. Bogart, for plaintiff in error. H. J. Hamlin, Atty. Gen., Charles S. Deneen, State's Atty., George B. Gillespie, Asst. Atty. Gen., and Frank Crowe, Asst. State's Atty. (J. G. Grossberg, of counsel), for the People.

† 4. See Criminal Law, vol. 14, Cent. Dig. § 1262, 1263.

CARTWRIGHT, J. The plaintiff in error was employed by the Grossfeld & Roe Company, a corporation engaged in selling groceries at wholesale in Chicago, as an outside salesman, taking orders and collecting money from customers. He made collections from various customers which he did not account for or turn over to his employer, and on March 14, 1903, he furnished to the officers of the corporation a list of such customers and the amounts collected from them, aggregating \$1,689.60, and signed two written statements confessing that he had collected said sums from customers of the corporation without accounting for them or paying the same over after demand, and without the knowledge of the corporation. He was continued in the employ of the corporation afterward, and collected from customers and retained other sums up to June 17, 1903, when he told the officers of the corporation that he had collected money amounting to about \$300 which he had not turned over. He was then arrested, and was subsequently indicted for larceny and embezzlement. On his trial under the indictment he admitted the collection of \$316.09, specified in sundry receipts, which he had not paid to his employer. The only controversy as to matter of fact was whether he was authorized by his contract of employment to retain the sums of money collected and not turned over. The jury found him guilty of larceny by embezzlement, and found the amount taken to be \$285.09. Motion for new trial was overruled, and he was sentenced in accordance with the verdict.

The first alleged error is the admission in evidence of the papers executed by the defendant on March 14, 1903, confessing the embezzlement previous to that date. They were objected to when offered, and the objection was overruled, but the only evidence then before the court was that the confession was purely voluntary. The question whether the confession was admissible in evidence was a preliminary one for the court, and for the purpose of determining that question it would have been proper for the court to hear the evidence on both sides as to the circumstances under which it was made. *Bartley v. People*, 156 Ill. 234, 40 N. E. 831; 12 Cyc. 482; 1 Greenleaf on Evidence, § 219; 6 Am. & Eng. Ency. of Law (2d Ed.) 554. The defendant had offered no evidence on that question, and there was nothing before the court tending to prove any threat or improper influence or any promise or inducement tending to bring about the confession. The defendant afterward testified to facts tending to prove that the confession was not voluntary, but there was no motion to exclude it after such testimony was given. There was no ruling by the court as to its admissibility in view of the testimony given by the defendant as to the manner in which it was obtained. The jury were fairly instructed, at the request of the defendant, as to the consideration and credit to be given to the confession,

and were directed to consider all the evidence respecting it, including its character and the manner in which it was obtained. The confession was properly submitted to the jury under that instruction.

It is next alleged that the court erred in giving the twelfth instruction at the request of the people, and it is said that it assumed as a fact that the terms of defendant's contract of employment were arbitrarily fixed and settled. The instruction did not assume the existence of any fact, but merely stated to the jury the law applicable to a case where, by the terms of his employment, an agent is required to pay over his collections to his principal, and to wait for his commission until the profits have been ascertained, when the commission is to be paid to the agent by the principal. The evidence on the part of the prosecution tended to prove that such were the terms of defendant's employment, and it was not error to give an instruction based on that theory. The instruction did not assume the truth of the theory.

It is next insisted that the court erred in refusing to give to the jury an instruction concerning the weight to be given to the confession. The jury were sufficiently instructed on that subject by the instruction already alluded to, and the refused instruction was of the nature of an argument to the jury by the court. It was properly refused.

Another instruction which was refused stated, in substance, that the legal presumption of innocence meant that the defendant did not intend to defraud his employer when he kept its money. There is no rule of law that an employé who takes his employer's money, and keeps it without accounting for it, is to be presumed innocent of the intent implied by his act or to have no intent to defraud his employer. The court was right in refusing to give such an instruction.

Another instruction which was refused related to the difference between civil and criminal cases. It was objectionable, both as being argumentative and because it required the jury to find the defendant not guilty unless the evidence generated a full belief of his guilt, which was equivalent to entire certainty. In fact, a rule that the guilt of the defendant should be entirely certain was improperly given in another instruction. The instructions, as a whole, were more favorable to the defendant than the law.

After the jury had retired to consider their verdict they requested a further instruction, and were brought into court, when an instruction was given in the presence of counsel. This instruction was not returned into court with the verdict. By the practice act, instructions taken by the jury are to be returned by them into court; but the failure to return the instruction in question was apparently overlooked, and no objection was made when the verdict was delivered or before the jury were discharged. If the defendant knew that it was not returned, and no objection

was made, failure to return it should be considered as waived. However that may be, the judge rewrote the instruction from memory, and inserted it in the bill of exceptions, and it is not alleged that the instruction so appearing is not exactly as given to the jury. The instruction was correct as a matter of law, and it is apparent that the defendant was not prejudiced by a failure to return the instruction read to the jury. Under the circumstances, the failure to return it is not ground for reversal.

It is also argued that the evidence was insufficient to justify the verdict. The defendant had drawn his weekly wages as agreed, and had retained other money collected by him without any settlement or accounting with his employer, and the question of his guilt hinged on his right, under the contract, to retain the same. Taking the evidence in its most favorable light to him, it tended to prove that he was working for a salary, and in case 40 per cent. of the gross profits of his sales, after deducting the expenses of cartage, exceeded the weekly salary, he was to be paid the excess. It was his duty to make daily reports of sales and collections, and whether anything would be due him above his weekly wages involved an accounting and settlement. His testimony that he was authorized to retain money not due him for wages, from time to time, as he saw fit, without any accounting or settlement, was so improbable and contrary to ordinary business methods as to be entitled to very little credit. Moreover, his testimony was merely his conclusion as to his rights, and not evidence as to what contract was made.

We do not see how the jury could have arrived at a different verdict, and in our opinion the evidence fully justified the verdict. The judgment is affirmed.

Judgment affirmed.

(213 Ill. 287)

CROCKER v. PEOPLE.

(Supreme Court of Illinois. Dec. 22, 1904.)

RAPE — EVIDENCE — SUFFICIENCY — TRIAL —
ARGUMENT OF COUNSEL—DENUNCIATION
OF PRISONER.

1. A conviction for rape of a 13 year old girl held warranted by her testimony.

2. In view of the evidence it was not improper for the state's attorney, in his argument to the jury, to say that, "if the evidence be true, the defendant has been as low as the most lecherous animal that ever crawled on earth."

Error to Criminal Court, Cook County;
Jos. E. Gary, Judge.

Frank J. Crocker was convicted of rape, and brings error. Affirmed.

Burres & McKinley, for plaintiff in error.
H. J. Hamlin, Atty. Gen., and Charles S. Deneen, State's Atty. (Frank Crowe, of counsel), for the People.

BOGGS, J. An indictment returned into the criminal court of Cook county charged

the plaintiff in error with the crime of rape in having carnal knowledge of the person of Grace Platt, a child of the age of 13 years. The indictment also charged Ada Platt, the mother of Grace, and Nora Mack, her aunt, as accessories at and before the fact to the commission of the crime. On the trial, on motion of the state's attorney, the jury returned a verdict of not guilty as to Ada Platt and Nora Mack, and upon a full hearing the jury found the plaintiff in error guilty as charged, and fixed his punishment at imprisonment in the penitentiary for the term of one year. The motion entered by the plaintiff in error for a new trial was overruled, and the sentence of the court in accordance with the verdict of the jury was pronounced. This is a writ of error to reverse the judgment of conviction.

Ada Platt and her daughter, the prosecutrix, lived at 516 West Sixty-Sixth Place, in Chicago. Nora Mack, an unmarried sister of Mrs. Platt, also made her home in the same dwelling. The plaintiff in error, a widower of the age of 33 years, during 7 or 8 years before the commission of the alleged offense had been in the habit of going to the home of Mrs. Platt and having sexual intercourse with Nora Mack. On such occasions he occupied a bed with Nora Mack and remained with her during the night. The girl, Grace Platt, was sometimes placed in the same bed occupied by the plaintiff in error and Nora Mack. These facts were established not only by the evidence for the people, but by the testimony of the plaintiff in error as well. Grace Platt testified that during the month of March, 1904, the plaintiff in error came to the house of her mother, and slept during the night in a bed with herself and her aunt, Nora Mack; that he had intercourse with her during the night. Plaintiff in error, though admitting that he at different times occupied the same bed with Nora Mack and Grace Platt, and frequently had intercourse with Nora Mack, denied that he ever had carnal knowledge of the girl. A written statement signed by the plaintiff in error stated that he had occupied the same bed with Nora Mack and Grace Platt; that he slept between them, and that he felt and touched the private parts of both, and that he had intercourse with Nora Mack. Plaintiff in error, as a witness in his own behalf, admitted that he had a number of times occupied the same bed with Nora Mack and Grace Platt, but denied that he had ever had intercourse with the girl at any time. He testified that the paper introduced in evidence purporting to be his written statement bore his genuine signature, but insisted that he did not read it before he signed it. He testified that he did not remember telling the police that he had put his hands between the legs of Nora Mack and Grace Platt, but that he thought he did tell the police that he had inserted his finger in the private parts of Grace. The written

statement was as follows: "Some time in February I went to Mrs. Mack's house, and slept with Nora Mack and Grace Platt. I slept in the middle. I didn't have any connection with either one of them that night. I put my hand between Grace's legs and also between Nora's legs. About March 15th I went to Mrs. Mack's house again, and slept with Grace Platt and Nora Mack. About March 16th I went to the house again, and slept with Nora and Grace. I had intercourse with Nora. On the 17th inst. I went to the house again, and slept with Nora. Grace slept on the lounge. On the 19th inst. I went to the house again, and slept with Nora and Grace. I slept in the middle of the bed."

Counsel for plaintiff in error insist that the guilt or innocence of the accused was solely a question of veracity between the prosecutrix and the accused. Conceding that to be true, when the admissions of the plaintiff in error are considered, the jury would be amply justified in believing the statements of the girl that he had had sexual intercourse with her to be by far the most reasonable and probable. It would, indeed, have been strange had the jury accepted his own denial of intercourse as being true, knowing, as they did, such other acts of his as he admitted to be true.

The ninth instruction given on behalf of the people related to the right of the plaintiff in error to testify; to the tests which the jury might legally apply and subject his testimony to in order to determine the degree of credibility and weight that should be accorded thereto. The giving of this instruction is assigned as for error. The instruction is identical with instruction No. 3 which came in review in this court in *Hirschman v. People*, 101 Ill. 568, and instruction No. 4 reviewed in *Rider v. People*, 110 Ill. 11. In each of those cases the instruction was held to be free from any substantial error or objection. There was no prejudicial error in giving it in the case at bar. *Swan v. People*, 98 Ill. 610, and *Dacey v. People*, 116 Ill. 555, 6 N. E. 165, are authority for the contention that the false testimony of a witness must have related to a matter material to an issue in the cause in order to justify the jury in disregarding his testimony, and so the jury were expressly advised in the concluding statement of the instruction here complained of.

In the course of his address to the jury, counsel for the people, among other things, said: "Why, if the evidence be true, the defendant has been as low as the most lecherous animal that ever crawled on earth. I am not going to call him names. I am not going to call any man names." Counsel for plaintiff in error objected to the remark "most lecherous animal." The court did not sustain the objection, and counsel for plaintiff in error preserved an exception. It is urged the remark was so grossly abusive

and unfair as to prevent an impartial consideration of the case by the jury.

It is the duty of trial courts to restrain counsel, in their arguments, within the limits of professional duty and propriety. A gross abuse of the privilege of counsel to argue the facts and law of the case to a jury, if it prejudices the cause of the opposite party, would constitute good ground for a new trial; but arguments and statements of counsel based on the facts appearing in the proof, or on legitimate inferences deducible therefrom, do not transcend the bounds of legitimate debate, and are not to be discountenanced by the courts. It is not improper for a prosecuting attorney to reflect unfavorably on defendant or denounce his wickedness, and even indulge in invective, if based upon evidence competent and pertinent to be decided by the jury. 2 Ency. of Pl. & Pr. 747. It is not improper for the prosecuting attorney to denounce a defendant to be a "murderer," in the trial of an indictment for murder, if there is testimony tending to support the truth of the charge. *State v. Griffin*, 87 Mo. 608. Whatever is deducible from the testimony by direct proof, or legitimate inference from facts that are proven, and which bears upon the issue in a cause, must be a fair subject of comment by counsel, and, if such deductions or inferences tend to fix upon a defendant the wickedness and crime that are charged against him, it must be within the scope of proper and fair argument to denounce him accordingly. The remarks of counsel for the state in the case at bar were well merited and in no wise objectionable. The judgment is affirmed.

Judgment affirmed.

(213 Ill. 328)

GRANAT v. KRUSE et al.

(Supreme Court of Illinois. Dec. 22, 1904.)

APPEAL—ERROR—DISMISSAL—PARTIES OF RECORD—PERSONS INTERESTED.

1. Where there is a motion to dismiss a writ of error, and the parties of record agree to dismissal, the Supreme Court will dismiss; and it cannot consider an affidavit of a third person, filed in resistance of the motion, showing that he is interested, by virtue of a contract with one of the parties.

Error to Appellate Court, First District.

Action by Simon Kruse and another against John Granat. There was a judgment of the Appellate Court affirming a judgment for plaintiffs, and defendant brings error. Writ dismissed.

Musgrave, Vroman & Lee, for plaintiff in error. Edmund S. Cummings, for defendants in error.

CARTWRIGHT, J. Defendants in error, Simon Kruse and Thomas J. Peden, composing the firm of Kruse & Peden, brought suit

* 1. See Appeal and Error, vol. 2, Cent. Dig. § 3116, 3120.

in the superior court of Cook county against plaintiff in error, John Granat, upon the following written contract:

"Articles of Agreement between Kruse & Peden and John Granat, 181 Townsend Street.

"Chicago, Ill., April 4, 1901. Whereas, on the 10-14 day of July, 1899, I, John Granat, received a personal injury for which I hold a claim against Brand Brewing Company and M. L. Barrett & Co.; and whereas, I have this day employed Kruse & Peden as my attorneys and have authorized and directed them to prosecute said claim:

"Now, therefore, it is agreed between the parties hereto as follows:

"First. Kruse & Peden shall use their best skill and efforts to prosecute said claim to a successful issue, and shall receive for their services a sum equal to fifty per cent. of the value of what may be recovered on said claim.

"Second. If nothing is recovered on said claim, then Kruse & Peden are to receive nothing.

"Third. I agree not to settle or compromise without the consent of Kruse & Peden, and to be guided by their judgment and advice, and Kruse & Peden are not to settle or compromise said claim without my approval and consent.

"In case judgment is obtained, it is further agreed that said judgment be assigned to Kruse & Peden, with the understanding that all expenses of the case are to be paid out of the fifty per cent. agreed upon as being Kruse & Peden's share of the judgment, and the other fifty per cent. to be paid Mr. Granat free of any expense.

"John Granat,

"Kruse & Peden,

"Per T. J. Peden."

"Witness: Mrs. Gertrude B. Davies."

This contract was set out in a special count of the declaration, and it was averred that under and by virtue of it the plaintiffs commenced suit against the Brand Brewing Company and M. L. Barrett & Co. in the superior court of Cook county; that the defendant, Granat, who was plaintiff in that suit, settled his claim against the Brand Brewing Company and M. L. Barrett & Co., and received \$3,800, and executed a release of his cause of action; and that plaintiffs thereupon became entitled to \$1,900, one-half of said sum of \$3,800. The defendant demurred to the special count, and, the demurrer being overruled, the common counts were withdrawn, and he elected to stand by his demurrer. There was a judgment for \$1,900 against him, and he appealed to the Appellate Court for the First District, where the cause was assigned to the branch of that court, and the judgment was affirmed. The writ of error in this case was sued out to review the judgment of the Appellate Court.

A stipulation of plaintiff in error and defendants in error that the writ of error may be dismissed has been filed, and defendants in error have moved the court to dismiss the writ in accordance with such stipulation. The motion is resisted by the attorneys appearing for plaintiff in error for reasons set forth in an affidavit of M. L. Barrett. It appears from that affidavit that, upon a settlement of the original suit of Granat for personal injuries against the Brand Brewing Company and M. L. Barrett & Co., it was agreed by M. L. Barrett & Co., one of the defendants, that it would hold Granat free from all liability to Kruse & Peden for attorneys' fees; that by virtue of that agreement M. L. Barrett & Co. are bound to indemnify plaintiff in error against any claim of Kruse & Peden for such fees; that M. L. Barrett & Co. attempted to agree with Kruse & Peden upon a reasonable fee for their services rendered to Granat, but were unable to do so; that thereupon the suit of Kruse & Peden against Granat was brought upon the said written contract, which M. L. Barrett & Co. claimed to be champertous, illegal, and void; that Granat served notice upon M. L. Barrett & Co., requiring them to defend the suit against him because of said contract of indemnity; that M. L. Barrett & Co. assumed the defense of the suit, and filed the demurrer, and elected to stand by it, and took the appeal to the Appellate Court; that the bond was signed by M. L. Barrett, and the company perfected the appeal; that said company incurred expenses for disbursements and attorney's fees, and, upon affirmation of the judgment by the Appellate Court, prayed an appeal to this court; that Granat, acting under the advice of Kruse & Peden and Edmund S. Cummings, who was interested with them, refused to execute the appeal bond and perfect the appeal; that he notified the company that he did not wish any further proceedings taken in his behalf in the suit, and his name must not be used for the purpose of suing out a writ of error or any other purpose; that the writ of error was then sued out in his name by the attorneys employed by M. L. Barrett & Co., who had defended the suit in the trial court and prosecuted the appeal to the Appellate Court. These facts are not denied by defendants in error, and it is insisted, in opposition to the motion to dismiss, that, on account of the relation of M. L. Barrett & Co. to the suit, that corporation had a right to sue out the writ of error, and that it ought not to be dismissed on motion of plaintiff in error.

The suing out of a writ of error is the beginning of a new suit, and a plaintiff in error has the same right to dismiss a writ sued out in his name that he has to dismiss a suit begun by him in a court of original jurisdiction. A writ of error is a writ of right by the common law, but the right is limited to parties to the action, or their legal representatives, or one whose privity of estate,

title, or interest appears from the record. No person can sue out a writ of error who is not a party or privy to the record, or who is not shown by the record to be prejudiced by the judgment. In *re Sturms*, 25 Ill. 390; *McIntyre v. Sholty*, 139 Ill. 171, 29 N. E. 43; 2 Cyc. 626. In this case the relation of *M. L. Barrett & Co.* to the suit does not appear from the record, but only from the affidavit filed in the case. It appears from the affidavit that that corporation, being bound to indemnify Granat against the claim of *Kruse & Peden*, was notified to assume the defense of the action, and did so, but that, after the judgment of the Appellate Court, Granat refused to permit them to prosecute an appeal, or sue out a writ of error, or proceed further in the defense against the claim, or seek a reversal of the judgment. We have no jurisdiction to hear and determine such questions, or to make them the basis of our action. The record certified to this court speaks for itself, and we cannot hear extrinsic evidence to determine whether a party seeking a reversal is aggrieved by the judgment. *Hauger v. Gage*, 168 Ill. 365, 48 N. E. 142. In the case of *Anderson v. Steger*, 173 Ill. 112, 50 N. E. 665, the circuit court ordered the defendant, Steger, to pay to the plaintiff in error, Anderson, \$1,073. Although Anderson was not a party to the suit, the record showed that he was injured by the judgment of the Appellate Court reversing that decree, and it was on that ground he was permitted to sue out the writ of error. The writ of error is dismissed.

Writ dismissed.

(213 Ill. 190)

SLACK v. KNOX.

(Supreme Court of Illinois. Dec. 22, 1904.)

LANDLORD AND TENANT—LEASE—CONSTRUCTION—ADDITIONAL AGREEMENT—RENEWAL.

1. A landlord leased premises under an agreement to furnish steam heat during certain months, the building to be used for certain purposes. Afterwards the tenant installed in the building certain steam-heated tables, and boiler for heating water, etc., and the landlord permitted connection to be made with his heating plant, in consideration of which the tenant agreed to perform certain services about the premises. *Held*, that on a renewal of the lease on the same terms as the first lease, without any reference to such subsequent oral agreement, the tenant was not entitled to a maintenance of the connection of the steam with said tables, etc., without cost other than the rent paid.

Appeal from Appellate Court, First District.

Bill by Kate Knox against Charles H. Slack. From a judgment of the Appellate Court affirming a judgment for plaintiff, defendant appeals. Reversed.

This was a bill for an injunction filed on August 31, 1903, in the superior court of Cook county, by Kate Knox, the appellee, against Charles H. Slack, the appellant, to restrain the latter from interfering with a

certain steam pipe which transmitted steam from a boiler owned by appellant to certain tables and a hot-water tank owned by the appellee. A temporary injunction was issued in accordance with the prayer of the bill. The defendant appeared and filed a general and special demurrer, which was overruled by the court, and, defendant standing by the demurrer, a decree was entered making the injunction permanent. Slack appealed to the Appellate Court for the First District, where the decree was affirmed, and has prosecuted a further appeal to this court.

The facts relied upon by appellee to support the decree, and as set forth in her bill, are substantially as follows: On October 30, 1899, appellant leased to appellee the second floor of a six-story building in the city of Chicago for a term commencing November 10, 1899, and ending April 10, 1902, at a monthly rental of \$500. The lease provided that the premises were to be used for a woman's clubroom, and for no other purpose, and also provided that the lessor should furnish steam heat, without charge, from September 1st to April 30th during the term of the lease. Appellee entered into possession of the premises, and arranged and furnished part thereof as parlors and reading rooms, and the remainder as a restaurant, with a kitchen connected therewith. There were installed in said kitchen a range, and also certain steam-heated tables, by means whereof the food could be kept warm after being cooked, and a tank or boiler for heating water for use in washing dishes and cooking utensils, cleansing rooms, and for other purposes. Slack, the lessor of the premises, maintained in the basement of the building a steam-heating plant, consisting of an engine and boiler and steam pipes conveying steam to the different portions of the building for heating and other purposes. Appellee, with the knowledge and acquiescence of appellant, and under the direction and supervision of the engineer in charge of appellant's steam boiler, caused a steam pipe to be connected with the boiler, and to be extended to and connected with the steam tables, for the purpose of heating them, and also to the water tank, for the purpose of heating water therein. Slack requested appellee, in consideration of the steam so furnished by him, to clean and keep clean certain hallways and stairs at her own expense, which she agreed to do, and did do up to the time the bill was filed herein. On July 25, 1901, another lease, containing practically the same terms and conditions as the first one, was executed and entered into between the same parties and for the same premises, for a term commencing April 10, 1902, and ending April 30, 1907. The connection with appellant's boiler was still maintained, and appellee continued to keep the hallways and stairs clean. On August 5, 1903, appellee received a letter from appellant, stating that the excessive use of water and steam by her, and the in-

creased cost of coal and labor, made it impossible for him to continue to furnish her with steam for her kitchen in exchange for the service rendered him in keeping the hallways and stairs clean, and that, if she desired him to furnish steam for the tank and tables after August 31st, it would cost her \$50 per month in addition to said service. The complainant was using the same amount of water and steam as she had been using theretofore during her tenancy, except as such use may have been increased by the growth and expansion of her business. She was then furnishing meals to about 2,400 persons daily. The appellant threatened to shut off the supply of steam carried through the pipe in question after August 31st, and appellee filed the bill for an injunction, alleging that, if the steam was shut off for a single day, it would cause her great annoyance and loss and serious damage to her business, and that, if the steam was not furnished as aforesaid, she could continue to carry on her business and make use of the premises for the purposes designated in the lease only by the erection of a steam plant upon the premises occupied by her, which could not be done without great expense, and that she would also thereby be deprived of the use of a portion of the premises for her business, on account of the loss of the space which such plant would occupy.

Appellant here contends that the bill does not state a cause of action, (1) because the lease gives to appellee no right to steam for the purposes for which she is using it, and the lease cannot be modified or changed by proof of a subsequent parol agreement or understanding giving that right; and (2) because the permission given to appellee to use steam for the tank and tables was a mere license, revocable at any time by appellant, and such license was revoked by the letter of August 5, 1903.

Musgrave, Vroman & Lee, for appellant.
Franklin P. Simons and Pliny B. Smith, for appellee.

SCOTT, J. (after stating the facts). Appellee urges that she has the right to have the demised premises, with all their appurtenances and beneficial rights, maintained, throughout the term of the lease, in the same condition they were in during the former occupancy and at the time of the execution of the new lease, and contends that the right to have the steam pipe connect the steam boiler in the basement of the building with the hot-water tank and steam tables on the premises leased by her, and to have steam supplied through that pipe, passed to her, by implication, as an appurtenance or easement under the second lease, for the reason that, in view of the facts stated in the bill, it is apparent that it was the intention of the parties to the lease, at the time of the execution of the second lease, that the appellee

was to have the steam pipe and connections continued in the same condition and situation in which they then were, during the term of that lease. At the time of the execution of the first lease, the pipe was not in position, and no connection existed between the water tank and steam tables owned by the appellee and the boiler in the basement of the building. The tank and the tables were placed on the premises after the execution of the first lease, and the connection with the boiler was made at the instance of the appellee under an oral contract, separate and distinct from the lease, as we think.

Appellee urges that this is not a correct view of the matter, and that the pipe was installed and the connections made by appellant's leave without any consideration therefor passing to him, and without any new contract, and that it is therefore to be regarded as though done in the first instance under the terms of the first lease. Her contention in this regard is inconsistent with the following language found in the bill, to wit: "That, while said lease provided that the defendant should supply the complainant with steam heat from the 1st day of September to the 30th day of April in each year, said lease contained no provision specifically relating to said connection between said steam boiler and complainant's said apparatus, and defendant thereupon requested complainant, in consideration of said connection, with said steam boiler, to clean and keep clean the hallways and stairs from the second floor of said building to the front doorway or public entrance thereto at her own expense, which said complainant consented to, and thereafter did." It is apparent that the right to the use of this connection with the boiler, and to the steam thereby conveyed, did not pass by implication under the first lease, for the reason that at the time that lease was executed the pipe was not in position, nor were the tank and tables, in connection with which it was afterwards used, on the premises at all, so that there was nothing in the condition of the property which was the subject of the contract to indicate that it was the intention of the parties that appellee was to have the use of the pipe and steam thereby conveyed under the terms of that lease; and, construing the language quoted above from the bill, as it must be construed, most strongly against the pleader, we think it shows that the connection between the boiler and the tank and steam tables was made pursuant to a contract by which appellant was to permit that connection and furnish steam, and appellee was to clean the hallways and stairs from the second floor of the building to the entrance thereof.

It is elementary that this oral contract did not alter or vary the terms of the original lease, which was under seal and made prior to the time the oral agreement was made.

Baltimore & Ohio & Chicago Railroad Co. v. Illinois Central Railroad Co., 137 Ill. 9, 27 N. E. 38, and cases there cited. Consequently at the time of the execution of the second lease the appellee was enjoying the use of the pipe, and the steam thereby conveyed, not under the terms of the original lease, nor as an appurtenance or easement connected with the property granted, but under the oral agreement made subsequent to the lease last mentioned; and, inasmuch as the second lease is also silent as to this pipe and the steam by it supplied, we do not think it can be said that the use of that pipe and the steam necessary for the steam tables and tank passed to appellee by implication, or on the theory that it was the intention of the parties that such use should be included in the lease, as an appurtenance or easement.

After the beginning of the term covered by the second lease, and down to the time that this difficulty arose between the parties hereto, appellee continued, at her own expense, to keep the hallways and stairs clean, in accordance with the terms of the oral agreement. If it was the intention of the parties that the right to the use of the pipe and the steam should pass by the second lease, how can these acts of the appellee be explained? Manifestly, no duty was imposed on her by the second lease to clean the hallways and stairs. Had she failed to do that work, an action of covenant on the lease certainly could not have been brought against her to recover upon a cause of action resulting from her default in that respect. The conclusion is irresistible that she incurred that expense because she believed that she was thereby compensating appellant for the use of the pipe and the steam which it supplied, and, if she was so doing, then she was accepting and receiving the steam under the oral agreement, and not under the lease.

It is permissible, in construing a contract, to look to the interpretation that the parties thereto have placed thereon, in its performance, for assistance in ascertaining its true meaning. "No extrinsic aid can be more valuable." *Vermont Street M. E. Church v. Brose*, 104 Ill. 206; *Storey v. Storey*, 125 Ill. 608, 18 N. E. 329, 1 L. R. A. 320, 8 Am. St. Rep. 417.

Appellee relies particularly upon the case of *Thomas v. Wiggers*, 41 Ill. 470. In that case it appeared that a tenant under an earlier lease had used the exhaust steam from an engine, which was conducted by means of a pipe from the engine to a steamer used by the tenant, and that this steam was essential to the conduct of his business. This court held that under the terms of his second lease, which provided, as the first had done, that he should have a certain portion of the building, together with one-half of the steam power produced by the steam engine located therein, he was entitled to

the use of the exhaust steam as he had previously used it, and was using it at the time the second lease was made. This is put upon the ground that in the construction of grants the courts ought to take into consideration the circumstances attendant upon the transaction, the particular situation of the parties, and the state of the thing granted, for the purpose of ascertaining the intent of the parties, and that the defendant well knew when he signed the second lease that the plaintiff understood that he was acquiring the right to use the exhaust steam in the precise manner in which he was then using it under the first lease. That case is distinguished from the one at bar by the fact that here appellee was enjoying the right now in controversy under a contract separate and distinct from the first lease, and was paying for the enjoyment of that right a valuable consideration, in addition to the rent reserved by the lease. Under such circumstances, it cannot be said that it was the intention of the parties that this right should be included in the new lease. In the *Thomas Case*, at the time of the execution of the new lease there was no contract, except the old lease, under which the right could have been enjoyed. In this case the right was being enjoyed under a separate contract, and the presumption which arose in the *Thomas Case* that the parties intended that the right should be enjoyed under the second lease does not arise here. On the contrary, following the reasoning in that case, we arrive at the conclusion that the parties intended that the right in question should be regulated by the same contract under which it existed at the time of the execution of the second lease, viz., the oral contract. As the oral contract fixed no term during which it should continue in force, either party thereto had a right to terminate it upon reasonable notice to the other.

The judgment of the Appellate Court and the decree of the superior court will be reversed, and the cause will be remanded to the latter court, with directions to sustain the demurrer to the bill. Reversed and remanded, with directions.

(213 Ill. 72)

WISTRAND v. PEOPLE.

(Supreme Court of Illinois. Dec. 22, 1904.)

CRIMINAL LAW—JURY—JURORS SERVING IN DIFFERENT BRANCHES OF THE SAME COURT—RAPE—AGE OF DEFENDANT—EVIDENCE.

1. *Hurd's Rev. St. 1903*, c. 78, § 29, and chapter 37, § 38a, provides that one or more of the judges of the criminal court of Cook county may each hold a different branch of the court at the same time, and that one or more of the judges shall certify to the clerk the number of jurors required at each term. Chapter 78, § 12, provides in general that all jurors responding to the jury summons in excess of 24 shall be discharged. *Held*, that this section does not apply in Cook county to a court having several branches, but that all the jurors drawn for the

various branches of the criminal court in that county are drawn for but one court and may serve in any branch.

2. In a criminal court having separate branches, a defendant on trial in one branch is entitled to a list of all the jurors serving in any of the branches, but the names of jurors who have been assigned to other branches need not be placed in the box from which a jury is drawn to try defendant's case.

3. In a prosecution for rape without force, the fact that defendant is over 16 years of age, being a necessary element of the corpus delicti, cannot be proven by defendant's confession alone.

4. On an issue as to the age of defendant, in a prosecution for rape without force, testimony as to his appearance, by persons who have seen him, is admissible, but the jury cannot fix his age merely by looking at him.

Error to Criminal Court, Cook County;
R. W. Clifford, Judge.

Charles Wistrand was convicted of rape, and brings error. Reversed.

This is a writ of error, sued out of this court by Charles Wistrand, the plaintiff in error, to review a judgment of the criminal court of Cook county whereby plaintiff in error was adjudged guilty of the crime of rape and sentenced to the penitentiary for a term of two years.

The indictment consisted of three counts. The first and third charged rape by force upon one Eva Goldstein. There was no evidence of the use of force to sustain these counts. The second count charged the commission of the crime without force, alleging that the defendant was a male person above the age of 16 years, that the female was under the age of 14 years, and that the act was committed with the consent of the female.

The evidence for the prosecution showed that the plaintiff in error had sexual intercourse with one Eva Goldstein, a girl under the age of 14 years, on or about June 17, 1904. The defendant below did not testify in his own behalf, except on a preliminary question considered by the court alone, and did not offer any evidence except that of his good reputation for chastity and for peace and quiet.

The jury which tried the case was composed in part of jurors obtained from among jurors serving in other branches of the criminal court of Cook county. Six hundred jurors had been summoned to attend this term of court, and had been distributed among the six branches of the court, and each one impaneled in the branch to which he had been assigned, each branch thus having different jurors. The list of jurors serving in that branch in which plaintiff in error was to be tried having been exhausted by reason of the fact that some of the jurors whose names constituted such list had been selected in a preceding case and were engaged in the consideration of that case, and by the fact that others had been transferred to other branches of the court, the sheriff, by order of court, obtained jurors from other branches of the court, and a list was thus made up

from which to select a jury for the trial of the case. Plaintiff in error challenged the array, but the court overruled the challenge. He then challenged each juror called to the jury box for cause, assigning as the cause that the juror had been ordered, selected, and summoned to that branch of the court without authority of law. He exhausted all his peremptory challenges. As the list of jurors thus obtained became exhausted, the sheriff obtained more jurors from the other branches of the court. Plaintiff in error challenged these as they were brought in, and refused to accept any of the jurors called. He was furnished with a list of the jurors constituting the first list so obtained, and was also furnished with lists of the other jurors as they were brought in by the sheriff.

The only evidence of the age of the prosecuting witness was that of her father, who testified that she would be 14 years old on the 14th of September following. The only evidence of the age of the defendant was contained in a written confession, signed by the defendant, which was offered by the prosecution and admitted in evidence, after proof that it was voluntarily made, in which he stated that he was 44 years of age, and in which he also admitted having had sexual intercourse with the prosecuting witness at the time charged in the declaration and at times previous thereto.

The errors assigned are that the court erred in overruling the challenge to the array, and in overruling the challenge for cause to each juror in the case; in refusing certain instructions, and modifying others, asked by the defendant below; in giving certain instructions asked by the state; in failing to submit a form of verdict finding defendant guilty of assault; in admitting the confession in evidence, and in refusing to receive evidence of defendant's general reputation for peace and quiet. It is also urged that there is no legal evidence of the age of the plaintiff in error, and that the court permitted the state's attorney to ask leading questions of the witnesses for the prosecution.

Charles P. R. Macaulay and Oscar D. Olson, for plaintiff in error. H. J. Hamlin, Atty. Gen., Charles S. Deneen, State's Atty., and El C. Lindley, Asst. State's Atty., for the People.

SCOTT, J. (after stating the facts). It is provided by section 88a of chapter 37, Hurd's Rev. St. 1903, "that two or more of the judges of the criminal court of Cook county may each hold a different branch of said court at the same time." At the time of the trial of this cause, several branches of that court were in session. The jury commissioners had summoned 600 jurors to appear at that term, and these jurors had been divided among the various branches of the court, each juror being directed to report for service in a particular branch. Plaintiff in error

was tried in the branch over which Hon. Richard W. Clifford, one of the judges of the circuit court of Cook county, was presiding. Upon the list of jurors who had been assigned to duty in that branch being exhausted, jurors were transferred from other branches to that branch of the criminal court. The legality of so transferring these jurors was questioned by a challenge to the array.

Section 29 of chapter 78, Hurd's Rev. St. 1903, which applies to Cook county, directs that "one or more of the judges of said court shall certify to the clerk of the court the number of jurors required at each term," and that jurors to that number shall be drawn from the jury box kept by the jury commissioners, and, "if more jurors are needed during said term, the court shall so certify, and they shall be drawn and summoned as above provided forthwith."

Plaintiff in error's contention is that, upon the list of the jurors who had been assigned to duty in the branch of the court presided over by Judge Clifford being exhausted, others should have been drawn and summoned in accordance with the directions contained in the language last above quoted, and urges that the entire jury drawn cannot be regarded as a jury drawn for but one court, for the reason that if that was the situation, then under section 12 of chapter 78, *supra*, it would be the duty of the court to discharge all the jurors in excess of 24. Our view is that in Cook county, where the act authorizing the appointment of jury commissioners is in force, the fourth section of the last-mentioned act, being section 29, *supra*, governs this matter, and that the number of jurors who should be in attendance upon a term of the criminal court is "the number of jurors required at each term," in the language of that section, and that section 12, *supra*, in so far as it directs the discharge of all jurors in excess of 24 who appear in response to the jury summons, does not apply in that county to a court having several branches. There is but one criminal court of Cook county. All the jurors properly drawn and summoned for any term, if otherwise qualified, are eligible for service in any branch of the court which may be in session during the term of service, and may be transferred from one branch of the court to another as suits the convenience of the various branches of that court.

Plaintiff in error seeks to sustain his challenge to the array by the case of *People v. Compton*, 132 Cal. 484, 64 Pac. 849. In that case it was held that if the jurors serving in different branches of the same court were, as we think they are, members of the same panel, tickets having the names of all the jurors serving in all the branches should be placed by the clerk of the court in the box from which he draws the jury for a particular case, and that a failure in this regard was fatal to the judgment. We have frequently held that the judgment of the court

below will not be reversed because a challenge to the array was overruled, unless it appears that some substantial right of the defendant was thereby impaired. *Wilhelm v. People*, 72 Ill. 468; *Siebert v. People*, 143 Ill. 571, 32 N. E. 431; *Healy v. People*, 177 Ill. 306, 52 N. E. 426. Following this rule, long established in this state, we are brought to a conclusion diametrically opposed to that reached by the able court which pronounced judgment in *People v. Compton*, *supra*.

The purpose of the act authorizing the appointment of jury commissioners was to secure to litigants jurors drawn at random by the clerk of the court from names selected by the jury commissioners, who in turn were to be selected by the judges of the several courts of record of the county. The discretion and competency of the persons chosen as such commissioners were to be taken into consideration, the purpose being to prevent abuses in the selection of juries, and to insure, so far as possible, that none but competent, honest, and impartial jurymen should be called into the box, and that the interest of neither party to the controversy should in any way intervene in determining what jurors should be drawn and summoned for any particular term of the court. Defendant has had the benefit of the safeguards of that act. No juror was called in his cause except one who had been selected and drawn in the office of the jury commissioners in the manner contemplated by that act. To adopt the view which he holds would be to require the drawing of a separate jury for each branch of the criminal court, and to do this would be to interpolate into the statute language not found there, and would amount to judicial legislation.

It follows, however, that a defendant in the criminal court, previous to his arraignment, is entitled to a list of all the jurors then selected to serve and who will be immediately engaged in service in that court, and not merely to a list of those who have already been assigned to a particular branch of the court. When he is furnished with such a list, the fact that some of the jurors on that list are then serving in other branches of the criminal court, and that no tickets having the names of such jurors are placed in the box from which the clerk draws the particular jury for the trial of his case, is not a just cause of complaint. If he were tried in a court having no branches or divisions and where but 24 jurors were in attendance, if 12 of these were engaged in considering of their verdict in another cause at the time a jury was called to try his case, tickets bearing the names of the jurors serving in such other cause would not be placed in the box from which the clerk would draw the names for the jury about to be examined and sworn. In such case the jury is not drawn by lot from among all the jurors, but those already actually engaged in performing jury service are necessarily excluded. In the criminal

court, jurors serving in branches other than that in which plaintiff in error was tried are members of the same panel as those serving in the latter branch, but may be regarded as already engaged in actual jury service, so that their names need not be put in the box from which the jury is drawn to try the defendant in the first instance, but may be so placed therein should the list of jurors serving in the branch where the cause is being heard be exhausted, precisely as in a court without divisions or branches a jury which is considering a case comes in with a verdict while a jury is being selected in another cause, and, the necessity for the services of those coming in with the verdict arising, their names are placed in the box, to be drawn to complete the jury in the second case.

There is in this record no evidence that tends to show the commission of the crime of rape by force. Where a conviction of the crime of rape without force is sought, to establish the corpus delicti it is necessary that the proof should show, first, that the female was under the age of 14; second, that the male was over the age of 16; third, that sexual intercourse occurred between them. In this case the fact that the female had not reached the age of 14 was shown by the evidence of her father. The fact that the sexual intercourse took place was shown by the evidence of the female herself, and by the written confession of the male, made shortly after his arrest. This confession contained also a statement that he was 44 years old, and his age was not otherwise proven. It is elementary that the corpus delicti cannot be proven by the confession of the defendant alone. *May v. People*, 92 Ill. 343; *Williams v. People*, 101 Ill. 382; *Gore v. People*, 162 Ill. 259, 44 N. E. 500. Unless the defendant was above the age of 16 at the time of the alleged commission of the offense, there was no violation of the statute. It was as essential to prove his age as it was to establish the age of the female, or to show that fornication occurred. Either of the three elements lacking, the corpus delicti is not established. Consequently, there should be evidence tending to establish each of these three necessary facts, aside from the confession of the defendant. So far as proving his age was concerned, there was no evidence except his confession. It follows, therefore, that without his confession there was no proof that a crime had been committed, because, except he was more than 16 years of age, no crime was committed. For the purpose of fixing the age of the defendant, persons who had seen him would have been competent to testify relative to his appearance, and such testimony would have been proper for the consideration of the jury on the question of age.

Defendant in error suggests that the defendant was present in court on the trial, and that this, together with the confession,

was sufficient to justify the jury in finding him to be more than 16 years of age. The defendant did not take the witness stand except on a preliminary question in reference to the admission of his confession in evidence, and the jury was excluded from the courtroom while he was testifying on that subject. But whether he did or did not testify, the law does not allow the jury to fix his age by inspecting his person. *Stephenson v. State*, 28 Ind. 272. While the appearance of the defendant might be conclusive evidence to the jury, there would be some difficulty in having evidence of that character preserved in the bill of exceptions for the inspection of a court of review. "To allow a jury to make up their verdict upon a disputed fact from their own individual observation would be most dangerous and unjust." *Seaverns v. Lischinski*, 181 Ill. 358, 54 N. E. 1043.

There is no merit in the other errors assigned. The judgment will be reversed, and the cause will be remanded to the criminal court of Cook county.

Reversed and remanded.

(213 Ill. 124)

OLCOTT et al. v. TOPE.

(Supreme Court of Illinois. Dec. 22, 1904.)

LIENS—CONSTRUCTION—TITLE OF TRUSTEE.

1. Testatrix disposed of her property as follows: "I wish my executor to collect the rents of my farm * * *, and any other indebtedness due me and pay all just debts that may be owing at my decease at the expiration of the term for which my farm is leased, I desire my executor to either lease the same again, or sell it whichever in his judgment is to the best interest of my estate, after the payment of all my debts, I desire my executor to invest the surplus rent, or in case of the sale of the property heretofore mentioned, or any moneys derived from any source which may be owing at my decease, for the benefit of C. L. S. * * *, and to be paid to him when he shall have arrived at the age of twenty-one years. In case the said C. L. S. should die before arriving at the age of twenty-one years, I desire that whatever money or property of whatever kind which would belong to him under the will, to go to his mother, M. S., and in case of her decease prior to the decease of her son, C. L. S., I desire the property to be distributed to my legal heirs." *Held*, that the testator intended to devise the fee of the land to the person named therein, or to dispose of the principal sum derived therefrom, and that he did not intend to leave to him merely the surplus of such rent as might be due at his death, together with any other moneys then due the estate.

2. An executor who is authorized by will to sell or release real estate at discretion is vested with the fee in trust for the beneficiary named in the will.

Appeal from Appellate Court, First District.

Bill by John W. Tope against Nellie M. Olcott and others. From a judgment of the appellate court affirming the decree construing a will in question, defendants appeal. Affirmed.

The following is the statement of facts in this case made by the Appellate Court:

"This is a bill filed by appellee, praying for a construction of the will of Anna B. Moore, deceased, and asking the direction of the court. Letters were issued to appellee as executor named in the instrument, and he proceeded to administer the estate. September 29, 1902, he was discharged as executor. The bill states that it became necessary to sell the real estate to pay debts; that this was done under the direction of the probate court and the debts were paid; that there was left in the hands of appellee, as executor, a balance of \$4,924.76 belonging to the estate, which, it is claimed, by the terms of the will appellee should hold and manage for the purposes therein stated; that appellee is advised and believes that in accordance with the provisions of the will he should invest the money in his hands for the benefit of Charles Leslie Spikings, the amount, with its accumulation, to be paid to him when he shall reach the age of 21 years; that in the event of the death of said Spikings before arriving at that age the accumulated fund shall be paid to Mary Spikings, mother of Charles Leslie Spikings; that in the event of her death before the death of Charles Leslie Spikings, and of his death before reaching the age of 21 years, the fund shall be distributed to the next of kin and heirs at law of said Anna B. Moore, deceased; that it is the right and duty of appellee to invest the funds so remaining in his hands, and the income therefrom, and to reinvest the same in such manner as will, in his judgment, be safe and promote the interests of the estate. Answers were filed by the surviving heirs and next of kin, who are nephews and nieces of Anna B. Moore, deceased, claiming that by the terms of the will any moneys remaining in appellee's hands arising from the sale of the real estate should be distributed to the legal heirs of the deceased according to the laws of descent. The decree appealed from finds, inter alia, that Mary Spikings and Charles Spikings are sole beneficiaries under the will, and that the true intent and meaning of its provisions are in accordance with the views of the executor as set out in the bill. The will is as follows:

"This memorandum I wish as my last will and testament being written and witnessed by my request. I desire Dr. J. W. Tope to act as my executor. I wish my executor to collect the rents of my farm in Leyden Tp., Cook Co., Ills., and any other indebtedness due me and pay all just debts that may be owing at my decease at the expiration of the term for which my farm is leased, I desire my executor to either lease the same again, or sell it whichever in his judgment is to the best interest of my estate, after the payment of all my debts, I desire my executor to invest the surplus rent, or in the case of the sale of the property heretofore mentioned, or any moneys derived from any source which may be owing at my decease,

for the benefit of Charles Leslie Spikings, son of Charles and Mary Spikings of Chicago, Cook Co., Illinois, and to be paid to him when he shall have arrived at the age of twenty-one years.

"In case the said Charles Leslie Spikings should die before arriving at the age of twenty-one years, I desire that whatever money or property of any kind which would belong to him under the will, to go to his mother Mary Spikings, and in case of her decease prior to the decease of her son Chas. Leslie Spikings, I desire the property to be distributed to my legal heirs according to the laws of Illinois.

"Signed by me as my last will and testament this 23th day of January, 1899.

her
"Anna X B. Moore.
mark.

"Witnessed at her request and signed and sealed in the presence of each other this 23th day of January, 1899.

"H. S. Hubbell,
[L. S.] 118 43d St., Chicago, Ill.
"Mrs. M. J. Bunnell."

"State of Illinois, County of Cook—ss.: Personally appeared before me, a notary public in and for said county, Anna B. Moore, and acknowledges the above will to be her free and voluntary act.

"Given under my hand and notarial seal this 29th day of January, 1899.

"Henry S. Hubbell,
[Seal.] Notary Public."
"Anna B. Moore died the day following the execution of the above instrument, which, it appears from the bill, was contested and found to be her last will and testament."

Bowles & Bowles (Thomas E. D. Bradley, of counsel), for appellant Edward J. Hammett. Frederick Mains for appellants Nellie M. Olcott, Sarah J. Mahoney, and Fannie Dean. Jesse A. & Henry R. Baldwin, for appellee John W. Tope, trustee. Julius A. Johnson, for appellee Mary Spikings.

MAGRUDER, J. (after stating the facts). The following opinion, delivered by a majority of the Branch Appellate Court, speaking through Mr. Justice Freeman, correctly disposes of the questions involved in this case, and is adopted as the opinion of this court:

"It is contended in behalf of the heirs at law of Anna B. Moore, deceased, that no intention is expressed by the language of the will to devise the fee of the land, or to dispose of the principal sum derived therefrom; that having a farm, which was leased, and assuming the income therefrom would be more than sufficient to pay her debts, the testatrix intended to leave to Charles Leslie Spikings—only the surplus of said rent that might be due at the time of her death, together with any other moneys then due her estate, as a modest bequest in indication of her affection for him; that the executor has a mere power of sale, and that the proceeds

must be distributed among the heirs at law, since, as is claimed, the fee was vested in them upon the death of the testatrix.

"We are unable to agree with these contentions. It is true that 'heirs at law are not to be disinherited by conjecture, but only by expressed words or necessary implications (29 Am. & Eng. Ency. of Law [1st Ed.] p. 352), and that a court of equity will not undertake to rectify a mistake in a will. Engelthaler v. Engelthaler, 196 Ill. 230-235, 63 N. E. 669. But where, from the language used in the will itself, the intent of the testator can be clearly conceived, and is not contrary to some positive rule of law, it must prevail, though the gift is not made in formal language. Powell v. McDowell, 194 Ill. 394-397, 62 N. E. 879, and cases there cited.

"In the present case, there is no serious difficulty in discovering the intention of the testatrix, as expressed by the language of the will, taking into consideration all its parts. The contention of appellants is based upon the absence of words explicitly devising the real estate or its proceeds. There is no want of clearness until we come to the following: 'After the payment of all my just debts, I desire my executor to invest the surplus rent, or in case of the sale of the property heretofore mentioned, or any moneys derived from any source which may be owing at my decease for the benefit of Charles Leslie Spikings, son of Charles and Mary Spikings, of Chicago, Cook county, Illinois, and to be paid to him when he shall arrive at the age of twenty-one years.' The ambiguity in this is due, in part, to an equivocal or superfluous use of the word 'or,' and to the omission of other words implied, but not expressed, but which may be with propriety 'supplied by the court in order to effectuate the intention of the testator as gathered from the context of the will.' 2 Jarman on Wills, c. 16, p. 486, 60; 29 Am. & Eng. Ency. of Law, 872; Glover v. Condehl, 163 Ill. 566, 45 N. E. 173, 35 L. R. A. 360; Blinn v. Gillett, 208 Ill. 473, 70 N. E. 704; Lash v. Lash, 209 Ill. 595-604, 70 N. E. 1049. In the last mentioned case the will provided that the executor should 'have one year after my decease to sell the land.' The court finds that the intention, collected from the context of the will, was that the wife should have the use and benefit of the land during her natural life, and that at her death the land should be sold and the proceeds applied by the executor, as directed in the will. It is held that what the testator intended to express by that portion of his will was that the executor should 'have one year after my [wife's] decease to sell the land'; that the word 'wife' was omitted in drafting, and that the ambiguity or apparent inconsistency on the face of the will is ascribable to that omission, which may be supplied to effectuate the intention of the testator.

"In the case before us, the testatrix provided for the collection of the rents of her

farm and any other sums due her and their application in payment of her own debts. Then she authorizes her executor either to let the farm again after the expiration of the then existing lease, or to sell it, whichever would be, in his judgment, for the best interest of the estate, thus indicating a purpose that the executor should control the farm and its proceeds after her death. Then follows the language above quoted, over the meaning of which this controversy arises. What the testatrix honestly intended to express, reading this part of her will in connection with the whole instrument, is, in substance, that the executor shall invest the surplus rent (and a surplus might be expected if he should relet the farm for a term of years), or in case of the sale of the farm that he shall invest any moneys derived from such sale, or from any source, including money owing to her at the time of her decease, for the benefit of Charles Leslie Spikings, the sum, with its accumulation, to be paid to him if he lives to attain the age of 21 years.

"With slight changes of the reading in words, reading 'or' as 'and' where it evidently has that meaning, and supplying a verbal omission in order to effectuate the intentions of the testatrix as gathered from the context of the will (Lash v. Lash, supra), the provision in controversy will read as follows: 'After the payment of all my just debts, I desire my executor to invest the surplus rent, or, in case of the sale of the property heretofore mentioned, *the proceeds, and* (or) any moneys derived, from any source, which may be owing at my decease, for the benefit of Charles Leslie Spikings.' We are of opinion that the italicized words we have supplied are implied from the connection and context and from the will as a whole. The word 'or,' which we read as meaning 'and,' is conceded by counsel for some of the appellants to have that meaning in this connection, and in behalf of other appellants it is claimed that it should be discarded altogether, as having no meaning. In Boyles v. McMurphy, 55 Ill. 236-239, the word 'or,' as used in the eleventh section of the Dower Act, 'shall thereupon be entitled to dower in the lands "or" share in the personal estate of her husband,' is construed in connection with the preceding sections as meaning 'and.' In Ebey v. Adams, 135 Ill. 80, 25 N. E. 1018, 10 L. R. A. 162, is a discussion of the effect of the word 'or' in a will between the name of devisees and the words 'their heirs.' In Bouvier's Law Dictionary (title 'or') it is said: "'Or" is often construed "and," and "and" construed "or" to further the intent of the parties in legacies, devises, deeds, bonds, and writings"—citing authorities.

"A will should be so construed as to give effect to every part of it without change or rejection, provided an effect can be given not inconsistent with the general intent as

gathered from the entire will. See 29 Am. & Eng. Ency. of Law (1st Ed.) p. 350. The words 'or in case of the sale of the property heretofore mentioned,' as they stand in the will, suggest a purpose and intent of the testatrix not fully stated—a verbal omission which is implied. *Young v. Harkleroad*, 166 Ill. 318-325, 46 N. E. 1113. To give effect to these words requires their construction in connection with the rest of the instrument. They distinctly refer back to the power of sale given to the executor in the words which precede them. The 'property heretofore mentioned' is the farm, which the executor had just been authorized and directed to either lease or sell. If leased, the executor is authorized and directed to invest the surplus rent. If sold, the testatrix evidently intends, as the context indicates, to provide for the investment and disposition of the proceeds in the same way, together with any money derived from any other source; otherwise the reference to 'the sale of the property heretofore mentioned,' in that connection, would have no meaning. Having provided for the disposition of the surplus rents in the case of reletting, the disposition of the proceeds in case of the other alternative, a sale, was the next proper, orderly, and logical thing to be provided for in that connection. This provision she evidently intended to make and supposed she had made, and though she failed to employ apt language, we are of opinion the intention is sufficiently manifest in the language used that both surplus rents and proceeds of 'sale of property heretofore mentioned' are alike to be invested for Charles Leslie Spikings, and to be paid to him when he becomes of age. This conclusion is justified, if it needs justification, by phraseology employed in the concluding paragraph of the will. As we have said, and it is perfectly apparent from the context, the testatrix refers to the farm in the words, 'in case of the sale of the property heretofore mentioned,' using the word 'property' to designate the only real estate mentioned in the will. In the concluding paragraph of her will she uses the same word evidently in the same sense, where she says, 'I desire that whatever money or property of any kind which may belong to him [Spikings] under the will, to go,' etc., thus distinguishing between the 'money,' which would so belong to him and the 'property,' or farm, which she evidently expects and intends should belong to him also. The rents and other indebtedness are specifically given to Spikings in language not questionable, and are properly referred to as 'money' in distinction to the farm, which is spoken of as 'property.' But, except in the controverted part of the will above considered, there is no specific bequest to Spikings of any property except the 'money' to be collected from rents and debts due her. Yet the testatrix speaks not only of 'money,' but of 'property' also, as what 'would belong to him un-

der the will,' unless he 'should die before arriving at the age of twenty-one years,' thus indicating clearly that such was her intention, and also, as we think, tending to show that she supposed the language before employed expressed such intention. 'The inquiry always is what did the testator intend, and the answer is to be sought for and found in the intentions of the will, taking into consideration all its parts, and giving to the language the sense in which it was used by the testator. For this purpose the court will look to every provision of the will, the better to understand the plan of distribution adopted and the purpose of the testator in making the particular provisions under consideration.' *Ebey v. Adams*, 135 Ill. 80-86, 25 N. E. 1013, 10 L. R. A. 162.

"The intent of the testatrix in the case before us is further evidenced by the later language of the will, where it is provided that the 'property,' using the same word before applied to the farm in distinction from the money referred to in the will, shall be distributed to her legal heirs according to law only in case of the contingency therein stated. While mere words excluding the heirs at law will not suffice to disinherit unless the estate is actually given to someone else, such gift need not be in express terms, 'but may be by necessary implication' (*Powell v. McDowell*, 194 Ill. 394, 62 N. E. 879), and the words of exclusion or of contingent inclusion may alike serve to indicate the intention of the testatrix and aid in the interpretation of her will. The instrument, as a whole, shows beyond cavil an intention to provide for the legatee, Spikings, and that the property, real and personal, should revert to the heirs only in the event of his death, and that of his mother. The decree finds that it became necessary to sell the real estate to pay debts, the personal property not sufficing. The testatrix, apparently anticipating such a contingency, gave the executor power to rent or sell for the benefit of her estate, which she follows with a statement that 'after the payment of all my just debts, I desire my executor to invest the surplus rents or in case of the sale,' etc. As the sale of the realty was necessary to pay her debts, it is apparent that, unless he is entitled to the proceeds of the farm, Spikings will get nothing under the will. The rule is well recognized that, in the construction of a will, the court will look at the state of the property devised in endeavoring to ascertain from the language used the intention of the testator. *Fisher v. Fairbank*, 188 Ill. 187-191, 58 N. E. 962. The testatrix might well have had in mind the probability that the farm would have to be sold to pay debts, and in that event, under the construction contended for by the appellants, the whole purpose and intention of the will would have been subverted and the only legatees mentioned would take nothing, while the heirs, whom she specifically postpones in their favor,

would take the whole of the estate. Such was not the intention of the testatrix as indicated in the will.

"It is claimed by appellants' counsel that the testatrix conferred upon the executor a mere power to lease or sell at the expiration of the term for which the farm was rented, and no legal estate in the land, and that, hence, the title descended to the heirs at law, who are therefore entitled to the proceeds. The estate of a trustee in real estate is commensurate with the powers conferred by the trust and the purposes to be affected by it. 'If a trustee is required to grant a fee, the fee must be conferred upon him.' *Lawrence v. Lawrence*, 181 Ill. 248-251, 54 N. E. 918; *Lash v. Lash*, 209 Ill. 595-605, 70 N. E. 1049. In *Kirkland v. Cox*, 94 Ill. 400-412, it is said, quoting from *Perry on Trusts*, § 305: 'If the trustee is to exercise any discretion in the management of the estate, in the investment of the proceeds or the principal or in the application of the income, or if the purpose of the trust is to protect the estate for a given time, or until the death of someone, or until division, * * * the operation of the statute of uses is excluded and the trusts or uses remain mere equitable estates.' And it is further said, quoting from the same author, in section 315: 'Thus, if land is conveyed to trustees without the word "heirs," in trust to sell, they must have the fee, otherwise they could not sell. The construction would be the same if the trust was to sell the whole or a part, for no purchasers would be safe unless they could have the fee, and a trust to convey or lease, at discretion, would be subject to the same rule.' In the case at bar the executor is authorized to sell or lease at discretion, and, therefore, was vested with the fee in trust.

"The decree of the circuit court must be affirmed."

Accordingly, the judgment of the Appellate Court, affirming the decree of the circuit court, is affirmed.

Judgment affirmed.

(213 Ill. 274)

CHICAGO CITY RY. CO. v. SAXBY.

(Supreme Court of Illinois. Dec. 22, 1904.)

DAMAGES—PERSONAL INJURIES—DUTY TO EMPLOY PHYSICIAN—MISTREATMENT BY PHYSICIAN—INHERENT TENDENCY TO DISEASE—EVIDENCE—EXPERT TESTIMONY.

1. A person injured by the negligence of another is bound to use reasonable care to effect a speedy cure, and must exercise reasonable care to employ physicians of ordinary skill, but such person is not an insurer of the skill of the physicians employed, or required to employ the highest medical skill available; and the fact that the physicians employed make a mistake in the treatment and thereby fail to effect a cure, does not preclude the person injured from recovering for the entire injury sustained, so long as the requisite care has been used in the employment of a physician.

2. The question whether or not injuries were the result of defendant's negligence, or of an

inherent disease, or tendency to disease, in plaintiff, is a question of fact.

3. The fact that injuries caused through the negligence of another were aggravated by an organic tendency to disease existing in the person injured, which was developed by the injury, or the treatment applied to the injury by the physicians, does not preclude a recovery for the injuries.

4. In an action for injuries, where plaintiff had fully testified as to the circumstances of the accident, the refusal of the court to strike out an answer in which she stated that she was upset in every particular, and thought every function of her body was out of order from the shock, was not reversible error.

5. In an action for injuries, the evidence showed that plaintiff was thrown to the ground, and struck upon her left side; that prior to the injuries she was in good health; and that she sustained an injury to the hip, which subsequently involved the knee. A physician testified that the night of the injury he discovered visible evidence of trouble with the knee, and further stated that the knee was very painful from the time of the injury. *Held*, that there was sufficient evidence that the knee was injured at the time of the accident to permit evidence that tuberculosis, which developed in the knee, might be occasioned by violence.

Appeal from Appellate Court, First District.

Action by Mary Saxby against the Chicago City Railway Company. From a judgment of the Appellate Court affirming a judgment for plaintiff, defendant appeals. Affirmed.

This was an action on the case brought by the appellee in the circuit court of Cook county against the appellant to recover damages for an injury to her person claimed to have been sustained by her in consequence of the car of appellant, upon which she was a passenger, being suddenly started as she was about to leave the car, and before she had time to alight upon the street, whereby she was thrown down and injured. The jury returned a verdict in her favor for \$16,000, and, upon her remitting \$6,000 of that amount, the court overruled a motion for a new trial and entered judgment upon the verdict for \$10,000, which judgment has been affirmed upon appeal by the Appellate Court for the First District, and a further appeal has been prosecuted to this court. Two reasons are urged in this court as grounds for reversal: First, that the verdict is not justified by the evidence; second, the court admitted improper evidence on behalf of the appellee.

Wm. J. Hynes and Watson J. Ferry (Mason B. Starring, of counsel), for appellant. Brode B. Davis and Walker & Williams, for appellee.

HAND, J. (after stating the facts). At the close of the plaintiff's evidence, and again at the close of all the evidence, the defendant requested the court to instruct the jury to return a verdict in its favor, which the court declined to do, and the action of the court in that regard has been assigned as error.

On the evening of August 16, 1899, ap-

pellee was a passenger upon one of appellant's cars going south upon Indiana avenue, in the city of Chicago. The evidence introduced on her behalf tended to show: That as the car approached Forty-Fifth street she signaled the conductor to stop the car at that street. That the car stopped at the intersection of Indiana avenue and Forty-Fifth street. That she started to leave the car, but, before she had time to alight upon the ground, and while she stood upon the running board upon the west side of the car, the car was suddenly started without warning to her, and she was violently thrown from the car upon the street, where she struck upon her left side and was injured. At the time of the accident the appellee was 60 years of age, and was in good health. From the time of the injury to the date of the trial, which occurred more than two years after the accident, she had left her room but once, and at the time of the trial was unable to sit up but a portion of the time or to walk. That the injury was to her left leg. That the neck of the femur bone of that leg was fractured, and tuberculosis had developed in the left knee, and the knee joint of that leg had become ankylosed.

The main contention of the appellant is that the diseased condition of the knee was caused by the leg being improperly treated by the physicians employed by the appellee, by placing thereon splints and plaster casts, and attaching to the foot pulleys and weights, and that tuberculosis, which, it is claimed, was organic with her, by reason of such imperfect treatment was developed in the knee; and it is urged that by reason of those facts the diseased condition of the knee was not the natural and ordinary consequence of the injury received by appellee at the time she fell upon the street, and that she ought not to be permitted to recover damages from the appellant for the conditions which were shown to exist in the knee. The appellee, immediately after the injury, was carried to her apartment, and was treated by Drs. Freund and Farnum, and Drs. Fenger and Andrews were called in consultation—Dr. Freund was called within a few minutes after the accident—all of whom were physicians practicing their profession in the city of Chicago. She was also cared for by a trained nurse during the first 18 months succeeding her injury, and at the time of the trial had in her employ a young woman who had devoted her entire time to her care since the trained nurse left her employ. Drs. Halstead and Findley, also physicians in practice in the city of Chicago, were called as experts, and approved the treatment applied to the appellee by her attending physicians.

It was the duty of the appellee to use reasonable care to effect a speedy and complete cure of the injury which she sustained by being thrown upon the street from appellant's car, and, to that end, she was re-

quired to exercise reasonable care to employ physicians of ordinary skill and experience to treat her, and other means to effect a cure of her injuries. She was not, however, required to employ the highest medical skill which might be found. All the law required was that she exercise such prudence as men and women of ordinary judgment, under like circumstances, would exercise in the choice of physicians and the means to be used to effect a recovery. She was not an insurer, bound to act at her peril; and if she exercised reasonable care in selecting her physicians, and in the employ of other means for her recovery, if her physicians made a mistake in the treatment applied by them to her, or the means employed failed to effect a cure, then she may recover for the entire injury which she has sustained, as the law, if the injured person uses ordinary care in selecting a physician, and in the employment of other means to effect a cure, regards an injury resulting from the mistake of a physician, or from a failure of the means employed to effect a cure, as a part of the immediate and direct damages which naturally flow from the injury.

In Pullman Palace Car Co. v. Bluhm, 109 Ill. 20, 50 Am. Rep. 601, which was a personal injury case, the court permitted the plaintiff to prove that the bones of his arm which were broken had not healed, but that the same had formed a false joint. On page 25, 109 Ill., 50 Am. Rep. 601, the court said: "If appellee exercised ordinary care to keep the parts together, and used ordinary care in the selection of surgeons and doctors, and nurses, if needed, and employed those of ordinary skill and care in their profession, and still, by some unskillful or negligent act of such nurses or doctors or surgeons, the parts became separated, and the false joint was the result, appellant, if responsible for the breaking of the arm, ought to answer for the injury in the false joint. The appellee, when injured, was bound by law to use ordinary care to render the injury no greater than necessary. It was therefore his duty to employ such surgeons and nurses as ordinary prudence in his situation required, and to use ordinary judgment and care in doing so, and to select only such as were of at least ordinary skill and care in their profession. But the law does not make him an insurer, in such case, that such surgeons or doctors or nurses will be guilty of no negligence, error in judgment, or want of care. The liability to mistakes in curing is incident to a broken arm, and where such mistakes occur (the injured party using ordinary care) the injury resulting from such mistakes is properly regarded as part of the immediate and direct damages resulting from the breaking of the arm." In Collins v. City of Council Bluffs, 32 Iowa, 324, 7 Am. Rep. 200, the court instructed the jury that if in the selection of a physician, and in the use of other means for effecting a cure, the plaintiff used reasonable

and ordinary care, her damages should not be diminished, notwithstanding her suffering might have been alleviated and her condition improved. The court, in discussing this instruction, said (page 329, 32 Iowa, 7 Am. Rep. 200): "This instruction unquestionably announces a correct rule. All that the law required of plaintiff was the exercise of her judgment and the care which men of ordinary prudence, under like circumstances, would exercise in the choice of physicians and the means to be used to effect her recovery. She was not required to employ the best surgical skill and the means best adapted to heal her injuries. These may not have been within her reach; and while she may have possessed prudence, and reason, even, in the highest degree possessed by men who are unlearned in medicine and surgery, she still may have been unable to choose the best means for her recovery. But she was required to exercise only the judgment and care which men and women in her condition are ordinarily capable of exercising. This is the purpose of the instruction."

The evidence fails to establish with any degree of certainty that the appellee had in her system an organic tendency to tuberculosis—at least, at the time of the injury it was not developed in any form, and prior to the injury her left knee was in a healthy condition; and at least two of the physicians called by her stated, in reply to hypothetical questions submitted to them, that, in their opinion, the conditions found in her left knee were due to an external injury, and the appellee testified (and she was corroborated by Dr. Freund) that her left leg was swollen and painful from the time of the injury. If, however, it be conceded that she had tuberculosis in her system, and that the same was developed in the knee by reason of the injury thereto, or from the treatment she received in the endeavors made to effect a cure of the fracture of the neck of the femur, we think it cannot be said that the diseased condition of the knee was not a consequence which naturally and ordinarily might not follow as a result of the injury of appellee caused by the negligent act of appellant.

In *Stewart v. City of Ripon*, 38 Wis. 584, an action was brought to recover damages alleged to have been sustained by the plaintiff from a fall upon a defective sidewalk. The contention was made on behalf of the city that the diseased condition of the arm of the plaintiff was due to the fact that he had in his system an organic tendency to scrofula, and that such tendency was the proximate cause of the necrosis of the bone of his arm, and not the injury which he sustained by falling upon the sidewalk. The court held that, although the diseased condition of plaintiff's arm might not have occurred but for his organic tendency to scrofula, still, if the disease was developed by the injury, and a cure was retarded or prevented by reason of the presence of scrofula

in the plaintiff's system, the defendant's negligence was the proximate cause of the whole injury. And in *Baltimore City Railway Co. v. Kemp*, 61 Md. 74, it was said: "It is the common observation of all that the effect of personal physical injuries depends much upon the peculiar conditions and tendencies of the person injured, and what may produce but slight and uninjurious consequences in one case may produce consequences of the most serious and distressing character in another; and, this being so, a wrongdoer is not permitted to relieve himself from responsibility for the consequences of his act by showing that the injury would have been of less severity if it had been inflicted upon any one else of a large majority of the human family."

Mr. Thompson, in his *Commentaries on the Law of Negligence* (volume 1, § 150, p. 145), says: "The duty of care and of abstaining from injuring another applies to the sick, the weak, and the infirm, as well as to the strong and healthy. When this duty is violated, the measure of damages is the injury which results, though this injury may not have followed but for the peculiar physical condition of the person injured, although it may have been thereby aggravated." In section 151 of the same work (page 147) it is said: "It may be stated generally that if the negligence of A. produces a hurt to B., which aggravates a pre-existing tendency to disease in B., the negligence, and not the disease, is deemed, in law, the proximate cause of the injury."

The author of the article on "Contributory Negligence" in the *American & English Encyclopædia of Law* (volume 7 [2d Ed.] p. 388), says: "In cases where the defendant's negligence caused a disease, developed a latent tendency to disease, aggravated a prior disease, or led in immediate sequence to disease, the defendant must respond in damages for such part of the diseased condition as his negligence caused; and if there can be no apportionment, or if it cannot be said that the disease would have existed apart from the injury inflicted by the defendant, then the defendant is responsible for the diseased condition."

The court instructed the jury upon behalf of the defendant: "The jury are instructed that, even though the defendant were liable for the accident in question, still you are instructed that she could not recover in this case for any damage which was not the natural and necessary result of the accident and injury then sustained, if you find from the evidence she sustained injury at the time of the accident; and if you find from the evidence that the plaintiff has now, or has had, any other disability resulting from conditions which existed in the plaintiff prior to said accident, and of which the accident in question was not the proximate cause, then you are not permitted by law to allow her anything for such disability, and should not do so from motives of sympathy or any other

motive." The question was therefore submitted to the jury whether the injuries from which the appellee was suffering were the results of the diseased condition of her system, which existed prior to her injury, or were the direct and immediate result of the appellee being thrown from the car upon the ground by the negligent act of the appellant; and they were told, if her injuries were the result of disabilities with which she had been afflicted prior to the injury, she could not recover damages by reason of such disabilities. The question whether or not the injuries of the appellee were the result of the negligence of the appellant, or resulted from disease, or a tendency to disease, was a question of fact; and, as there was evidence in the record which fairly tended to show that the injuries from which the appellee was suffering were the result of her being thrown from the appellant's car, we are of the opinion the trial court did not err in declining to take the case from the jury, even though the injuries of the appellee were aggravated by the fact that she had in her system an organic tendency to tuberculosis, which was developed by the injury, or the treatment applied to the injury by the physicians and which retarded or prevented a complete recovery.

Numerous exceptions were taken upon the trial to the rulings of the court upon questions pertaining to the evidence. We have examined the questions thus raised, and are of the opinion that the trial court in that regard in no instance committed reversible error. For example, the appellee, in detailing upon her direct examination the result of the injury occasioned to her person by the fall, said: "I was upset in every particular. Every function of my body, I think, was out of order from the shock, and I suffered terribly in every way." This statement of the witness was unimportant. She had already testified fully as to the manner in which she fell from the car, and the effect of the fall; and, while the statement was in a certain sense the expression of an opinion, it was in a broader sense the statement of a fact—that is, the condition her person was in as a result of the injury. In any event, in the opinion of the court, the refusal to strike out the answer should not cause a reversal of the case.

While Dr. Davis, who had treated the appellee, was upon the stand, he was asked, "What is the fact, doctor, as to tuberculosis being occasioned by trauma or violence?" to which he replied: "Tuberculosis may be caused to center at the point of trauma. A great many instances are known where it occurs." It is urged there was no evidence upon which to base the question, as the evidence failed to show the left knee of appellee was injured at the time of the accident. The evidence showed the appellee was thrown from the car and struck upon the ground upon her left side, that prior to her

injury she was in good health, and that she sustained an injury to the hip which subsequently involved the knee. While upon the stand she testified: "I suffered excruciating pain all the time in my hip and in my back—in my hip principally, but my limb was swollen and painful." Dr. Freund also stated: "The first time I discovered any visible evidence of anything the matter with the knee was the same night of the injury." He also stated: "During the period described the knee was always very painful—from the time of the injury." While he qualified this statement upon cross-examination, we think it cannot be said that there is no evidence that the knee was injured at the time of the accident. The court did not err in permitting the question to be answered.

We do not deem it necessary to take up separately and consider all of the objections to the court's ruling upon the evidence which have been raised and discussed in the briefs. Suffice it to say that they are technical in the extreme, and, in our judgment, had no perceptible effect upon the verdict, and were not prejudicial to the appellant. Finding no reversible error in this record, the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

(213 Ill. 36)

CHICAGO & M. ELECTRIC R. CO. v. DRIVER et al.

(Supreme Court of Illinois. Dec. 22, 1904.)

EMINENT DOMAIN—CONDEMNATION—DAMAGES—EVIDENCE—SUFFICIENCY—PLEADINGS—ISSUES—JUDICIAL NOTICE—INSTRUCTIONS.

1. On proceedings by a railroad company for the condemnation of a right of way, evidence considered, and *held* to warrant the damages awarded.

2. The petitioner in a condemnation proceeding is required at his peril to ascertain, and name in the petition the true owner of the land sought to be condemned and taken, and the person so named is not required to prove title.

3. In condemnation proceedings the petitioner in a cross-petition praying for an award of damages to land which is not taken must allege in the cross-petition that he is the owner of the property alleged to be damaged.

4. Where, in condemnation proceedings, a landowner files a cross-petition praying for an award for damages to land not taken, if the original petitioner desires to contest the allegation of ownership the issue must be raised by an appropriate pleading.

5. In condemnation proceedings the issue of ownership of land, if any, is preliminary to the submission of the question of damages to the jury, and is to be determined before the jury is impaneled to assess the damages.

6. Where, in condemnation proceedings by a railroad to acquire a right of way, both litigants proceeded in charging the jury on the theory that damages to lands not taken had been established by the evidence, neither could complain of instructions which assumed that such damages were to be assessed.

7. An appellant cannot complain of error in an instruction where the same ruling was contained in an instruction given at his request.

8. On proceedings by a railroad company to

¶ 8. See Eminent Domain, vol. 18, Cent. Dig. § 239, 294.

condemn land for a right of way, an instruction that under the statute the railroad company was not required to fence its road until six months after it had completed the same, and that the damages, if any, attending the keeping open of the right of way during that time, were proper for the consideration of the jury as an element of damage, was proper.

9. Judicial notice cannot be taken that the rights of way of railroad companies are fenced as the track is constructed.

10. On proceedings by a railroad company to condemn land for a right of way, an instruction that the jury must be confined to the market value of the land, was not erroneous for not confining the jury to the "fair cash market value," they having been informed that the only measure of damages was the fair cash market value in another instruction, and the court in the examination of witnesses having restricted the proof to the fair cash market value of the land.

11. Where, on proceedings by a railroad company to condemn lands for a right of way, the jury visited and viewed the premises of D., one of the property owners, on whose land there was no building, an instruction that the element of danger by fire and increased cost of insurance on buildings should be considered on the question of damages was applicable to the proof of damages to the other property owners, and was not prejudicial as to D. because of the fact that there was no building on her premises.

12. On proceedings by a railroad company to condemn land for a right of way, an instruction that in estimating the compensation for land actually taken no deductions could be made because of any benefits which would accrue to other portions of the lands not proposed to be taken was not erroneous on the theory that it should have gone further, and informed the jury that benefits to lands not taken were proper to be considered in estimating the damages to land not taken, other instructions having clearly shown that benefits to land not taken were proper to be considered on the question of damages to land not taken.

13. Where the charter of a railroad company authorized it to use steam or other motive power, and on proceedings by it to condemn land for a right of way it was not willing to stipulate that it would not use steam, it could not complain that the court instructed the jury that the property owners had the right to have their damages estimated with reference to any motive power that the railroad company might use under its charter.

14. On proceedings by a railroad company to condemn land for a right of way, an instruction that in arriving at the value of the land the jury might consider its value for the purpose for which it was shown by the evidence to be most available was no ground for reversal.

Appeal from Lake County Court; D. L. Jones, Judge.

Petition by the Chicago & Milwaukee Electric Railroad Company against Helen E. Diver and others for the condemnation of a right of way. From the judgment for damages, petitioner appeals. Affirmed.

F. S. Munro and Charles Whitney, for appellant. Hanna & Miller, for appellees.

BOGGS, J. This was a petition filed by the appellant company for the condemnation of a right of way for the line of its road on and over certain tracts of lands and town lots belonging to the appellees, respectively. The jury awarded the appellee Helen E. Diver \$2,000 for land taken for the right of

way and \$2,600 for damages occasioned to land not taken, and the verdict was approved by the court. Counsel for the appellant conceded that the amount awarded her for the land taken for the right of way is fair and reasonable, but insist that the damages awarded for lands not taken is excessive, and not supported by the proofs. Mrs. Diver owned a tract of land containing approximately 28 acres, situated between State street on its west, in North Chicago, and the Chicago & Northwestern Railway Company's tracks on the east. A narrow strip of land, belonging to one A. C. Frost, was situated between State street and a portion of Mrs. Diver's tract. The shape of Mrs. Diver's tract of land is substantially that of a square. The right of way of the appellant company, of the width of 70 feet, enters the tract near the northwest corner thereof, and passes in a southerly direction through the tract, passing out near the southwest corner, leaving a strip west of the right of way 16.30 feet wide at the northernmost end and of the width of 128.54 feet at the south end. The length of the strip is 1,160 feet, or thereabout, and it contains 2.14 acres. The right of way contains 1.815 acres, leaving 24 acres east of the right of way. The company stipulated it would construct two crossings across its right of way, each 32 feet in width, at points designated on a plat that was produced before the jury. The crossings were for the purpose of providing access from the lands on the west side of the right of way to the larger tract on the east thereof, and by means of which crossing the 24-acre tract would, in a degree, be made accessible from State street. The strip west of the right of way was well shown to be of the value of \$1,000 per acre. That was the value per acre placed upon the land taken, and the appellant company concedes that such valuation was reasonable and fair. The strip was clearly worth that much, or more, per acre, before the location of appellant's railroad. The lowest estimate of the damage to this tract was 50 per cent. of its value. Seventy-five per cent. of its value was the estimate of some of the witnesses. If computed at 50 per cent., the damages to that tract would be practically \$1,100. Deducting this sum from \$2,600, the total amount allowed for damages to lands not taken, would leave \$1,500 as damages to the 24-acre tract east of the right of way. The testimony of the witnesses produced on behalf of Mrs. Diver was, in substance, that the 24-acre tract was best adapted to and most valuable for subdivision into lots and blocks for residence purposes, and that for such purposes it would be depreciated in value from 10 to 15 per cent. All of the witnesses, as counsel for the appellant in their brief concede, practically agreed that the land was worth \$1,000 per acre for subdivision purposes. Estimating the depreciation at 10 per cent., the lowest estimate of

the percentage of depreciation for such purpose, the damages to this tract would be \$2,400, which, added to the damages of \$1,100, clearly shown to be occasioned to the strip west of the right of way, would make the total of the damages to the land of Mrs. Diver not taken \$3,500—\$900 greater than the judgment sought to be reversed. Witnesses for the appellant company were of the opinion, and so testified, that the value of the 24-acre tract would be enhanced for manufacturing purposes by the construction of the railroad contemplated by the appellant company, and that its value for such purposes would be as great as it would have been for subdivision purposes before the construction of the railroad. There was a conflict in the testimony as to the purpose for which the land was best adapted and for which it was most valuable, and we are unable to say there was a decided weight of testimony supporting the view of the appellant company. The jury visited and inspected the premises and the surroundings, and had superior facilities and opportunity thereby for applying the testimony relative to this conflict, and for determining whether the location of appellant's railroad would affect the property as to render it as valuable for manufacturing purposes after the construction of the road as it was for subdivision purposes prior thereto. The amount allowed for damages to land not taken was clearly within the range of the testimony, and there is no reason we should disturb the verdict on the ground it is not supported by the proof.

The appellee Peter Fortune owned lots Nos. 8 and 9 in Lenox's Subdivision of the south half of section 33, etc. He was allowed \$240 for the portions of his lots which were taken and was awarded damages in the sum of \$300 to the portions not taken. It is urged the amounts so allowed are unreasonable, and against the weight of the evidence. Lot 8 lies adjoining to and immediately north of lot 9. The lots have a frontage of 25 feet each on State street and extend 125 feet eastward to an alley 16 feet in width. The right of way of appellant's road occupied the alley, and extended over the easterly part of both of appellee's lots, taking therefrom a strip of the width of 24.6 feet at the north line of lot 8 and 35.14 feet at the south line of lot 9. The evidence of the greater number of witnesses estimated the value of the parts of the lots which were taken at a somewhat lesser amount than was allowed. One witness, however, estimated the value of the portions of the lots taken at a greater sum than was awarded. The jury saw the premises, and seem to have reached the conclusion that the evidence of this latter witness was entitled to the greater weight. We incline to the same conclusion. The two lots, as appeared from the testimony of all of the witnesses, were worth at least \$1,000, exclusive of the buildings that

stood thereon. One-fifth of lot 8 and one-fourth of lot 9 were actually taken, and it is clear that we cannot say that \$240 was palpably an excessive allowance for the parts of the lots that were taken. The allowance of \$300 as damages to the parts of the lots not taken was much less than the greater weight of the evidence would have warranted. The lots were materially shortened, and were deprived of the benefit of an alley or any means of access to the rear as shortened, except by appropriating a portion of their frontage to that purpose.

Appellee Gibbons owned lot No. 10 in the same subdivision as the Fortune lots. His lot has a frontage of 25 feet on State street, and extends eastward 125 feet to an alley 16 feet in width. The right of way of appellant's road covered the alley and extended over the easterly portion of the lot a distance of 35.14 feet at the north line of the lot and 41.18 feet at the south line thereof. The strip taken was valued at \$400 by the jury, and \$300 was awarded as damages to the remainder of the lot. On the property taken there were a frame stable 16 by 22 or 24 feet and a frame water-closet. The witnesses who testified as to this property variously estimated the value of the part of the lot that was taken and the damage to the remainder. The witnesses, except two of them, estimated the value of the land taken and the damage to that not taken at greater amounts than were fixed by the award of the jury. One of these two excepted witnesses—James G. Smith—valued the land taken at \$100 less than the jury allowed, but he estimated the damage to the land not taken at \$100 more than the award. The total of his estimate is the same as the total award made by the jury. The other of the excepted witnesses—one Fred W. Cornish—differed so widely from all others who testified in this case that it is not strange his testimony did not control.

The only complaint as to the verdict and judgment as to the property of appellee Mary E. Thomas is that the verdict is erroneous because it allowed to her damages to lot No. 2 without any proof that she was the owner of the lot. The petitioner in a condemnation proceeding is required, at its peril, to ascertain and name in the petition the true owner of the land sought to be condemned and taken, and the person so named as owner in the petition is not required to prove title. *Peoria, Pekin & Jacksonville Railroad Co. v. Laurie*, 63 Ill. 264; *St. Louis & Southeastern Railway Co. v. Teters*, 68 Ill. 144. The petitioner in a cross-petition who prays for an award for damages accruing to land which is not taken must allege in the petition that he or she is the owner of the property alleged to be damaged. If the original petitioner desires to contest the allegation of ownership by the cross-petitioner, he or it must, by appropriate pleadings, raise that issue. It is not contended that any

such issue was raised in the case at bar. Had such issue been raised, it would not have been submitted to the jury impaneled to assess the damages to be paid the landowner. The jury impaneled in this proceeding had no other duty to perform than to assess the value of land taken and the damages occasioned to land not taken. *Lieberman v. Chicago & South Side Rapid Transit Railroad Co.*, 141 Ill. 140, 30 N. E. 544. In a condemnation proceeding the issue of ownership, if any, is preliminary to the submission of the question of damages to the jury, and is to be litigated and determined before the jury is impaneled to assess the amount to be paid the owner. No question of title or ownership should be presented to the jury impaneled in such a proceeding.

It is urged that the court erred in giving instructions Nos. 1 and 2, and that for such alleged error the judgments should be reversed. The complaint as to these instructions is that they are so drawn as to imply that the lands not taken were damaged. These instructions were so carelessly drawn that the criticism is not wholly unfounded. But the implication, if any, was one which the appellant also proceeded upon in the instructions to the jury asked in its behalf. Instructions Nos. 5, 10, and 11 asked and given on behalf of appellant assumed that damages were to be assessed to lands not taken, and the implication in each of these instructions is more definite and direct than in instructions 2 and 3 given at the request of the appellees. Both litigants having proceeded in charging the jury on the theory damages to the lands not taken were established by the proofs, neither can be allowed to urge the action of the other as error. Moreover, there was no substantial ground on which to insist that damages for land not taken should be wholly denied to any of the cross-petitioners.

The complaint that said instruction No. 2 erroneously defined the "character of benefits" to lands not taken which may be deducted from the damages sustained by such property may also be disposed of by saying that instruction No. 19 asked and given at the request of appellant declared the same rule as did instruction No. 2.

Instruction No. 3 for appellees advised the jury that under the statute the appellant company was not required to fence its road until six months after it had completed the same, and that the damages, if any, attending the keeping open of the right of way during that time, were proper for the consideration of the jury as an element of damage. This instruction was approved by this court in *St. Louis, Jerseyville & Springfield Railroad Co. v. Kirby*, 104 Ill. 345, *Centralia & Chester Railroad Co. v. Rixman*, 121 Ill. 214, 12 N. E. 685, and *Centralia & Chester Railroad Co. v. Brake*, 125 Ill. 393, 17 N. E. 820. The instruction here given did not, as did the instruction in the case last cited,

assume that damages would necessarily attend the keeping open of the farm by the failure to fence, and the instruction given in that case was for that reason, and none other, condemned. The court cannot, as counsel for appellant urge, take judicial notice, as being a matter of common knowledge, that the rights of way of railroad companies are fenced as the track is constructed. The appellant company could have lawfully stipulated that it would fence its track and right of way at once on taking possession thereof, and thus have removed this element of damage from the consideration of the jury; but it declined to do so, and expressly so framed the stipulation it did submit as to stipulate only that it would construct and maintain fences along its right of way within six months after its line was open for use.

Instruction No. 4 given in behalf of the appellees charged the jury that in assessing damages, "their inquiries must be confined to the market value of the land," etc. It is urged that the judgments should be reversed because the instruction did not expressly confine the inquiry of the jury to the "fair cash market value of the land." The jury were expressly informed that the only measure of damages was the "fair cash market value" thereof by instructions Nos. 1, 13, and 14 given on behalf of the appellees, and also with equal explicitness and directness in instructions Nos. 1, 7, 10, and 20 given in behalf of the appellant. Moreover, the court, in the examination of witnesses, restricted the proof to the fair cash market value of the land, and the jury had no other testimony on which to act. When the instructions are considered as a series, there is no room for the contention that the jury were misled to understand that some other standard of value than the "fair cash market price" could be considered by them.

Instruction No. 5 informed the jury that the element of danger by fire, if the jury believed there would necessarily be any increased danger from fire arising from the lawful operation of the contemplated road, or that the cost of insuring the buildings thereon would necessarily be increased by the building and operation of the road, and that the value of the premises would thereby be decreased, if proven, were proper for the consideration of the jury in arriving at a conclusion on the question of damages. It is urged the judgment in favor of Mrs. Diver should be reversed because of the giving of this instruction, as there was no building on her premises, and no proof in her case relating to her premises upon which to base the instruction. The instruction was applicable to the proof of damages to be allowed other property owners defendant to the condemnation proceeding near whose buildings the road would run, and was proper as applied to those cases. The evidence showed that there was no building on Mrs. Diver's land, and the jury visited and viewed

her premises, and we cannot conceive that it can be seriously contended that any injury could have resulted to the appellant from the giving of this instruction.

Instruction No. 6 cannot be construed as likely to mislead the jury to believe that the possibilities of injuries to persons or property from the negligent operation of the road was proper for their consideration. The instruction clearly refers only to actual and appreciable injuries resulting from the construction and operation of the railroad in a lawful manner and without negligence.

Instruction No. 7 was intended to advise the jury, and did no more than to advise them, that in estimating the compensation for land actually taken no deductions could be made because of any benefits which would accrue to other portions of the lands not proposed to be taken. The criticism of this instruction is that it should have gone further, and informed the jury that benefits to land not taken were proper to be considered in estimating the damages to land not taken. That benefits to land not taken were proper to be considered when arriving at a conclusion as to damages accruing to land not taken was repeatedly made known to the jury in a number of other instructions given at the request of the litigants, and the complaint that it was not again repeated in instruction No. 7, which had no relation to the question of damages to lands not taken, is so trivial that it, perhaps, might better have been passed without notice.

The charter of the appellant company authorized it to use steam or any other motive power in propelling its trains. The appellant company was not willing to stipulate that it would not use steam as a motive power, and has no right to complain that the court instructed the jury, as it did in instruction No. 8, that the property owners had the right to have their damages estimated with reference to any motive power the appellant, under its charter, might elect to use. *Lieberman v. Chicago & South Side Rapid Transit Railroad Co.*, supra, is authority for the principle announced in this instruction.

The only objection to instruction No. 9 not disposed of by what has been hereinbefore said is that the instruction declares that in arriving at the value of the land the jury may consider its value for the purpose for which it is shown by the evidence to be most available. Counsel for appellant declare that the true rule is "that the value of the property shall be arrived at upon the basis of the uses and purposes for which it is best adapted." We content ourselves with the observation that we are unable to agree that the judgments should be reversed and new trials awarded because of the giving of this instruction.

The remarks made in disposing of other alleged errors fully answer the criticisms

advanced against instructions Nos. 10 and 11 given in behalf of appellees.

The record is free from error reversible in character, and the judgments are affirmed. Judgment affirmed.

(213 Ill. 47)

HARRIS et al. v. CITY OF MACOMB.

(Supreme Court of Illinois. Dec. 22, 1904.)

MUNICIPAL CORPORATIONS—STREET IMPROVEMENT—ASSESSMENT AGAINST STREET RAILROAD.

1. A city ordinance authorizing a street railroad to operate its lines in certain streets, and providing that, if the city should thereafter pave any street along which the railroad might run, the company should pave the space between the rails, and, whether paved or not, it should keep such space in good repair and make good crossings over its tracks and street intersections, and, in case it took up any paving for the purpose of laying or repairing tracks, should replace the same and repair damaged pavement, did not authorize the city to assess against the railroad any portion of the cost of improving a street on which it was authorized to run, but on which it had not actually built its tracks, but the whole cost of paving such streets was properly charged against the property owners.

Appeal from McDonough County Court; W. J. Franklin, Judge.

Petition for the confirmation of a special assessment by the city of Macomb against H. H. Harris and others. From a judgment of confirmation, defendants appeal. Affirmed.

Elting & O'Harra and Hiram H. Harris, for appellants. Conrad G. Gumbart, City Atty., for appellee.

BOGGS, J. This was a petition for the confirmation of a special assessment levied for the purpose of defraying the expense of grading, curbing, and paving West Jackson street, in the appellee city, in pursuance of an ordinance of the city council. The appellants objected that the ordinance, estimate of the cost of the proposed improvement, and the assessment roll were void, for the alleged reason that the ordinance provided for, and the estimate and assessment roll included, the cost of grading and paving one block of said West Jackson street which the Macomb & Western Illinois Railway Company was, under the terms and conditions of the license granted it by the city of Macomb, required to grade and pave at its cost. The objection was overruled, and judgment confirming the assessment entered, from which this appeal has been perfected.

The ordinance authorizing the improvement to be made was adopted June 6, 1904. On May 6, 1903, the city adopted an ordinance authorizing the Macomb & Western Illinois Railway Company to construct, and to maintain and operate for the period of 20 years, its railroad in and along certain of the streets of the city, including therein one block in and along West Jackson street.

The railroad company had constructed its track in and along Johnson street to the intersection of that street and said Jackson street, and to the center of the intersection, before the ordinance authorizing the improvement of the street was adopted. It seems, however, that the track across, or partly across, Jackson street was but a temporary track, laid for the purpose of conveying material used in the construction of the road, and that aside from this temporary track the company had not occupied Jackson street. The contention of the appellants was and is that nevertheless the railroad company had, and for the remainder of the term of the license will have, authority, under the ordinance of May 6, 1903, to construct and operate its road in and along and upon the said block in Jackson street, and may at any time avail of that privilege and license and construct its tracks along Jackson street, in which event, appellants insist, the burden of paving that part of the street that will be between the rails of the tracks of the railroad company will have been borne by the appellants and other owners of property assessed to pay the expense of the improvement, and that the railroad company will be relieved from the performance of one of the conditions of the ordinance authorizing it to occupy and use the street.

The obligations of the railroad company are to be found in sections 9, 10, and 11 of the ordinance conferring the license on the company to build and operate its railroad in and along the streets of the city. These sections are as follows:

"Sec. 9. In case said city of Macomb shall, at any time hereafter, pave the surface of any street, or any portion thereof, along which said railroad or street railroad may run, said company shall pave the space between the rails of its tracks and keep the same in repair so that it shall correspond with such paving. All of such paving shall be done under the supervision of the city engineer.

"Sec. 10. The space between the rails of said street railroad on all streets, whether improved or not, shall be kept by said company, its successors and assigns, in good repair, and at street intersections not paved, said company, its successors and assigns, shall make, with hard brick or plank, a good crossing over said track or tracks and keep the same in repair.

"Sec. 11. On all paved streets, when the paving is taken up by said company for the purpose of laying or repairing tracks, switches or turn-outs, the said pavement shall be replaced by said company at their cost, in good condition; and when said pavement is damaged, either inside or outside of said track, by reason of the repairing, laying or re-laying of said tracks, switches or turn-outs, or by reason of the running of cars over said streets where paving is laid,

said company shall repair said pavement at their cost."

Section 9 relates to the duties imposed on the railroad company in the event the city shall determine to pave a street in and along which the railroad company has previously constructed its railroad, and has no application to the present investigation. The words "may run," in this section, very plainly mean streets whereon the track of the railroad company shall have been constructed, not streets whereon the company has the right or license to operate its road, but of which right or license it has not availed itself. Section 10 is likewise without application. Its provisions relate only to the duty of the railroad company with reference to the care of the space between the rails of its tracks in all streets in and along which it should thereafter lay the tracks of its road. Section 11 controls the course and duty of the railroad company when it shall construct its tracks in and along a street that has been paved. If the railroad company shall hereafter determine to lay its tracks in and along that portion of West Jackson street after it has been paved, under the judgment of confirmation here appealed from section 11 will then apply, and direct the duty of the railroad company in the matter of repairing and restoring the paving. The provisions of section 10, as to the duty of the company to keep the space between its tracks in good repair, will also become applicable if the tracks of the company are laid on West Jackson street.

The trial court correctly held that the provisions of the ordinance did not authorize the assessment of any portion of the cost of improving West Jackson street against the property of the railroad company. The judgment is affirmed.

Judgment affirmed.

(212 Ill. 546)

CINCINNATI, I. & W. RY. CO. v. PEOPLE
ex rel. BIEBINGER.

(Supreme Court of Illinois. Dec. 22, 1904.)

TAXATION—COLLECTION OF TAXES—OVERPAYMENTS BY TAXPAYERS—EFFECT ON LIABILITY OF OTHER TAXPAYERS.

1. The fact that a county has collected, by means of an excessive tax on the property of certain taxpayers, the full amount which it is authorized to levy, does not prevent it from collecting a tax legally due from another taxpayer.

Appeal from Platt County Court; F. M. Shonkwiler, Judge.

Application by the people, on the relation of I. N. Biebing, collector of Platt county, for a judgment against the Cincinnati, Indianapolis & Western Railway Company for a county tax. From a judgment for the tax, defendant appeals. Affirmed.

George W. Fisher and James L. Hicks, for appellant. H. J. Hamlin, Atty. Gen., and Chas. F. Mansfield, for the People.

RICKS, C. J. This is an appeal from a judgment against the appellant for a county tax, rendered by the county court of Piatt county, through which the appellant owns and operates its railroad. It was assessed by the state board of equalization for the year 1903, upon which valuation taxes for county and other purposes were extended, the county tax amounting to \$524.53. The resolution of the board of supervisors directing the levy provided "for current expenses, \$34,000; for the payment of bonds issued to build court house and repair jails Nos. 1 to 10, \$10,000; and \$6,000 interest accrued and accruing thereon"—making the total amount of levy \$50,000; and in order to produce the amount of the levy it was necessary for the county clerk to extend the tax at the rate of 80 cents on each \$100 of the total valuation for 1903, which total valuation amounted to \$3,420,466, making the total county tax \$51,441.17, and being \$1,441.17 more than required by the board to collect and \$3,287.59 in excess of the amount which a rate of 75 cents on the \$100 would produce. Appellant refused to pay the county tax extended against its property, and, on application of the county collector to the June term of the county court for judgment and order of sale, filed its objections in writing, the principal objection, and the only one relied on, being, in substance, as follows: The county of Piatt having heretofore received and collected the full amount which it is authorized by law to levy or collect for the year 1903, no authority exists to collect more from this objector, and that the county has already received more tax than it was authorized to levy and collect for the year 1903. Upon a hearing judgment was rendered sustaining the objections to the extent of 5 cents on each \$100, and overruled as to 75 cents on each \$100, and judgment entered for \$492.75 and costs, from which judgment an appeal is prosecuted to this court.

It is insisted by the appellant that inasmuch as a rate of 75 cents on the \$100 of the total valuation would only amount to \$48,153.16, and there had already been collected over \$50,000 in taxes, no authority existed to recover more or to render judgment against the property of appellant. It is conceded by appellant that a 75 cent rate on the \$100 would produce the amount of the tax against appellant's property rendered by the judgment, and the only position contended for is that, inasmuch as there had already been collected as tax the amount 75 cents on the \$100 would produce, no more tax could be collected. In this contention we cannot agree with appellant, as the law has always been that all property should bear its just proportion of tax, and because some person has paid an unjust or excessive tax on his property it is no reason why other property should not bear its just proportion of the tax and pay the amount legally assessed against it.

Appellant cites the cases of *Walser v. Board of Education*, 160 Ill. 272, 43 N. E. 346, 31 L. R. A. 329, and *Wabash Railroad Co. v. People*, 196 Ill. 606, 63 N. E. 1064, to sustain its contention. The *Walser Case* was where, by mistake, certain lands were taxed in the wrong district, and the tax was paid, and a suit was brought by five resident taxpayers and by the district entitled to the tax, and against the district collecting the tax, to recover the amount paid. The court stated in the opinion: "The only question here is the right of complainant to recover the amount of an illegal tax paid." And in the *Wabash Case*, supra, the *Wabash Railroad Company* paid its tax each year, but paid it in the wrong school district, and it was attempted afterward to assess its property as "omitted property" in the district which had been entitled to receive its tax. The court held that the property of the railroad company could not be assessed as "omitted property." We are unable to see how either of these cases relied upon is authority for the principle contended for in this case by counsel for appellant. In both cases relied upon the taxpayers paid the taxes for the year in question, and paid the full amount for which they were liable; and while the court said in the *Wabash Case*, supra, "Payment satisfies the taxes and discharges the land and the owner, * * * and the full amount of the levy as made by the district having been paid, no right exists to recover more than the amount levied," this holding only goes so far as to find that the taxes legally assessed and paid discharge the property, whether they were received and used by the proper parties or not. No such question arises here. The tax was properly extended, and it was legally chargeable against appellant's property to the amount of 75 cents on the \$100, which assessment would produce the amount for which judgment was rendered.

We think the judgment of the county court was right, and it is accordingly affirmed. Judgment affirmed.

(213 Ill. 9)

POLICEMEN'S BENEV. ASS'N OF CHICAGO v. RYCE.

(Supreme Court of Illinois. Dec. 22, 1904.)

LIFE INSURANCE—EVIDENCE—PRESUMPTION OF DEATH FROM ABSENCE—INSTRUCTIONS—HARMLESS ERROR.

1. On an issue as to the death of an insured, sought to be proved by absence, the jury were instructed, as a matter of law, that if "the insured left his residence and home, and has been continually absent therefrom for a period of over seven years, without any intelligence being received of his whereabouts by the members of his family, relatives, neighbors, and acquaintances, within said period, or at any time thereafter, then such continuous absence, together with such lack of intelligence, raises the presumption of death of the said J. R. [the insured], and the jury, on such proof, have a right to presume his death." In addition, the

jury were told that they must consider all the circumstances under which the insured left, together with the length of time he had been gone, and from all such facts and circumstances they were to determine whether he was in fact dead at the time of the suit. They were also told that if they believed from the evidence, and from all the facts and circumstances shown, that he was not dead at that time, their verdict should be for defendant. *Held*, in view of the other instructions given, that the instruction quoted did not present a presumption of death from absence as a conclusive presumption, imposing on the jury an imperative obligation to find the fact of death in favor of plaintiff.

2. In view of evidence of a diligent search for insured, the instruction must be regarded as involving a consideration of the evidence on the question whether or not inquiries had been made as to his whereabouts, and hence it was not objectionable as omitting any reference to that question.

3. If an instruction as to the presumption of death from the absence of an insured omitted a reference to the question whether or not inquiries had been made as to his whereabouts, the omission was cured by an instruction that plaintiff must establish the case as charged in the declaration, which alleged that intelligent and continuous search had been made without avail.

4. The refusal of an instruction that, in order to find that insured was dead at the commencement of the suit, the jury must believe that at the time he left his usual place of abode he intended to return thereto, or at least to let his friends and relatives hear from him, was without prejudice to defendant, where, in view of the testimony, the jury were bound to conclude that he did intend to return.

5. The refusal of the instruction was proper because it singled out the fact of his expressed intent, and gave undue prominence thereto, as a circumstance to be considered in determining whether he was dead; other instructions having required the jury to consider all the facts and circumstances shown in evidence.

6. The instruction was erroneous because it eliminated from the consideration of the jury the question whether any presumption would arise as to his death from the nature of his intention, and substantially stated that such intent was conclusive evidence on the subject.

7. In an action for life insurance, an instruction for defendant that, before plaintiff could recover, the jury must believe from the evidence that defendant had received satisfactory evidence of the death of the insured, was properly refused.

8. Error, if any, in the admission of evidence, is harmless, where the fact sought to be shown thereby is established by other evidence.

Appeal from Appellate Court, First District.

Action by Mary Ryce against the Policemen's Benevolent Association of Chicago. From a judgment for plaintiff, defendant appealed to the Appellate Court. The judgment was affirmed, and defendant appeals. Affirmed.

The following is a statement of the facts in this case, as made by the Appellate Court in their opinion deciding it, with the exception of the parts omitted where stars occur, to wit:

"James Ryce on February 19, 1890, was a member of the police force of the city of Chicago, in good standing, and on that day

received a certificate of insurance from the appellant association, in which the appellee, Mary Ryce, then his wife, was named beneficiary, by which the association agreed to pay to her, within thirty days after satisfactory evidence of the death of said James Ryce, two dollars for every member of the association, provided that amount should in no event exceed \$2,000. On May 15, 1895, while still a member of said association, in good standing, and having paid all his dues and assessments up to that time, said Ryce disappeared, and has never since May 16, 1895, been heard of, although diligent search for him had been made up to the time of the commencement of this suit, on August 8, 1902. Presuming that he was dead, appellee, having paid all her husband's dues and assessments, brought this suit, and recovered a verdict, and judgment thereon, of \$2,000, from which the association has appealed. * * *

"The evidence * * * shows, in substance, that James Ryce was married to appellee in May, 1889, and was then aged about twenty-nine years. They lived happily together as husband and wife until May 15, 1895, and had one child born to them, which was nearly five years of age at that time. Mr. Ryce had been a member of the police force of Chicago prior to his marriage, and was thereafter from time to time until May 7, 1895, when, under a general order of the then mayor, he was, with five hundred other police officers, discharged. During his time of service he was discharged once or twice prior to May 7, 1895, as the evidence tends to show, because of changes in the city administration. * * * The evidence on behalf of the appellant is also to the effect that he was once discharged because of absence from duty without permission, intoxication, and neglect of duty. There is also a conflict in the evidence as to Mr. Ryce's habits with regard to the use of intoxicating liquors, but, * * * while it tends to show that he was in the habit of drinking occasionally, * * * he was in no way seriously affected thereby. On May 15, 1895, he left his home, at Cragin, near the western limits of Chicago, in the morning, after bidding good-by and kissing his wife and little girl, and stating to the former that he would return on the afternoon train. His wife says that she expected that he would return on the afternoon train, but he did not; that she waited until the twelve o'clock train was due, but he did not come, and she has never since heard anything from him. On the second day after his disappearance, appellee's brother and a police officer named Lyons inquired for Mr. Ryce at a saloon on West Madison street, in Chicago, where it was suggested he might go, and were told by a bartender that Mr. Ryce had been in the saloon the previous day or evening. With this exception, no information or intelligence as to his whereabouts has ever been received

¶ 8. See Appeal and Error, vol. 2, Cent. Dig. §§ 4161-4170.

by his wife, relatives, friends, or any one else, so far as known, although a dispatch containing his description in detail, and that he had been missing since the previous Wednesday, which was May 15, was sent out on May 21, 1895, to each police station in the city of Chicago, and it was read to the police officers at roll call in at least one station. It appears that it was the custom to read at roll call such dispatches at every police station in the city. The record of the dispatch in question, kept by the police department in Chicago in the regular course of business, indicates that this dispatch was sent to all the stations in Chicago on said May 21st. The evidence shows that appellee made numerous inquiries of her neighbors and friends and of numerous relatives of Mr. Ryce, and, as she says, of 'every one I came in contact with—all that I knew'—but was unable to get any information with regard to him. It appears that his disappearance was a matter of common talk among his acquaintances and neighbors, and that many of them had been inquiring after him to find out his whereabouts, but no information was ever received by the many who were called to testify. Also several of his relatives who were called to testify stated that they made like inquiries, but none of them could get any information of him. It is shown that one of his sisters, Mrs. Bridget Walsh, with whom he lived for about five years prior to his marriage, and whom he visited once or twice a week at her home after his marriage, notified certain of his relatives in Wisconsin and in Ireland of his disappearance, but received no communication from them. She says in this regard: 'I have kept up the correspondence among my relatives, and inquired for my brother, and never heard from him in any way. * * * I corresponded with my mother, in Ireland—wrote that my brother had disappeared, and that I could not find him, and I believed him dead. I asked her if she had heard from him. She said "No." I got a reply by letter about six weeks later. I have not that letter. I don't know where it is.'

Upon appeal to the Appellate Court, the judgment of the circuit court in favor of appellee for \$2,000 has been affirmed, and the present appeal is prosecuted by the appellant association from such judgment of affirmance.

Cannon & Poage, for appellant. John C. King and William J. King (Andrew J. Hirschl, of counsel), for appellee.

MAGRUDER, J. (after stating the facts). By stipulation between the parties, substantially all the facts necessary to establish a right of recovery in the appellee are admitted, except the fact of the death of the insured. It was agreed between the parties that, at the time of the commencement of this

suit, James Ryce, the insured, was a member of the appellant association in good standing; that all dues and assessments were paid up; and that the association on February 19, 1890, issued the certificate of insurance, as described in the statement preceding this opinion, to James Ryce. The undisputed evidence in the case is that James Ryce, the insured, was the husband of the appellee. The only question, therefore, to be determined by the jury, was the question whether or not the jury were authorized by the evidence to presume that the insured was dead at the time of the commencement of the present suit. This question is raised upon the record by the motion of the appellant at the close of the evidence of the plaintiff below, and again at the close of all the evidence, to instruct the jury to find a verdict in favor of the defendant below (the appellant here). At the close of all the evidence the defendant submitted to the court a written instruction to the jury to find the issues for the defendant, and this instruction was refused, to which ruling exception was taken by the defendant. The facts are settled by the judgments of the lower courts, and the only matters to be decided by us are questions of law arising out of the action of the trial court in giving and refusing instructions and in ruling upon the evidence.

The court gave one instruction for the plaintiff below, and three instructions for the defendant below. The instruction so given for the plaintiff below (appellee here) is as follows:

"The court instructs the jury, as a matter of law, that if you find from the preponderance of the evidence in this case that James Ryce, the insured, left his residence and home, and has been continually absent therefrom for a period of over seven years, without any intelligence being received of his whereabouts by the members of his family, relations, neighbors, and acquaintances within said period or at any time thereafter, then such continuous absence, together with such lack of intelligence, raises the presumption of death of the said James Ryce, and the jury on such proof have a right to presume his death."

The three instructions so given on behalf of the defendant below (appellant here) are as follows:

"(1) The jury are instructed that in determining whether the insured, James Ryce, was dead at the commencement of this suit, they must consider all the circumstances under which he left which are shown on this trial, together with the length of time he has been gone, if any, and from all these facts and circumstances the jury must determine whether the said James Ryce was in fact dead at the time of the commencement of this suit.

"(2) The court instructs the jury that, in order to recover in this case, the plaintiff must establish her case, as charged in her

declaration, by the preponderance of the evidence.

"(3) The jury are instructed that if you believe from the evidence and all the facts and circumstances shown on this trial that the insured, James Ryce, was not dead at the time of the commencement of this suit, then your verdict must be for the defendant."

1. It is said by counsel for appellant that the instruction given for the appellee is erroneous, upon the alleged ground that it presents to the jury the presumption of death, arising from the absence of the insured for seven years without any intelligence as to his whereabouts, as a conclusive presumption, and that in this respect the instruction amounted to a direction to the jury to find for the appellee if an absence of seven years without such intelligence was shown. The language of the instruction is substantially the same as that which has been used by this court in a number of cases. In *Hitz v. Ahlgren*, 170 Ill. 60, 48 N. E. 1068, we said (page 63, 170 Ill., page 1068, 48 N. E.): "The rule in this state is that the absence of a person for seven years from his usual place of abode or resort, and of whom no account can be given, and from whom no intelligence has been received within that time, raises the presumption that he is dead." To the same effect is *Reedy v. Millizen*, 153 Ill. 636, 40 N. E. 1028; *Johnson v. Johnson*, 114 Ill. 611, 3 N. E. 232, 55 Am. Rep. 883.

Counsel for appellant criticise the following words at the close of the instruction, to wit, "and the jury on such proof have a right to presume his death," and say that those words amounted to a direction to the jury to find for the plaintiff. The language thus objected to, however, was used by this court in a discussion of this subject in the case of *Whiting v. Nicholl*, 46 Ill. 230, 92 Am. Dec. 248, where it was said (page 235, 46 Ill., 92 Am. Dec. 248): "So that it has come to be regarded as a settled principle, that the absence of a party for seven years without any intelligence being received of him in that time raises the presumption that he is dead, and the jury, on proof of such absence, have a right to presume his death." The instruction, upon a careful consideration of its terms in connection with the instructions given for the appellant, is not justly subject to the criticism thus made upon it. The instructions, considered as one charge, authorized the jury to take into consideration the circumstances attending the disappearance of the insured, and bearing upon the question whether he was dead or not. The presumption of death, arising from an unexplained absence of seven years, is not a conclusive presumption, but may be rebutted by proof of facts and circumstances inconsistent with and sufficient to overcome it. The presumption of death under such circumstances may be overcome by proof of facts and circumstances raising a contra-

dictory presumption. *Johnson v. Johnson*, supra; *Reedy v. Millizen*, supra. The jury were told that they must consider all the circumstances under which the insured left which were shown on the trial, together with the length of time he had been gone, and from all such facts and circumstances they were to determine whether he was in fact dead at the time of the commencement of the suit; and they were also told that if they believed from the evidence, and from all the facts and circumstances shown on the trial, that the insured was not dead at the time of the commencement of the suit, their verdict should be for the defendant. Under the instructions, the jury were warranted in finding the fact of death after due consideration of all the other facts in evidence, but the fact of such death was not thereby presented to the jury as a conclusion which they were obliged to draw in the face of proof furnishing ground for other inferences. There was some testimony tending to show that the insured had been discharged from the police force, and that he was in the habit of using intoxicating liquors. It was for the jury to say whether such facts were sufficient to justify them in believing that he remained away from home because of them, and not necessarily that he should be presumed to be dead. We are of the opinion that the instructions did not present the presumption of death as a rule of law which imposed upon the jury an imperative obligation to find the fact of such death in favor of the appellee.

The instruction is also complained of as omitting any reference to the question whether or not inquiry or search was made for the insured. In *Hitz v. Ahlgren*, supra, we said (page 63, 170 Ill., page 1069, 48 N. E.): "In order to enforce the presumption of death of a person after an absence of seven years, there must be evidence of diligent inquiry at the person's last place of residence, and among his relatives, and any others who probably would have heard from him if living. * * * Long absence, alone, no matter how long continued, is not sufficient to raise the presumption of death. There must be shown an absence of seven years or more from the established residence of the party, before the presumption of death can be raised. * * * We hold, therefore, that mere absence of a person from a place where his relatives reside, but which is not his own residence, and mere failure on the part of his relatives to receive letters from him for a period of seven years, are not of themselves sufficient to raise a presumption of death. The absence must be from his usual place of abode or resort." The evidence is abundant in this case that inquiries were made at the last place of residence of the missing James Ryce, and at his usual places of abode or resort. He had four or five sisters living in Chicago, in different parts of the city. Inquiries were made of them. He had relatives living in Wisconsin. In-

quiries were made there. He had relatives living in Ireland. Letters were written in reference to his absence to these relatives. The evidence tends to show that a policeman named Lyons and a brother-in-law of James Ryce were told by a bartender in Chicago on May 17th, the second day after James Ryce left his home, that Ryce was in his saloon on the evening of May 16th. Complaint is made that the clew alleged to have been thus furnished as to his whereabouts was not followed up. The only ground for this complaint is the statement by the policeman, Lyons, in his testimony, that he did not see the bartender who made this statement to him after May 17th, and did not know where he could be found at the time his testimony was given. There is nothing in the evidence, so far as we have been able to discover, to show that this bartender knew anything about the whereabouts of James Ryce, except that he had been in his saloon on the evening of May 16th. It cannot be said that, because of the information given by the bartender, there was a failure to follow up a clew; but it was for the jury to say, as to this evidence, and as to all the other facts and circumstances developed by the proof, whether or not those whose business it was to inquire and search for the missing man performed their duty in that respect. The objection made by counsel for appellant to the instruction is that it was silent upon this subject of inquiry or search. The instruction presented to the minds of the jury the question whether or not James Ryce had been continually absent for a period of over seven years without any intelligence being received of his whereabouts; and such continuous absence, together with such lack of intelligence, was said by the instruction to raise the presumption of death. In view of the evidence, the language of the instruction involved a consideration of the evidence upon the question whether or not inquiries had been made as to the whereabouts of the insured. The jury were directed to consider whether or not there was a lack of intelligence as to his whereabouts, and this lack of intelligence, in view of the evidence, may have been the result of the inquiry and search shown by the proof to have been made. If there was no intelligence of the movements of the missing Ryce, the want of it was as much the result of inquiry and search as of a failure to make such inquiry and search. But whether the instruction is capable of this interpretation or not, the court instructed the jury, at the request of the appellant, that the plaintiff, in order to recover in this case, "must establish her case as charged in her declaration by the preponderance of the evidence." Upon referring to the declaration, we find the following allegation: "Said James Ryce suddenly and without explanation left and disappeared from his home, 1039 North Fifty-First ave-

nue, Chicago, has been unaccountably absent ever since, and has never returned or been heard of since said departure, although plaintiff has made diligent and continuous search for him, and been wholly unable to find him or get any clew of him." When the jury were thus told that the plaintiff must establish her case as charged in the declaration, the jury, upon looking at the declaration, could not have concluded otherwise than that she must establish her case by showing that there had been diligent and continuous search for the missing Ryce. Certainly the evidence tended to establish the fact of such diligent inquiry and search.

2. Complaint is also made in behalf of the appellant that the trial court erred in refusing three instructions asked by the appellant upon the trial below. Two of these instructions related to the subject of the intention of the insured when he left his home. These instructions told the jury that in order to find that the insured, James Ryce, was dead at the commencement of this suit, they must believe from the evidence that at the time he left his usual place of abode he intended to return thereto, or at least to let his friends and relatives hear from him. The only positive evidence as to the intention of the insured upon this subject is the testimony of his wife that at the time of leaving he told her he would return on the afternoon train. In view of this testimony, the refusal of the instruction could have done the appellant no harm, because the jury were bound to conclude that he did intend to return when he left, and therefore, under the direction contained in the instruction, were bound to find that he was dead at the commencement of the suit, and not merely to entertain a presumption as to his death. The instruction singled out the fact of his expressed intent, and gives undue prominence to it as one of the circumstances to be taken into consideration by the jury in coming to a conclusion upon the question whether or not he was dead. Instructions already given had required them to take into consideration all the facts and circumstances developed by the evidence, and it was wrong to single out and give prominence to one particular fact or circumstance.

As we understand the argument of counsel for appellant, it is that, if the circumstances were such as to indicate an intention on the part of the insured not to return, then his absence might be accounted for without assuming his death. That is to say, he may have intended to go elsewhere to engage in business, or may have had some other good reason for not wishing to return to his home. From such considerations it might be argued that his absence was not attributable to his death, but was due to other causes. On the contrary, the theory is that if he intended to return when he left, and did not return, the presumption of his death would be stronger. The instruction in question eliminated from

the consideration of the jury the question whether any presumption would arise as to his death from the nature of his intention, but presented to them substantially the statement that such intent was conclusive evidence upon the subject. In this respect the instruction was erroneous, as it is well settled that it is a question for the jury to determine, from all the facts and circumstances, whether or not the fact of death at the time contended for exists.

It is also assigned as error that the court refused to give an instruction on behalf of the appellant which told the jury that, before the plaintiff could recover in this case, they must believe from the evidence adduced at the trial that the defendant had received satisfactory evidence of the death of James Ryce, the insured. By the terms of the certificate of insurance, the appellant association agreed to pay the amount of the insurance money to Mrs. Ryce "within thirty days after satisfactory evidence of the death of said James Ryce." The evidence shows that on July 6, 1902, about two months after the expiration of the seven years from the disappearance of the insured, Mrs. Ryce, or her attorney and agent, presented to the association affidavits setting up all the facts in regard to the disappearance of Ryce, and the length of the time of his absence, and the efforts made to discover his whereabouts. It is not denied that the association refused to pay the \$2,000 to the beneficiary in the certificate, and this suit is the result of such refusal. The question whether or not there was satisfactory evidence of the death of the assured was a question to be determined by the jury in this suit, and not by the association. The question in the case upon the trial below was not whether the association received satisfactory evidence of death, but whether the jury trying this case believed from the evidence that such death had occurred. The instruction is misleading and uncertain in not defining what is meant by "satisfactory evidence of death." While the questions of fact, whether proofs of loss or of death have been furnished, or whether the insured rendered as full proofs of loss or death as the circumstances would permit, are for the jury, yet the legal effect of such proofs is a question of law for the court. 11 Ency. of Pl. & Pr. pp. 429, 431; *Thomas v. Burlington Ins. Co.*, 47 Mo. App. 172. In *Thomas v. Burlington Ins. Co.*, supra, the court say: "Defendant's counsel, however, seems to have gone on the theory that the sufficiency of this paper as a proof of loss, whether or not it filled the requirements of the policy and the law, was a question for the jury, and an instruction was asked wherein this question of law was submitted to the jury. The court refused the instruction, and correctly, of course. It is the province of the court, and not the jury, to declare the legal effect to be given a written instrument." In addition to this, the decla-

ration alleges that the plaintiff submitted satisfactory evidence of the death of the insured to the appellant association, and, as the jury were told by the instructions that the plaintiff must establish her case as charged in her declaration, they were required to find, if such finding was important, that the association had received satisfactory evidence of the death.

3. It is said that the court erred in admitting in evidence a record found in the office of the police department of the city of Chicago, kept by the desk sergeant in the ordinary course of his duty, for the reason that such duty was not imposed by law. It is not necessary to discuss the question whether the court erred, or not, in the admission of this police record. If it be admitted that there was error in its admission, it could not have done the appellant any harm. The only fact sought to be established by it was the fact that James Ryce had been missing since May 15 or 16, 1895. The fact that he had been missing since that date was so overwhelmingly established by other evidence that the additional confirmation thereof by the recital in the police record was of no importance, and added no particular weight to the testimony already given by the witnesses upon that subject. We see no good reason for interfering with the judgments of the courts below. Accordingly the judgment of the Appellate Court affirming the judgment of the circuit court is affirmed. Judgment affirmed.

(213 Ill. 59)

LIVINGSTON COUNTY BUILDING & LOAN ASS'N v. KEACH et al.

(Supreme Court of Illinois. Dec. 22, 1904.)

APPEALS—APPEALABLE ORDERS—RULINGS ON PLEADINGS—NECESSITY OF DISMISSAL—CLERK OF COURT—POWERS.

1. An order sustaining a demurrer to a bill is not a final order, and in the absence of an accompanying decree of dismissal no appeal lies to the Supreme Court.

2. A statement, in the condition of an appeal bond filed and approved by the clerk, that a decree was entered dismissing the bill, does not show that any such decree was actually entered.

3. The clerk of the circuit court has no judicial power, and cannot enter a decree dismissing a bill after the court has sustained demurrers thereto.

Appeal from Circuit Court, Livingston County; Geo. W. Patton, Judge.

Bill by the Livingston County Building & Loan Association against Anna L. Keach and another. From an order sustaining a demurrer, complainant appeals. Dismissed.

A. C. Norton and C. J. Abern, for appellant. Fred G. White, for appellee White. C. C. & L. F. Strawn, for appellee Keach.

MAGRUDER, J. The original bill in this case was filed by the appellant against the appellees, Anna L. Keach and Fanny L.

¶ 3. See Judgment, vol. 30, Cent. Dig. § 508.

White. Subsequently an amended bill was filed by appellant against the same parties, to which demurrers were filed by the appellees, Keach and White. These demurrers were sustained, but no order was entered by the court dismissing the bill. The order sustaining the demurrers is not a final order, and, therefore, no appeal lies from it to this court. The recital in the record is as follows: "This cause coming on to be heard on demurrer to bill herein, and after arguments of counsel and due deliberation by the court, it is considered and ordered that said demurrer be, and the same is hereby, sustained, to which ruling of the court complainant excepts, and prays an appeal to the Supreme Court of this state, which is allowed upon filing bond in the sum of \$100.00, to be approved by the clerk of this court within thirty days from this date."

It is true that the appeal bond filed in the cause recites in the condition thereof that appellees did, on June 7, 1904, obtain a decree against the appellant, dismissing its bill of complaint and sustaining a demurrer thereto. But the statement in the condition of the appeal bond that a decree was entered dismissing the bill does not show that any such decree was actually entered. The order of the court granting the appeal was that the bond was to be approved by the clerk of the court. The bond shows, by indorsement on its back, that it was filed and approved by the clerk. An approval by the clerk of the court of an appeal bond containing a recital that the bill was dismissed does not make it true that there was such dismissal. The clerk has no judicial power, and could not enter such a decree of dismissal.

In *Williams v. Chicago Exhibition Co.*, 188 Ill. 19, 58 N. E. 611, we said (page 26, 188 Ill., and page 613, 58 N. E.): "Where a complainant is willing to rest his case upon a demurrer, he must move the court to dismiss the bill. An order dismissing the bill is final, and from it appeal or error will lie; but a decision on the demurrer is merely interlocutory." See, also, *Titus v. Mabey*, 25 Ill. 257; *Prout v. Lomer*, 79 Ill. 331; *Weaver v. Poyer*, 70 Ill. 567. As the present appeal is prosecuted from an interlocutory order merely, it must be, and is, dismissed.

Appeal dismissed.

(212 Ill. 518.)

CINCINNATI, I. & W. RY. CO. v. PEOPLE
ex rel. **MOFFETT**, County Collector.

(Supreme Court of Illinois. Dec. 22, 1904.)

TAXATION—ROAD AND BRIDGE TAXES—PROCEEDINGS OF COMMISSIONERS—AMENDMENTS—CERTIFICATES OF LEVY—ILLEGAL TAXES—JUDGMENT FOR LEGAL PROPORTION.

1. Under Hurd's Rev. St. 1903, c. 121, § 119, providing that the highway commissioners of each town shall annually ascertain how much money must be raised for the making and re-

pairing of bridges, the opening and alteration of roads, the purchase of tools and materials for building or repairing roads, etc., and shall give to the supervisor of the township a statement of the amount necessary to be raised and the rate per cent. of taxation, and under chapter 120, § 191, permitting amendments to be made in judicial proceedings for the collection of taxes, a record of the highway commissioners, defective in failing to show separately the amount necessary to be raised for the purposes above specified, may be amended to correspond with their proceedings, where they actually did ascertain how much money should be raised for each separate object, and their certificate to the supervisor may likewise be amended where it fails to contain a statement of the amount necessary to be raised.

2. Under Hurd's Rev. St. 1903, c. 121, § 119, requiring the highway commissioners to ascertain how much money must be raised for the making and repairing of bridges, the opening and altering of roads, the purchase of tools and materials for working and repairing roads, etc., and further requiring them to give to the supervisor of the township a statement of the amount necessary to be raised and the rate per cent. of taxation, it is not necessary for the certificate to the supervisor to state in itemized form the amounts sought to be levied for each of the purposes enumerated, but it is sufficient if it states in a gross sum the amount necessary to be raised in making the tax levy.

3. The fact that the full amount of the road and bridge tax lawfully levied for a certain year has been paid by the taxpayers of a township does not exempt an objecting taxpayer from the obligation of paying the valid portion of the tax assessed against him.

4. Where 60 cents on the \$100 is levied for a road and bridge tax, in violation of Hurd's Rev. St. 1903, c. 121, § 119, which restricts a levy for that purpose to 40 cents on the \$100, the illegal portion of the tax is severable from the legal portion, and judgment may be rendered for the latter and refused as to the former portion.

Appeal from Macon County Court; O. W. Smith, Judge.

Application by the people, on the relation of Edward R. Moffett, county collector, for judgment against the property of the Cincinnati, Indianapolis & Western Railway Company for delinquent taxes. From the judgment rendered, defendant appeals. Affirmed.

George W. Fisher, for appellant. W. E. Redmon, State's Atty., and E. S. McDonald, for the People.

HAND, J. This was an application in the county court of Macon county for judgment against the property of appellant for \$231.16 delinquent road and bridge tax in Long Creek township, in said county, for the year 1902. The appellant appeared and filed objections to the rendition of judgment against its property, which were overruled, and, judgment of sale having been rendered, it prosecuted an appeal to this court, where the judgment of the county court was reversed on the ground that the tax was for 60 cents on the \$100 of the assessed value of the taxable property of the township, when the highway commissioners had no power, under the facts disclosed by the record, to levy a tax of more than 40 cents on the \$100 of said assessed valuation (205 Ill. 538, 69 N. E. 40), and the

case was remanded to the county court. Upon the case being reinstated the appellant again filed objections to said tax, which were sustained as to the portion thereof in excess of 40 cents on the \$100, and judgment was rendered for \$187.44, being the amount of the tax remaining after deducting the excess over 40 cents on the \$100, and the railway company has again appealed.

The township of Long Creek is under the labor system, and the tax for which judgment was rendered was levied under the provisions of section 119 of chapter 121 of the Revised Statutes, entitled "Roads and Bridges" (Hurd's Rev. St. 1903, p. 1605), which, in part, reads as follows: "The highway commissioners of each town shall, annually, ascertain as near as practicable, how much money must be raised on real, personal and railroad property, for the making and repairing of bridges, the payment of damages by reason of the opening, altering and laying out of new roads and ditches, the purchase of necessary tools, implements and machinery for working roads, the purchase of the necessary material for building or repairing or draining roads and bridges, the pay of the overseer of highways during the ensuing year, and for the payment of all outstanding orders drawn by the commissioners on their treasurer, commencing on Tuesday next preceding the annual meeting of the county board in September, which tax shall be extended on the tax books, according to the assessment of the current year; and shall levy a tax on all the real, personal and railroad property in said town, not exceeding forty cents on the \$100; and they shall give to the supervisor of the township, and in Cook county to the county board, a statement of the amount necessary to be raised, and the rate per cent of taxation, signed by said commissioners, or a majority of them, on or before the Tuesday next preceding the annual September meeting of the board of supervisors, or the county board of Cook county, who shall cause the same to be submitted to said board for their action at such September meeting of said board." The record of the meeting of the highway commissioners of Long Creek township held September 2, 1902, at which meeting said road and bridge tax was levied, was as follows:

"Long Creek, Sept. 2, 1902, '78. The Com. met at the town hall on the above date and made their levy, being sixty cents on the one hundred dollars (\$100) of assessed value, which was granted by the town board.

"R. F. McDonald,

"Wm. Sheets,

"C. C. Cochran,

"Comrs. of Highways.

"W. J. Hayes, Town Clerk."

And the following is a copy of the certificate of levy of the highway commissioners, which was presented by the supervisor of the township to the board of supervisors, and upon which the road and bridge tax for

Long Creek township in said year was extended by the county clerk:

"Board of Comrs. of Highways, Town of Long Creek, County of Macon, Ill. We do hereby certify that we require the sum of _____ dollars to be raised by a tax on the real, personal and railroad property in the above town, for the making and repairing of bridges, the payment of damages by reason of opening, altering and laying out new roads and ditches, the purchase of the necessary material for building and draining roads and bridges, the pay of overseers of highways for the ensuing year, and for the payment of all outstanding orders drawn by the commissioners on their treasurer, said amount being a levy of sixty cents on each \$100 valuation according to the assessment of said town for the current year. Given under our hands this second day of September, 1902.

Wm. Sheets,

"C. C. Cochran,

"R. F. McDonald,

"Comrs. of Highways.

"Filed September 9, 1902. J. M. Dodd, County Clerk."

It was conceded by counsel for appellee, upon the hearing, that the record of the proceedings of the highway commissioners did not show a compliance with the provisions of said section 119, in that it failed to show that the highway commissioners had ascertained, as near as practicable, how much money must be raised on real, personal, and railroad property, for the making and repairing of bridges, the payment of damages by reason of the opening, altering, and laying out of new roads and ditches, the purchase of necessary tools, implements, and machinery for working roads, the purchase of the necessary material for building or repairing or draining roads and bridges, the pay of the overseer of highways during the ensuing year, and for the payment of all outstanding orders drawn by the commissioners on their treasurer, commencing on Tuesday next preceding the annual meeting of the county board in September, and that the certificate of levy presented to the board of supervisors by the highway commissioners was informal, in that it failed to state the amount of road and bridge tax "necessary to be raised" by the township of Long Creek for said year, and he moved the court that in the presence of the court the town clerk have leave to amend the record of the proceedings of said highway commissioners, and that the highway commissioners have leave to amend said certificate of levy to correspond with the facts, and in support of said motions made proof by the town clerk and the highway commissioners that at the meeting of the commissioners of said township on September 2, 1902, the commissioners did ascertain, as near as practicable, how much money must be raised on real, personal and railroad property for the making and repairing of bridges, the payment of damages by reason

of the opening, altering and laying out of new roads and ditches, the purchase of necessary tools, implements and machinery for working roads, the purchase of the necessary material for building or repairing or draining roads and bridges, the pay of the overseer of highways during the ensuing year, and for the payment of all outstanding orders drawn by the commissioners on their treasurer, commencing on Tuesday next preceding the annual meeting of the county board in September, and reduced said finding to writing and signed the same, or caused the town clerk to sign the same on their behalf, and filed the same with the town clerk, and that the same had remained in his office from the date of said meeting until the time of the hearing in said cause in the county court, which statement was in words and figures as follows:

"State of Illinois, Macon County. Long Creek, Sept. 2, 1902. Board of Commissioners Town of Long Creek: The commissioners of highways of said town of Long Creek having proceeded to ascertain, as near as practicable, how much money must be raised by tax on real, personal and railroad property in said town for the purposes following for the ensuing year, as required by law, have ascertained and determined the same to be as follows, to wit:

1. For making and repairing of bridges	\$1,500 00
2. For the payment of damages by the reason of opening, altering and laying out new roads and ditches	400 00
3. For the purchase of necessary tools, implements and machinery for making roads	50 00
4. For the purchase of the necessary material for building, repairing and draining roads and bridges..	600 00
5. For the pay of overseers of highways for the ensuing year.....	300 00
6. For the payment of all outstanding orders drawn by the commissioners on their treasurer.....	50 00

"Wm. Sheets,
"R. F. McDonald,
"C. C. Cochran,
"Commissioners."

—And that said statement had recently been attached to the page of the record book upon which the record of the proceedings in said meeting was written, and that the highway commissioners, by inadvertence, had omitted from said certificate of levy the amount of road and bridge tax necessary to be raised in said township of Long Creek for the year 1902; whereupon the court, over the objections of appellant, permitted the record of the proceedings of the meeting of said highway commissioners held on the second day of September, 1902, to be amended so as to read as follows:

"Long Creek, Sept. 2, 1902. The commissioners of highways of said town of Long Creek having proceeded to ascertain, as near as possible, how much money must be raised by tax on real, personal and railroad prop-

erty in said town for the purposes following during the ensuing year, as required by law, have ascertained and determined the same to be as follows:

1. For the making and repairing of bridges	\$1,500 00
2. For the payment of damages by reason of repairing, altering and laying out new roads and ditches	400 00
3. For the purchase of necessary tools, implements and machinery for making roads	50 00
4. For the purchase of the necessary material for building, repairing and draining roads and bridges..	600 00
5. For paying of overseers of highways for the ensuing year.....	300 00
6. For the payment of outstanding orders drawn by the commissioners on their treasurer.....	50 00

"Wm. Sheets,
"R. F. McDonald,
"C. C. Cochran,
"Comrs. of Highways."

"W. J. Hayes, Town Clerk."

—And that said certificate of levy be amended so as to read as follows:

"Board of Comrs. of Highways, Town of Long Creek, County of Macon, Ill. We do hereby certify that we require the sum of twenty-nine hundred dollars to be raised by a tax on the real, personal and railroad property in the above town, for the making and repairing of bridges, the payment of damages by reason of the opening, altering and laying out new roads and ditches, the purchase of the necessary material for building and draining roads and bridges, the pay of overseers of highways for the ensuing year, and for the payment of all outstanding orders drawn by the commissioners on their treasurer, said amount being a levy of sixty cents on each \$100 valuation according to the assessment of said town for the current year. Given under our hands this second day of September, 1902.

Wm. Sheets,
"C. C. Cochran,
"R. F. McDonald,
"Comrs. of Highways."

"Filed September 9, 1902. J. M. Dodd, County Clerk."

Section 191 of chapter 120 of the Revised Statutes, entitled "Revenue" (Hurd's Rev. St. 1903, p. 1541), in part, reads as follows: "In all judicial proceedings of any kind, for the collection of taxes and special assessments, all amendments may be made which, by law, could be made in any personal action pending in such court, and no assessment of property or charge for any of said taxes shall be considered illegal on account of any irregularity in the tax lists or assessment rolls, or on account of the assessment rolls or tax lists not having been made, completed or returned within the time required by law, or on account of the property having been charged or listed in the assessment or tax list without name, or in any other name than that of the rightful owner; and no error or informality in the proceedings of any of the officers connected with the

assessment, levying or collecting of the taxes, not affecting the substantial justice of the tax itself, shall vitiate or in any manner affect the tax or the assessment thereof; and any irregularity or informality in the assessment rolls or tax lists, or in any of the proceedings connected with the assessment or levy of such taxes, or any omission or defective act of any officer or officers connected with the assessment or levying of such taxes, may be, in the discretion of the court, corrected, supplied and made to conform to law by the court, or by the person (in the presence of the court) from whose neglect or default the same was occasioned."

We think, under the repeated rulings of this court (*Chicago & Alton Railroad Co. v. People*, 171 Ill. 544, 49 N. E. 489; *Chicago & Northwestern Railway Co. v. People*, 183 Ill. 247, 55 N. E. 680; *Indiana, Decatur & Western Railway Co. v. People*, 201 Ill. 851, 66 N. E. 293; and *Cleveland, Cincinnati, Chicago & St. Louis Railway Co. v. People*, 205 Ill. 582, 69 N. E. 89), construing said section of the statute permitting amendments to be made in judicial proceedings for the collection of taxes, the court did not err in permitting the record of the highway commissioners to be so amended that it would state the true action taken by the highway commissioners at said meeting, as evidenced by said writing executed by them and filed in the town clerk's office, and which remained on file as a part of the records and files of his office at the time of the trial of this case; and are also of the opinion that after the record of the proceedings of the highway commissioners had been amended so as to show the action of the commissioners at their September meeting relative to the levy of said road and bridge tax, it was not error to permit the certificate levying said road and bridge tax to be amended to correspond with said record. In *Cleveland, Cincinnati, Chicago & St. Louis Railway Co. v. People*, supra, it was held proper to permit a certificate of levy to be amended upon the trial to conform with the record of the town meeting in pursuance of which it was made.

It is, however, contended by the appellant, that, conceding the court had the power to allow the highway commissioners' record and the certificate of levy to be amended upon the trial, the certificate of levy was not sufficient, after the same was amended, upon which to authorize the county clerk to extend said road and bridge tax, as the amended certificate of levy does not state the specific amounts sought to be levied for each of the purposes named in the certificate. Said section 119 provides that the highway commissioners shall ascertain, as near as practicable, the amount necessary to be raised for each of the purposes named in that section of the statute. This the amended record of their proceedings shows they did. The statute then provides the highway commissioners "shall give to the supervisor of

the township * * * a statement of the amount necessary to be raised, and the rate per cent of taxation, signed by said commissioners, or a majority of them, on or before the Tuesday next preceding the annual September meeting of the board of supervisors, * * * who shall cause the same to be submitted to said board for their action at such September meeting of said board." This provision was also complied with so soon as the certificate was amended.

It is said, however, in *Cincinnati, Indianapolis & Western Railway Co. v. People*, 207 Ill. 566, 69 N. E. 938, this court held it was necessary the certificate of levy of a road and bridge tax should state the specific amounts for each purpose for which the tax is levied. It has been repeatedly held by this court, under statutory provisions substantially the same as section 119, that while a strict compliance with such statutes would require the amount of the tax to be raised to be stated in dollars and cents, a fixed per centum upon each \$100 of taxable property is sufficient. In *Chicago & Eastern Illinois Railroad Co. v. People*, 200 Ill. 237, 65 N. E. 701, on page 240, 200 Ill., page 708, 65 N. E., it was said: "It was the duty of the commissioners to ascertain, as near as practicable, how much money must be raised by tax for the making and repairing of roads, and to levy and assess the same as a road tax against the real, personal, and railroad property in the town subject to taxation. Here there was no ascertainment of the amount of money necessary to be raised by amount or by a per centum upon each \$100 of taxable property, and no levy was made. A strict compliance with the statute would require the amount of the tax to be raised to be fixed in dollars and cents, but under the authority of *Chicago & Alton Railroad Co. v. People*, 155 Ill. 276, 40 N. E. 602, *Chicago & Alton Railroad Co. v. People*, 163 Ill. 616, 45 N. E. 122, and *Gage v. Bailey*, 102 Ill. 11, a fixed per centum upon each \$100 of taxable property would have been sufficient, as the amount of the assessment and tax could readily be determined therefrom." Under the doctrine announced in that and other cases it is clear the certificate of levy filed by the highway commissioners of Long Creek township, through the supervisor of that township, with the board of supervisors, in 1902, was sufficient before it was amended. By the amendment the certificate of levy, by inserting therein the total amount of road and bridge tax sought to be raised for the year 1902 in said township in dollars and cents, was made to comply literally with all the requirements of said section 119. It will be observed that while section 119 requires the highway commissioners to ascertain the specific amount for each purpose named in the section for which a road and bridge tax is sought to be raised, the highway commissioners, in the certificate which the section provides shall be delivered to the

supervisor of the township and by him to the board of supervisors, are only required to state the amount necessary to be raised, and it does not require the commissioners to incorporate in the certificate of levy the several amounts which they have ascertained will be necessary to be expended for the different purposes named in that section of the statute, and which, when aggregated, constitute "the amount necessary to be raised." While the contention of the appellant finds support in the case referred to, we are satisfied the court in that case did not give the last clause of the portion of section 119 above set out the full force it is entitled to in the construction of said section of the statute, and upon further reflection and consideration we have reached the conclusion it is not necessary, in the certificate of levy of a road and bridge tax by the highway commissioners, to state more than the amount necessary to be raised in making the tax levy for road and bridge purposes under the provisions of section 119 of the road and bridge act, and that so far as the case of Cincinnati, Indianapolis & Western Railway Co. v. People, supra, is in conflict with such view it is overruled.

It is claimed that the proof shows that the full amount of the road and bridge tax lawfully levied for the year 1902 in Long Creek township was paid by the taxpayers of said township other than the appellant, and it is contended for that reason the appellant should not be required to pay said road and bridge tax, even though it be found to be a legal and valid tax to the extent of 40 cents on the \$100. The condition referred to by appellant was due to the fact that many of the taxpayers of said township paid in full the levy of 60 cents on the \$100. That is, they did not question the legality of the extra 20 cents on the \$100 upon the assessed valuation of the property of the township, but paid the assessment in full. To sustain its position appellant relies upon the cases of Walser v. Board of Education, 160 Ill. 272, 43 N. E. 346, 31 L. R. A. 329, and Wabash Railroad Co. v. People, 196 Ill. 606, 63 N. E. 1084. In the Walser Case a suit was brought by one school district against another school district to recover taxes collected by the defendant district upon lands located within the boundaries of the plaintiff district through a mistake as to the location of the lands against which the taxes were assessed. And in the Wabash Case the property of the railroad company had been assessed for school purposes in a school district other than the school district wherein its property was located, and the school taxes levied by reason of such assessment were paid. Afterwards an attempt was made to reassess the property of the company in the district in which it was located, as omitted property. It appeared in both cases that all the school taxes levied in the school districts where the lands should have been

assessed had been paid in full by other property owners against whose property the full amount of the taxes had been assessed—that is, the full amounts of the taxes had been extended against other property in the districts and paid—and it was held such payments were a satisfaction and discharge of the taxes and said taxes could not be again collected. Here there is no pretense that all the taxes lawfully levied for road and bridge purposes in said township for the year 1902 have been paid, but it is said the taxes collected upon an illegal assessment should be used to satisfy the taxes extended upon a legal assessment. In other words, the appellant should be relieved from the payment of its legal taxes because other taxpayers in the township have paid taxes which were illegal. The cases referred to have no application, in principle, to the case at bar.

It is further contended the county court was powerless to render judgment against the property of appellant for a portion of said tax levy. The law is plain that where a part, only, of a tax is illegal, but it is so levied that the legal can be separated from the illegal tax, judgment may be rendered for the tax legally assessed and refused as to the portion which is illegal. *People v. Nichols*, 49 Ill. 517; *Mix v. People*, 72 Ill. 241; *Thatcher v. People*, 93 Ill. 240; *Vittum v. People*, 183 Ill. 154, 55 N. E. 689. The 40 cents on the \$100 of road and bridge tax levied in said township for the year 1902 was severable from the 60 cents on the \$100, and the county court, after eliminating the excessive levy of 20 cents on the \$100 from said assessment, properly rendered judgment for the valid portion of the tax.

Finding no reversible error in this record, the judgment of the county court will be affirmed. Judgment affirmed.

(213 Ill. 197)

CINCINNATI, I. & W. RY. CO. v. PEOPLE
ex rel. MOFFET, County Collector.

(Supreme Court of Illinois. Dec. 22, 1904.)

TAXATION—COUNTY TAXES—CERTIFICATION—PURPOSES OF LEVY—TOWN TAXES—DESIGNATION OF OBJECTS—NECESSITY OF PRIOR AUDIT—MUNICIPAL TAXES—CORRESPONDENCE WITH APPROPRIATION BILL.

1. Under Hurd's Rev. St. 1903, c. 120, § 121, requiring county boards to determine the amounts of all taxes to be raised for county purposes, the aggregate of which shall not exceed the rate of 75 cents on the \$100, and requiring the amount to be raised for each of several purposes to be separately stated, and section 127, directing the clerk to determine the rate per cent. which will produce not less than the net amount of the several sums required by the county board, the county board should ascertain the total amount of county taxes to be levied each year by determining the amount that is required for each purpose for which county taxes may be levied, and a levy of 75 cents on the \$100 for "current expenses" is invalid for failure to specify the amounts to be raised and the specific purpose for which each sum is required.

2. A tax levy of a certain sum as a tax for "town purposes" is insufficient in its designation

of the purposes for which the tax is levied, and is invalid.

3. A certificate of the levy of a town tax stated that at the annual town meeting there was voted to be levied as a tax for town purposes the sum of \$432. Attached to the certificate was a statement signed by the town clerk specifying the purposes for which that amount was to be raised, and the sum required for each purpose. The record of the annual town meeting corresponded with the statement attached to the certificate of levy. *Held*, that the statement attached to the certificate should be regarded as a part thereof, and, the whole being so regarded, sufficiently designated the purposes of the tax.

4. Hurd's Rev. St. 1903, c. 139, § 121, requires the board of auditors to examine and audit all charges and claims against the town and the compensation of all town officers. Section 124 directs the board to make a certificate showing the claims and demands allowed, and to file the same with the town clerk. The aggregate amount of such claims is to be certified to the county clerk, and is to be levied and collected as other town taxes. Section 40 authorizes the electors at the annual town meeting to direct the raising of money by taxation for specified purposes, and "for any other purpose required by law." Section 126a provides for the auditing of accounts and their payment by the supervisor on presentation of a certificate of the town clerk, countersigned by the supervisor. *Held*, that the electors may levy taxes at the annual town meeting in anticipation of demands that will thereafter arise against the town for services rendered by its officers, and for other proper charges of like character, and they need not delay making the levy for the compensation of officers until after the claims for such compensation have been audited by the town board and certified to the town clerk.

5. Under Hurd's Rev. St. 1903, c. 121, §§ 13, 14, providing for the determination by the commissioners of highways of the per cent. of tax necessary to be levied for road and bridge purposes, and section 16, directing that their certificate be lodged with the town clerk, who shall certify the levy to the county clerk to be extended, the town clerk's certificate of levy is a jurisdictional prerequisite to a valid extension of the tax, and he cannot merely file with the county clerk the original certificate made by the commissioners.

6. Where a city appropriation bill specified the objects and purposes for which the appropriations were made and the amount appropriated for each purpose, and its tax levy ordinance followed the appropriation bill in specifying the separate objects and purposes for which the tax was levied, and in no case levied a greater tax for any purpose than the amount appropriated for that purpose, the fact that in some cases the amount levied was less than the amount appropriated was no valid objection to the tax.

Appeal from Macon County Court; O. W. Smith, Judge.

Application by the people, on the relation of Edward R. Moffett, county collector, for judgment against the property of the Cincinnati, Indianapolis & Western Railway Company for delinquent taxes. From the judgment rendered, defendant appeals. Affirmed.

George W. Fisher, for appellant. W. E. Redmon, State's Atty., for appellee.

SCOTT, J. This is an appeal from a judgment of the county court of Macon county, rendered at the June term, 1904, for certain taxes of the year 1903, extended by the

county clerk of said county against the real estate of appellant. The taxes involved include county tax for the county of Macon, town taxes for the towns of Decatur, Blue Mound, and Long Creek, road and bridge taxes for the towns of Blue Mound and Long Creek, and city tax for the city of Decatur.

The objection made to the county tax is that the resolution of the board of supervisors merely directed the clerk to extend the amount of 75 cents on each \$100 of valuation for the current expenses of the county, when it should have specified the sums of money to be raised and the specific purpose for which each sum was required.

Paragraph 6 of section 25, c. 34, Hurd's Rev. St. 1903, empowers the county board annually to cause the levy and collection of taxes for county purposes, not exceeding 75 cents on the \$100 valuation. Section 121, c. 120, Hurd's Rev. St. 1903, reads as follows: "The county board of the respective counties shall, annually, at the September session, determine the amounts of all taxes to be raised for county purposes, the aggregate amount of which shall not exceed the rate of seventy-five cents on the \$100 valuation of property, except for payment of indebtedness existing at the adoption of the present state constitution, unless authorized by a vote of the people of the county. When for several purposes, the amount for each purpose shall be stated separately." Section 127 of the same chapter is in the following language: "The said clerks shall estimate and determine the rate per cent upon the proper valuation of property in the respective towns, townships, districts and incorporated cities, towns and villages in their counties, that will produce, within the proper divisions of such counties, not less than the net amount of the several sums that shall be required by the county board, or certified to them according to law."

It is to be observed that section 121, supra, directs the board to determine, not the amount of taxes for county purposes, but "the amounts of all taxes to be raised for county purposes," and "when for several purposes, the amount for each purpose shall be stated separately." Section 127, supra, directs the clerk to determine the rate per cent. which will produce, not the amount or sum required by the county board, but that will produce "not less than the net amount of the several sums that shall be required by the county board." It is apparent from the two sections last cited that the Legislature intended that the county board should ascertain the total of county taxes to be levied each year under its authority by determining the amount that would be required for each purpose for which county taxes may be levied, the aggregate of such amounts to be the total county tax—for example, a certain sum for the pauper fund, a certain sum for the fund for the purchase of supplies for county offices; if the county is engaged, or is about to engage, in building, a certain sum for the building fund; if its

property requires repair, a certain sum for the repair fund; and so with each of the purposes for which the county board is authorized to levy taxes and for which it may require money.

The levy here was for 75 cents on the \$100, and specified no purpose except to state that it was for "current expenses." This designation is too general. The resolution was passed by the board before the total amount of the assessment of property in the county had been ascertained, and before the county board could know what amount of money would be produced by the 75 cent rate. The Legislature did not intend to put it in the power of the county board to levy a 75 cent tax without reference to the needs of the county, but did intend that the total amount of the tax should be determined by an ascertainment of the sum needed by the county for each purpose for which it may levy taxes.

We have invariably held that, under similar statutes, a levy for town taxes must specify the various purposes for which the tax was levied, and that a designation of the tax as "for town purposes" is not sufficiently definite (*People v. Chicago & Alton Railroad Co.*, 194 Ill. 51, 61 N. E. 1064; *Indiana, Decatur & Western Railway Co. v. People*, 201 Ill. 351, 66 N. E. 293; *Cincinnati, Indianapolis & Western Railway Co. v. People*, 207 Ill. 566, 69 N. E. 938), and that an ordinance for the levy of city or village taxes must specify in detail the several purposes for which the tax is levied (*People v. Peoria, Decatur & Evansville Railroad Co.*, 116 Ill. 410, 6 N. E. 459; *Cincinnati, Indianapolis & Western Railway Co. v. People*, supra). There is no distinction between this case, in so far as it affects the county tax, and cases arising under the statutes authorizing the levy of township and city or village taxes.

Appellee relies upon the case of *Mix v. People*, 72 Ill. 241. In that case the amount of the county tax extended was \$25,000. That sum had been fixed by an order of the county board which merely adopted the report of a committee recommending that a tax in that amount be levied. The only question considered by this court was whether or not that order levied the taxes. The objection that the county board had not stated specifically the various purposes for which the tax was to be levied does not seem to have been either made or considered, and the case is therefore not authority so far as the objection now before us is concerned.

We are also referred to cases in which this court has held that a levy made by taxing officers of a certain number of cents on the \$100, instead of fixing the total amount of the levy, while not in strict accordance with the statute, was sufficient, and that taxes extended thereunder were valid. Those under existing statutes are cases in which the tax could have been for but one purpose, as in *Chicago & Alton Railroad Co. v. People*, 155 Ill. 276, 40 N. E. 602, where,

on each \$100 of the assessment, \$2 was levied for school purposes and \$1.50 for building purposes. Those cases are distinguishable from the one at bar by the fact that the tax levied by a fixed percentage could be used for one purpose only, and not for a number of purposes, as in the case of county taxes levied for current expenses.

Gage v. Bailey, 102 Ill. 11, is not in point, as the town tax there levied at a certain rate per cent. was imposed under the provisions of article 10, c. 103, Gross' St. 1863, which differed materially from the statute now under consideration.

The objection to the Decatur town tax is that the certificate of the town clerk recites that at the annual town meeting held in that town it was voted to levy \$3,000 as a tax for town purposes, when it should have specified the purposes for which that amount was required, and the amount required for each purpose. The same objection is made to the Blue Mound town tax. We have so frequently held that such a designation of a town tax is insufficient that a reference to the cases on that subject is no longer necessary.

The certificate of the levy of town tax made by the town clerk of the town of Long Creek states that at the annual town meeting there was voted to be levied as a tax for town purposes the sum of \$432. Attached to the certificate, when filed with the county clerk, was a statement under the hand of the town clerk specifying the purposes for which that amount was to be raised, and giving the sum required for each purpose. The record of the annual town meeting, introduced in evidence by the people, also showed the several purposes for which the sum of \$432 was required, together with the amount required for each purpose, and corresponded with the statement attached to the certificate of levy. The objection to this levy is, first, that it does not designate the purposes of the tax. The statement attached to the certificate of levy for this town tax, we think, should be regarded as a part thereof. So considering it, the certificate meets the requirements of the statute. This statement showed the purposes of the tax were to pay compensation of town officers, to pay for auditing the accounts of the town, and to pay election expenses, properly specifying the amount for each purpose.

Section 121 of chapter 139, Hurd's Rev. St. 1903, directs the board of auditors to "examine and audit all charges and claims against their town and the compensation of all town officers except the compensation of supervisors for county services." Section 124 of the same chapter directs the board to make a certificate showing the claims and demands allowed, and file the same with the town clerk, and the section then continues: "The aggregate amount thereof shall be certified to the county clerk at the same time

and in the same manner as other amounts required to be raised for town purposes, which shall be levied and collected as other town taxes." The third paragraph of section 40 of the same chapter authorizes the electors at the annual town meeting to direct the raising of money by taxation for constructing roads and bridges, for the prosecution and defense of suits, and "for any other purpose required by law." The second objection to this tax is that, if it is for compensation already earned and expenses already incurred, the levy could only be made in pursuance of the certificate of the board of town auditors, as provided by section 124, *supra*, and that if the levy is for future compensation and future expenses, no power exists in the electors at the annual town meeting to levy taxes in anticipation of claims and demands against the town. Appellant's contention is that no tax can be levied by the town authorities to pay the compensation of its officers until after the claims for compensation have been audited by the town board and certified to the town clerk. If this be the true construction of the statutory provisions on the subject, a town officer who, for example, performs some official duty in the autumn of 1904 after the town clerk has filed his certificate of levy for the taxes of that year with the county clerk, and after the second meeting of the board of auditors in that year, would have his claim for the performance of that duty audited and certified to the town clerk in 1905, and included in the tax levy of that year, and collected and paid to him in 1906—about 18 months after the services had been performed. We think such a construction violates the legislative intent as manifested by the enactment under consideration. Section 126a of chapter 139, *supra*, evidently contemplates the payment of claims and demands against the town immediately after they have been audited and certified to the clerk. The statute authorizing a levy of taxes in accordance with the auditors' certificate and the statute authorizing a levy in accordance with the direction of the electors at the town meeting must be construed together. We hold that the electors, at the annual town meeting, are authorized to levy taxes in anticipation of demands that will thereafter arise against the town, for services rendered by its officers, and for other proper charges of like character; that when the auditors make their certificate to the town clerk of claims and demands allowed, such allowances should be immediately paid, provided there is money on hand in the proper fund or funds sufficient for the purpose, the deficiency, if any, to be included by the town clerk in the next certificate of levy made by him, the amount of such deficiency to be in addition to the amount of the levy made by the electors at their annual meeting. By pursuing this course, the town will ordinarily have on hand funds to

meet its current expenses as they arise, and in case of a deficiency, the same will be met by a levy made upon the auditors' certificate.

The certificate of the road and bridge tax for the town of Long Creek did not state the total sum required, but specified that the amount was 60 cents on each \$100 valuation. This town is under the "labor" system, and the commissioners attempted to act under section 119 of chapter 121, Hurd's Rev. St. 1903. The certificate recited the purposes for which the amount was required, but did not specify the amount required for each purpose or the total amount of the levy. The record of the commissioners' meeting at which the levy was made being introduced in evidence, showing the amounts required for the several purposes, respectively, and the total sum, the court permitted the certificate to be amended by inserting the total amount required as shown by the record of the commissioners. The objection made is that the certificate, as amended, does not show the amount required for each of the several purposes specified in the certificate.

We have considered this question at the present term of this court in the case of *Cincinnati, Indianapolis & Western Railway Co. v. People*, 72 N. E. 770, and determined that the defect pointed out by this objection is not fatal to the tax.

The document from which the county clerk extended the road and bridge tax for the town of Blue Mound at the rate of 80 cents on each \$100 of valuation stated that the rate per cent. agreed upon by the commissioners of highways at their semiannual meeting was 60 cents. This document is signed by the three commissioners of highways, and is not certified by the town clerk. Attached to it was the written consent of the assessor and board of town auditors, granted upon the petition of the commissioners, for an additional levy, not exceeding 20 cents. The certificate of the commissioners of highways filed in the office of the town clerk was received in evidence, and showed the rate per cent. to be 80 cents instead of 60 cents, and the town clerk testified that by mistake he wrote 60 cents in the document filed with the county clerk, and which he copied from the one filed with him, instead of 80 cents as specified in the latter document. Thereupon the court permitted the people to amend the paper filed with the county clerk, on which the tax had been extended, by substituting 80 cents for 60 cents, and gave leave to the town clerk to file a certificate of the levy as of September 3, 1903. The town clerk thereupon made a certificate of the levy, and dated the same September 1, 1903, and the same was filed by the county clerk, during the progress of the trial of this cause, on June 15, 1904, as of September 3, 1903. The objection made to this tax is that there was no certificate of the town clerk on file with the county clerk when this tax was extended, and that the filing of the certificate on

June 15, 1904, came too late to obviate this objection.

The town is under the "cash" system, and the tax was levied by the commissioners of highways under sections 13 and 14 of chapter 121, Hurd's Rev. St. 1903. Section 16 of that chapter directs that the certificate made by the commissioners shall be lodged with the town clerk, and that the town clerk shall certify the levy to the county clerk to be by him extended. In this case, the town clerk did not certify the levy, but, instead, filed with the county clerk the original certificate made by the commissioners, accompanied by their petition to the assessor and board of auditors and the consent of the last mentioned officers to the additional levy.

In *Village of Russellville v. Purdy*, 206 Ill. 142, 68 N. E. 1085, we held, under a statute requiring that a certified copy of the tax levy ordinance of a city or village shall be filed with the county clerk as a warrant for extending the tax levied by the ordinance, that filing the original of the tax levy ordinance or the original of the appropriation ordinance upon which the tax levy was based, would not authorize the clerk to extend the tax. The same rule must prevail here. The town clerk failed to file a certificate of the levy. There was nothing to amend. The certificate of the levy of the tax is jurisdictional. *People v. Chicago & Northwestern Railway Co.*, 183 Ill. 311, 55 N. E. 682; *Indiana, Decatur & Western Railway Co. v. People*, 201 Ill. 351, 68 N. E. 293. Had the clerk filed a certificate which varied from the certificate filed with him by the highway commissioners, that variance might have been cured by amendment. Not so, however, where he failed entirely to file the certificate required by the statute.

The objection made to the city tax of the city of Decatur was that it did not appear that the amounts levied for various purposes by the tax levy ordinance had been appropriated for the purposes mentioned in that ordinance. Within the first quarter of the fiscal year, the city council of the city of Decatur passed the annual appropriation bill, properly specifying the objects and purposes for which the appropriations were made and the amount appropriated for each purpose, the aggregate of the appropriations being \$165,000. On the 4th day of September, 1903, the council passed the annual tax levy ordinance, which specified in detail the objects and purposes for which the tax was to be levied and the amount levied for each purpose or object, a certified copy of which was the county clerk's authority for extending the city tax objected to. The total amount levied was \$99,755.80. Each object and purpose specified in the tax levy ordinance as an object and purpose for which the tax is levied is specified in the appropriation bill as an object and purpose for which money is appropriated. In some instances, the amount appropriated is in excess of the

amount levied. In no instance is the amount levied for a particular purpose in excess of the amount appropriated for that purpose. We do not think the fact that the amount levied is less than the amount appropriated a valid objection to the tax where the purpose for which the levy is made is the same for which the appropriation is made. Here the purposes for which the levy was made are the same as those for which the appropriations were made, and the tax should be regarded as levied to meet in part the appropriation bill.

The judgment of the county court will be reversed as to the county tax, the town taxes of the towns of Decatur and Blue Mound, and the road and bridge tax of the town of Blue Mound, and will be affirmed as to the town tax of the town of Long Creek, the road and bridge tax of the town of Long Creek, and the city tax of the city of Decatur, and judgment will be entered in this court against appellant for the town tax of the town of Long Creek in the sum of \$44.05, and in addition thereto 5 per cent. damages thereon, for the road and bridge tax of the town of Long Creek in the sum of \$229.83, and in addition thereto 5 per cent. damages thereon, and for the city tax of the city of Decatur in the sum of \$256.05, and in addition thereto 5 per cent. damages thereon, and the clerk of this court is directed to transmit to the county collector of Macon county a certified copy of the judgment herein.

Affirmed in part and judgment in this court.

(213 Ill. 225)

PEOPLE ex rel. CROSBY, County Collector,
v. CHICAGO, B. & Q. RY. CO.

(Supreme Court of Illinois. Dec. 22, 1904.)

MUNICIPAL CORPORATIONS—TAXATION—LEVY—SUFFICIENCY.

1. The designation of a tax as levied for "town purposes" is insufficient, though the town clerk certifies that the board of town auditors certified to him and filed in his office for the year the levy was made certificates of claims and demands in a certain aggregate amount, where it appears that the certificates of the board of auditors were made for the sole purpose of authorizing payment of the claims so certified as having been allowed.

2. A contention that as the ordinary expenses of a town cannot be included in the levy made by the electors at the annual town meeting, but that such expenses after being audited must be met by a tax, certified by the town clerk, based on the auditors' certificate, a judgment was warranted for the town for taxes extended as for "town purposes" on certificates of the auditor made to the clerk for the sole purpose of authorizing payment of claims certified as allowed, is untenable.

Appeal from Mercer County Court; W. T. Church, Judge.

Proceeding by the people, on the relation of Henry Crosby, county collector, to subject lands of the Chicago, Burlington & Quincy Railroad Company to the payment of taxes. From a judgment for defendant, plaintiff appeals. Affirmed.

This was an application made by appellant to the county court of Mercer county, at the June term, 1904, seeking judgment against the real estate of appellee for delinquent taxes of the year 1903. Appellee filed written objections to the town tax of each of the towns of Rivoli, Greene, Mercer, Millersburg, New Boston, and Keithsburg, the ground of the objections being that the town tax in each instance was levied for "town purposes," and that such designation of the tax was not sufficient. The certificate of the levy and the record of the annual town meeting of each of the towns mentioned were introduced in evidence, from which the facts appear as stated in the objections. Appellant then introduced in evidence the record of the town auditors in each of the towns of Rivoli, Greene, Millersburg, and Keithsburg, showing by certificates contained therein that at the meetings held by the auditors in each town in September, 1902, and March, 1903, certain claims against the town had been allowed by the auditors, and certificates made to that effect, except in the case of the town of Keithsburg, where the record introduced showed a certificate made at the March meeting only. The appellant was then permitted, over the objection of appellee, to amend the certificate of levy made by the clerk of the town of Greene, by inserting therein the following words: "And I also certify that the board of town auditors of the town of Greene aforesaid have certified to me and have filed in my office certificates during the past year of claims and demands audited by them in the aggregate amount of six hundred and forty-two dollars and eighty-five cents (\$642.85)," and a like amendment over like objection was made of the certificate of levy of the town tax of each of the towns of Rivoli, Millersburg, and Keithsburg; and the appellant then sought judgment against the real estate of appellee for such sum as appellee's property would bear as its pro rata share of a town tax in each town equal in amount to the sum shown by the amendment to have been certified by the auditors of that town. The court, however, sustained the objections, and refused judgment, and the case comes here by appeal.

It is urged by counsel for the people that the certificates found in the record of the town auditors were, in each instance, a proper basis for certifying such a tax levy as is made to appear by the amended certificate of levy. An inspection of these certificates found in the record of the board of town auditors does not show that they were made as a basis for a tax levy. There is no language in either certificate to indicate that it was the purpose of the auditors to have the amount of claims audited certified to the county clerk to be extended as a town tax. Each was apparently made for the sole purpose of authorizing the payment of the claims which it is certified were allowed. For aught that appears in the record in this

cause, there may have been funds in abundance in the town treasury to meet the claims audited, and such claims may have been paid prior to the time the town clerk's certificate of levy was originally filed in each instance. It is also urged by appellant that a levy to meet the ordinary expenses of the town, such as salaries of town officers, election expenses, etc., cannot be included in the levy made by the electors at the annual town meeting, but that such expenses, after being audited, must be met by a tax, certified by the town clerk, based upon the auditors' certificate; and that this presents an additional reason for holding that a judgment should have been entered for town taxes extended in accordance with the four amended certificates of levy.

William J. Graham, State's Atty., for appellant. McArthur & Cooke (Chester M. Dawes, of counsel), for appellee.

PER CURIAM. Questions arising upon the assignment of error attached to this record have been determined by this court adversely to the contentions of appellant in the cases of *People v. Indiana, Illinois & Iowa Railroad Co.*, 206 Ill. 612, 69 N. E. 575, and *Cincinnati, Indianapolis & Western Railway Co. v. People*, 72 N. E. 770. To again discuss them would be profitless.

The judgment of the county court will be affirmed. Judgment affirmed.

(213 Ill. 154)

MURPHY v. PEOPLE.

(Supreme Court of Illinois. Dec. 22, 1904.)

EVIDENCE—VITAL STATISTICS—MARRIAGE RECORDS—PROOF—HANDWRITING—LEGITIMACY—LEGACIES—TAXATION.

1. Where the laws of the state where vital statistics were kept by the pastor of a church did not require such records to be kept, and did not authorize their introduction in evidence to prove a marriage, the record of a marriage so kept was inadmissible to prove the same, after the death of the clergyman making it, without proof that the record was in his handwriting.

2. Evidence held insufficient to establish that an entry of a marriage in the record of a church was in the handwriting of the clergyman alleged to have performed the same.

3. In a proceeding for the assessment of an inheritance tax on a legacy, evidence held insufficient to show that the legatee was the legitimate daughter of testator's brother, within 3 Starr & O. Ann. St. 1896, p. 3528, c. 120, § 1, fixing the rate of inheritance tax on legacies to nieces at 2 per cent.

Appeal from Cook County Court; O. N. Carter, Judge.

Proceeding by the people for the collection of an inheritance tax on a legacy bequeathed to Anna Murphy by the will of Bernard Von Glahn, deceased. From a judgment in favor of complainant, the legatee appeals. Affirmed.

J. S. Dudley, for appellant. H. J. Hamlin, Atty. Gen. (E. M. Ashcraft, of counsel), for the People.

BOGGS, J. Bernard Von Glahn, late of Cook county, deceased, by his will, dated December 24, 1901, bequeathed the sum of \$8,000 to Anna Murphy, the appellant. An inheritance tax of \$3 per \$100 on said legacy of \$8,000, being the sum of \$240, was ordered by the county court of Cook county to be deducted by the executor of said deceased from said legacy and paid to the county treasurer of Cook county.

Section 1 of the revenue act (3 Starr & O. Ann. St. 1896, p. 3528, c. 120) directs that the rate of inheritance tax on legacies to a niece of the testator shall be \$2 on each \$100 in excess of \$2,000. The appellant claimed that Hildebrand August Von Glahn, a brother of the testator, and one Mrs. Martha McCabe, a widow, were husband and wife, and that she was born of that union, and was therefore the niece of the testator, and entitled to have \$2,000 of said legacy free from inheritance tax, and that only \$2 on the \$100 of the remainder of said legacy could be lawfully deducted therefrom. Upon a hearing the county court of Cook county declared that it was not established that Hildebrand August Von Glahn and Mrs. Martha McCabe, the mother of appellant, were husband and wife, and consequently that it did not appear that appellant was the niece of the said Bernard Von Glahn, and directed the inheritance tax to be deducted from the legacy and paid into the county treasury at the rate of \$3 on each \$100 of the full amount of the legacy. The appellant was born of the body of said Martha McCabe, and it was quite well established that said Hildebrand August Von Glahn was her father, but we agree with the county court that it was not shown that the marriage relation existed between said Hildebrand August Von Glahn and said Martha McCabe. The appellant sought to prove that a marriage ceremony was celebrated between said Hildebrand August Von Glahn and said Martha McCabe at St. Andrew's Catholic Church, in New York, in May, 1850, and that she was the only issue of that marriage. A book purporting to contain the records of marriages celebrated in said St. Andrew's Catholic Church from April 15, 1842, to November 1, 1851, was offered in evidence, on one of the pages whereof appeared what purported to be the record of the celebration of the marriage of one August Von Glahn and Martha McCabe, by Father Michael Curran, the pastor or rector of said church, on the 20th or 23d day of May, 1850. The court refused to receive the book in evidence. It is not contended that any other competent or sufficient evidence of a ceremonial marriage between the parties was produced, but it is urged that the court erred in refusing to admit the church record in evidence.

The laws of the state of New York in force at the time of the alleged entries in the record of the church did not require that pastors of churches should keep a record of mar-

riages celebrated by them, nor did such laws authorize the introduction in evidence of such records as a means of proving a marriage. Father Curran had departed this life long prior to the hearing of the cause. It seems to have been the view of the trial judge that in cases where, as here, the pastor who it is alleged had made the entries in the record of the church was not living, it was essential to the admissibility of the record in evidence that it should be shown that the record was in the handwriting of such pastor. Evidence was heard upon that question, and the court held it was not proven that the entry in question was in the handwriting of the rector, Father Curran. Without being understood as ruling at all on the question whether the church records would have been admissible in any event, it is quite clear from all authorities upon the question that it is requisite to the admission of such records that it shall be made to appear that the entries were made by the person whose duty it was to make them. 1 Greenleaf on Evidence, § 485; Kennedy v. Doyle, 10 Allen, 101. We concur in the conclusion reached by the trial judge that the evidence did not justify the view that the entry in question in the church record was in the handwriting of the pastor, Father Curran.

A photograph of the page of the church record on which were the entries of marriages from May 17 to June 13, 1850, both inclusive, has been incorporated in the record for our inspection. The entry of 12 marriages conceded to be in the handwriting of Father Curran appear on the page in addition to the entry in dispute. Three witnesses, experts in handwriting, testified that in their opinion the body of the disputed entry was not in the handwriting of Father Curran. Documents conceded to be in the handwriting of appellant were, without objection, submitted to the inspection of the experts, and all expressed the opinion that the body of the disputed entry was in the handwriting of appellant. It was the opinion of the expert witnesses that the entry in dispute had been written on the page many years after the other entries thereon. Two of the expert witnesses testified that an ingredient used in compounding the ink with which the disputed entry was written was not in use in making ink in 1850, when that entry purported to have been made, and that such ingredient was not used in making inks until 1890—about 40 years after the purported time of the entry. We have examined the photographic page of the record. The writing in the disputed entry is so plainly different from that of the other entries made by Father Curran as to attract the attention at but a casual glance. The difficulty in comparing the writing of the disputed and the other entries is not to detect points of difference, but to find any points of resemblance. The entry in dispute is near the cen-

ter of the page, and in a space that, if it is a forgery, must have been left unfilled by Father Curran. Counsel for appellant urges this fact as strongly indicating that the entry was regularly made, and is not a forgery. A close inspection deprives this suggestion of all of its force. On the margin at the left side of the space on the page there appears in writing the date "20" and the words "hurried off." These figures and words are in the same handwriting as all of the other entries made by Father Curran. A figure "3" has been written over the "0" in the date, leaving the "0," however, still plainly discernible. We have no doubt from the appearance of the page that on the 20th day of May, 1850, Father Curran began to make an entry of a marriage on the page where the disputed entry now appears, but that the parties "hurried off" without having the ceremony completed, or they were or he was "hurried off" before he had time to complete the record. He therefore wrote the words "hurried off" just below the date "20," and thus it was, no doubt, that the blank space was left between the entries on the page. That the entry was written in this blank space by some other person than Father Curran does not admit of any doubt.

We concur in the view reached by the learned trial judge that the other proof in the record is not sufficient to justify the conclusion that Hildebrand August Von Glahn and Martha McCabe bore the relation of husband and wife. We find testimony in the record tending to prove, and other testimony tending to disprove, the fact of such marriage by general reputation. The repute of marriage was based almost wholly on alleged statements of Hildebrand August Von Glahn. The testimony of appellant tended to show cohabitation matrimonial in character in 1863. She was then of the age of seven years. That said Von Glahn had had sexual intercourse with the mother of the appellant in New York City, and believed that the appellant was the fruit of such intercourse, is well established from his statements. The appellant came to Chicago, where he lived, when she was about 14 years of age, and he gave her money, and after she returned to New York he caused her to be educated at his expense, and provided for her until his death. She visited him in Chicago during her vacations, and there is much force in the suggestion of counsel that his statements made to friends in Chicago, relied upon to prove his marriage with her mother, were made to shield the appellant from the imputation of illegitimacy. In his will he bequeathed to her the income for life accruing on a fund of \$10,000, the principal whereof he directed should be paid "to her children lawfully begotten." In this bequest the appellant is expressly described by the testator as "Anna, daughter of Martha McCabe, who claims said Anna to be my child." The declarations of the father, in his will, as to

the legitimacy of his child, impress us as the better guide to the real truth of the matter than the oral statements made by him, as testified to by the witnesses. The declarations in the will are inconsistent with the existence of the marriage relation of the testator and Martha McCabe. The conduct of said Von Glahn was also inconsistent with the existence of such marriage relation, unless the presumption be indulged that he willfully committed bigamy. On the 8th day of August, 1863, while, as he then knew, said Martha McCabe was still living, he entered into the marriage relation with Matilda Busse in Chicago, and such marriage was celebrated by ceremonials and lawful forms. The issue of that marriage was one son, who is still living. Said Von Glahn lived in the city of Chicago during the remainder of his lifetime. His death occurred on the 5th day of April, 1874. We are not to presume that he was guilty of bigamy, but the presumption is in favor of his innocence and of the legality of the marriage which was formally solemnized. 19 Am. & Eng. Ency. of Law (2d Ed.) p. 1206. Martha McCabe survived Von Glahn more than 12 years. She lived during the last five or six years of her lifetime in Chicago, but did not seek to enforce any right, as widow, against his estate, though he was the owner of valuable property at the time of his death. Nor is it shown that she ever, at any time during her lifetime, attempted to assert any legal right under the marriage relation. The presumptions of a prior marriage with Martha McCabe are too weak to be allowed to operate to render void the duly solemnized marriage between Hildebrand August Von Glahn and Matilda Busse. The order and judgment of the county court are affirmed.

Judgment affirmed.

(213 Ill. 133)

WATHEN et al. v. ALLISON DITCH DIST. NO. 2.

(Supreme Court of Illinois. Dec. 22, 1904.)

DRAINS—BENEFITS — ASSESSMENT—EXCESSIVENESS—PRIMA FACIE CASE—REBUTTING EVIDENCE—SUFFICIENCY.

1. In a proceeding to assess the benefits to lands embraced in a ditch district, where the jury was impeached under 2 Starr & C. Ann. St. 1896, p. 1509, c. 42, par. 45, evidence examined, and held sufficient to show that the assessment of the benefits on 214.90 acres of land at \$355.40 was excessive, and therefore sufficient to overcome the prima facie case made by the assessment roll.

2. A prima facie case cannot prevail if rebutted or the contrary is shown by competent proof.

Appeal from Lawrence County Court; J. D. Madding, Judge.

Proceeding by the Allison Ditch District No. 2 against Elizabeth L. Wathen and others to assess benefits. From the judgment, Elizabeth L. Wathen appeals. Reversed.

Tohill & Kingsbury, for appellant. S. B. Rowland and C. J. Borden, for appellee.

BOGGS, J. The jury impaneled by the county court of Lawrence county under the provisions of paragraph 45 of chapter 42, 2 Starr & C. Ann. St. 1896, p. 1509, to assess the benefits to the lands embraced within Allison Ditch District No. 2, in said county, by the construction of the drainage ditch, returned a total assessment of \$627.40 for benefits to 214.90 acres of land belonging to the appellant. The lands consisted of two tracts, described as follows: The fractional northwest quarter of section 27, town 4 north, range 10 west, 148.65 acres, which was assessed for \$348.65, and the fractional north half of the southwest quarter of said section 27, containing 66.25 acres, which was assessed for \$278.75. The appellant filed objections to the assessment, in substance, that the lands were so situated that they were not in any way benefited by the ditch, except for sanitary purposes, and that each tract was assessed for benefits in a greater amount than any benefits derived from the work. The jury was reconvened, and the evidence bearing upon the objections was submitted; the result being a reduction of the benefits assessed to the fractional northwest quarter to \$292.65 and a reduction of the benefits to the fractional north half of the southwest quarter to \$262.75; being a total reduction of \$72. The appellant contended that it was shown by the evidence that the said lands were not benefited to any extent by the construction of the ditch, except possibly for sanitary purposes, and has perfected this appeal.

It was stipulated that a tax of 25 cents per acre was the extent of the benefits conferred on the land for sanitary purposes.

Five witnesses gave testimony on the hearing, all of whom were introduced by the appellant. The northernmost end of the ditch (being the starting point thereof) is between one-third and one-half miles south of the nearest part of the appellant's lands, and south of the westernmost limits thereof. There was no conflict in the testimony of the different witnesses. It appeared from their testimony that the greater part of the appellant's lands slopes toward the east and southeast; that a ridge or elevation extends from north to south across the lands, and somewhat west of the center of the tracts, and that all of the water falling or coming on the lands east of the ridge flows to the east and the south, and does not reach the head of the ditch, and could not be carried there against the natural course of drainage, except by the construction of a long, expensive ditch through the ridge. The testimony also showed that the only portion of the land which needed drainage west of the ridge was in the southwest corner, where there was a small pond or depression, which,

in occasional seasons only, rendered an acre and a half or two acres of the land too wet for cultivation; that to drain this portion of the land would require the construction of a ditch one-half mile in length in order to reach the head of the district ditch. Some of the witnesses thought such a ditch would drain the depression or pond only, and one witness thought that possibly 12 acres in the southwest corner might be benefited by the construction of a ditch from the pond south to the head of the drainage ditch; but all agreed that the expense of digging the ditch from the pond to the drainage ditch would, when the small tract benefited was considered, be too great to justify that course. The witnesses were all farmers. Four of them had cultivated the lands of appellant—two of them for five years, one for two seasons, and the other was the husband of appellant, who had known or cultivated all or a portion of the farm for more than 30 years. The other of the five witnesses had lived for 12 years within one-fourth mile of the lands. The testimony of these witnesses, if there was no reason for refusing it weight and credit, plainly demonstrated that the assessment was grossly excessive. There is no other testimony to be found in the record.

Counsel for the appellee district say this testimony is not sufficient to overcome the prima facie case made by the assessment roll returned by the jury after the personal view of the premises by them, "and the evidence of the engineers." The assessment roll makes a prima facie case that the assessment is correct, and is sufficient to establish that fact if not rebutted. But here the objector produced evidence showing the assessment to be unjust. Such proof being produced, the presumption was not of itself sufficient to authorize the confirmation of the assessment, but the case made by the proofs offered by the objector must be met by other testimony. Prima facie evidence means evidence which is sufficient to establish the fact unless rebutted. 22 Am. & Eng. Ency. of Law (2d Ed.) 1294. A prima facie case cannot prevail if rebutted or the contrary shown by competent proof. *Lovell v. Drainage District*, 159 Ill. 188, 42 N. E. 600. It does not appear from the record that the engineer testified on the hearing before the jury, nor do we find anything in the record to show that the engineer at any time took any action whatever with reference to these tracts of land. The testimony submitted to the jury plainly and fully rebutted the presumption arising from the return of the assessment roll, and the trial court erred in refusing to set aside the verdict and grant a new trial. The judgment must be, and is, reversed, and the cause will be remanded for such other and further proceedings as to law and justice shall appertain.

Reversed and remanded.

(212 Ill. 532)

WOOD v. SUPREME RULING OF FRATERNAL MYSTIC CIRCLE.

(Supreme Court of Illinois. Dec. 22, 1904.)

INSURANCE—BENEFICIAL ASSOCIATIONS—ORGANIC LAW—BY-LAWS—AGE LIMIT—ACCEPTING MEMBER ABOVE LIMIT—ESTOPPEL.

1. In the absence of evidence, it will not be presumed that the statutes of New Jersey contain any limitation as to the age of persons to whom insurance may be issued by fraternal benefit associations organized under the laws of that state.

2. The certificate of organization of a foreign beneficial association provided that the association should receive persons for membership of the ages named by the national council, and such council enacted a by-law—designated a constitution—which provided that membership should not be granted to any one older than 59 years at his nearest birthday. An application for membership stated that the applicant was 59 years of age at his nearest birthday, when in fact the applicant was older, but the true date of his birth was stated in the application. A certificate of membership was issued, and for more than two years the association accepted payment of assessments. *Held*, in an action on the certificate, that the association was estopped from taking advantage of the fact that insured was above the age limit; such limit not having been fixed by the organic law of the association, and it having been within the power of the association to determine insured's real age.

Appeal from Appellate Court, First District.

Action by Mary E. Wood against the Supreme Ruling of the Fraternal Mystic Circle. From a judgment of the Appellate Court reversing a judgment in favor of plaintiff, plaintiff appeals. Reversed.

This was an action of assumpsit, commenced in the superior court of Cook county by the appellant upon a benefit certificate issued upon the life of her husband, Joseph H. Wood, in which she was named as beneficiary, by the Order of the Protectors, a fraternal benevolent insurance association organized under the laws of the state of New Jersey, the obligations of which had been assumed by appellee, the Supreme Ruling of the Fraternal Mystic Circle, a fraternal benevolent insurance association organized under the laws of the state of Pennsylvania. The declaration was in the usual form, and pleas and replications were filed, and a jury was waived, and a trial had before the court, which resulted in a finding and judgment in favor of plaintiff for \$556.10, which judgment, on appeal to the Appellate Court for the First District, was reversed, without remanding the cause; and, a certificate of importance having been granted, plaintiff has brought the case to this court by appeal.

It appears from the evidence, which was in the form of a stipulation, that Joseph H. Wood, in his application for membership in the Order of the Protectors, which bore date March 19, 1898, stated "he was fifty-nine years of age at his nearest birthday, and was born June 8, 1838." He also stated

therein: "I hereby consent and agree that any untrue or fraudulent statements made herein or any concealment of facts by me in this application, or my suspension or expulsion from or voluntary severing my connections with the Protectors, shall forfeit the rights of myself and my beneficiaries to all benefit and privileges therein. I agree to make punctual payment of all dues for which I may become liable, and conform in all respects to the laws, rules and usages of the Protectors now in force or which may hereafter be adopted by the governing board or executive committee, and I further agree that this application, the said laws, rules and usages of the Protectors and the certificate of membership issued to me, shall constitute the contract between the Protectors and myself and my beneficiaries."

The certificate of organization of the Order of the Protectors provided the association should receive persons for "beneficial membership of such ages as limited or named by the national council," and the constitution and by-laws of said order in force at the time the application was made, and the certificate issued to the assured, provided that such membership should not be granted to "any one who is younger than eighteen years or older than fifty-nine years of age at nearest birthday at date of initiation." Joseph H. Wood died September 21, 1900, and it was admitted that he had paid to the Order of the Protectors and appellee all charges and assessments from the time he was admitted to membership in the order to the time of his death, lawfully assessed against him, which, with interest, aggregated the sum of \$962.42, which amount the appellee tendered to the appellant prior to the commencement of this suit, and that the appellee had assumed, and was liable to pay in case of the death of the holder thereof, all legal benefit certificates issued by the Order of the Protectors, and remaining in force at the time of the death of the assured.

The appellee presented to the trial court the following propositions of law, and requested that the same be held as the law of the case, and the refusal of the court to hold said propositions as law was assigned as error:

"(2) That inasmuch as the laws of said corporation provide that beneficial membership shall not be granted to anyone who is younger than eighteen years of age or older than fifty-nine years of age at nearest birthday at date of initiation, and inasmuch as it appears from the evidence herein that Joseph H. Wood, the husband of plaintiff herein, and to whom said corporation issued the benefit certificate introduced in evidence herein, was older than fifty-nine years of age at nearest birthday, at the date of his application for membership in General Council No. 2 of the Order of the Protectors—said General Council No. 2 being one of the subordinate councils of said corporation—he

¶ 1. See Evidence, vol. 20, Cent. Dig. § 101.

was therefore at the date of said application, and at the date of his admission to said order, ineligible to membership therein, and the benefit certificate issued to him was void, and no rights accrued thereunder to his beneficiary, the plaintiff herein.

"(3) That in taking over the membership of said order the Supreme Ruling of the Fraternal Mystic Circle, under the terms of the resolution adopted at a meeting of the National Council of the Order of the Protectors held March 3, 1898, and of the resolution adopted by the Supreme Ruling of the Fraternal Mystic Circle at a meeting held March 15, 1898, and in issuing the 'transfer of certificate obligation' to said Joseph H. Wood under date of March 19, 1898, did not assume any obligations larger or different from such as may have existed between said Wood and said National Council of the Order of the Protectors, and that said Wood never became a member of the Order of the Fraternal Mystic Circle, and that his beneficiary, the plaintiff herein, is not entitled to any benefits from the said Order of the Fraternal Mystic Circle by reason of the said benefit certificate issued to him by said National Council of the Order of the Protectors, or by reason of the issuance of said 'transfer of the certificate obligation,' or by reason of any other action of said the Supreme Ruling of the Fraternal Mystic Circle set out in the stipulation and agreed statement of facts filed herein.

"(4) That the officers of such a corporation as either the National Council of the Order of the Protectors or the Supreme Ruling of the Fraternal Mystic Circle cannot waive the operation of its laws which fix the limit of the age at which persons may be admitted as members thereof, and that the action of the officers of either of said corporations, or of any of the subordinate bodies thereof, in accepting dues and assessments from said Joseph H. Wood, did not constitute a waiver of the provisions of the laws of either of said corporations which forbid of a person as a member thereof who is older than fifty-nine years of age at nearest birthday, at the date of his admission as a member."

Black & Black (John L. Black, of counsel), for appellant. H. H. C. Miller, for appellee.

HAND, J. (after stating the facts). It is conceded by the appellant that Joseph H. Wood was more than 59 years of age at his nearest birthday at the date he applied for membership and was admitted to membership in the Order of the Protectors. It is clear, therefore, that there can be no recovery in this case unless the Order of the Protectors and the appellee, by receiving from Joseph H. Wood assessments as a member of said order from the time of his admission to membership therein to the time of his death, which covered a period of time intervening between March 19, 1898, and September 21, 1900, and which payments ag-

gregated in amount, with interest, \$962.42, waived the restriction as to age contained in the constitution and by-laws of the Order of the Protectors when said Joseph H. Wood might be admitted to membership in said order, and are estopped by their action in receiving said assessments from taking advantage of the fact that said Joseph H. Wood was above the age limit provided by the constitution and by-laws of said order at the time he was admitted to membership in said order.

The law is well settled in this state that corporations can only exercise such powers as are conferred upon them by their charters, and that an act of a corporation not authorized by its charter is void, and the fact that the corporation has received the benefits of a contract, or the party with whom it deals has acted thereunder, does not estop the corporation from raising the defense, when sued upon such contract, of *ultra vires*. When, however, the contract is within the chartered powers of a corporation, but there has been a failure to comply with some regulation, or the power has been improperly exercised, if the corporation has received the benefit of the contract it may be estopped to raise that defense. *Durkee v. People*, 155 Ill. 354, 40 N. E. 628, 46 Am. St. Rep. 340; *National Home Building & Loan Ass'n v. Home Savings Bank*, 181 Ill. 35, 54 N. E. 619, 64 L. R. A. 399, 72 Am. St. Rep. 245. In the last case, on page 43, 155 Ill., page 621, 54 N. E., 64 L. R. A. 399, 72 Am. St. Rep. 245, in discussing the doctrine of *ultra vires*, the court said: "The term has been applied to acts of directors or officers which are outside and beyond the scope of their authority, and therefore are invasions of the rights of stockholders, but which are within the powers of the corporation. In such a case the act may become binding by ratification, consent, and acquiescence, or by the corporation receiving the benefit of the contract. * * * Where an act is not *ultra vires* for want of power in the corporation, but for want of power in the agent or officer, or because of the disregard of formalities which the law requires to be observed, or is an improper use of one of the enumerated powers, it may be valid as to third persons. In the more proper and legitimate use of the term, it applies only to acts which are beyond the purpose of the corporation, which could not be sanctioned by the stockholders. * * * If there is no power to make the contract, there can be no power to ratify it, and it would seem clear that the opposite party could not take away the incapacity and give the contract vitality by doing something under it."

In this state the charter or organic law of an insurance association similar to that of the Order of the Protectors consists of the certificate of organization granted to it by the state, and the statutes of the state which provide for the organization of such associa-

tions and which define their powers. *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 22 N. E. 798, 8 L. R. A. 497, 17 Am. St. Rep. 319; *City of Danville v. Danville Water Co.*, 178 Ill. 299, 53 N. E. 118, 69 Am. St. Rep. 304. The laws of the state of New Jersey governing the organization and specifying the powers of fraternal benefit insurance associations in that state were not introduced in evidence; and it will not be presumed, in the absence of proof, that the statute of said state contained any limitation as to the age of persons to whom insurance might be issued by fraternal benefit associations. We find nothing in the certificate of organization of the Order of the Protectors which prohibited that association from granting certificates of membership to persons over 59 years of age at their nearest birthday. By said order's certificate of organization its national council was authorized to fix the age limit of its beneficial members. Said national council fixed by a by-law, or by what is designated its constitution—which designation added no force to its effect, other than that of a by-law (*Supreme Lodge Knights of Pythias v. Kutscher*, 179 Ill. 340, 53 N. E. 620, 70 Am. St. Rep. 115; *Peterson v. Gibson*, 191 Ill. 365, 61 N. E. 127, 54 L. R. A. 836, 85 Am. St. Rep. 263)—the age limit of its beneficial members at not less than 18 nor more than 59 years at nearest birthday, and the most that can be said in support of the position that the certificate of membership to Joseph H. Wood was improperly issued is that it was issued by the officers of said order in violation of the by-law of the association fixing the age limit of its beneficial members.

In *High Court Independent Order of Foresters v. Schweitzer*, 171 Ill. 325, 49 N. E. 506, and in *Coverdale v. Royal Arcanum*, 193 Ill. 91, 61 N. E. 915, it was held the requirement of a by-law limiting the class of persons who might be admitted to membership in a fraternal benevolent insurance association might be waived. In the *Coverdale* Case, on page 100, 193 Ill., page 918, 61 N. E., it was said: "It was certainly held in the *Schweitzer* Case that there could be a waiver of the enforcement of a requirement embodied in a by-law of a benefit society. It cannot be said that because of the by-law which provided that applications should not be received from barkeepers, or from persons who at any time sold or served intoxicating liquors to be drank on the premises, William Wasserman did not become a member of the appellee society, and that on that account there was no membership to be forfeited. In his application, submitted to appellee, he agreed that any untrue statement made therein should forfeit the rights of himself and his family, or dependents, to all benefits or privileges therein. * * * The by-law is a direction to the persons whose duty it was to receive applications for membership. They were directed not to receive applications from barkeepers, etc. * * *

The appellee itself was affected with the same knowledge which the subordinate council had. It would be unjust to hold that, having such knowledge, it could continue for a year and eight months to recognize Wasserman as a member, and receive dues and assessments from him, and yet, after his death, insist that he was never a member of the Royal Arcanum or its subordinate council at all. Having knowledge, as it must be presumed to have had from the present record, the appellee should have taken steps to declare Wasserman's membership forfeited. * * * The laws and rules of such associations as the appellee should be liberally construed, and, where an attempt is made to work a forfeiture by a benevolent association, its laws, rules, and regulations will be most strictly construed against it."

It appears from the admitted facts that Joseph H. Wood in his application stated the true date of his birth—that is, June 3, 1833—from which it appeared he was nearer his sixtieth than his fifty-ninth birthday at the time he applied for membership in the Order of the Protectors. The application was presented to the Order of the Protectors, and a certificate of membership based thereon was issued, and for more than 2 years that association and the appellee, with the written evidence before them that he was nearer 60 than 59 years of age when he applied for membership, recognized him as a member of the association; and during that time accepted his money in payment of assessments, and after his death the supreme recorder of appellee wrote the appellant her husband was a member of the appellee association and called upon her for death proofs, which were subsequently furnished.

In the case of *Morrison v. Wisconsin Odd Fellows' Mutual Life Ins. Co.*, 59 Wis. 162, 18 N. W. 13, it was held the provisions of a by-law restricting membership to persons under a certain age might be waived by the officers of the association, and that where the application for the insurance, and other written evidence in possession of the secretary of the association, showed the age of the applicant as stated in his application for membership to be incorrect, the company was charged with notice of the mistake, and if it continued to accept assessments from the assured, and failed to take action to forfeit his membership for such mistake, the association, after the death of the assured, was estopped to insist upon a forfeiture, or that his certificate of membership was never in force. This case also points out very clearly the distinction between the doctrine of waiver as applied to a limitation upon age contained in a by-law and such limitation when contained in the charter of the association.

The authorities mainly relied upon by appellee (*Alexander v. Parker*, 144 Ill. 355, 33 N. E. 183, 19 L. R. A. 187; *Grimme v. Grimme*, 198 Ill. 265, 64 N. E. 1088, and kindred cases) are cases holding a benefit asso-

ciation has no authority to create a fund for persons other than the classes specified in the law authorizing its organization, and that a member cannot direct a fund to be paid to a person outside of such classes. Had the charter of the Order of the Protectors restricted membership therein to persons 59 years of age at their nearest birthday, the cases cited by appellee would perhaps be in point. But the case presented by this record for decision is not that sort of a case. Here the age limitation is found in a by-law, and, while the issue of the certificate of membership to Joseph H. Wood by the officers of the Order of the Protectors was outside and beyond the scope of their authority as defined in that by-law, the act of admitting Joseph H. Wood to membership in said order was within the powers of the association, viz., the issuing of fraternal benevolent insurance to applicants therefor, and in such a case the act may become binding by ratification, consent, and acquiescence, or by the association receiving the benefit of the contract. *National Home Building & Loan Ass'n v. Home Savings Bank*, supra.

We are of the opinion the trial court did not err in refusing to hold the propositions of law contained in the statement preceding this opinion, submitted to it by the appellee, as the law governing this case. The judgment of the Appellate Court will be reversed, and the judgment of the superior court will be affirmed.

Judgment reversed.

(213 Ill. 283)

In re MAPLEWOOD COAL CO.

(Supreme Court of Illinois. Dec. 22, 1904.)

TAXATION—ASSESSMENT—OWNERSHIP OF PROPERTY—MINING RIGHTS—ACTION OF ASSESSING BOARD—PRESUMPTION OF REGULARITY—APPEALS—QUESTIONS PRESENTED.

1. Under the statute authorizing appeals from the county board of review to the State Auditor, and the certification of such appeals to the Supreme Court for determination, the Supreme Court can consider only whether the property is liable to taxation, and cannot pass upon questions as to the amount of the assessment.

2. The county board of review, in assessing property, is not confined to the statement of the taxpayer's witnesses, but may act upon information coming to it from other sources or upon its own knowledge.

3. Buildings erected by the lessee of a mine, who is permitted by his lease to remove the same, are personal property, and subject to assessment as the property of the lessee, until and unless, by a noncompliance with the provisions of the lease, the lessee forfeits his rights, whereupon the buildings become a part of the realty.

4. It is presumed that an assessment made by the board of review is regular and legal, and one seeking to impeach it must affirmatively show sufficient grounds for so doing.

5. Under *Starr & C. Ann. St. 1898, c. 94, § 7*, providing that a conveyance of a mining right shall be considered as so separating the right from the land that the same shall be taxable separately, and any sale of the land for taxes shall not include or affect such mining right, the fact that a mining right which has been severed by sale is assessed to the owner of the

land does not preclude the assessment of such mining right against the person to whom it has been sold, and the owner of the land is the only one who can complain of the assessment as double taxation.

6. Mining rights are real estate, and should be taxed as such.

Certified by Auditor of Public Accounts.

Appeal by the Maplewood Coal Company to the State Auditor from the action of the county board of review in assessing property. Certified to the Supreme Court by the State Auditor. Assessment sustained in part.

Chipperfield & Chipperfield, for appellant.
H. J. Hamlin, Atty. Gen., for appellee.

RICKS, C. J. This is an appeal from the action of the board of review of Fulton county in assessing certain property to appellant, and certified to us by the State Auditor.

Appellant is operating a coal mine in Fulton county upon lands leased from the Horace Clark & Sons Company, and owns the machinery, consisting of engines, boilers, and hoisting apparatus, cars, mules, and tools. It presented to the assessor a schedule of its property, but the assessor, not being satisfied therewith, declined to make the assessment upon such schedule, and referred the same to the board of review for its action. Appellant was cited before that board, and upon a hearing was assessed, and three items are complained of. The items are: (1) Twenty-five mules, at \$1,000; (2) investments in real estate and improvements thereon, \$1,200; and (3) coal rights in lands, \$17,300.

The complaint as to the first item is that the assessment is too great. With that question we have nothing to do. The statute conferring authority to appeal, and on this court to consider appeals, confines our inquiry to the sole question of whether the property is liable to taxation.

Concerning the second item, appellant's president and general manager testified that the tippie, boiler house, and buildings at and around the shaft were, in his opinion, real estate and worth \$1,200—the amount of the item objected to. He says they were constructed and held there under an agreement with the Clark & Sons Company that if appellant, as lessee, has performed certain conditions mentioned in the lease between the Clark & Sons Company and appellant, the latter may remove the same. The witness does not make himself very clear in regard to this item, and the lease was not introduced in evidence. The board was not confined to the statement of appellant's witness, who alone testified, but could act upon information coming to it from other sources or upon its own knowledge. If appellant leased the right to mine and operate certain mining rights owned by the Clark & Sons Company, with the agreement that appellant should construct the buildings necessary thereto, and upon complying with

¶ 6. See *Taxation*, vol. 46, Cent. Dig. § 147.

the conditions of the lease should have the right to remove the buildings, the latter were personal property and the property of appellant until it had been determined that appellant had forfeited its rights, when the buildings would become attached to and a part of the realty by reason of the forfeiture. Appellant does not make this matter so clear that it may not be reasonably and fairly inferred that the facts were as we have above presumed they might be, and we are unable to say that the property was not liable to assessment as belonging to the appellant. The burden is upon appellant. It is complaining of the official acts of the board designated by the law to make the assessment. The presumptions are all in favor of the regularity and legality of the assessment, and one seeking to impeach it must affirmatively show sufficient grounds for doing so.

The third item consists of about 800 acres of coal rights owned by appellant in fee. These coal "mining rights" had been purchased from the owners of the surface, and are described as vein No. 5 under certain lands in Fulton county. A list of the lands under which the coal lies was agreed upon and is contained in the record, and it appears that appellant paid \$30 per acre for such coal rights. By the board of review the property was scheduled and assessed as personal property. Appellant contends that it is not subject to taxation and cannot be assessed to it at all, and, if it is subject to taxation, it must be assessed as real estate.

The argument that the property is not subject to taxation proceeds upon the ground that as our statute requires that lands be assessed quadrennially, and as the last assessment of land was made in 1903, at which time, it is argued, the lands under which these mining rights lie were assessed for their full value, including the mining rights, therefore, if the mining rights be assessed to appellant, there would be a double taxation of the same property. The evidence taken only shows that 350 acres of these rights were purchased since 1903, but, if it showed that they were all purchased since that time, we do not think the contention of appellant should be admitted. By the purchase of the mining rights by appellant there was a separation of such rights from the land, as declared by section 7 of chapter 94 (Starr & C. Ann. St. 1896), in such a manner, as declared by the statute, that "any sale of the land for any tax or assessment shall not include or affect such mining right." If effect is to be given to this provision of the statute, and the contention of appellant is to be admitted, then the land of the proprietor, owning all except the mining right, can be sold for the tax due from appellant, and its interest in the land not thereby be affected. It would be manifestly unjust so to construe the language, and we do not think the argument warrants such construction. The evidence does not show

that the assessment of the land included the mining right. The only evidence upon that subject was a copy of the assessment roll assessing the property to the original proprietor. If, however, as a matter of fact, the property is assessed to the original proprietor, including the land and the mining rights, which belong to appellant, it is the fault of the proprietor. He has his remedy, and if he does not elect to avail himself of it, but permits an excessive assessment to the extent that appellant's mining rights depreciated the value of the land, it is not for appellant to complain for him. He alone can make that complaint. The law requires that appellant shall be assessed upon its property, and it cannot urge that, because some other property holder is assessed enough higher than he ought to be to make up the tax that appellant ought to pay, therefore appellant ought not to pay any tax.

That appellant's mining rights, as here involved, are real estate and should be taxed as such, seems so well settled by previous decisions of this court that that question hardly requires further discussion. In re Major, 134 Ill. 19, 24 N. E. 973; Consolidated Coal Co. v. Baker, 135 Ill. 545, 26 N. E. 651, 12 L. R. A. 247; Sholl Bros. v. People, 194 Ill. 24, 61 N. E. 1122.

It was error to list and assess this property on the personal property schedule. It should have been assessed as the mining rights in the lands, describing them, in which case the mining rights can be sold for the taxes as other lands. In this regard the assessment is not approved. In all other respects it is approved.

Assessment sustained in part.

(212 Ill. 541)

CAMFIELD v. PLUMMER et al.

(Supreme Court of Illinois. Dec. 22, 1904.)

REAL ESTATE—TRUST—EVIDENCE—SUFFICIENCY
—WITNESS—COMPETENCY—DE-
MURBER—WAIVER.

1. Answering over after demurring to a bill is a waiver of the demurrer.

2. Plaintiff advanced money to relieve real estate of liens on the oral promise of the owner to give him the entire property on her death. Thereafter the owner conveyed the land, for a valuable consideration, to defendant, by warranty deed, which was recorded, defendant having no notice of plaintiff's equity; and also left a will devising the property to defendant. The will was duly probated without its validity being questioned. Held insufficient, as against defendant, to raise a trust in the property in plaintiff's favor.

3. Where plaintiff in a suit to recover real estate and declare the defendant a trustee thereof did not claim the property as heir of defendant's grantor, nor bring the suit as such, the competency of the defendant as a witness was not affected merely because plaintiff was an heir of defendant's deceased grantor.

Error to Circuit Court, Moultrie County; W. G. Cochran, Judge.

¶ 1. See Pleading, vol. 29, Cent. Dig. § 522.

Suit by J. D. Camfield against Taylor Plummer and others. From a decree for defendants, plaintiff brings error. Affirmed.

Harbaugh & Thompson, for plaintiff in error. R. M. Peadro, for defendant in error Taylor Plummer.

RICKS, C. J. This cause was begun in the circuit court of Moultrie county by J. D. Camfield, plaintiff in error in this court, by filing a bill making the defendant in error Taylor Plummer and others, defendants, charging that said Plummer was in possession of lot 4, block 5, Hamilton's Addition to the city of Sullivan, claiming title thereto, when in fact plaintiff in error was the real owner; and further claiming that the said Plummer became a trustee, and as such holds the property in dispute for plaintiff in error, and refuses to deliver up possession. The defendant Taylor Plummer answered the bill, and all the minor defendants answered by guardian ad litem. Replications to the answers were filed, and the cause referred to a master in chancery to report both conclusions of law and fact. The master found the issues for the defendants, and recommended the dismissal of the bill. Objections and exceptions were filed to the conclusions and report of the master and overruled, and a decree was entered dismissing the bill. This writ of error is brought to review that record.

It appears from the record that a demurrer was filed to the bill by Plummer, and answer also filed without disposing of the demurrer. Under this condition the demurrer will be considered as waived. Taylor Plummer is the only party answering in this court, and the only defendant to the bill claiming any interest in the property.

The facts, as disclosed from the record, are substantially as follows: Kittoria F. Seaney was in 1897 and prior thereto the owner of the property in dispute, and resided thereon until her death. Prior to that time she improved the premises by building a dwelling house upon the lot, and became indebted for the material between \$800 and \$900. A mechanic's lien was filed against the premises, and to satisfy the same she placed a mortgage thereon, which was not paid at maturity, and foreclosure proceedings were had, and a decree of sale was rendered, and sale made for the sum of \$831.51, being the amount of judgment, interest, and costs. Between the time of sale and the expiration of the time to redeem she began to correspond with her half-brother, living in Kentucky, who is the plaintiff in error here, informing him of her condition, and asking him to assist her in saving her house. After considerable correspondence with him, and promising that, if he would assist her, she would give him the entire property at her death, plaintiff in error sent her \$900 to settle the amount due. The street had also been paved in front of the premises, and he afterwards advanced her \$40 in payment of

one of the assessments. Mrs. Seaney was a widow without children, and lived alone in the property for some years. The defendant in error Plummer was a neighbor of Mrs. Seaney, and she did sewing for his children, he being a widower, and in the spring of 1900, during a conversation with her in reference to some sewing, she proposed to Plummer that, if he would move into her house with her, and build some outbuildings, finish the upstairs of the house, build some walks, etc., and take care of her during her lifetime, she would give him the property, she being in poor health, and having a cancer, which the doctors had pronounced incurable, and had no money, and was unable to earn a living. Plummer accepted the proposition, moved into the property, and did all that was asked of him, and the undisputed evidence shows he expended in improving the place, in provisions, doctors' bills, in sending Mrs. Seaney to the Springs for her health, nurses, money advanced, etc., \$1,711.73, and also that it was worth \$350 for taking care of her. On December 10, 1901—the same date the deed was made from Mrs. Seaney to Plummer—they had an accounting in writing, which is signed by Mrs. Seaney, and which, giving each item, concludes with the statement that there is due Taylor Plummer \$2,161.73. The accounting is not only over the signature of Mrs. Seaney, but is regularly acknowledged by her before the same notary public who took the acknowledgment of the deed to the premises in question. A careful examination of the evidence fails to show that this account is incorrect in any substantial item or particular. The item of \$350 for the care of her is contained in the statement of the account, and is the last item therein. Of this item, following the account, and explanatory of it, Mrs. Seaney declares: "The last item in said statement of \$350 for care and attention has been well earned. Much of the time embraced in said item I have been unable to help myself, and I can say in truth that Mr. Plummer has ever been ready at my call to render me any assistance in his power. The items of borrowed money are all true and correct. In fact, every item in said statement is just, and the full sum of \$2,161.73 is due Taylor Plummer, as aforesaid." The evidence further discloses that the property was not worth to exceed \$2,000. On December 10, 1901, Mrs. Seaney executed her warranty deed to Plummer, the consideration named in the deed being \$1,800. The deed was not recorded until May 8, 1902, being the next day after the death of Mrs. Seaney. It further appears that on December 23, 1901, Mrs. Seaney made her will, disposing of all the property, both real and personal, making Plummer her sole devisee and executor without bond, which will was probated at the June term of the county court of Moultrie county. It is claimed by plaintiff in error that a previous will was

made by Mrs. Seaney, in which he was made devisee, but under the view we take it is not worth while to discuss the previous will, for the reason the last will revoked all former wills made, and defendant in error is not shown to have had any knowledge of it or its provisions. The master found that no knowledge of the promises of Kittoria F. Seaney to her brother, J. D. Camfield, ever came to said Taylor Plummer; that Taylor Plummer took care of the deceased; that at the time of the execution of the deed and will Mrs. Seaney was of sound mind, and capable of understanding the instruments which she signed and executed; that the acts were voluntary on her part, and that the equities are with Taylor Plummer; that no trust of the property has been consummated in the said James D. Camfield; and recommended a decree in accordance with the above facts and conclusions, which was accordingly entered.

We are satisfied that the findings of the master and decree of the court are in accord with the evidence, and while it is no doubt a hardship upon plaintiff in error to lose his money advanced to clear the title to the property, yet, as he only had at most an equitable title, of which Plummer had no notice, and as the only question is as to the superiority of titles as between Camfield, who only has to sustain his title the letters written by Mrs. Seaney, and Plummer, who has a warranty deed, of record, showing a valuable consideration, and without any apparent fraud upon the part of the grantee, together with a will duly probated, and which has apparently not been questioned, and which could not be attacked except by a direct proceeding, under these conditions a trust could not arise in favor of plaintiff in error, Camfield. It is a well-settled rule of law that a bona fide purchaser of real estate will be protected against a prior equitable title of another of which he had no notice.

It is insisted by plaintiff in error that Plummer was not a competent witness, inasmuch as Camfield was a brother and heir of Mrs. Seaney. This could in no way affect Plummer's right to testify in this proceeding, for the reason Camfield did not claim the property as heir, nor bring the suit as such. Finding no reversible error in this record, the decree of the circuit court will be affirmed.

Decree affirmed.

(212 Ill. 615)

PEOPLE ex rel. DENEEN v. JOHN.

(Supreme Court of Illinois. Dec. 22, 1904.)

DISBARMENT—ACQUITTAL OF CRIMINAL CHARGE—CONCLUSIVENESS.

1. The acquittal of an attorney indicted for crime is a bar to proceedings under an information for disbarment based on the crime charged in the indictment.

Information by the people, on the relation of Charles S. Deneen, for the disbarment of Richard John. Rule discharged.

This is an information filed in this court by the state's attorney of Cook county, at the instance of the grievance committee of the Chicago Bar Association, against the respondent, Richard John, an attorney of this court, charging him with having fraudulently converted to his own use the sum of \$65, which was collected by him, as attorney at law for Elise Wasserman, upon a promissory note for that amount intrusted to him for collection by her. The evidence shows that the respondent heretofore was indicted for the embezzlement of the said fund by the grand jury of Cook county, and that upon a trial on the merits upon said indictment in the criminal court of said county he was acquitted.

Charles S. Deneen, State's Atty. (John T. Richards and John L. Fogle, of counsel), for relator. A. L. Flaningham, for respondent.

HAND, J. We are of the opinion that the judgment of the criminal court of Cook county acquitting the respondent of the charge of having embezzled the funds collected by him as an attorney at law for said Elise Wasserman should be held to be a bar to this proceeding. In *People v. Comstock*, 176 Ill. 192, 52 N. E. 87, leave was sought to file an information in this court for the disbarment of Comstock on the ground that he had induced a witness, by the payment of money, to swear falsely in a suit before that time pending in the circuit court of Fulton county. It appeared from the information that the respondent had been indicted by the grand jury of said county for subornation of perjury for inducing said witness to swear falsely, and that said indictment was then pending in the circuit court of Fulton county for trial, and it was held, the respondent being under indictment for said offense, the proper place to investigate the question of his guilt was in the court where said indictment was pending, and not in this court, and the information was not permitted to be filed. We think the logical conclusion to be drawn from the decision in that case is that a judgment of conviction or acquittal upon the merits upon a trial on an indictment will ordinarily be treated by this court as conclusive of the guilt or innocence of an attorney at law upon a subsequent trial upon information for disbarment for the same offense. The foregoing seems to be the rule in all the courts of this country, unless special reasons, such as lapse of time, proof of reformation, or other facts, are shown, which, in the view of the court, should relieve the attorney from the force of a judgment of conviction.

The application of the rule above announced is not affected by reason of the fact that a recovery has been had by the client against the attorney in a suit before a justice of

the peace for the full amount of the money collected, although the attorney sought to offset in that suit, without avail, a claim for professional services rendered the client, other than the collection of the moneys for which suit was brought. In a disbarment proceeding moral turpitude is involved, as it is in a trial upon an indictment for embezzlement, while in a suit before a justice of the peace on a money demand it is not. The rule heretofore entered against said Richard John to show cause will be discharged.

Rule discharged.

(212 Ill. 551)

CLEVELAND, C. C. & ST. L. RY. CO. v. PEOPLE ex rel. BROWN, County Collector.

(Supreme Court of Illinois, Dec. 22, 1904.)

COLLECTION OF TAXES—OBJECTIONS TO VALIDITY—RECORD ON APPEAL—SUFFICIENCY—PRESUMPTIONS AS TO LEVY—BURDEN OF PROOF.

1. On appeal from the judgment and order of sale for delinquent road and bridge taxes, it was urged that the tax was levied under the cash system, while the township had adopted the labor system, and that a petition for an election to return to the cash system was not signed by 25 legal voters, pursuant to the statute, and hence the election was void. All that the record showed was the following: "Petition to Vote on Money System. To the Town Clerk of the Town of I.: Twenty-four persons, claiming to be legal voters, asked to have the proposition to pay in money the district labor and property road tax submitted to the legal voters," etc. Held, that appellant's contention was not sustained by the abstract, which did not show, as was necessary, that the petition mentioned therein was the petition on which the election was held, and which may have been signed as required.

2. A tax is presumed to have been legally levied, and the burden of proof is on the party objecting thereto to establish the contrary.

Appeal from Montgomery County Court; M. J. McMurray, Judge.

Action by the people, on the relation of Daniel F. Brown, county collector for delinquent taxes, against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company. From a judgment and order of sale against defendant's property, the latter appeals. Affirmed.

Jett & Kinder and Geo. F. McNulty, for appellant. H. J. Hamlin, Atty. Gen., and L. V. Hill, State's Atty., for the People.

WILKIN, J. The county court of Montgomery county, over the objection of the appellant, entered judgment and order of sale against the appellant's property for the delinquent road and bridge taxes of Irving township, in said county, amounting to the sum of \$301.87, for the year 1903. But one ground of reversal is urged, namely, that the tax was levied under the cash system, while the township had adopted the labor system and was operating under it at the time of the levy.

On August 4, 1883, a petition was filed with the town clerk, as provided in section

80 of chapter 121 of our statutes (Starr & C. Ann. St. 1896), asking that the question of the adoption of the labor system be submitted to a vote of the people. An election was held, and the labor system adopted, and subsequent taxes were levied and collected under it until 1903. In 1885 said section 80 was amended, so that any town having adopted the labor system could abolish the same by petition, and vote in the same manner as provided for its adoption. On March 21, 1903, a petition seems to have been filed with the town clerk, asking that the question of paying the district road tax be submitted to a vote of the people at the next April election, and at the election following a majority of the votes were cast in favor of the cash system. Subsequent to this vote all taxes were assessed under the cash system, including that in question here. It is now claimed by the appellant company that the petition filed with the town clerk on March 21st was signed by 24 legal voters, whereas it should have been signed by 25; that it was therefore not in compliance with the statute, and the election held in pursuance thereof was null and void.

Conceding the soundness of the view, and that the question was properly raised by the objections filed below, it is not sustained by the evidence appearing from the abstract of the record filed by the appellant. All that is shown in that record is the following recital: "Petition to vote on money system.—To the town clerk of the town of Irving.—Twenty-four persons, claiming to be legal voters, asked to have the proposition to pay in money the district labor and property road tax submitted to the legal voters of said town at the annual town meeting to be held on the first Tuesday of April, 1903. Filed March 21, 1903." Manifestly this does not pretend to be the petition upon which the election was held, but is simply a statement by counsel for appellant of their conclusion as to its legal effect. There is nothing in the abstract to show that the petition itself was not, in fact, signed by 24 legal voters. There is nothing here to show that the petition mentioned in the foregoing statement was the petition upon which the election was held. From all that appears in this abstract, a petition may have been signed by the requisite number of legal voters, or another and different petition may have been presented as a basis for the election which was held. If appellant desired to rest its case upon the fact that the election returning to the cash system was illegal because not petitioned for by 25 legal voters, it should have set out the petition, so that we might determine whether it was in conformity with the requirements of the statute, and it should have been made to appear that the election was in fact held under that petition. The presumption is that the tax was legally levied, and the burden of proof was upon

the appellant to establish the contrary. The evidence falls far short of this requirement. We are of the opinion that the county court properly overruled the objections and entered the judgment and order of sale.

Judgment affirmed.

(213 Ill. 96)

CITY OF CHICAGO v. RICHARDSON.

(Supreme Court of Illinois. Dec. 22, 1904.)

MUNICIPAL CORPORATIONS—IMPROVEMENTS—INSUFFICIENT ASSESSMENT—SUPPLEMENTAL ASSESSMENT—WHEN MAY BE MADE.

1. Under Local Improvement Act 1897 (Laws 1897, p. 121) § 59, providing that, if the first assessment for a public improvement proves insufficient, another may be had, where a special assessment based on the estimated cost of a proposed improvement is levied and confirmed, and the contract is let for a sum greater than the assessment, a supplemental assessment cannot be levied for the excess of the contract price above the first assessment before the improvement is completed.

Appeal from Cook County Court; W. H. Himebaugh, Judge.

Proceedings by the city of Chicago for an assessment to pay the estimated cost of a street improvement. From a judgment dismissing a petition for a supplemental assessment so far as related to the property of O. S. Richardson, the city appeals. Affirmed.

Robert Redfield and Frank Johnston, Jr. (Edgar Bronson Tolman, Corp. Counsel, of counsel), for appellant. Charles D. Richards and William J. Donlin, for appellee.

CARTWRIGHT, J. The following question is the only one to be considered on this appeal: Where a special assessment, based on the estimated cost of a proposed improvement, is levied and confirmed, and the contract is let for a sum greater than the assessment, can a supplemental assessment be levied for the excess of the contract price above the first assessment before the improvement is completed? Appellant filed its petition in the county court of Cook county praying for an assessment to pay the estimated cost of a proposed street improvement. The assessment was levied and confirmed, and the contract was then let for \$1,967 more than the assessment. Thereupon appellant filed its petition in this case for a supplemental assessment, alleging that a deficiency had been created by the fact that the contract price was in excess of the original assessment. Appellee objected on the ground that the improvement had not been completed and the deficiency had not yet been actually and definitely ascertained. On the hearing it was stipulated that when the supplemental petition was filed only 60 per cent. of the improvement had been completed, and that it had not been completed at the time of the hearing. The court, being of the opinion that the law did not authorize the proceeding until the amount of the deficiency had been finally ascertained by the comple-

tion of the improvement, sustained the objection and dismissed the petition so far as it related to appellee's land. The construction of section 59 of the local improvement act of 1897 (Laws 1897, p. 121), which provides for a supplemental assessment in case of a deficiency, was involved in the case of *City of Chicago v. Noonan*, 210 Ill. 18, 71 N. E. 32, and in deciding that case we were of the opinion that the insufficiency of the first assessment contemplated by that section is to be determined after the contract has been performed, when the amount may be definitely known. We are satisfied that the decision was correct. The law provides for the levy of an assessment before the work is actually done, in order that means of payment may be provided. Such an assessment must necessarily be based upon an estimate of the probable cost of the improvement, and, while it is presumed that the estimate will equal the cost of the work, it may prove incorrect. Section 59 makes provision to meet the contingency of the assessment proving insufficient, in order that the work, when finally completed, may be paid for. If that should happen, the amount of the deficiency can only be finally and definitely ascertained after the work has been performed. If the contract is let for more than the amount of the assessment, all that can be said is that, if the contractor performs the obligation on his part, he will become entitled to the contract price, which will exceed the amount of the assessment. If he does not perform his obligation, another contract must be let for the unfinished portion of the work, and under changed conditions the second contract may be for more or less than the amount of the forfeited contract. There might be cases where interest or other things might affect the amount of the deficiency, and in no case can the actual deficiency in the first assessment be known until the work has been performed. The deficiency is not necessarily fixed by the difference between the contract price and the assessment, and, if a supplemental assessment can be levied as soon as a contract is let, there could be another assessment on the reletting of a forfeited contract, or the happening of any other event which would increase the probable deficiency. We do not think it was the intention of the Legislature that property owners may be called upon for successive assessments to meet probable, but uncertain, deficiencies. The judgment of the county court is affirmed.

Judgment affirmed.

(213 Ill. 51)

DICKY & BAKER et al. v. PEOPLE ex rel. HANBERG, County Collector.

(Supreme Court of Illinois. Dec. 22, 1904.)

STREET IMPROVEMENTS—APPLICATION FOR SALE FOR ASSESSMENT—DEFECTIVE NOTICE—WAIVER OF OBJECTIONS—ENTRY OF JUDGMENT.

1. A defect in the notice of application for a sale for an assessment is waived, and the court

is given jurisdiction, by the property owner filing objections to the application which call for exercise of jurisdiction and a decision on the merits.

2. The power of the court as to entering judgment against the same lots for the same assessment is exhausted, except as to amending or correcting the judgment during the term, by entry of a judgment for sale thereof for such assessment, though such judgment is erroneous because not signed by the judge; so that entry of a subsequent judgment against such lots for such assessment is error.

Appeal from Cook County Court; O. N. Carter, Judge.

Application by the people, on the relation of John J. Hanberg, county collector of Cook county, for judgment and order of sale for a delinquent special assessment. From such a judgment and order of sale, Dickey & Baker and others, the property owners, appeal. Reversed.

George W. Wilbur, for appellants. William M. Pindell (Edgar Bronson Tolman, Corp. Counsel, and Robert Redfield, of counsel), for the People.

CARTWRIGHT, J. The county collector of Cook county applied to the county court for judgment against appellants' lots and an order of sale for a delinquent special assessment. The appellants appeared, and filed objections to the application, which were heard and overruled by the court. They contend that the court erred because their names, as published in the notice of the application, were not correct, and did not correspond with the names as given in the judgment, sale, and redemption record, so that the notice did not give the court jurisdiction over them. This objection was waived by the general appearance entered in the case by the appellants. They filed seven objections to the application, some of which called for the exercise of jurisdiction by the court and a decision upon the merits. The entry of such an appearance gave the court jurisdiction of appellants. *Nichols v. People*, 165 Ill. 502, 46 N. E. 237.

On August 3, 1904, the objections of appellants were overruled, and judgment was entered against their lots, which were severally ordered to be sold to satisfy the amount of the assessment and costs. Upon the entry of the judgment an appeal was prayed and allowed. It is objected that said judgment was not in proper form, but we find it substantially in the form directed by section 191 of the revenue act (Hurd's Rev. St. 1903, p. 1541, c. 120), and sufficient in that respect. It was not signed by the judge, as required by that section, and for that reason it must be reversed. The record contains another judgment, entered some days after the judgment against appellants' lots, which seems to cover the whole delinquent list, including said lots. The second judgment is signed by the judge, and counsel for the appellee contend that it is a valid judgment. It is not proper to enter two judgments

against the same lot for the same tax or assessment, although counsel for appellee say that such has been the practice in contested cases in the county court of Cook county. If the statements of counsel are correct, there is great laxity and confusion in keeping the records of that court. It is clear, however, that the power of the court was exhausted by the first judgment, except for the purpose of amending or correcting the judgment during the term, and the second judgment does not purport to be an amendment or correction of the first judgment. It was error to enter the second judgment. There was no error in overruling the objections, but the judgments entered are erroneous.

The judgments against appellants' lots are reversed, and the cause is remanded to the county court, with directions to enter a proper judgment as directed by section 191 of the revenue act.

Reversed and remanded.

(213 Ill. 142)

HAYNER v. PEOPLE.

(Supreme Court of Illinois. Dec. 22, 1904.)

HOMICIDE—PROSECUTION—ASSISTANT COUNSEL FOR STATE—SELF-DEFENSE—DEFENSE OF HABITATION—JUSTIFIABLE HOMICIDE—INSTRUCTIONS—FORM AND CONSTRUCTION—VERDICT.

1. Though the prosecuting attorney cannot be supplanted by counsel employed by private parties, the court may, in its discretion, permit such counsel to assist, and this was not forbidden by Laws 1903, p. 85, providing that the state's attorney shall not receive any fee from any private person for any services within his official duties.

2. Where, on a prosecution for homicide, there was evidence that the deceased was thrusting himself into defendant's house to assault defendant, instructions that defendant had no right to take life unless apparently necessary to prevent the commission of a felony, or to defend himself against loss of life or great bodily harm, were erroneous, in view of Cr. Code, div. 1, § 148 (Hurd's Rev. St. 1899, c. 88), declaring homicide justifiable in the defense of habitation, property, or person against any person who manifestly intends by violence to commit a felony, or who manifestly intends in a violent manner to enter the habitation of another for the purpose of assaulting any person dwelling therein.

3. On prosecution for homicide it appeared that, after a conflict between defendant and deceased, defendant entered his own house and procured a revolver and came to the door, and that deceased was then in a position where he might have left the premises by another way, but that he turned and came to the door and attempted to open it, when he was wounded by defendant. *Held*, that an instruction that if deceased attacked defendant, and afterwards abandoned the attack and retreated, and defendant became the aggressor and pursued and killed deceased, defendant was guilty, was without support in the evidence.

4. On prosecution for homicide, an instruction, abstract in form, assuming to state a case where "one" (evidently intended to be applied to the defendant) assaulted "another" (intended to be applied to the deceased), but, further on,

* 1. See Criminal Law, vol. 14, Cent. Dig. § 1487-1494.

transposing the terms "one" and "another," was misleading.

5. It was error to instruct the jury that their power and duty to judge the effect of the evidence were not arbitrary, but should be exercised with legal discretion and in subordination to the rules of evidence, with no explanation as to what constituted legal discretion, or to what rules of evidence their judgment should be subordinate.

6. Where, on a prosecution for homicide, the court erroneously instructed that if accused should be found guilty the jury should fix his punishment, and the jury found him guilty of manslaughter and fixed his punishment at imprisonment for one year, and the court disregarded the part of the verdict fixing the term and sentenced defendant to confinement in the penitentiary for an indeterminate period, the error in the instruction was prejudicial.

Error to Criminal Court, Cook County; Axel Chytraus, Judge.

Amaziah Hayner was convicted of manslaughter, and brings error. Reversed.

W. P. Black and C. D. F. Smith, for plaintiff in error. H. J. Hamlin, Atty. Gen., C. S. Deneen, State's Atty., and Harry Olson, Asst. State's Atty., for the People.

CARTWRIGHT, J. Amaziah Hayner, plaintiff in error, was indicted in the criminal court of Cook county for the murder of Henry Martin. A trial resulted in a disagreement of the jury, but on a second trial a verdict was returned finding the defendant guilty of manslaughter, and fixing his punishment at imprisonment in the penitentiary for a term of one year. The court disregarded that part of the verdict fixing the term of imprisonment, and sentenced him to confinement in the penitentiary for an indeterminate period, in accordance with the statute.

The death of Henry Martin resulted from a shot from a revolver fired by the defendant in defendant's kitchen in the rear flat on the second floor of No. 4433 State street, in Chicago. The only persons present in the room at the time were Martin and the defendant, and the evidence, except the testimony of the defendant, was confined to what occurred previously. The buildings numbered 4431 and 4433 State street were occupied on the lower floors by storerooms. Above the storerooms in each building were three floors finished as flats, and divided into front and rear flats. Above the storeroom in No. 4433 the rear flat was occupied by the defendant, Hayner, a widower, and his daughter, a stenographer and typewriter, and he had charge of the flats in that building as janitor. The next flat above was occupied by Mrs. Lawson, and the rear top flat by Mrs. Clay. Above the storeroom of No. 4431 the rear flat was occupied by Mrs. Kenny, the next by Mrs. Draper, and the top flat by Mrs. Beard. There were rear porches and stairways, above each other, to both buildings, with an outer railing, and a railing extending across the porches separating the buildings. On the afternoon of September 4, 1902, the defendant called up

on Mrs. Beard at her flat on the top floor of No. 4431 for the key of a front flat in No. 4433, from which she had recently removed. He sat for a time on the railing or banister between the porches of Mrs. Clay and Mrs. Beard, talking with the latter. Martin was a business agent or walking delegate of a carpenters' union, and at that time came up the stairway to Mrs. Beard's porch. He was intoxicated, and, when asked what he wanted, said he was looking for a carpenter by the name of Garlof. Mrs. Beard told him that Garlof did not live there, and requested him to go downstairs. He inquired the name of the building, and she replied that she did not think it had any, and referred the question to the defendant, who said he had lived there 14 years, and that it had no name, and he informed Martin that Garlof had moved farther south on State street. Mrs. Beard requested Martin to go downstairs, and he replied with profane and obscene language, and refused to go. Mrs. Beard and defendant tried to persuade him to leave, but he would not. He walked to the dividing railing where the defendant sat and stepped over it to Mrs. Clay's porch, and as he went over he called Mrs. Beard the vilest name that can be applied to a woman, accompanied with an oath. The defendant became very much excited, and took hold of a stepladder, saying to Martin that he had insulted the woman as long as he could stand it, and pushed the ladder sideways against Martin. Defendant then dropped the ladder and picked up a broom. The evidence was contradictory as to whether at this time Martin struck the defendant or said that he did not want to fight. Defendant attempted to strike Martin with the broom, but did not hit him, and the broom went out of his hands across the porch. Mrs. Clay then tried to get Martin to go downstairs, and agreed to go with him. They started to go down together, and when they had gone three or four steps Martin stopped and wanted to go back, but she persuaded him to go on. When they reached the bottom of that flight of stairs they turned on the porch between the railing and the brick wall and went to the head of the next stairway, which descended to the porch on the second floor, where defendant's apartments were. The defendant came downstairs, and, as Mrs. Clay and Martin stood at the head of that stairway, defendant laid his hand on the railing near the door and jumped over, reaching the stairway three or four steps farther down in front of them. Martin then kicked the defendant twice in the back as he went down the stairs, Martin following him to the bottom of the stairs, when Mrs. Clay went back to her own flat above. The defendant went to his own door and went into his kitchen, opening a screen door, which shut behind him. He went on into the bedroom and got a revolver which he kept there, and returned to the kitchen door

and pushed the screen open. When Martin reached the bottom of the stairs on that floor he was near a passageway leading to State street, by which he could go out the way he came in. Instead of doing that, he turned back a few steps to the door of the defendant and took hold of the screen door with his left hand, holding it partly open. Defendant asked him what he was doing there, and told him to get out—that he did not want any further trouble with him. Defendant had the revolver in his hand, hanging by his side and swinging it around. As Martin stood there he said to the defendant, "Shoot, damn you! shoot!" The defendant thereupon fired a shot, which made a flesh wound on the upper part of Martin's arm with which he was holding the door. Martin's arm slipped down the door, and, as a witness described it, he lunged forward into the kitchen, the screen door closing behind him. Nothing was seen from the outside after that, except through the screen door, and the only witness who saw anything testified that he saw Martin's arm going back and forth, but was unable to state what he was doing. The first shot was followed very soon by another, which severed the femoral artery in the left leg and proved fatal. There was a great quantity of blood on the floor near the middle of the kitchen, and about the time of the shots Martin was heard to say: "You have shot me; give me a rag." There was testimony that the defendant, as he went down the stairs, said: "I will show you; I will shoot you;" but this was contradicted. The defendant was 73 years of age, and weighed about 147 pounds. Martin was 36 years old, and weighed, according to the testimony of his widow, 180 pounds. The coroner's physician testified that he weighed 210 pounds. The parties had not been acquainted with each other, and there was no hostility between them, except such as was aroused by the conduct of Martin on this occasion. The defendant testified that he fired the first shot when Martin said "Shoot," not intending to injure him, but only to frighten him, and the wound in the arm would have had no serious effect. He testified that, following that first shot, Martin came into the room towards him, and he backed up, and Martin attempted to strike him; that Martin was close to him, and he was holding the pistol down; that it was an automatic revolver, and he thought that in his excitement he pulled the trigger without knowing it.

The first error assigned is that the court permitted W. S. Elliott, Jr., an attorney not connected with the office of the state's attorney, but hired and paid by the carpenters' union, to assist the state's attorney and take a prominent part in the trial. When the objection was made it was agreed that Mr. Elliott would testify that the carpenters' union had paid him a retainer, amounting to

several hundred dollars, for his services in the prosecution of the defendant, and had become liable to pay him a considerable sum as fees in such prosecution. It is not the right of an attorney to appear as assistant of the state's attorney, whether his services are gratuitous or paid for by private parties, but the state's attorney, as a public officer, must have the direction and assume the responsibility of the prosecution. It would be manifestly improper to permit counsel paid by private parties to supplant the constituted officer of the law and to assume the management of the case, but we do not think it is beyond the power of the court to permit counsel paid by private parties to assist the state's attorney where there is no oppression of the defendant or injustice to him. In granting such permission, the court should see that the criminal law is not being used to gratify malice or personal ends, but cases frequently arise where the administration of public justice requires that the state's attorney should have assistance. There are cases where the state's attorney is clearly outclassed and overmatched by counsel for the defendant. Such matters must be left largely to the discretion of the court, whose duty it is to prevent oppression of the defendant, and to permit such assistance as fairness and justice may require. It might be a wrong and oppression to a defendant to permit able and experienced counsel employed by private parties to assist a competent state's attorney in a contest with inexperienced or inefficient counsel for the defense.

Counsel for plaintiff in error call attention to the new section added in 1903 to the act in regard to attorneys general and state's attorneys, which provides that the state's attorney shall not receive any fee or reward from or in behalf of any private person for any services within his official duties, and shall not be retained or employed, except for the public, in a civil case depending upon the same state of facts on which a criminal prosecution shall depend. Laws 1903, p. 85. It is insisted that in view of this statute the law should be that counsel assisting the state's attorney should be as unprejudiced and impartial as a public prosecutor. We do not think the statute was intended to prohibit the court, in the exercise of a sound discretion, from permitting counsel paid by private parties to assist the state's attorney where it may seem necessary. It must be presumed that the discretion was properly exercised in this case, and we find nothing in the record to indicate the contrary.

The instructions are complained of, and upon inspection we find they do not present a connected or consistent theory of the rights of the defendant in the defense of his habitation. The defense was that the fatal shot was fired in opposing an entry into the defendant's habitation, against his will, for the purpose of assaulting him. On the part of the defendant the court instructed the

jury that a homicide is justified when the killing is in the defense of one into whose dwelling the person killed forces his way, against the protest of the occupant, for the purpose of assaulting or offering personal violence to such person; that if Martin had, with violence and against the protest of defendant, entered the place of residence of defendant, and the defendant in good faith reasonably believed that Martin intended to offer personal violence to him or assault him, and Martin threatened then and there, with word or gesture, to assault the defendant, and the defendant acted under the influence of fears of personal violence or an assault, and not in a spirit of revenge, the shooting was justifiable, and the jury should acquit the defendant. In giving instructions at the request of the prosecution the court ignored all distinctions between a homicide committed in self-defense in a public place, where both parties have equal rights, and a homicide committed by a person in his own habitation of one entering it, against his will, for the purpose of assaulting or offering personal violence to him. Accordingly, the jury were told that the defendant, in order to justify the killing on the ground that it was in defense of habitation, property, or person, must in good faith have believed that the killing was necessary either to preserve his own life or prevent his receiving great bodily harm, and that if the circumstances would not induce a reasonable person to believe, and the defendant did not believe, he was in danger of losing his own life or was in great bodily danger, then he had not established his defense. These instructions stated the law to be that the defendant had no right to take the life of Martin unless it was apparently necessary in order to prevent the commission of a felony or to defend himself against loss of life or great bodily harm.

There are text-books and decisions which state the rule as given in these instructions, making no distinction whatever between the right of self-defense generally and the right of defense by a person in his own habitation, and it has been said that the extent of the right to defend the habitation and persons in it is involved in some obscurity and confusion. That, however, cannot be said of this state, where, both by statute and decision, the right has been clearly defined. Section 148 of division 1 of the Criminal Code defines justifiable homicide as follows: "Justifiable homicide is the killing of a human being in necessary self-defense, or in the defense of habitation, property or person, against one who manifestly intends or endeavors by violence or surprise to commit a known felony, such as murder, rape, robbery, burglary and the like, upon either person or property, or against any person or persons who manifestly intend and endeavor, in a violent, riotous or tumultuous manner, to enter the

habitation of another for the purpose of assaulting or offering personal violence to any person dwelling or being therein. A bare fear of any of these offenses, to prevent which the homicide is alleged to have been committed, shall not be sufficient to justify the killing. It must appear that the circumstances were sufficient to excite the fears of a reasonable person, and that the party killing really acted under the influence of those fears, and not in a spirit of revenge." Hurd's Rev. St. 1899, p. 595, c. 33. Section 149 relates only to the necessary self-defense mentioned in section 148, as is apparent from its language. That section provides that, if a person kill another in self-defense, it must appear that the danger was so urgent or pressing that, in order to save his own life or to prevent great bodily harm, the killing of the other was absolutely necessary, and also that the person killed was the assailant, or that the slayer had really and in good faith endeavored to decline any further struggle before the mortal blow was given. Section 148 declares homicide justifiable in the defense of habitation, property, or person against any person who manifestly intends and endeavors, in a violent, riotous, or tumultuous manner, to enter the habitation of another for the purpose of assaulting or offering personal violence to any person dwelling or being therein. An assault or offer of personal violence does not necessarily imply danger to life or great bodily harm. In *Reins v. People*, 30 Ill. 256, the judgment of conviction was reversed, and it was held that the first instruction asked by the defendant should have been given. That instruction was based upon the statute, and declared the law to be that if defendant, Reins, in defense of himself, inflicted upon deceased the wounds or stabs which caused his death, while the deceased was manifestly intending and endeavoring, in a violent manner, to enter the habitation of the witness Mrs. Foley for the purpose of assaulting or offering personal violence to the defendant, Reins, being therein, the killing was justifiable, and the jury must acquit the defendant. In *Davison v. People*, 90 Ill. 221, the court held that a mere trespass to property would not justify the killing of the trespasser, but expressed the view of the court as to habitation by saying (page 229): "A man's house is his castle, and he may defend it even to the taking of life, if necessary or apparently necessary to prevent persons from forcibly entering it against his will, and when warned not to enter and to desist from the use of force." We think, also, the general rule is that a person within his own house may exercise all needful force to keep an aggressor out, even to the taking of his life. A man in his own habitation may resist force with force, and oppose an unlawful entry against his will by one who in a violent manner at-

tempts to enter with a purpose of assaulting or offering violence to him, even to the extent of taking life, although the circumstances may not be such as to justify a belief that there was actual peril of life or great bodily harm. 2 Bishop on Crim. Law, § 653; 2 Wharton on Crim. Law, § 1024; Pond v. People, 8 Mich. 150. The instructions were in conflict with each other, and those given at the request of the prosecution were not correct.

It is said by counsel for the people that the defendant was clearly guilty, and therefore could not be prejudiced by incorrect instructions. We cannot say that there must necessarily have been a verdict of guilty. The defendant had a right to the judgment of the jury under correct instructions as to the law. He had a right to have his testimony and all the circumstances considered by the jury for the purpose of determining whether Martin attempted to enter his kitchen against his will for the purpose of assaulting him, and whether, in reasonably resisting such entrance, he fired the fatal shot, accidentally or otherwise. It cannot be said that the erroneous instructions were not prejudicial.

There were a great many instructions given, at the request of the people, introducing to the jury all sorts of legal propositions inconsistent with the facts of the case or not founded upon them. For instance, the tenth stated the law in case the evidence showed that Martin attacked the defendant, and afterward abandoned the attack and retreated, and the defendant became the aggressor and pursued and killed Martin. There was no evidence to which the instruction could be applied. The instructions given at the request of the people were 32 in number—more than three times the number given at the instance of the defendant. Many of them were wholly uncalled for. A few plain and simple instructions which the jury could understand were all that were required, and the practice of incumbering the record and troubling the jury with useless and irrelevant instructions is a pernicious one, frequently condemned. Dunn v. People, 109 Ill. 635; 11 Ency. of Pl. & Pr. 150.

The ninth instruction given at the request of the people was abstract in form, assuming to state a case where "one" (evidently intended to be applied to the defendant) assaults "another" (intended to be applied by the jury to Martin); but, as the instruction proceeded, the terms "one" and "another" were transposed, and the defendant became "another" and Martin became "one." While we can see what was meant, the instruction was confusing and misleading, and should not have been given.

Instruction numbered 37 is criticised, and counsel for the people concede that the criticism is just. The jury were told that their power and duty to judge the effect of the evidence were not arbitrary, but should be

exercised with legal discretion and in subordination to the rules of evidence. There was no explanation what constituted legal discretion, or what rules of evidence their judgment should be subordinate to. The question in the case was whether the killing was done in reasonably resisting the entry of Martin in a violent manner into the dwelling house of defendant for the purpose of assaulting him, and the law on that subject could have been stated to the jury very clearly and briefly.

Instruction numbered 33 given at the instance of the people told the jury that whoever is guilty of manslaughter is to be imprisoned for his natural life or any number of years, and, if the accused should be found guilty, the jury should fix his punishment by their verdict. The jury, in obedience to the instruction, fixed the punishment at one year in the penitentiary. The court disregarded that part of the verdict, and the defendant filed affidavits of three jurors to the effect that the verdict was a compromise, by which the defendant was found guilty provided all should agree that the punishment should not continue longer than one year; that the verdict of guilty would not have been returned except for that agreement; and that the jurors in question would never have consented to a verdict of guilty if they had not understood that they had the right to fix the punishment as they were instructed, and had fixed it at one year. Affidavits of jurors cannot be received to avoid their verdict. Sanitary District v. Cullerton, 147 Ill. 385, 35 N. E. 723. Whether that rule applies to the particular circumstances of this case or not, we think the erroneous instruction permitting the jury to fix the term may very likely have been harmful to the defendant. The jury fixed the shortest term possible under the law, while the court imposed a sentence which was, in effect, for the maximum term, unless shortened in accordance with the parole law. The record does not show that the error in giving the instruction was not prejudicial. The judgment is reversed, and the cause remanded.

Reversed and remanded.

(213 Ill. 22.)

CHICAGO & J. ELECTRIC R. CO. v. SPENCE.

(Supreme Court of Illinois. Dec. 22, 1904.)

PERSONAL INJURY—DAMAGES—EVIDENCE—ADMISSIBILITY—X-RAY PHOTOGRAPHS AS EVIDENCE—TRIAL—TAKING PAPERS TO JURY ROOM.

1. In an action for a personal injury, evidence showing the salary of plaintiff for a period ending years before the injury, for services in an employment different in nature from that in which he was engaged when injured, and for five years before, is inadmissible on the issue of damages.

2. The testimony of an X-ray expert, regularly engaged in taking X-ray photographs, that he

took the negative from which an X-ray photograph of the portions of the body of a person was developed, that he developed the photograph, and that it was a correct representation, rendered the photograph admissible in evidence.

3. The fact that a witness for the adverse party testified that the photograph had not been properly taken, and that it was of little or no value as a representation of the person's body, did not require the court to exclude it.

4. 3 Starr & C. Ann. St. 1896, p. 3054, c. 110, par. 56, authorizing the jury to take to the jury room "papers read in evidence," other than depositions, empowers a jury to take to the jury room an X-ray photograph received in evidence.

Appeal from Appellate Court, Second District.

Action by Samuel Spence against the Chicago & Joliet Electric Railroad Company. From a judgment of the Appellate Court affirming a judgment for plaintiff, defendant appeals. Reversed.

E. Meers, for appellant. Eddy, Haley & Wetten and J. L. O'Donnell, for appellee.

BOGGS, J. An electric car propelled by the appellant railway company, on which the appellee was riding as a passenger, collided with another of appellant's cars, and appellee was injured thereby. He instituted an action on the case in the circuit court of Will county, and, on a hearing before the court and a jury, was awarded judgment in the sum of \$14,000. This judgment has been affirmed by the Appellate Court for the Second District, and the record is before us on the further appeal of the company.

The collision occurred on the 28th day of March, 1902. The appellee at that time was in the employ of the Inter-Ocean Construction Company as a timekeeper and inspector of poles for electric wires, at a salary of \$125 per month. It was insisted before the jury that, because of the injury received during the collision of the cars, the appellee had become permanently disabled to labor or engage in the active pursuits of life. Damages were sought for such alleged loss of capacity to earn money in the future. As being proper for the consideration of the jury in arriving at a conclusion as to the pecuniary loss which would be inflicted on appellee by reason of his injuries and disabilities, the appellee was permitted to prove, without objection, that at the time of the collision he was employed as timekeeper and inspector for the construction company, and was receiving wages at the rate of \$125 per month; that he had been so engaged since January, 1902—about three months before he was injured; that for the period of six months immediately preceding he was in the employ of the sanitary district of Chicago at the controlling works at Lockport, at a salary of \$150 per month; that immediately prior thereto he was engaged for about one month in putting in abutments for the Joliet Bridge Company, at a salary of \$125 per

month, and that during the period of three months immediately preceding said last employment he was engaged in putting in concrete work for water wheels of an electric light company, at \$125 per month and board, and that for the preceding term of two years he had worked for the sanitary district, inspecting bridges and building abutments and piers, at \$100 per month; and that for some five or six months still prior thereto he was superintendent of a quarry in Tennessee, at a salary of \$100 per month. Over the objection of the appellant company the appellee was allowed to prove that he was superintendent of the Western Stone Company from 1892 and 1893 at an annual salary of \$2,500, and that he remained in that position until 1897, at a salary of \$2,100 or \$2,250 per annum. Appellee was injured in 1902. His employment as superintendent of the Western Stone Company at \$2,500, in 1892, was ten years before he was injured, and the salary of \$2,250 received by him as such superintendent, when his employment in that position terminated, was for services rendered in 1897—five years before he was injured.

The proper inquiry was the comparative capacity of the appellee to earn money at the time of and after he had received the injury. He was at the time of the collision of the age of 53 years. The salary that he had enjoyed when superintendent of the stone company, beginning ten years before and ending more than five years before the date of the injury, ought not, we think, to have been allowed to be proven. It was remote in point of time, and the employment was different in its nature from that in which he was engaged when injured, or had been engaged in for some five years before. He was a younger man and more capable then, and had either abandoned the position of superintendent, or had been supplanted by another. The salary he received from the stone company as superintendent from 1892 to 1897 was dependent on too many independent and collateral circumstances to give the jury any correct information as to the value of his earning power or capacity at the time he received the injuries which, as he claimed, deprived him of the capacity to work or earn money. *West Chicago Street Railroad Co. v. Maday*, 183 Ill. 308, 58 N. E. 933. As such superintendent he received very much larger compensation per annum than when he was injured, or at any time during the period of time immediately prior thereto, while the circumstances were such as to indicate with reasonable certainty the extent of his ability to command wages and to earn money. The purpose of making known to the jury what salary he had received from the stone company in years past was to enhance the damages to be awarded him for the loss or diminution of his earning capacity for the future. It, no doubt, had that effect, and contributed to the conclusion

¶ 4. See Trial, vol. 46, Cent. Dig. § 736.

reached by the jury that the appellee was entitled to receive the large amount specified in the verdict. The evidence was incompetent and prejudicial.

In *West Chicago Street Railroad Co. v. Maday*, supra, we held that the appellee, who was keeping a coffee and tea store when injured, and had been so engaged for five years, could not properly prove the amount of wages he had received when engaged as a worker in wood prior to the time when he engaged in selling coffees and teas, for the reason that he had abandoned the business of working in wood five years before he was injured, and for the further reason that the testimony was too remote and involved consideration of too many independent and collateral circumstances to give the jury any correct information as to his earning power at the time of the injury. We declined, however, to reverse that case, although the evidence was incompetent, for the reason the amount shown to have been earned by appellee as a woodworker was only daily wages of \$2 or \$2.25 per day, and that it was plain, from the competent facts proven in the case bearing on his capacity to earn money at the time that he received the injury, that the incompetent evidence had not enhanced the award of damages. In the case at bar the evidence was incompetent, and it is manifest that the damages were enhanced thereby—to what extent we cannot determine.

As the case may be again heard, it is necessary we should consider the insistence that the court erred in permitting the introduction in evidence of a skiograph, or X-ray photograph, of a portion of the chest and body of the appellee. The skiograph was made by an expert who testified he was an X-ray expert, and was regularly engaged in taking such photographs for physicians; that he took the negative from which the photograph was developed, and that he developed the photograph; and that it was an accurate and correct representation, etc. It was intended to show by the skiograph that appellee's heart had been displaced, that the walls of that organ had become thick, and that an abnormally heavy tissue had formed on the walls of his heart. The testimony of the X-ray expert who had taken the skiograph tended to show the picture correctly represented the condition of the heart of the appellee. Photographs taken by the X-ray process are admissible in evidence after proper preliminary proof of their correctness and accuracy has been produced. 22 Am. & Eng. Ency. of Law (2d Ed.) 755. We think the testimony of the X-ray expert who made the skiograph was sufficient to justify the court in ruling that the picture should be admitted in proof. Subsequently, when the appellant was introducing testimony in chief, another X-ray expert was produced in its behalf. This witness gave testimony tending to show that the skiograph had not been properly taken, and expressed the opinion that the

picture was of little or no value as a representation of the heart and other portions of the body of the appellee. But the court was not asked to exclude the picture because of this adverse criticism, nor do we think the motion to exclude should have been granted, had it been interposed.

It was not error to allow the jury to take the skiograph with them when they retired to consider of their verdict. Paragraph 56 of the practice act (3 Starr & C. Ann. St. 1896, p. 3054, c. 110) authorizes "papers read in evidence, other than depositions," to "be carried from the bar by the jury." "Papers in evidence" clearly embrace photographs or skiographs offered and received in evidence. One of the definitions of the word "read" given by Mr. Webster is "to discover or understand by characters, marks, features, etc.: to gather the meaning of by inspection; to learn by observation." Photographs or skiographs produced in evidence on a trial before a jury are, within this definition, "read" in evidence, and may be taken by the jury on their retirement to consider and determine the cause. 12 Ency. of Pl. & Pr. 591, 592; *Barker v. Perry*, 67 Iowa, 146, 25 N. W. 100.

For the reason stated, the judgment must be, and is, reversed, and the cause will be remanded to the circuit court for such other and further proceedings as to law and justice shall appertain.

Reversed and remanded.

(213 Ill. 92)

JONES et al. v. CITY OF CHICAGO.

(Supreme Court of Illinois. Dec. 22, 1904.)

LOCAL IMPROVEMENTS—RESOLUTION OF BOARD—ENGINEER'S ESTIMATE—SUFFICIENCY—ORDINANCE—REASONABLENESS—DEFINITENESS.

1. Local Improvement Act 1897, § 7 (Laws 1897, p. 104), requires the engineer's estimate of the cost of a local improvement to be itemized, and to be made a part of the resolution of the board of local improvements providing for the improvement. The engineer's estimate for an improvement was as follows: "Wood curb spiked to cedar posts, 800 lineal feet at 20 cents, \$160.00. Paving with asphalt on six inches of Portland cement concrete, swept with natural hydraulic cement, 765 square yards at \$2.50—\$1,912.50." The estimate, except the caption and signature of the engineer, was copied into the resolution ordering the improvement. Held a sufficient compliance with the statute.

2. A resolution ordering the improvement of an alley, which sets forth the locality of the improvement, and how it is to be made, is sufficient, without stating the width of the alley.

3. Under Local Improvement Act 1897, §§ 7, 8 (Laws 1897, pp. 104, 105), providing that all ordinances for local improvements to be paid for by special assessment shall originate with the board of local improvements, who shall adopt a resolution therefor, and prepare and submit an ordinance, which shall describe the improvement and provide whether it shall be paid for by special assessment, it is not necessary that the resolution state how the improvement is to be paid for.

¶ 2. See *Municipal Corporations*, vol. 36, Cent. Dig. § 812.

4. An ordinance for a local improvement, which described the improvement as "the alley between North Clark street, * * * said alley being 18 feet in width," provides for the improvement of the whole width of the alley.

5. The court, in determining whether an ordinance providing for an improvement is reasonable, is not justified in substituting its judgment for that of the municipal authorities, merely because witnesses think that the improvement is unnecessary.

6. An ordinance for a local improvement, which recites "that seven parts best quality of broken limestone, or other stone which shall be equal in quality for concrete purposes," shall be used in the improvement, is not uncertain.

Appeal from Cook County Court; W. H. Hinebaugh, Judge.

Proceedings by the city of Chicago for the confirmation of a special assessment for a street improvement. From a judgment of confirmation, Caroline O. Jones and others appeal. Affirmed.

Charles D. Richards and William J. Donlin, for appellants. Robert Redfield and Frank Johnston, Jr. (Edgar Bronson Tolman, Corp. Counsel, of counsel), for appellee.

WILKIN, J. The appellee, the city of Chicago, filed its petition in the county court of Cook county for the confirmation of a special assessment to pay the cost of curbing, grading, and paving the alley between Clark street and La Salle avenue from Chestnut street to Locust street. Legal objections were filed by the appellants questioning the preliminary proceedings and the validity and reasonableness of the ordinance. The ground upon which it was objected that the ordinance is unreasonable was that the improvement therein provided for was unnecessary, and in support of that contention evidence was introduced to the effect that witnesses thought the alley "in question in good, serviceable condition to carry heavy traffic." The judge who presided at the hearing by agreement of the parties made a personal examination of the alley, and decided that the ordinance was not unreasonable, and overruled the other objections. Further questions being waived by the objectors, the assessment was confirmed. From that judgment this appeal is prosecuted.

The first ground of reversal insisted upon is that the estimate of the cost of the improvement made by the engineer is not sufficiently itemized, and that it was not made a part of the resolution of the board of local improvements, as required by section 7 of the act of 1897 (Laws 1897, p. 104). In support of this objection reliance is placed upon the cases of *Bickerdike v. City of Chicago*, 203 Ill. 636, 68 N. E. 161, and *Kilgallen v. City of Chicago*, 206 Ill. 557, 69 N. E. 586. Neither of these cases is in point. In the first it was simply held that the statute was not complied with by the resolution merely stating that the engineer had estimated the cost in gross, and in the latter that the requirement of that section as to the engineer's estimate can only be complied with by incorporating such esti-

mate in the record, and not by reference, only, to the estimate on file. In this case an estimate was made by the engineer, and incorporated in the resolution of the board. That resolution is as follows:

"Be it resolved by the board of local improvements of the city of Chicago, that a local improvement be and the same is hereby ordered to be made within the city of Chicago, State of Illinois, as follows, to-wit: That the alley between North Clark street and LaSalle avenue from the north line of Chestnut street to the south line of Locust street be improved by curbing with wooden curb spiked to cedar posts, grading and paving of asphalt on six inches of Portland cement concrete, swept with natural hydraulic cement, the estimate of the cost of such improvement as made by the engineer of the board being as below set forth, and that Tuesday, the first day of March, A. D. 1904, at eleven o'clock A. M., in room 203 City Hall, be fixed for the time and place for the public consideration thereof.

Estimate.

Wood curb spiked to cedar posts, 800 lineal feet at twenty cents.....	\$ 160 00
Paving with asphalt on six inches of Portland cement concrete, swept with natural hydraulic cement, 765 square yards at \$2.50	1,912 50
Total	\$2,072 50

"John A. May, Secretary."

The statute requires the estimate to be itemized to the satisfaction of the board, which shall be made a part of the record of the resolution. Here the estimate is copied literally into the resolution, except the caption and the signature of the engineer. Wherein it fails to substantially conform to the requirements of the statute we are at a loss to perceive.

The second ground of reversal urged is that the width of the alley proposed to be paved is not shown either in the first resolution or in the estimate of the cost, and that there is no statement in that resolution, nor in the second resolution, that the proposed improvement shall be paid for by special assessment or special taxation. The statute requires that the first report of the board shall describe the proposed improvement, but it is not necessary that it should do so with minuteness. *Walker v. City of Chicago*, 202 Ill. 531, 67 N. E. 369. The resolution, as above set forth, does give the locality of the improvement, and how it is to be made. We do not think it was essential, in the description of the improvement in that resolution, that the width of the alley should be stated. Nor is it necessary, under said section 7, supra, that the first resolution should state how the improvement is to be paid for. That report leads up to the public hearing provided for in section 8 (page 105), which provides: "And thereupon, if the said proposed improvement be not abandoned, the said board shall cause an ordinance to be prepared therefor, to be submitted to the council or board of trustees (as the case may be). Such ordinance shall pre-

scribe the nature, character, locality and description of such improvement, and shall provide whether the same shall be made wholly or in part by special assessment, or special taxation of contiguous property," etc. No objection is made to the ordinance in this case as not complying with the provisions of the statute. It expressly says that the improvement shall be made, and the whole cost thereof paid for by special assessment, etc., and in describing the improvement it says: "The alley between North Clark street, * * * said alley being eighteen feet in width." This language, being unqualified, means the whole width of the alley—eighteen feet.

The point that the ordinance is unreasonable is without force. "The presumptions are all in favor of the reasonableness of the ordinance, and we cannot declare it void unless it is manifestly so, or is made so to appear from the evidence." *Myers v. City of Chicago*, 196 Ill. 591, 63 N. E. 1037. The municipal authorities are the best judges of the necessity for the improvement of public streets and alleys. Merely because witnesses may think an improvement is unnecessary will not justify a court in substituting its judgment for that of the municipal authorities in determining whether or not an ordinance providing for an improvement is reasonable, and to hold otherwise would be to put in issue the reasonableness of every ordinance for local improvement.

It is objected that the language of the ordinance, "that seven parts best quality of broken limestone, or other stone which shall be equal in quality for concrete purposes," is indefinite and uncertain. We do not regard the point as of substantial merit.

Our consideration of the grounds of reversal here urged has led to the conclusion that there is no substantial merit in either of them. The judgment of the county court will be affirmed.

Judgment affirmed.

(213 Ill. 252)

CHICAGO NORTH SHORE ST. RY. CO. et al. v. STRATHMANN.

(Supreme Court of Illinois. Dec. 22, 1904.)

STREET RAILROADS—NEGLIGENCE—INJURIES—ACTION—INSTRUCTIONS.

1. Where, in an action against a street railroad company for injuries to plaintiff in a collision between the vehicle he was driving and defendants' car, defendants' evidence tended to show that plaintiff turned onto the track almost in front of the car, an instruction that if plaintiff, while in the exercise of ordinary care, was injured through the negligence of defendants, defendants should be found guilty, was not erroneous on the theory that it limited the duty of plaintiff in the exercise of due care to the time of the accident.

2. If such instruction was erroneous, it was cured by other instructions, one of which stated that the question whether plaintiff exercised ordinary care before and at the time of the occurrence was a question of fact, and another having called the jury's attention to plaintiff's conduct before the accident, and stated that, if

he turned the horse in front of the car without looking, he could not recover.

3. In an action for injuries to plaintiff in a collision between the vehicle he was driving and a street car, the court refused an instruction that, if the jury should find that plaintiff was not entitled to recover, then they would not have occasion to consider the character or extent of his injuries at all. *Held*, that such ruling was not erroneous, another instruction given for defendants having told the jury that if they believed from the evidence that there was no negligence in the operation of the car, though plaintiff was injured, they should find for defendants.

Appeal from Appellate Court, First District.

Action by Henry Strathmann against the Chicago North Shore Street Railway Company and another. From a judgment of the Appellate Court affirming a judgment for plaintiff, defendants appeal. Affirmed.

This is an action on the case brought by Henry Strathmann, appellee, against the Chicago North Shore Street Railway Company and the North Chicago Electric Railway Company, the appellants, to recover damages for personal injuries. The accident occurred on Evanston avenue, a public highway leading from the city of Chicago to the city of Evanston, and within a short distance of Lawrence avenue, about 9 o'clock on the morning of September 11, 1897. On Evanston avenue appellants have a double track extending north and south, and at this point the avenue was unpaved, and there were ditches from four to six feet deep on either side of the car track. Appellee was driving south in a one-horse wagon, and was thrown to the ground by a south-bound electric car striking the rear end of his wagon. There is an irreconcilable conflict in the evidence as to the manner in which the accident occurred. The evidence on behalf of appellee was to the effect that he had been driving upon the south-bound track for several squares, when the car came up behind the wagon without any warning. On the other hand, the evidence on behalf of the appellants tends to show that before reaching the place of the accident the appellee was driving upon the north-bound track, and just at the time of reaching the place of the accident he suddenly turned out and into the south-bound track, almost directly in front of the car; that the motorman rang his bell and called to appellee; that at the time the car struck it the wagon was almost in the south-bound track, and the horse was headed east, thus indicating that appellee was trying to swing out of the south-bound track into the north track at the time he was struck. Upon a trial before the court and a jury judgment was rendered in favor of appellee for \$5,500, which has been affirmed by the Appellate Court for the First District, and a further appeal has been prosecuted to this court.

John A. Rose and Henry W. Brant (W. W. Gurley, of counsel), for appellants. William A. Doyle, for appellee.

WILKIN, J. (after stating the facts). The grounds relied upon by appellants for reversal are three, all arising upon instructions. The first objection is to the eighth of those given at the request of the plaintiff, as follows: "If the jury believe, from a preponderance of the evidence in this case, that the plaintiff, while in the exercise of ordinary care, was injured by or in consequence of the negligence of the defendants as charged in the declaration, then you may find the defendants guilty." The contention is that it limits the duty of appellee, in the exercise of due care, to the time of the accident, although the main question at issue was whether the appellee was guilty of contributory negligence in turning into the track near the approaching car. In support of this contention several authorities are cited to the effect that it is improper to give an instruction which limits the question of due care to the conduct of the plaintiff at the time of the injury, regardless of his conduct in placing himself in the place of danger. We do not think the objection to this instruction well taken. The instruction does not limit the exercise of ordinary care to the exact time of the injury, but tells the jury that if the plaintiff, while in the exercise of ordinary care, was injured, etc., which time or ordinary care could reasonably be applied to the entire accident or occurrence, rather than to the moment of the injury. Even if the objection to the instruction should be sustained, it was cured by others given. The first given on behalf of the plaintiff told the jury that the question whether or not the plaintiff exercised ordinary care for his personal safety before and at the time of the occurrence of the injury complained of was a question of fact to be determined by them, and the fifteenth given at the request of the defendants directly called the attention of the jury to the conduct of appellee before the accident, and told them that if, immediately prior to the time of the alleged accident, the plaintiff turned his horse from the north-bound track into the south-bound track immediately in front of the defendants' approaching car, without looking to see if a car was approaching, and without paying attention as to whether the car was approaching, he could not recover. These instructions, taken together, fully informed the jury as to the rights of the plaintiff and the duty of the defendants, and it cannot be held that the eighth in any way injured or prejudiced the rights of appellants, even though inaccurate.

Complaint is next made of the refusal of the ninth instruction offered by the defendants. It was to the effect that if, immediately prior to the accident, plaintiff was driving his horse on the north-bound track, and he was then at a safe distance from the car, then the defendants' servants operating said car would not be bound to slacken the speed in anticipation that the plaintiff might pos-

sibly suddenly turn his horse in front of the car; that the motorman would, under such circumstances, be required to slacken the speed of his car only when it became apparent to him, in the exercise of ordinary care on his part, that the plaintiff was about to turn off of the north-bound track into the south-bound track. The substance of this instruction was covered by the fifteenth and twenty-eighth given on behalf of defendants, and, while there were some matters contained in the instructions refused which were not contained in the other, they were not so material as to require the giving of the former.

It is finally insisted that the refusal of the defendants' twelfth instruction was reversible error. It is as follows: "The jury are instructed that if, under the instructions of the court, they find, from the evidence in this case, that the plaintiff is not entitled to recover, then they will not have occasion to consider at all the character or extent of plaintiff's injuries, whether serious or slight." In support of their contention appellants' counsel cite the case of *Chicago City Railway Co. v. Osborne*, 105 Ill. App. 462. That case, under the statute, would not be authority in this court. It does not, however, hold that the refusal of a similar instruction constituted reversible error. The twenty-first given on behalf of defendants instructed the jury that if they believed, from the evidence, that there was no negligence on the part of the defendants in operating the car at the time and place in question, but that plaintiff was nevertheless injured, they should find the defendants not guilty. It contained all that was material and proper to be given in the twelfth, refused.

From a consideration of the whole case and all the instructions given, we think the jury were fully and clearly informed as to the law applicable to the facts of the case, and that appellants' rights were in no way prejudiced by the giving or refusing of instructions. The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

(213 Ill. 261)

THOMAS v. FIRST NAT. BANK OF BELLEVILLE.

(Supreme Court of Illinois. Dec. 22, 1904.)

GAMING—CONVEYANCES FOR GAMBLING CONSIDERATION—VALIDITY—APPEAL—BRIEFS.

1. A holder of a certificate of deposit transferred it to an agent of a third person engaged in the business of pool selling on race tracks, guarantying persons depositing with him money the right to share in the profits of the business. The transfer was made to enable the making of a deposit in cash with the third person for the purpose of the business, the holder to share in the winnings. The deposit was made. *Held*, that the transfer was void as a gambling transaction, within Hurd's Rev. St. 1903, c. 38, § 131, declaring that all conveyances made, where any

part of the consideration shall be for money won by gambling, shall be void.

2. A certificate of deposit was issued by a bank in Illinois. The depositor was a resident of the state. He transferred the certificate in the city of Washington to an agent there for a third person engaged in gambling transactions for the purpose of depositing money with the third person to be used in gambling. The principal office of the third person was in Missouri, but he carried on his gambling business to some extent in Illinois. *Held*, in an action by the agent against the bank to recover on the certificate, that the statute of Illinois relating to gambling barred a recovery, though there was no law in the District of Columbia or Missouri prohibiting the making of such contracts.

3. The rule that courts will refuse aid to a party to a gambling transaction, but will leave him where he has placed himself, prevents a transferee of a certificate of deposit, transferred to him as agent of a third person engaged in the business of gambling for the purpose of enabling the holder of the certificate to deposit money with the third person to be used in the business, from recovering on the certificate against the bank issuing it.

4. Under Sup. Ct. Rule No. 15 (47 N. E. vii), requiring each party to file a printed brief in the cause, the arguments of the several counsel of a party must be incorporated in a single brief and argument.

Appeal from Appellate Court, Fourth District.

Action by J. Edward Thomas against the First National Bank of Belleville, Ill. From a judgment of the Appellate Court affirming a judgment for defendant, plaintiff appeals. Affirmed.

This is an appeal from the Appellate Court for the Fourth District to reverse a judgment in that court in favor of appellee, against appellant, in an action of assumpsit upon a certificate of deposit issued by the defendant to one J. F. Wassell and indorsed by him to plaintiff.

The evidence shows that the firm of E. J. Arnold & Co. had their principal office in St. Louis, Mo., where, from September, 1902, until February, 1903, they were engaged in the business of bookmaking, pool selling, and betting on horse races. They had branches of their business in Chicago, Harlem, Hawthorn, Washington, D. C., and other places, and sold pools on various race tracks throughout the country. They also had a breeding farm in Illinois, upon which they claimed to raise horses. They sought customers throughout the country, but the customers did not do individual betting or buying pools, but were called "depositors." They placed certain amounts of money in the hands of Arnold & Co., and were by them guaranteed the right to share in the profits of the business to the extent of 2 per cent. per week on all sums deposited, and to withdraw the original deposit at any time. The appellant, with full knowledge of the character of the business carried on by Arnold & Co., in September, 1902, engaged with them to open a branch office in Washington, D. C., and there solicit deposits from persons willing to invest in the business. He was to remit the deposits to Arnold & Co., and receive

10 per cent. of all money thus secured as his share or compensation. He operated that branch office during the existence of the firm of Arnold & Co., advertised himself as manager, distributed literature of the firm, and orally and by letter solicited investments, and advocated and advanced the business generally. When he secured a customer, it was his custom to deposit the money received in bank, and send his individual check to the firm at their principal office in St. Louis, from which was issued a certificate directly to the customer. J. F. Wassell, a printer by trade, engaged in the government printing office in Washington, his home being in Belleville, this state, had his attention called to the flattering reports of the financial success of Arnold & Co., and on January 23, 1903, went to the office of appellant in Washington, D. C., for the purpose of investing a certificate of deposit issued by the appellee bank, payable to him, amounting to \$1,335. He was informed by appellant that Arnold & Co. would accept nothing but cash, and it was therefore agreed that appellant should take the certificate himself, and issue his check directly to Arnold & Co. Appellant was also to advance \$15 in addition to the \$1,335 due on the certificate, and send the same to Arnold & Co., provided Wassell should indorse and deliver to him the certificate of deposit and pay the \$15 advanced in cash on the following Monday. The agreement was carried out according to these terms, and the certificate indorsed to appellant. On the morning of February 8, 1903, the home office of Arnold & Co. at St. Louis failed to open, and the partners absconded. Thereupon Wassell informed the bank of the indorsement and delivery of said certificate of deposit, and notified it not to pay the same. The certificate matured the following March, and at the April term of the circuit court of St. Clair county this suit was commenced. A jury was waived, and the case tried by the court. On the trial appellant submitted four propositions of law to the court, all of which were marked "Refused," and judgment rendered against the plaintiff for costs of suit. An appeal was prosecuted to the Appellate Court for the Fourth District, where the judgment of the circuit court was affirmed.

L. D. Turner (Dill & Wilderman, of counsel), for appellant. Winkelmann & Baer and R. W. Kopequet, for appellee.

WILKIN, J. (after stating the facts). It is contended by counsel on behalf of appellant that the certificate of deposit sued on, when indorsed by the original payee, became, in effect, a promissory note, and upon being presented to the bank for payment by the holder, properly indorsed, it was the duty of the bank to immediately pay the same. This, it is said, is so because the title to the certificate was absolutely vested in and became the property of the assignee at the time of

its indorsement, and that the only defense which the bank could make to this suit was such as would go to the ownership of the instrument, affecting the title thereto, such as forgery. Conceding the law to be as claimed in all legitimate transactions, it has no proper application to the facts in this case. The defense does question the title of the plaintiff to the certificate of deposit sued on. Section 131 of chapter 38 of our statute (Hurd's Rev. St. 1903) provides: "All promises, notes, bills, bonds, covenants, contracts, agreements, judgments, mortgages, or other securities or conveyances made, * * * where the whole or any part of the consideration thereof shall be for any money, property, or other valuable thing won by any gaming, or playing at cards, dice, or any other game or games, or by betting on the side or hands of any person gaming, or by wager or bet upon any race, * * * shall be void and of no effect." Section 136 of the same chapter provides: "No assignment of any bill, note, bond * * * shall, in any manner, affect the defense of the person giving, granting, drawing, entering into or executing the same, or the remedies of any person interested therein." It is insisted by appellant that section 131, above quoted, has no proper application to the transaction between the appellant and J. F. Wassell, because the latter, as a customer of Arnold & Co., did not agree to enter into a gambling transaction, but was a mere depositor with them, investing his money in the business of that firm. In the case of *Chapin v. Dake*, 57 Ill. 295, 11 Am. Rep. 15, it was held, where a party in possession of two drafts for \$1,000 each, drawn in his favor, had lost \$1,500 at gaming, indorsed the drafts, and delivered them to the winner, and received the difference, \$500, in money, under our statute against gaming the indorsement was void, and the property in the drafts remained in the payee, and, although in the hands of an innocent holder for value, such indorsement had no more effect than could be given to it provided it had been forged. Under that authority the indorsement made by Wassell to appellant in furtherance of a gambling transaction was null and void, and the title to the certificate of deposit remained in the payee. When the suit was brought appellant had no more claim against the bank than if the indorsement had never been made; and it had not only the right, but it was its duty, to question plaintiff's title to the instrument sued upon. *Williams v. Judy*, 8 Ill. 282, 44 Am. Dec. 699. It certainly cannot be seriously contended that the business of Arnold & Co. was not that of gambling, so far as they were engaged in bookmaking, pool selling, and betting on horse races, nor that the scheme by which they obtained money from customers was not for the purpose of carrying on that illegitimate business. Their agreement to pay to customers the unprecedented profit of 2 per cent. per week strongly

tended to prove that calling them depositors was a mere subterfuge. At least, the evidence fairly tended to show that the money which was deposited with Arnold & Co. was nothing more nor less than placing money in their hands to be used in gambling, 2 per cent. per week to be the depositor's share of the winnings. Whether the transaction was an honest, legitimate one, or a mere device to avoid liability under the statute against gambling, was a mixed question of law and fact, which has been settled adversely to the appellant by the judgment of affirmance in the Appellate Court. It seems to us unreasonable, under the evidence in this case, to contend that the appellant was a bona fide assignee of the certificate. He was the agent and promoter of Arnold & Co. in their gambling transactions, and he knew their methods of doing business. Wassell had the right to stop payment on the certificate in order to protect himself against loss. It then not only became the right, but it was the duty, of the defendant bank to interpose the defense interposed.

It is next insisted that, the assignment being made in the city of Washington, and the principal office of Arnold & Co. being located in St. Louis, and no law of either the state of Missouri or District of Columbia having been offered in evidence condemning the transaction in those jurisdictions, the assignment should have been sustained, and judgment entered for the plaintiff, notwithstanding the statute of this state. The principal office of Arnold & Co. was in St. Louis, but the evidence shows that they carried on their gambling business to a greater or less extent in Illinois. The certificate of deposit was issued by an Illinois bank, the assignor, Wassell, was a resident of this state, and the suit to recover the amount of the certificate was brought by the plaintiff in a court of this state. A contract made in one state, though lawful there, will not be enforced in another, where to do so would contravene the criminal laws of the latter, or where to do so would be against the express prohibition of its laws. Comity between different states does not require a law of one state to be executed in another when it would be against the public policy of the latter state. No jurisdiction is bound to recognize or enforce contracts which are injurious to the welfare of its people, or which are in violation of its own laws. *Pope v. Hanke*, 155 Ill. 617, 40 N. E. 839, 28 L. R. A. 568; *Story on Conflict of Laws*, § 327. Therefore, conceding that there was no law in the District of Columbia or in the state of Missouri prohibiting the making of gambling contracts, it was contrary to the laws of this state, where appellant sought to enforce his remedy.

Neither of the propositions submitted by the plaintiff to the trial court announces the law of the case applicable to the facts, as we have already shown, and they were therefore properly refused.

There is another consideration upon which the plaintiff could not maintain this action, if we are correct in the view that it was a part of a gambling transaction. He sought affirmative relief by enforcement of that contract, and the rule is that courts will refuse to aid him in that attempt, but will leave him where he has placed himself. Substantial justice has been done in this case by the judgment of the circuit court and its affirmance by the Appellate Court, and we find no reversible error in the record.

It appears that the appellant in this case is represented by a lawyer who signs his brief and argument as "attorney for appellant." A firm of lawyers also appear for him, and they file a separate and independent brief and argument, which they sign as "of counsel for appellant." The appellee is represented by an individual attorney, who files a brief and argument over his name, and a firm of attorneys also appear for him, filing another brief and argument on his behalf; so that we have two briefs and arguments on either side of the case. This is a violation of our rule 15 (47 N. E. vii), and imposes upon the court the burden of reading and considering more than one brief and argument on behalf of each party. The practice, if adopted, would in many cases require the reading and consideration of a large number of briefs and arguments, limited only by the number of attorneys who happen to be employed in the case. Of course, each counsel has a right to present his views of the case, but by conference and consultation among themselves one brief and argument should present the respective theories of counsel, and be incorporated in a single brief and argument. The impracticability of any other rule will be readily recognized by the profession.

Judgment affirmed.

(213 Ill. 256)

GRANT LAND ASS'N v. PEOPLE ex rel.
HANBERG, County Treasurer.

(Supreme Court of Illinois. Dec. 22, 1904.)

TAXATION—ASSESSMENT—VIEWING PROPERTY—
MISINFORMATION—PUBLICATION.

1. The requirement of Hurd's Rev. St. 1899, c. 120, par. 306, § 12, that the assessor, by himself or his deputy, shall actually view and determine, as near as practicable, the value of each tract of land listed for taxation, is satisfied by the property being viewed by the assessor elected for a township within a county having a board of assessors, who by section 3 is ex officio deputy assessor for such board within such township.

2. Failure to go on the land and actually view it for assessment for taxation, as provided by Hurd's Rev. St. 1899, c. 120, par. 306, § 12, is but an irregularity, not defeating the tax.

3. Under Hurd's Rev. St. 1899, c. 120, par. 321, § 27, providing that the chief clerk of the board of assessors, when requested, shall deliver to any person a statement of the valuation put on property assessed in his name, one who does not avail himself of such opportunity to learn of such valuation cannot complain of the assess-

ment because of misinformation he obtained on inquiry of a deputy assessor.

4. By express provision of Hurd's Rev. St. 1899, c. 120, par. 323, § 29, failure to publish an assessment as provided by statute is not a valid objection to application for judgment for tax sale.

Appeal from Cook County Court; L. C. Ruth, Judge.

Application by the people, on the relation of John J. Hanberg, county treasurer and ex officio county collector of Cook county, for a judgment and order of sale for delinquent taxes. From such a judgment and order the Grant Land Association, owner of the property, appeals. Affirmed.

A. J. Redmond, for appellant. James H. Wilkerson, Co. Atty., and William F. Struckmann, Asst. Co. Atty., for appellees.

BOGGS, J. The appellant association filed two objections to the application of the appellee treasurer for a judgment and order of sale against its lands and lots in the town of Cicero for delinquent taxes alleged to be due for the year 1903. The objections were as follows: "(1) The valuation of objector's property has been raised contrary to law and the provisions of the statute, and to the extent of such increase (thirty per cent.) the taxes so extended are illegal and void; (2) the valuation of objector's property is illegal, excessive, and void, and the taxes extended thereon, and for which judgment is sought herein, are illegal, contrary to the statute, excessive, null, and void." In 1899 the lands and lots here involved were valued for assessment by Chris. F. Hafner, the assessor for the town of Cicero. The board of review, at, as it seems, the instance of Mr. Hafner and other citizens, reduced the valuations for assessment upon this and other real estate in the town of Cicero 30 per cent. for the year 1899. The property was not reassessed until 1903, the beginning of the next quadrennial assessment period. In 1903 James G. Lynn was elected assessor for the town of Cicero, and became ex officio deputy assessor for the board of assessors in and for the county of Cook. He adopted the valuations of lands and lots which had been made by Assessor Hafner for the year 1899, and the lands and lots were assessed for taxation accordingly. W. T. Block was secretary and treasurer for the appellant association in 1903, and he testified that it was his duty to "look after" the assessments of the property of the association for taxation, and that, in pursuance of his duties, he called upon Mr. Lynn, the assessor-elect for the town of Cicero, and inquired what valuations had been placed upon the lands and lots of the appellant association as the assessment thereof for taxation for the year 1903; that Mr. Lynn told him he had assessed the lands and lots, and "that the assessed valuation thereof for taxing purposes would be the same as in the preceding year"; that he (the witness) believed the statement to be true, and did not examine the

assessor's books, but relied upon the information received from Mr. Lynn. A list of the assessment of the property assessed for taxation in the town of Cicero for the year 1903 was not published in any newspaper. The appellant association did not apply to the board of assessors, or to the clerk of said board of assessors, or to the board of review, to ascertain the valuations that had been placed upon the property for taxation, or ask for any relief or action upon the part of either of such bodies. Mr. Lynn, the assessor-elect for the year 1903, testified that he fixed the valuation upon appellant's property with the understanding that the assessment would be reduced 30 per cent., as had been done at the beginning of the preceding quadrennial term for assessments.

The position of the appellant association is that it appeared "that the valuation of its property was thirty per cent. higher than the true estimate of the valuation thereof by the local assessor; that the officer misrepresented to the appellant that the valuations of appellant's property were the same as for the preceding year, when, as a matter of fact, they were thirty per cent. higher; that the year 1903 was the fourth year, and the board of assessors failed to publish the list of assessments as provided by statute; that therefore such a fraud was committed upon the appellant as to make the tax levied against its real estate in the town of Cicero illegal and void."

It was stipulated that "no member of the board of assessors or board of review, except the deputy assessor of the board of assessors, viewed said property for the purpose of making said assessment." It seems to be urged that it was the duty of the board of assessors or of the board of review to "view" all real estate which it assessed for taxation, and that the failure to perform this duty vitiates the tax. This question last stated may conveniently be first determined.

Section 12 of chapter 120, entitled "Revenue" (Hurd's Rev. St. 1899, par. 306), provides that the assessor, by himself or by his deputy, shall actually view and determine, as near as practicable, the value of each tract or lot of land listed for taxation. The requirements of this section are fully met if Mr. Lynn "viewed" the property, and the stipulation concedes that he did so. Moreover, a failure to go on the land and actually view it is but an irregularity, and would not defeat the tax. *Du Page County v. Jenks*, 65 Ill. 275.

Nor do we think appellant's other contentions are well taken. In Cook county, where appellant's lands and lots are situate, assessments for taxation are made by a board of assessors, under the provisions of the act approved February 25, 1898 (Hurd's Rev. St. 1899, p. 1444). The assessor, Lynn, though elected in the town of Cicero, was but a deputy assessor, ex officio, for the board of assessors, and his assessments were subject

to the revision and approval or disapproval of the board of assessors, as were the assessments of those appointed deputy assessors by the board. In *Burton Stock Car Co. v. Traeger*, 187 Ill. 9, 58 N. E. 418, we said (page 17, 187 Ill., page 421, 58 N. E.): "It is not clear that the Legislature intended assessments in Cook county within the limits of the city of Chicago to be made by one class of assessors, and assessments in the county outside of the city to be made by another class. As a matter of fact, there is but one class of assessors. The law provides for one board of assessors for the whole county. There are two classes of deputy assessors—those appointed by the board for the city, and those elected for the towns outside of the city. But the difference is only in the fact that one class is appointed, and the other is elected. Both are deputy assessors only, and are under the direction and supervision of the board of assessors. The work of both is subject to the revision and approval of the board of assessors, and becomes the work of that board when it is revised or adopted by such board."

Section 27 of the said act of 1898 provides that the chief clerk of the board of assessors, "when requested, shall deliver to any person a copy of the description, schedule, return or statement of property assessed in his name or in which he is interested, and the valuation placed thereon by the assessor or board of review." The appellant association did not avail itself of the opportunity thus provided by the statute for obtaining information as to the valuation of its property for assessment, and the record discloses no reason or excuse for the failure so to do. Had this information been sought from the chief clerk of the board of assessors, any error or overvaluation could have been reviewed or corrected. The appellant was required to employ this opportunity to acquire information as to the assessment of its property, and could only rely on other information at its peril. This principle was declared in *Porter v. Rockford, Rock Island & St. Louis Railroad Co.*, 76 Ill. 561, and in *Humphreys v. Nelson*, 115 Ill. 45, 4 N. E. 637. That the appellant association sought information from some other official than the one designated by the law to give it, and was misled, could have no effect to vitiate the assessment. The board of assessors, by section 23 of the said act of 1898, are expressly vested with the power of revising all assessments of real property in Cook county, and are required to enter all changes and revisions made by them on the assessment books; and, when such revision has been completed, are required to append to each of such assessment books the affidavit required by law, signed by at least two members of the board; and the section further provides that upon the signing of such affidavits the board of assessors shall possess no further power to change or alter the assessments. The local

assessor could have no official knowledge of the assessment as finally completed, and property owners cannot be heard, in defense of an application for judgment against their lands for unpaid taxes, to urge that they relied upon statements made by the local assessor as to the valuation placed upon their property for the purposes of taxation.

The failure to publish the assessments in any of the modes provided by the statute does not constitute a valid objection to the application of the county treasurer for judgment. Section 29 of the act of 1898 (Hurd's Rev. St. 1899, par. 323, p. 1451) expressly so provides.

It is not improper to add that we do not find in the record any testimony tending to show that the property of the appellant association was assessed above its value. The judgment is affirmed.

Judgment affirmed.

(213 Ill. 208)

HALL v. GABBERT.

(Supreme Court of Illinois. Dec. 22, 1904.)

BASTARDS—LEGITIMATION—INHERITANCE—PARTITION BETWEEN HEIRS—TIME TO SUE.

1. The courts will not indulge the presumption that a marriage was entered into merely to avoid the possible consequences of a pending bastardy proceeding, but will assume that, had the alleged father doubted his paternity, he would have resisted the prosecution and refused to marry.

2. The right of a bastard to inherit property in Illinois is governed solely by the laws thereof, and it is immaterial that the claimant could not inherit under the laws of a foreign jurisdiction.

3. Hurd's Rev. St. 1903, c. 39, relating to descent, provides (section 3) that an illegitimate child, whose parents have intermarried, and whose father has acknowledged him or her as his child, shall be considered legitimate. *Held*, that this section could not be construed as merely fixing the status of such a child, but was a rule of descent under which such a child inherits the same as if it were legitimate.

4. The right of adult heirs to partition under Hurd's Rev. St. 1903, c. 106, § 1, is not affected by the fact that their ancestor's estate is still unsettled, there being no condition of this kind in the statute, though, if a sale is ordered, the chancellor should properly guard the funds arising therefrom for the benefit of creditors.

Wilkin, Cartwright, and Hand, JJ., dissenting.

Appeal from Circuit Court, Peoria County; N. E. Worthington, Judge.

Bill by Daisy Gabbert against John Hall. From a decree for complainant, defendant appeals. Affirmed.

Arthur Keithley, for appellant. Sheen & Miller, for appellee.

RICKS, C. J. This is an appeal from the decree of the circuit court of Peoria county for partition, growing out of a conceded state of facts, and involving but two points of law. The principal question is as to the heirship of appellee, Daisy Gabbert. The only other question presented is as to the right to file a

bill for partition before the estate of the deceased is settled in the probate court.

The facts in reference to the heirship of appellee are substantially as follows: On November 23, 1873, and some time prior thereto, one Alice Hannahs resided in Cincinnati, Ohio, and on the date last named gave birth to appellee in that state. In July, 1874, the intestate, William C. Hall, was arrested in Cincinnati on the charge of bastardy, upon the complaint of said Alice Hannahs, imputing to him the paternity of appellee. This proceeding was settled by the marriage of appellee's mother and the said Hall on July 9, 1874, and immediately after the marriage said Hall left Cincinnati, and never lived or cohabited with the said mother of appellee after the said marriage ceremony. Appellee, when but an infant, was committed to a children's home in Cincinnati, where she remained until she was five years old, when she was adopted by a Mr. and Mrs. Beuhla, who removed to California, taking appellee with them, and appellee continued to reside in that state from that time. So far as appellee could remember, she never saw her father, nor heard directly from him until the fall of 1898, when she sent a letter to the chief of police of Pekin, Ill., the then home of her father, inquiring of his whereabouts. This letter was shown to the father by the chief of police, and thereupon the father admitted the paternity of the child; told the chief that in 1873, and prior to that time, he was working in the railroad yards in Cincinnati; that he kept company with appellee's mother; that they were engaged to be married, and that by him appellee's mother became pregnant; that the marriage was put off from time to time until appellee's mother had given birth to appellee, when he was arrested upon the charge of bastardy, and that he married appellee's mother in settlement of that charge, and deserted the mother and child, leaving Cincinnati, and in the year 1875 settling in Pekin. He further stated that the mother of appellee died in 1878, and that after her death he returned to Cincinnati, and went to the old home, and endeavored to find appellee; that he traced her to the children's home, and there learned of her adoption, but was refused the names or whereabouts of the persons that had adopted her, as the rule was that such information should not be given except with the consent of the persons adopting a child from such establishment. The father, after the death of the appellee's mother, again married, and his widow, Valie R. Hall, and his son by his last marriage, John William Hall, survived him. After receiving the information of the whereabouts of appellee, her father immediately began correspondence with her, addressing her as "My dear daughter," and closing his letters with the expression "Your father," and during the fall of 1898 wrote letters to the children's home at Cincinnati for the purpose

of verifying her history, inclosing the letter of inquiry, and following his signature to the letter with the words, "Her father." In the fall of 1898 or winter of 1898 and 1899 appellee's father and his then wife went to California, and visited four weeks with appellee, and he there declared himself the father of appellee, and her his child. He brought appellee home with him on that occasion, to Peoria, where he then resided, and introduced her to various and numerous friends as his daughter, stating that he was glad and proud he had found her. From the time he first learned of her whereabouts until the time of his death they continuously corresponded. In the fall of 1900 appellee's father and his said wife went to California for the health of the husband, stopping part of the time with appellee. While in California said William C. Hall died intestate, seised of the real estate in Peoria in controversy.

The original certificate of marriage and duly authenticated copy of the record of marriage of said William C. Hall and Alice Hannahs were admitted in evidence, as were also the letters, declarations, and admissions of said William C. Hall as to his paternity of appellee, and the details of the circumstances attending and surrounding her birth and identity as given by Hall. No complaint is made as to the admissibility of this evidence, or any of the evidence contained in the record; the principal controversy being, so far as the question of heirship is concerned, that, if it be admitted that all the evidence shows or fairly tends to show is true, still appellee cannot take an interest in the real estate in question, because, it is claimed, the evidence fails to show that the father recognized appellee as his child during the existence of the marriage relation between himself and the appellee's mother, and that the recognition of appellee by her father in 1898 and 1899 did not have the legal effect intended by our statute for the purpose of legitimating children born out of wedlock. It is further contended by appellant that upon this record appellee cannot be held, under our statute, to have been legitimated by the marriage of appellee's father and mother in Ohio, for the reason that there are certain depositions in the record showing that at the time of the birth of the appellee the domicile of said William C. Hall was at Pierceville, in the state of Indiana, and that the law as applied to illegitimates is that the domicile of the father at the time of the birth of the child determines its capacity to be legitimated by a subsequent marriage, and that this record contains no evidence showing that at the time of the birth of appellee the laws of Indiana recognized such method, or any method, of the legitimization of bastard children.

In support of the contention of appellant two cases are relied upon: *Munro v. Munro*, 1 Rob. (Scot. App. H. L.) 492, and *Blythe*

v. Ayres, 96 Cal. 532, 31 Pac. 915, 19 L. R. A. 40. In both of these cases the birth was in England, and by the laws of that country the status of illegitimacy was so indelible it could only be removed and the child be legitimated by an act of Parliament. In the *Munro Case* a Scotch gentleman bore illicit relations with an English woman in England, through which a child was born, and the parents subsequently married in England, and the father recognized the child as his child. The mother and the child remained in England until after the death of the father. Upon the death of the latter the child claimed heirship by the laws of Scotland. In the *Blythe Case* an illegitimate child was born of the bodies of Thomas H. Blythe and Julia Perry while the mother was a resident of England. The father, after the conception, and prior to the birth, left England, and came to America, and settled in California. The mother and child remained in England until after the death of the father. The latter died possessed of a large estate in California, and the child asserted heirship. In the Code of California (Civ. Code) two distinct provisions existed relative to illegitimates. The first, as section 230, seemed to relate solely to legitimization of such children, and provided that it might be done by the public recognition of the child by the father and receiving the child into his family with the consent of his wife, if married, and otherwise treating the child as his child. The other was section 1387 of the Code, which was a statute of descent, and provided that if the father recognized, in writings signed by him and witnessed by a competent witness, an illegitimate child as his child, the child should be his heir. It was found as a fact in the *Blythe Case* that the father had publicly acknowledged the child; that he had no family, but that he treated the child as his child; and it was further found, under section 1387, that by a writing, in the presence of two witnesses, he acknowledged himself to be the father of the child. In both the *Munro* and *Blythe Cases* the children were held to be legitimated. In the *Munro Case*, to avoid the irrevocable rule of bastardy obtaining under the English law, the House of Lords reached the conclusion of legitimization by what seems to us a refinement of reasoning, which was, in effect, that although by the law of England the child was a bastard when born, the fact that the father was domiciled in Scotland at the time of the birth, and that the laws of Scotland recognized legitimization by subsequent marriage, gave the child the capacity to be legitimated by the English marriage so as to take property under the laws of Scotland. The reasoning in the *Munro Case* is to some extent and on one phase of the case adopted and followed in the *Blythe Case* by the Supreme Court of California. The provision of section 230 of the California Code was not that the child should be

the heir in case of the public acknowledgment and receiving into the family, but that the father by such acts "thereby adopts it, and such child is thereupon, for all purposes, legitimate from the time of its birth." It will be observed that section does not purport to confer any property right, but to declare a certain status of the child, and under that section of the Code the Munro Case was discussed and the reasoning followed. The exact language of said section 1887 is: "Every illegitimate is an heir of any person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father of such child." When the court comes to the consideration of the right under that section it says: "It is unnecessary to decide whether this provision affects the status of a child or whether it is alone a statute of descent. If it either directly or indirectly touches upon the status, our views as herein previously expressed are applicable. If it is a statute of descent pure and simple—and *Estate of Magee*, 63 Cal. 414, seems to so declare in express terms—then the plaintiff is entitled to all the benefits of it, regardless of domicile, status, or extra-territorial operation of state laws." The above quotation thus clearly points out the distinction between the cases where the status of a child is the question to be determined and the conflicting laws of descent in a given case. It may be further said of the Munro Case, while in that case the principle that the domicile of the father in the country where the rule of legitimation per subsequens matrimonium is adopted at the time of the birth of the child gives the child capacity to be legitimated by a marriage in the country where that rule does not obtain was given weight, it may well be inferred from the remarks of Lord McKenzie that the decision would have been the same without its application. He said: "I cannot help entertaining doubt whether the indelibility of English bastardy has any meaning beyond this: that an English bastard is not legitimated by an English marriage. * * *

But suppose it were true that English bastardy is indelible, not only against a marriage in England, but against a marriage all the world over; I say, suppose there was produced a statute providing and declaring that an English bastard born in England should remain a bastard all the world over, notwithstanding anything that could be done in any country, I ask, could we give it effect? Could we acknowledge the authority of such a statute? I think we will be bound to say that the English Parliament might rule the fate of the bastards in England, but that its laws were not entitled to extend to other countries, and that there was no principle of the law of nations which would give effect to such a statute."

In the case at bar the statute of Ohio was introduced, and by its provisions in force at the birth of appellee the marriage of the fa-

ther to the mother and the acknowledgment of the child by him legitimated the child, and, if it were deemed essential, we think it might well be held, under the circumstances of this case, that the marriage of William C. Hall to appellee's mother was an acknowledgment of this child during the marriage. He, as the putative father, was arrested, charged with its paternity, and put an end to the prosecution by marrying the mother. The courts will not indulge the presumption in such case that the marriage was entered into merely to avoid the possible consequences of the proceeding, but will rather assume that, had the alleged father doubted his paternity of the child, he would have resisted the prosecution and refused the marriage. *Brock v. State*, 85 Ind. 397.

While the record does state the conclusion of witnesses or the assertion of the fact by them that the residence of the appellee's father was in Piercesville, Ind., at the time of her birth, it also unquestionably shows by his admission and by other evidence that at the time of his keeping company with appellee's mother, the time of her pregnancy, and the time of his arrest he was working in the railroad yards in Cincinnati. He was a single man, and his residence was wherever he wished to make it. As we have said, however, we do not regard this question as controlling. The question here presented is not one merely affecting the civil status, but is a question of descent and heirship of real estate. The descent of property, and real estate in particular, in a state or nation, is governed by the law of the situs. 3 Washburn on Real Prop. (3d Ed.) § 32, p. 16; *Tiedeman on Real Prop.* § 604; *Keegan v. Geraghty*, 101 Ill. 26; *Stoltz v. Doering*, 112 Ill. 234; *United States v. Fox*, 94 U. S. 315, 24 L. Ed. 192. In the latter case it is said (page 320, 94 U. S., 24 L. Ed. 192): "It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or in any other mode, is exclusively subject to the government within whose jurisdiction the property is situated." Where the question is as to the right to take real estate in this state under our laws of descent, the fact that the claimant may be qualified to take, as heir, under the laws of another state or sovereignty of which he is or has been a citizen, will not enable him to take under the laws of this state, unless those laws comply with the terms and requirements of our own law. *Keegan v. Geraghty*, supra; *Stoltz v. Doering*, supra. On the other hand, it cannot be material that the claimant could not inherit under the laws of some other state or country. If he bring himself within the requirements and provisions of the statutes and laws of this state he may take according to them.

The statute under which appellee claims is section 3 of chapter 39 of the Revised Stat-

utes (Hurd's Rev. St. 1903), and the act is entitled "An act in regard to the descent of property." The section reads: "An illegitimate child, whose parents have intermarried, and whose father has acknowledged him or her as his child, shall be considered legitimate." And under our law, when a child is legitimated he takes under our statute of descent, whether that legitimation arises from birth in wedlock or subsequent marriage and acknowledgment of a child born out of wedlock; in other words, without any distinction as to the rights of inheritance of legitimates. This section, placed as it is, cannot be construed as merely fixing the status of appellee, but is a rule of descent.

A citizen of our state, possessed of real estate in it, has died intestate, and the question is, to whom, under our statute, does his property descend? The law says it shall descend to his children. It recognizes that he may have two classes of children—legitimate children and illegitimate children. It also recognizes that by the doing of certain acts the illegitimate child may become legitimate, and then he will have but one class, and between that class of legitimates there is no distinction of right of descent or inheritance. As we view the law, it is immaterial what the laws of Indiana or Ohio, or any other country, are or were. We look to our own law, and read it as it is written; then to the facts, and, if the facts bring the claimant within our law, then he is entitled to its benefits, whatever may be his status elsewhere. We do not find in our law the requirements that the father shall acknowledge the child during the lifetime of the mother; nor do we find that, in order to make an acknowledgment such as will legitimate the child, the law of the domicile of the father at the time of the birth of the child must have recognized such form of legitimation. In a republic consisting of as many independent commonwealths as does ours, with each commonwealth invested with the power of determining the rules of descent and heirship within its borders, and with the people constantly changing from one to the other, if we should be called upon to determine the rights of descent of real estate in our own state by the legal status of claimants as affected by the laws of other states, any rules that we might attempt to adopt would be both unsettled and uncertain.

It is stipulated in this case that Vallie R. Hall, the widow of the intestate, had a claim allowed in her favor against the estate of her deceased husband in excess of \$6,000; that at the instance of appellee the order allowing said claim was set aside by the probate court, and that the matter is pending on appeal in the circuit court. Upon this state of facts appellant urges that it was error for the chancellor to have decreed partition until the settlement of the estate of the decedent. The parties in interest in the land are adults. The right of partition is

fixed by statute, and, where the rights of minors or infants are not involved, the court may not refuse to declare the rights of the parties claiming to be owners of the land and decree partition among them according to their rights. 21 Am. & Eng. Ency. of Law (2d Ed.) 1146; Hill v. Reno, 112 Ill. 154, 54 Am. Rep. 222; Martin v. Martin, 170 Ill. 639, 48 N. E. 924, 62 Am. St. Rep. 411; Ames v. Ames, 148 Ill. 321, 36 N. E. 110; Trainor v. Greenough, 145 Ill. 543, 32 N. E. 545; Wachter v. Doerr, 210 Ill. 242, 71 N. E. 401. The appellant, John W. Hall, denied and contested the right and claim of appellee to heirship. He urged her illegitimate birth, and denied that she had been legitimated within the requirements of our law. She was not shown on the files of the estate as an heir, and it was proper that she should timely bring and prosecute her suit, which would fix her rights. While the practice is not approved or commended of making actual partition or sale under such proceeding prior to the settlement of estates, we are not prepared to hold, under our statute, that a decree for either is reversible error. The creditor cannot be injured thereby, for, if actual partition is had, the lands are still subject to sale, and, if a sale in partition is had, the purchaser likewise takes subject to the charge of the debts of the ancestor, and the rule caveat emptor applies. Sutton v. Read, 176 Ill. 69, 51 N. E. 801; Bassett v. Lockard, 60 Ill. 164. If the owners of these lands could agree and should make partition among themselves, no one would question that it would be a good and valid partition, non constat the estate of the ancestor is unsettled. The statute points out when partition may be had, and the contents of the bill or petition, so far as the legislative body deemed the same essential, are prescribed. Hurd's Rev. St. 1903, c. 106, §§ 1, 5. Section 1 of chapter 106 expressly confers the right upon those who have derived their title by descent. That can only occur where the ancestor dies intestate, and the title passes by operation of law. If it had been the legislative intent that the right should only be exercised by those who derive title by descent after the period allowed by law for the filing of claims against the estate of the ancestor, that intention would have been manifested in some manner or by some language contained in the statute. Nothing of the kind appears, and we can find no warrant for the court reading into the statute additional requirements. Many of the states have by statute prohibited the institution of a proceeding for partition before the expiration of the time within which the estate of decedent should be settled. Not so in this state. Appellant and appellee are the owners of the land, charged with the payment of the debts of the ancestors and the widow's rights. As owners they are entitled to the beneficial use of it. If one shall chance to be in exclusive possession at the death of the ancestor, and

deny the right of the other, it would seem a harsh rule, in the absence of some positive requirement of law, to say his right should be postponed until the settlement of the estate. Here the ancestor died in December, 1900, and the present bill was not filed till September, 1902, nearly two years thereafter. In June, 1903, the estate was still unsettled, and it is common knowledge that many estates are four or five years in process of settlement.

It is suggested that the holding in *Wachter v. Doerr*, 210 Ill. 242, 71 N. E. 401, is in conflict with the holding in this case as to the right of partition before the settlement of the estate. The decree for partition entered in that case was reversed for the reason that the answer and the evidence disclosed the absence of necessary parties. Upon the question now before us it was there said (page 245, 210 Ill., page 402, 71 N. E.): "In some states a proceeding for partition before an estate has been settled or the time allowed for that purpose has expired has been held to be premature, and in others a suit for partition before that time is prohibited by statute. 21 Am. & Eng. Ency. of Law (2d Ed.) p. 1174. We have not held that the proceeding cannot be instituted, but have condemned the practice of taking decrees before it can be known whether or not it will be necessary to sell the land to pay debts." We do not think the cases are in conflict.

The chancellor, in case a sale is ordered, should require the administrator of the estate to be brought before the court, and control the time of sale, or the funds arising from the same, so that the creditors of the estate may have the benefit thereof. The decree of the circuit court is affirmed.

Decree affirmed.

WILKIN, CARTWRIGHT, and HAND, JJ. (dissenting). We adhere to the decisions in the cases of *Sutton v. Read*, 176 Ill. 69, 51 N. E. 801, and *Wachter v. Doerr*, 210 Ill. 242, 71 N. E. 401, which, as we understand, were not intended as advisory merely, but as decisions of the court on a question of law and practice.

(213 Ill. 317.)

CHICAGO DAILY NEWS CO. et al. v. SIEGEL et al.

(Supreme Court of Illinois. Dec. 22, 1904.)

CREDITORS' BILL—EVIDENCE—SUFFICIENCY—FRAUDULENT CONVEYANCES—SUBSEQUENT CREDITORS.

1. In a creditors' bill setting up judgments, the issuance and return of unsatisfied executions, and seeking to reach an indebtedness alleged to be due by defendants to the judgment debtors on contracts for merchandise, the evidence considered, and held to show that defendants had fully performed their contracts, and delivered to the judgment debtors all merchandise required by the contracts to be delivered to them.

2. Where a conveyance is alleged to be made in fraud of creditors, the creditors injured are

those whose claims exist when the conveyance is made and they only can avoid the conveyance.

Error to Appellate Court, First District.

Bill by the Chicago Daily News Company and others against Ferdinand Siegel, the Simmons Company, and others. From a judgment of the Appellate Court reversing the circuit court and affirming the findings of a master, complainants bring error. Affirmed.

This is a creditors' bill, filed on October 12, 1899, in the circuit court of Cook county, by the Chicago Daily News Company, an Illinois corporation, and Victor F. Lawson individually, and Edwin S. Osgood and Frederick S. Osgood as copartners under the firm name of Osgood & Co., against the Simmons Company, and Ferdinand Siegel and Joseph Siegel, of the firm of F. Siegel & Bros., setting up the recovery of judgments in favor of the complainants against the Simmons Company, the issuance of executions thereon, and the returns of said executions unsatisfied—the judgment in favor of the Chicago Daily News Company having been rendered on June 22, 1898, for the sum of \$3,921.50 and costs; the judgment in favor of Victor F. Lawson having been rendered on November 29, 1898, for the sum of \$184 and costs before a justice of the peace of Cook county, a transcript whereof was filed in said circuit court on December 15, 1898; and the judgment in favor of Osgood & Co. having been rendered on December 7, 1898, for the sum of \$718.40 and costs. A joint and several answer was filed by Ferdinand and Joseph Siegel, to which a replication was filed by the complainants. The cause was referred to a master in chancery to take the testimony and report his conclusions. The master made a report adversely to the claims of the complainants below, plaintiffs in error here, and recommended that the bill be dismissed. Upon the coming in of the master's report and the hearing upon exceptions thereto, the chancellor sustained the exceptions, and rendered a decree in favor of plaintiffs in error against the defendants in error, Ferdinand Siegel and Joseph Siegel, for the sum of \$4,361.05 and costs. Upon appeal to the Appellate Court, the Appellate Court reversed the decree of the circuit court, and remanded the cause to that court, with directions to it to affirm the master's report and enter a decree dismissing the bill for want of equity. The present writ of error is sued out for the purpose of reviewing the judgment so entered by the Appellate Court.

The bill charged upon information and belief that Ferdinand and Joseph Siegel, doing business under the firm name of F. Siegel & Bros., in Chicago, were largely indebted to the Simmons Company in the sum of, to wit, \$11,000, or in goods to the value of \$11,000.

The material facts are substantially as follows: The Simmons Company was en-

gaged in 1897 in the mercantile business in the city of Chicago, and Ferdinand Siegel and Joseph Siegel were doing business in that city under the firm name of F. Siegel & Bros. The Siegels were the principal stockholders in a corporation conducting a department store at the corner of State and Adams streets, in Chicago, and during the year 1896 and in the beginning of the year 1897 negotiated with William A. Simmons for the sale of the business of the concern known as The Grand to said Simmons, or to a corporation which was to be organized by him. The Siegels owned a majority of the capital stock of the corporation known as The Grand, so engaged in business at the corner of State and Adams streets, in Chicago, and the remaining shares of stock therein were owned by Maximilian Phillipsborn, who was then, and had been for a number of years, manager of The Grand. The corporation so formed by said Simmons was the defendant the Simmons Company, and all of the stock in it was owned by William A. Simmons, except one share, which was held by his son, Howard P. Simmons, and one share, which was held by his attorney, John C. Stetson. In pursuance of said negotiations a contract was entered into on January 20, 1897, between Howard P. Simmons and the corporation known as The Grand, through its president, F. Siegel, and its secretary, M. Phillipsborn, by the terms of which contract all of the merchandise, leasehold interests, good will, and property of The Grand was to be sold to the corporation so to be organized by W. A. Simmons. The property was to be taken in the name of Howard P. Simmons from The Grand as a matter of convenience, until the new corporation, the Simmons Company, should be organized. When the corporation known as the Simmons Company was organized, all of the assets and property which by the contract between Howard P. Simmons and The Grand were to be turned over to Howard P. Simmons were turned over and vested in the Simmons Company, and all rights under the contract became the rights and property of the Simmons Company, and the said contract became a part of the assets of that company.

By the terms of the contract Howard P. Simmons and wife were to execute a deed to The Grand of subplot 8 in subdivision of lot 71 in the east part of Ellis' Addition to Chicago, together with the improvements thereon, known as the "Cambridge Apartment Building," and the household furniture therein contained, subject to a trust deed for \$75,000, together with a bill of sale of the furniture therein, and the rentals to accrue therefrom from January 20, 1897, and also a certain block 44 in Cornell, subject to an incumbrance of about \$5,500 thereon; and was to pay to The Grand a certain sum of money, and execute a certain number of notes, and was also to pay the Siegels for

leases of the premises on which the business of The Grand was conducted, known as 202 and 204 State street, and 64 Adams street, and 66 to 72 Adams street, and to pay the rents for said premises according to the terms of said leases; and The Grand agreed to deliver a bill of sale of all the merchandise upon said premises, belonging to it, at cost price, and at such price such other merchandise as should be billed to The Grand from its stores in Kansas City, Mo., St. Louis, Mo., and Detroit, Mich., all of which merchandise was to be delivered to The Grand on or before February 1, 1897, and to aggregate in amount as per invoices the sum of \$75,000, exclusive of fixtures and improvements; and an additional amount of stock, as per invoices from F. Siegel & Bros., was to be delivered by F. Siegel & Bros. at said store in an amount of \$20,000, which said merchandise was to be delivered by F. Siegel & Bros. on or before May 1, 1897.

In addition to said contract between the Simmons Company and Howard P. Simmons, a supplemental agreement of the same date, to wit, January 20, 1897, was made between F. Siegel & Bros. and Howard P. Simmons, by the terms of which Siegel & Bros. agreed to deliver to the Simmons Company or Howard P. Simmons \$20,000 in merchandise, referred to in the contract between The Grand and Simmons, to be selected by M. Phillipsborn; but it was therein provided that, in case the merchandise in The Grand should be in excess of \$75,000, then the merchandise to be delivered by Siegel & Bros. should be reduced in amount by the same amount The Grand merchandise should be in excess of \$75,000, as Siegel & Bros. were not to deliver any more goods than was sufficient to make up the stock to \$95,000, and, if the said stock should inventory over \$75,000, then the Siegels were to deliver so much less on their \$20,000 contract.

On January 30, 1897, a paper was executed by The Grand, by its president, Ferdinand Siegel, and its secretary, M. Phillipsborn, wherein, after referring to the contract between The Grand and Howard P. Simmons bearing date January 20, 1897, whereby The Grand agreed to make a bill of sale to Howard P. Simmons of the merchandise then in its premises and other merchandise from the places above named, it was recited that The Grand thereby executed and delivered a bill of sale for all merchandise contained in its premises, and other merchandise, in compliance with the contract of January 20, 1897, placed in the said Grand, or delivered to said Howard P. Simmons; an itemized account of which merchandise, according to the inventory, amounted to \$70,638.95, leaving an amount of merchandise yet to be delivered under said contract to be called for by Howard P. Simmons of the sum of \$4,361.05, as per bills to be delivered by F. Siegel & Bros., etc.

On May 10, 1897, W. A. Simmons, by H.

P. Simmons, his attorney in fact, and H. P. Simmons executed the following receipt, to wit: "For one dollar and other good and valuable considerations the obligation of F. Siegel & Bros. to furnish further goods under their original contract with W. A. and H. P. Simmons is herewith canceled and annulled."

On October 10, 1897, the Simmons Company executed two chattel mortgages to the defendants Siegel for indebtedness then existing from the Simmons Company to said defendants, one of the said mortgages being for the sum of \$41,118.32, and the other for \$1,666.66, aggregating \$42,784.98.

Theron Durham, for plaintiffs in error.
Binswanger & Jackson, for defendants in error

MAGRUDER, J. (after stating the facts). The plaintiffs in error, by their creditors' bill, seek to reach an alleged indebtedness, amounting to \$11,748.18, charged to have been due from the defendants in error, Ferdinand Siegel and Joseph Siegel, to the judgment debtor, the Simmons Company. Of this amount the sum of \$4,361.05 is alleged to be due from the Siegels to the Simmons Company under the contract of January 20, 1897, between Howard P. Simmons and The Grand for the undelivered balance of the goods, amounting to \$75,000, which were to be delivered by The Grand by the terms of that contract. The remainder of the sum of \$11,748.18, to wit, the sum of \$7,387.13, is the amount alleged to be due from the Siegels to the Simmons Company under the contract for \$20,000 set forth in the statement preceding this opinion. In other words, it is conceded, as we understand the evidence, that on or about May 1, 1897, the Siegels owed the Simmons Company under the \$75,000 contract the sum of \$4,361.05, and under the \$20,000 contract the sum of \$7,387.13; the goods described in the former contract being spoken of in the evidence as the "old goods," amounting to \$4,361.05, and the goods described in the latter contract being spoken of in the evidence as the "new goods," amounting to \$7,387.13.

The only question involved in this case is a question of fact, and that question of fact is whether, at the time this creditors' bill was filed, the defendants in error owed anything to the judgment debtor, the Simmons Company. The plaintiffs in error, the judgment creditors, contend that the defendants in error were indebted to the Simmons Company on account of said contract, in that they had not delivered to the Simmons Company all the merchandise which they agreed to deliver to said Simmons. On the other hand, defendants in error claim that they have fully performed their contracts in all respects, and have delivered to the Simmons Company all merchandise required by the contracts to be delivered by them. The de-

fendants in error also claim that a full settlement of all accounts under said contracts has been had between them and the Simmons Company, and that the Simmons Company is indebted to them upon other accounts.

Defendants in error insist that on or before May 10, 1897, they delivered to the Simmons Company all the goods which they were required to deliver under their contracts, and thereby discharged said indebtedness of \$11,748.18. The evidence shows, as will be hereafter stated, that at that time the defendants in error delivered to the Simmons Company goods worth from \$10,000 to \$12,000, or worth, according to some of the testimony, from \$15,000 to \$16,000. Defendants in error insist that the goods so delivered to the Simmons Company were delivered in payment of the amounts due under both contracts; that is, \$4,361.05 due for "old goods" under one contract, and \$7,387.13 due for "new goods" under the other contract.

The contention thus made by the defendants in error is, in our opinion, sustained by the great preponderance of the evidence. Joseph Siegel and Maximilian Philipsborn, the latter having been manager for Siegel & Bros., and subsequently for the Simmons Company, both swear that goods to the amount of between \$10,000 and \$12,000 were so delivered in May, 1897, to discharge the balance due under both contracts. They are sustained by the testimony of three other witnesses, to wit, Alfred Husch, H. M. Ellinger, and Lizzie P. Miles. The testimony of these five witnesses is clear and positive that the goods were delivered upon trucks belonging to the defendants in error to the Simmons Company. The only testimony which contradicts that of these five witnesses is the testimony of W. A. Simmons and his son, H. P. Simmons. While the testimony of H. P. Simmons, given in rebuttal, is to the effect that no goods were delivered to the Simmons Company in discharge of the balance due upon these contracts, yet the force of his evidence is much weakened by the statement made by him upon his first examination in the case. Upon his first examination he stated that the Simmons Company received merchandise from defendants in error after May, 1897, and up to July, but that he did not know whether the merchandise so received was under the agreement or not. He also stated upon said first examination that he did not know whether or not the Siegels were in any manner indebted either to him or to the Simmons Company for anything after the release or receipt of May 10, 1897, set forth in the statement preceding this opinion, was executed by him, and given to the defendants in error. The following question was asked him in reference to said paper, and the following answer was given by him: "Q. At the time this paper was given by you to the Siegels were the Siegels

indebted to you, or your father? A. No, sir." Here is a positive statement on the part of H. P. Simmons that the defendants in error were not indebted to him or his father on the 10th of May, 1897.

The testimony of W. A. Simmons contradicts that of Joseph Siegel and M. Philipsborn and the other of the five witnesses above named, but he admits that his negotiations for a settlement with Joseph Siegel were finished on May 9th, and that he left Chicago for New York on May 10th, and did not actually see the delivery of the goods, whose delivery is testified to by witnesses who did see such delivery.

The evidence shows conclusively that between May 6 and May 10, 1897, a settlement of the indebtedness was made between Joseph Siegel and W. A. Simmons. They differ as to the terms of the settlement, but their evidence does not conflict as to the fact of the making of the settlement. W. A. Simmons swears, in substance, that he had interviews with Joseph Siegel at the latter's store on several different days prior to May 10, 1897, and that it was there agreed between them that the Siegels were to deed back to the Simmons, or to the Simmons Company, block 44, mentioned in the statement preceding this opinion, and to turn over to Simmons what were called the "Montgomery notes," and pay \$225 in money, and that the Simmons or the Simmons Company were to cancel the obligation of F. Siegel & Bros. to deliver the balance due for "new goods," to wit, \$7,387.13; but that Siegel & Bros. were to pay at once the balance due for "old goods," to wit, \$4,361.05, or deliver at once "old goods" to that amount in value; that upon receipt of these old goods to the amount of \$4,361.05 the Simmons Company was to cancel the obligations of F. Siegel & Bros. as above stated, and give two notes due in four months for rent then due from the Simmons Company to F. Siegel & Bros.; and it was also agreed at the same time that F. Siegel & Bros. were to stand by the Simmons Company, and supply them with money necessary to carry on their business until the fall of 1897. It is admitted by W. A. Simmons & Co. that the defendants in error kept faith in this regard, and did furnish them money, as agreed, to carry on their business. It will thus be noticed that a settlement was agreed upon, and that the difference between Joseph Siegel and W. A. Simmons as to the terms of that settlement is that, according to W. A. Simmons, part of the goods was to be delivered and the obligation to deliver the balance was to be canceled, while Joseph Siegel, who is confirmed by Philipsborn, testifies that all the indebtedness for outstanding merchandise was to be settled by the delivery of the job lot of goods, amounting to between \$10,000 and \$12,000, and that such goods were delivered. The testimony of W. A. Simmons is

to the effect that the Siegels were to be released from the obligation to deliver "new goods" under the \$20,000 contract, the amount of such new goods being \$7,387.13, upon condition that the Siegels would deliver at once to the Simmons Company "old goods" amounting in value to \$4,361.05, and would reconvey block 44 and deliver up the Montgomery notes, and pay \$225 in cash, etc.; and he claims that the Siegels failed to deliver "old goods" to the amount of \$4,361.05, as agreed, and that therefore the release did not operate to extinguish their obligation to deliver "new goods" to the amount of \$7,387.13, and, as a consequence, that their indebtedness amounts to the whole sum of \$11,748.18. It makes but little difference whether the theory of W. A. Simmons is correct or whether the theory of Joseph Siegel is correct, so far as the result is concerned. The evidence shows that on or before May 10, 1897, a large quantity of goods to the amount of from \$10,000 to \$12,000 was actually delivered by the defendants in error to the Simmons Company. If those goods were delivered in discharge of the whole amount due for undelivered goods, to wit, \$11,748.18, then the defendants in error are not indebted in any amount to the Simmons Company. But if those goods were delivered in discharge of the obligation to deliver "old goods" to the amount of \$4,361.05, then it is still true that no indebtedness exists from the defendants in error to the Simmons Company, because, upon delivering "old goods" to the amount of \$4,361.05, and doing the other things above named, they were, under the arrangement as interpreted by W. A. Simmons, to be released from the obligation to deliver the new goods to the amount of \$7,387.13.

The testimony of the defendants in error upon this subject is confirmed by several significant circumstances. In the first place, on May 10, 1897, H. P. Simmons, for himself and as attorney in fact for his company, executed a release to the defendants in error, and thereby recited that "for one dollar and other good and valuable considerations the obligation of F. Siegel & Bros. to furnish further goods under their original contract with W. A. and H. P. Simmons is herewith canceled and annulled." That release was executed by Howard P. Simmons in pursuance of a letter of instruction received from his father and bearing date on Sunday, May 9, 1897. In the letter of May 9, 1897, W. A. Simmons says to his son: "On the receipt of the above we are to cancel their obligations, or our order for further goods under the original contract," etc. "The above" refers to the delivery of the old goods, amounting to \$4,361.05, and to the reconveyance of block 44, and the surrender of the Montgomery notes, and the payment of \$225, etc. That is to say, when old goods to the amount of \$4,361.05 were delivered, and these other

things were done, then H. P. Simmons was authorized by his father to execute a release to the defendants in error of their obligation to deliver further goods. The fact that the release was executed and delivered confirms the testimony introduced by the defendants in error that goods were delivered in discharge of their indebtedness under these contracts. Where a release is authorized to be delivered upon the performance of certain conditions, then the fact of the delivery is almost indisputable proof that the conditions have been performed. H. P. Simmons and his father were shrewd, practical business men, and it is difficult to understand why a release of an obligation to deliver goods to the amount of \$7,387.13 was executed and delivered if all the conditions, upon which such delivery was to be made, including the delivery of "old goods" to the amount of \$4,361.05, were not actually performed. As we understand the contentions of the parties, it is not denied that the defendants in error reconveyed block 44 and did all the other things specified, except the delivery of "old goods" to the amount of \$4,361.05. Such delivery alone, of the things agreed to be done, is not admitted by plaintiffs in error.

In the second place, on October 10, 1897, the Simmons Company failed and executed chattel mortgages upon all its property to the amount of over \$42,000 to the defendants in error to secure an indebtedness to that amount, which then existed from the Simmons Company to the defendants in error. This indebtedness of \$42,000 was for rent due under the leases that had been transferred by the Siegels to the Simmons Company or the Simmonses, and for money advanced and loaned by the Siegels to the Simmons Company, and for merchandise sold by the Siegels to the Simmons Company after May 10, 1897. It is admitted that these chattel mortgages for over \$42,000 included an indebtedness from the Simmons Company to the defendants in error for goods to the amount of \$1,891.02, which had been sold by the Siegels to the Simmons Company after May 10, 1897. If on October 10, 1897, defendants in error owed the Simmons Company \$4,361.05 for "old goods," or \$7,387.13 for "new goods," or \$11,748.18 for both "new" and "old goods," why was not the amount deducted from the amount of indebtedness embraced in the chattel mortgages? The chattel mortgages were given to secure not only rent and borrowed money, but \$1,891.02 for merchandise sold and delivered by defendants in error to the Simmons Company after May 10, 1897. The fact that the Simmons Company owed this \$1,891.02 to the defendants in error for merchandise on October 10, 1897, shows that the defendants in error did not then owe the Simmons Company anything for merchandise undelivered; otherwise an offset would have been made, and the chattel mortgages would not have been executed for the amount there-

in specified. Upon this subject the Appellate Court in their opinion well say: "He [H. P. Simmons] testified that the goods in question were not delivered. It seems almost incredible that, if this testimony is true, he would not have insisted that the Simmons Company should be credited with the amount of these goods before giving the mortgages. No other reasonable explanation can be made of the failure to include this alleged liability in the settlement which resulted in the giving of these mortgages, under the evidence in this record, than that no such liability then existed. If such a liability existed, why was not the amount of \$1,891.02 for merchandise purchased after May 10, 1897, included in these mortgages, set off as against this alleged claim? To us, the whole evidence considered, the only explanation of the giving of these notes and mortgages, without a mention of this alleged claim, is that the Siegels were not indebted to the Simmons Company to any amount after May 10, 1897."

It is said that the Simmons Company was insolvent on May 10, 1897, and had no right to release F. Siegel & Bros. from their obligation to pay an indebtedness then existing to the Simmons Company. The evidence does not establish the fact that on May 10, 1897, when the release was executed, the Simmons Company was insolvent. On the contrary, the Siegels agreed to advance them money until the fall of 1897, when, as W. A. Simmons stated, he would be able to obtain in Europe an additional capital of \$100,000 to invest in his business. Business men, like the Siegels, would not have agreed to advance to the Simmons Company money for a period of upwards of six months after May 10, 1897, if they had believed that that company was insolvent on May 10, 1897. Moreover, we find no evidence in the record that the claims of these creditors, whose judgments were obtained long after the settlement of May 10, 1897, were in existence on May 10, 1897. Where a conveyance is alleged to be made in fraud of the rights of creditors, the creditors injured are those whose claims exist at the time of the conveyance. Only creditors having claims when the fraud is committed can avoid such conveyances. In *Mixell v. Lutz*, 34 Ill. 382, it was said (page 387): "If the conveyance was made before the indebtedness was incurred, then there was no fraud, as there was no design to hinder or delay creditors at the time; and the credit was not given upon the supposition that this property could be rendered liable for its payment." In *Seaman v. Bisbee*, 163 Ill. 91, 45 N. E. 208, it was held that a husband having conveyed his property to his wife without consideration, the conveyance could not be attacked by creditors whose debts did not exist at the time of the voluntary conveyance. See, also, *Wooldridge v. Gage*, 63 Ill. 157; *Moritz v. Hoffman*, 35 Ill. 553; *Tunison v. Chamblin*, 88 Ill. 378. It is not sufficient that

other creditors are prejudiced by such a conveyance or release, but it must be shown that the creditors attacking the fairness of the transaction had existing claims. There is nothing in the evidence in this record, so far as we have been able to find, which shows when the indebtedness of the Simmons Company to the present plaintiffs in error first came into existence. Moreover, according to the testimony of W. A. Simmons, as above referred to, there was a good and valid consideration for the release of May 10, 1897, and it cannot be regarded as a mere voluntary release, executed without consideration. But these views are expressed upon the supposition that the testimony of W. A. Simmons is a correct statement of the terms of the settlement of May 10, 1897, or May 9, 1897. According to the preponderance of the evidence, however, as we read it, the release of May 10, 1897, was executed, not because there was to be a delivery of part of the goods which defendants in error had agreed to deliver, but because there had been a delivery of all the goods under both contracts, which the defendants in error had agreed to deliver. In other words, the delivery of the goods, amounting to between \$10,000 and \$12,000, made in May, 1897, was in discharge of the two balances due upon both contracts, amounting to \$11,748.18. This being so, there was no release of the indebtedness of the defendants in error to the amount of \$7,387.13 upon the fulfillment of certain conditions, but there was a discharge of a full indebtedness of \$11,748.18 by the actual delivery of goods to that amount.

Counsel for the plaintiffs in error say that, if goods had been delivered in discharge of this indebtedness, entries to that effect would have been made upon the books of the Simmons Company. It appears that no such entries were made. Joseph Siegel testifies that, as both of the merchandise contracts had been settled, the Siegels did not consider it necessary to charge the job lot of goods delivered in May 1897, against the Simmons Company, but that the matter was allowed to stand open to be charged directly to The Grand when its affairs should be all settled. His testimony is to the effect that when both contracts were closed by the delivery of one lot of merchandise, and by an agreement that this should cover all merchandise then due under both contracts, F. Siegel & Bros. did not deem it necessary to charge the Simmons Company's account. The written memorandum, executed on May 10, 1897, was sufficient evidence of a settlement of the matter without any entries upon the books, although it would have been well to have made such entries in addition to the acceptance of the release. We agree with what the Appellate Court say upon this subject in their opinion delivered upon the decision of this case, where they use the following language:

"Much stress is laid by appellees' counsel upon the fact, which appears from the evidence, that no entry of the delivery of these goods was made upon the books of Siegel & Bros. We have fully considered the fact, which is not without importance, but think it cannot overcome the other, and to us convincing, evidence to which we have referred, and the further facts that no charge of fraud whatever is made in the pleadings against the Siegels, and they were merely closing up the affairs of The Grand, a corporation that was going out of business, and which they controlled."

Upon a careful examination of all the evidence in the record, we are satisfied that the defendants in error were not indebted to the Simmons Company, as charged by the plaintiffs in error. Accordingly, the judgment of the Appellate Court, reversing the circuit court and affirming the findings of the master, is affirmed.

Judgment affirmed.

(213 Ill. 170)

CHICAGO & M. ELECTRIC RY. CO. v. ULLRICH.

(Supreme Court of Illinois. Dec. 22, 1904.)

NEGLIGENCE—INJURIES—FUTURE DAMAGES—INSTRUCTIONS.

1. A plaintiff in an action for personal injuries cannot recover for future suffering unless it is reasonably certain to result from his injuries.

2. In an action for personal injuries, an instruction that in determining plaintiff's damages the jury should consider such future suffering and loss of health as they may believe she would sustain was not erroneous, on the theory that it did not limit the jury to such future damages as were shown by the evidence, but permitted them to speculate.

3. Where, in an action for personal injuries, the evidence was conclusive that at the time of trial plaintiff had not recovered from her injuries, it was proper to instruct on future suffering.

Appeal from Appellate Court, First District.

Action by Paula F. Ullrich against the Chicago & Milwaukee Electric Railway Company. From a judgment of the Appellate Court affirming a judgment in favor of plaintiff, defendant appeals. Affirmed.

Fayette S. Munro (M. F. Gallagher, of counsel), for appellant. James J. Barbour, for appellee.

CARTWRIGHT, J. The Appellate Court for the First District affirmed a judgment recovered by appellee in the circuit court of Cook county against appellant for damages on account of personal injuries received in a collision between two cars of appellant, in one of which she was riding as a passenger. The only error alleged by counsel is the giving to the jury of the following instruction at the request of plaintiff: "The court in-

¶ 1. See Damages, vol. 15, Cent. Dig. § 236.

structs the jury that if you find for the plaintiff you will be required to determine the amount of her damages. In determining the amount of damages the plaintiff is entitled to recover in this case, if any, the jury have a right to and they should take into consideration all the facts and circumstances as proven by the evidence before them; the nature and extent of plaintiff's physical injuries and resulting from the street car collision in question, if any, so far as the same are shown by the evidence; her suffering in body and mind, if any, resulting from such physical injuries, and such future suffering and loss of health, if any, as the jury may believe, from the evidence before them in this case, she has sustained or will sustain by reason of such injuries; her loss of time and inability to work, if any, on account of such injuries; and may find for her such sum as, in the judgment of the jury, under the evidence and instructions of the court in this case, will be a fair compensation for the injuries she has sustained or will sustain, if any, so far as such damages and injuries, if any, are claimed and alleged in the declaration." The objections to the instruction are, first, that it did not correctly state the law as to future damages; second, that it was improper to give it, because there was no evidence upon which to base it. It is acknowledged that future damages may properly be assessed where the evidence shows that they are reasonably certain to result from the injury. The action being for a single wrong, the plaintiff is entitled to recover all damages, present or prospective, which necessarily result from the injury, and a part of such damages is future pain and suffering and inability to labor. The evidence must show that it is reasonably certain the plaintiff will suffer such damages, and the nature and extent thereof, and the assessment of damages must be based upon such evidence. The first objection to the instruction is that it did not limit the jury to such future damages as the evidence showed were reasonably certain to result from the accident, but permitted them to speculate as to such damages, and to consider merely possible or probable damages. The reply of counsel for appellee to this argument is that the court has repeatedly approved of this instruction as a correct statement of the law. It is true that substantially the same instruction has been

before the court in different cases, where various objections to it were considered; but the particular objection now presented has not heretofore been made. Objections not made and questions not raised are not considered, and each decision must be regarded only as deciding the question presented for decision. We do not think, however, that the instruction is subject to the objection now made. A plaintiff cannot recover damages for future suffering which is not reasonably certain to result from his injury. 13 Cyc. 138-144. A mere possibility, or even a reasonable probability, that future pain or suffering may be caused by the injury, or that some disability will result therefrom, is not sufficient to warrant an assessment of damages. But we do not understand that this instruction authorized the jury to allow such damages. The damages are to be such as the jury believe, from the evidence, the plaintiff will sustain; not such as are possible or probable. If the evidence shows that the plaintiff will sustain damages in the future, they may properly be allowed, and that is the purport of the instruction.

The second objection is that there was no evidence that it was reasonably certain that the plaintiff would suffer in the future in mind or body. The evidence was conclusive that at the time of the trial she had not recovered from her injuries, and it necessarily followed that there would be future damages to some extent. The only debatable question was as to how long and to what extent she would suffer in the future, and that question was necessarily left to the jury to be determined from the evidence. There was evidence on which to base the instruction, and the case was not like that of *Illinois Iron & Metal Co. v. Weber*, 196 Ill. 526, 63 N. E. 1008, where the jury were authorized, by an instruction, to speculate on the possibility of damages being suffered six years after the trial, without any evidence that such a result was even probable.

Appellee's counsel asks us to award damages to her on the ground that the appeal was taken merely for delay. A similar motion was made and denied in the Appellate Court, and we are not satisfied that the purpose of the appeal was delay. The motion is therefore denied. The judgment of the Appellate Court is affirmed.

Judgment affirmed.

(213 Ill. 178)

MORTIMER et al. v. POTTER.

(Supreme Court of Illinois. Dec. 22, 1904.)

WILLS—CONSTRUCTION—NATIONAL BANKS—INSOLVENCY—ENFORCEMENT OF STOCKHOLDER'S LIABILITY—LIMITATIONS—REMEDY IN EQUITY—APPEAL—REVIEW—QUESTION NOT RAISED BELOW.

1. A testator gave all of his estate to trustees, and provided with reference to certain bank stock that they were to pay his wife all dividends that might be declared "during the time last mentioned upon the ten shares of stock," etc., and the evidence showed that she never claimed title to the stock, but that it was treated as belonging to the estate, and that the dividends thereon were paid to the trustees until the bank ceased to pay the same. *Held*, that she was only entitled to the dividends declared thereon, and that the shares belonged to the estate.

2. The statutory limitation as to the time for the presentation of claims against an estate does not apply to the remedy provided by Rev. St. U. S. § 5152 [U. S. Comp. St. 1901, p. 3465], for enforcing against a decedent's estate its liability for the amount of national bank stock belonging thereto, and the estate is liable so long as its assets can be reached.

3. It cannot be urged on appeal that the remedy of a complainant was at law, and not in equity, where such question was not raised either by demurrer or answer to the bill.

4. The complete and adequate remedy of a national bank receiver against a trustee and distributees of a decedent's estate to collect an assessment on stock for which the assets of the estate were liable is in equity.

Appeal from Appellate Court, First District.

Bill by Edwin A. Potter against William E. Mortimer and others. The bill was dismissed for want of equity, and complainant appealed to the Appellate Court. The decree was reversed, and defendants appeal. Affirmed.

Kerr & Kerr, for appellants. Elmer H. Adams (Edmund W. Froehlich, of counsel), for appellee.

WILKIN, J. Appellee filed a bill in the superior court of Cook county against appellants to collect an assessment upon 10 shares of the capital stock of the National Bank of Illinois, owned by Charles Kavanagh, deceased. On answer filed and replication thereto the cause was heard on an agreed statement of facts, and the bill dismissed for want of equity. The receiver appealed to the Appellate Court for the First District, which reversed the decree of the superior court, and remanded the cause, with directions. To reverse that judgment the defendants below have perfected this appeal.

It appears from the stipulation of the parties that on and prior to April 1, 1873, Charles Kavanagh owned 10 shares of the capital stock of the National Bank of Illinois, of the par value of \$100 each. He died on that date, leaving a will, afterward probated, and his estate was administered upon and settled in due course of administration about two years after his death. By the provisions of his will he created a trust vesting

all of his property in two trustees, William E. Mortimer and his widow, Lydia Kavanagh, which trust was to continue for and during the lifetime of his wife. The third clause of the will is as follows: "To pay unto my said wife, from the time of my decease as long as she shall live, an annuity of \$2,000 a year, and also all dividends that may be declared during the time last mentioned upon the ten shares of stock in the National Bank of Illinois now owned by me." He also directed by his will that there should be paid to such person or persons as his wife by her will should name and appoint the sum of \$10,000. After other bequests, the Chicago Home for the Friendless, the Chicago Relief & Aid Society, and the Chicago Christian Union were made residuary legatees. On December 21, 1898, the National Bank of Illinois failed, and a receiver was duly appointed for it, to which receivership appellee afterwards succeeded. On March 14, 1899, the Comptroller of the Currency ordered that an assessment of 100 per cent. of the capital stock of said bank be levied, to become payable April 14th of that year. On August 24th of the same year (1899) the widow, Lydia Kavanagh, died testate, having nominated Mary E. Holden as her appointee under the power in her husband's will to receive the \$10,000, and whom she also nominated as her executrix and sole legatee and devisee. Her will was duly admitted to probate soon after her death, and the estate was declared settled in due course of administration on June 10, 1902. During the administration the National Bank of Illinois filed no claim against her estate. After her death, and after the order had been made by the Comptroller of the Currency levying said assessment, Mortimer, the sole surviving trustee, distributed the remaining assets of the estate of Charles Kavanagh in his hands according to the provisions of the said last will and testament of Charles Kavanagh, paying to each of the residuary legatees the sum of \$1,500. The assessment upon the capital stock remaining unpaid, with no funds in the hands of the trustee with which to pay the same, this bill was filed. By their answer the defendants, among other things, set up that by the acceptance of the widow under the third clause of her husband's will the capital stock in question was segregated from the general body of his estate, whereby she alone became liable for the assessments thereon. By the judgment of the Appellate Court remanding the cause the superior court was directed to enter a decree for the complainant for \$1,000, with interest from April 14, 1899, against all of the defendants—primarily against the trustee as such, secondarily against the legatees and distributees, ultimately against the trustee personally.

It is argued on behalf of appellants that the 10 shares of stock, by the will of Charles Kavanagh, accepted by his widow, became

the property of Lydia Kavanagh, and ceased to belong to his estate; hence this proceeding cannot be maintained. If the position is tenable, other questions in the case become unimportant. We will therefore consider it first. The determination of the question must turn upon the construction to be given to the third clause of the will of Charles Kavanagh. Did the testator thereby intend to give his wife the stock? He gave all of his estate to trustees for certain expressed purposes. They were to pay his wife all dividends that might be declared "during the time last mentioned upon the ten shares of stock," etc. By this language the wife is not even given the custody or control of the stock itself, much less the power or right to dispose of it as her own. She was simply entitled to receive the dividends declared upon it during her lifetime. It seems to us too clear for argument that the testator did not intend to give her the stock. We do not agree with counsel for appellants that Mrs. Kavanagh had a life estate in the stock. The title to the same was in the trustees or executors of the estate of Charles Kavanagh. It is perfectly clear from the evidence that she never claimed the stock, nor was it dealt with, either by her or her co-trustee, William E. Mortimer, as other than the property of the estate of Charles Kavanagh, deceased, the dividends being received for on the bank's books at all times in that way. From 1884 until the bank ceased to pay dividends, in 1896, checks were drawn for the dividends, payable to Charles Kavanagh, and indorsed "Lydia Kavanagh, Trustee for the Estate of Charles Kavanagh, Deceased." We think that the Appellate Court properly held that the shares of stock belonged to the estate of Charles Kavanagh, deceased, and not to his widow, Lydia Kavanagh.

The appellant Mortimer, after he knew that the assessment had been ordered, divided the remaining estate in his hands among appellants, as above stated. Section 5151 of the federal statute [U. S. Comp. St. 1901, p. 3465] under which the liability here sued for is established is in the following language: "The shareholders of every national bank shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and acknowledgments of such association to the extent of the amount of their stock therein at the par value thereof, in addition to the amount invested in such shares." Section 5152 of the same statute [U. S. Comp. St. 1901, p. 3465] is as follows: "Persons holding stock as executors, administrators, guardians or trustees shall not be personally subject to any liabilities as stockholders, but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward or person interested in such trust funds would be if living and competent to act and hold the stock in his own

name." Under these sections the executors or trustees were liable for this assessment the same as Kavanagh would have been if living, and in view of the fact that Mortimer had distributed the estate leaving the claim unpaid, and each devisee had received more than the amount of the entire assessment, they are each liable therefor in equity.

It is next insisted by appellants that, even though this claim is valid against the estate, yet it cannot be enforced because it is barred by the statute of limitations, not having been presented for probate against the estate of Kavanagh within two years after the granting of testamentary letters. The claim against his estate is not by virtue of the laws of this state, but under the provisions of the foregoing federal statute. In addition to this, at the time the administration of his estate was closed the claim had not accrued. The liability arose more than 20 years after the expiration of the 2 years within which claims could have been filed against it in the probate court. But the remedy under the act of Congress is applicable, and the estate is liable under its provisions, so long as the assets can be reached. The case of *Zimmerman v. Carpenter* (C. C.) 84 Fed. 750, involved this same question. It was there claimed that a plea of the statute of limitations, based upon the statute of the state of South Dakota regulating the time in which claims should be presented for allowance or rejection against the estate, barred the claim there presented. In considering the question the court said: "Any theory upon which it is sought to maintain that the claim here attempted to be enforced is an ordinary claim against the estate of the deceased, to be represented and allowed in the manner required by the laws of the state of South Dakota, and, if not so presented and allowed, to be forever barred by the statute, involves a total misconception of the object, meaning, and effect of sections 5151 and 5152 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 3465]. Congress provided by these sections that the estate of the testator in the hands of an executor should be liable in like manner and to the same extent as the testator would be if living and competent to act and hold the stock. By the language of section 5152 the death of the testator does not in any way affect the liability of the estate, except, if no liability on the stock arises until after the estate is fully distributed, then there would be no estate to be charged." Under the facts in this case the liability attached while the assets were in the hands of the trustee, and therefore came directly under the provisions of section 5152, *supra*.

It is next insisted that the remedy of appellee was at law, and not in equity. We do not find that this question was raised either by demurrer to the bill or the answer thereto. It cannot, therefore, be urged now. The decisions of this court to that effect are

numerous. The reasons for the practice are manifest. We entertain no doubt, however, that the complainant's complete and adequate remedy was in a court of equity, where, only ample and complete justice could be done to all parties interested. The creditors of the defunct bank were entitled to the benefit of the assessment guaranteed to them by the act of Congress, and the distributees had no just claim to the bequests given them without the burden attached to the residuary assets in the hands of the trustee. Why should they receive the full benefit of the bequests given them by the will of Charles Kavanagh, and at the same time be relieved of the equitable lien which attached to the residue of the estate in the hands of Mortimer, the trustee?

We think the direction of the Appellate Court in its judgment remanding the cause to the superior court does justice to all parties here interested. Its judgment will accordingly be affirmed.

Judgment affirmed.

(213 Ill. 612.)

PEDDECORD v. VENNIGARHOLZ et al.
(Supreme Court of Illinois. Dec. 22, 1904.)

DISMISSAL—WANT OF PROSECUTION.

1. After all parties were before the court, and defendants had demurred, complainant made no effort for two years and seven months to obtain a hearing, and on the death of one of the defendants procured leave to make his executor a party, but did not do so, and two months thereafter, and after notice to complainant's solicitors that the case would be called, it was dismissed for want of prosecution. No motion was made to have this order vacated until forty-four days later, and only two days before the end of the term. *Held*, that refusal to vacate the order was not error.

Error to Circuit Court, Macon County; W. C. Johns, Judge.

Action by Elizabeth F. Peddecord against Isabella Vennegarholz and others. From a judgment dismissing the cause for want of prosecution, plaintiff brings error. Affirmed.

I. A. Buckingham (Lemon & Lemon, of counsel), for plaintiff in error. Hugh Crea, Charles C. Le Forgee, and Hugh W. Housum, for defendants in error.

BOGGS, J. The circuit court of Macon county ordered that the bill in chancery filed by the plaintiff in error to contest the will of Jasper J. Peddecord, deceased, should be dismissed for want of prosecution, and the entry of the order is assigned as for error. The bill was filed on the 20th day of September, 1900. On the 21st day of the same month service of summons was had on all of the defendants except Emeline W. Rurde, who was a nonresident of the state. The complainant proceeded to obtain service on her by publication and mailing of a notice to her, etc., and on the 19th day of January, 1901, a general demurrer was filed

to the bill on behalf of all of the defendants thereto. The cause was continued from term to term, without any effort on the part of any of the parties to have the demurrer decided, for more than two years. At the May term, 1903, the cause was continued on motion of the plaintiff in error, without any action on her part to have the demurrer disposed of, or have the cause brought to a hearing, either on issues of law or fact. No further steps were taken in the case until December 18, 1903, when the plaintiff in error, complainant below, suggested the death of Richard G. Peddecord, one of the defendants to the bill, and who was nominated executor in the will sought to be contested, and asked for and was granted leave to make Michael F. Kanan, executor of said Richard G. Peddecord, deceased, a party defendant to the bill. It does not appear that the bill was amended introducing the said Kanan, executor, etc., as defendant, or that summons was issued to be served upon him, or that any effort whatever was made to bring him within the jurisdiction of the court. This was the condition of the record when the January term, 1904, of the circuit court of Macon county was convened. On the thirty-first day of said January term, being the 19th day of February, 1904, on a regular call for trial of the cases on the chancery docket, this cause was reached and called, and then it was that the order was entered dismissing the proceeding for want of prosecution. The plaintiff in error took no action in the proceeding until the 4th day of April, 1904, when, the said January term of said court still being in session, being the forty-first day of said term, she caused a motion to be entered to set aside the order dismissing the cause, which, as aforesaid, had been entered on the 19th day of February, 1904. The court denied the motion.

We are unable to say this action of the court was improper or inconsiderate. The record, considered as a whole, discloses inexcusable delay and gross negligence on the part of the plaintiff. She permitted the cause to stand for two years and seven months, during which time all defendants to the bill were living and were before the court. She suggested the death of one of the defendants, and obtained leave to make the necessary new party, but did not amend her bill under the order granting leave or procure summons to be issued, or otherwise attempt to bring in the necessary new defendant. Her solicitors were advised, as appears from the record, at the October term, 1903, that the chancery docket would be called for trial during that term, after the criminal and common-law cases had been once called for hearing, and at the beginning of the January term the court again advised counsel that the chancery cases would be called for trial after the first call of criminal and common-law cases. The cause was called for trial on the thirty-first day of the January

term, being the 19th day of February, 1904, and no steps had yet been taken to prepare the case for presentation or for hearing, either upon issues of law or fact. On this day the order of dismissal was entered. No effort was made to have the order vacated until the 4th day of April, which was the forty-first day of the term, and being forty-four days after the order of dismissal had been entered, and being the last day but one before the adjournment of the court for the term. Had the motion to set aside the order of dismissal been entered at an earlier day, so that the cause could have been heard during the term, it would have been entitled to greater consideration. The delay in not asking the vacation of the order until the close of the court was consistent with the dilatory course pursued by the plaintiff in error during all the time of the pendency of the suit, and we can but repeat that, when the whole record is considered, the chancellor was justified in concluding that the plaintiff in error did not desire to have the cause heard and determined, but desired it should remain pending for some ulterior purpose. It was properly dismissed for want of prosecution. The judgment is affirmed.

Judgment affirmed.

(213 Ill. 141.)

THOMAS v. WATERS et al.

(Supreme Court of Illinois. Dec. 22, 1904.)

COURTS — ILLINOIS SUPREME COURT — APPELLATE JURISDICTION—QUESTIONS OF FREEHOLD.

1. No freehold is involved in a controversy between the administrator of a decedent's estate and the heirs as to whether land is subject to sale for the payment of debts of the estate, and the Supreme Court has no jurisdiction over an appeal by the administrator from an order dismissing his petition.

Appeal from Pope County Court; W. A. Whiteside, Judge.

Petition by Frank D. Thomas, administrator of Pleasant G. Waters, deceased, against James F. Waters and others. From an order dismissing the petition, plaintiff appeals. Dismissed.

D. G. Thompson and W. D. Beames, for appellant. Wm. H. Moore and Chas. Durfee, for appellees.

CARTWRIGHT, J. The county court of Pope county dismissed the petition of appellant for an order to sell lands owned by Pleasant G. Waters at the time of his death to pay debts of his estate, and this appeal was taken. The defendants were the heirs at law of Pleasant G. Waters and a tenant occupying the land under them. The petition alleged that Pleasant G. Waters owned the land at the time of his death, that the defendants were his heirs and the said tenant, and that the heirs were in possession of the land. The defendants, by their answer,

alleged that they inherited the same from him, and that they were in possession, as alleged in the petition. There was no claim of an adverse title by any one to be adjudicated, and the only controversy was whether the land was subject to sale for the payment of debts of the estate. No freehold is involved in such a case, and we have no jurisdiction to hear an appeal from the order of dismissal. *Richie v. Cox*, 188 Ill. 276, 58 N. E. 952. The appeal is dismissed.

Appeal dismissed.

(212 Ill. 595.)

TERHUNE et al. v. PORTER.

(Supreme Court of Illinois. Dec. 22, 1904.)

EJECTMENT—PLAINTIFF'S TITLE—RECOVERY ON HIS TITLE—PAPER TITLE—SUFFICIENCY.

1. In ejectment a plaintiff must recover, if at all, upon the strength of his own title.

2. A conveyance of land by one in possession is prima facie evidence of title.

3. Conveyances from strangers to the valid record title of vacant lands did not draw to the grantee constructive possession, available in an ejectment suit against one other than the owner of the paramount title.

Appeal from Circuit Court, Franklin County; P. A. Pearce, Judge.

Ejectment by Henrietta S. Porter against F. M. Terhune and others. From a judgment for plaintiff, defendants appeal. Reversed.

C. H. Layman, for appellants. Joplin & Spiller, for appellee.

CARTWRIGHT, J. This is an action of ejectment, in which appellee recovered a judgment against appellants for the possession of two 40-acre tracts of land in Franklin county. In her declaration plaintiff claimed title to the lands in fee, and the defendants filed pleas of not guilty and a former suit pending. The cause was heard by the court without a jury, which had been waived.

In ejectment a plaintiff must recover, if at all, upon the strength of his own title. *Doe ex dem. Moore v. Hill*, Breese, 304; *Hague v. Porter*, 45 Ill. 318. Unless the plaintiff proved title in herself, the defendants could not be disturbed in the possession of the lands, whether they had any title or not. It was proved and is admitted that the lands in controversy were swamp lands, the title to which was originally in Franklin county, under the swamp land act. Plaintiff offered in evidence a connected chain of conveyances beginning with a deed executed in 1861 by George H. Shotwell and wife to David B. Sexton; and ending with a conveyance to plaintiff from Mary H. Porter dated November 16, 1897, but she did not connect herself in any way with the title of the county. She also proved payment of taxes from 1868 to 1898 by the dif-

¶ 2. See Ejectment, vol. 17, Cent. Dig. § 221.

ferent persons to whom said conveyances were made. None of the parties executing such conveyances were ever in possession of the lands. They were vacant and unoccupied up to February 1, 1901, when the defendants took possession under a tax deed of that date, and they afterward cleared and put in cultivation a part of the land. So far as appeared from the evidence, the chain of conveyances under which the plaintiff claimed were executed by strangers to the title, who had no title to convey. A conveyance by one in possession is *prima facie* evidence of title. *Coombs v. Hertig*, 162 Ill. 171, 44 N. E. 392. But the plaintiff and the persons in the chain of conveyances leading to her having never been in possession nor connected with any source of title, the conveyances were no evidence of title.

Counsel say that, the lands being vacant, the legal title drew after it constructive possession, which would continue until actual interference with it by the owner of the paramount title. Plaintiff did not prove that she had the legal title, and the rule of law invoked does not apply. As the plaintiff did not prove a *prima facie* title, it is immaterial whether defendants had any title or not. The judgment is reversed, and the cause remanded.

Reversed and remanded.

(213 Ill. 104)

BUTMAN v. BUTMAN et al.

(Supreme Court of Illinois. Dec. 22, 1904.)

VENDOR AND PURCHASER—SPECIFIC PERFORMANCE—DEATH OF VENDOR—ACTIONS AGAINST HEIRS—STATUTE OF FRAUDS—AUTHORITY OF AGENT—DECEDENTS' ESTATES—SALES OF LAND—APPEARANCE—WAIVER OF PROCESS—PARTIES.

1. The interposition of demurrers and an unlimited appearance by defendants give the court complete jurisdiction, although there was no personal service.

2. An administratrix suing the heirs at law to compel them to specifically perform a contract made by decedent for the sale of real property may join herself in her personal right, as heir at law, as complainant.

3. Where a decedent made a contract for the sale of land, and the purchaser was ready and willing to perform the same, and had deposited a check for the money in escrow, the administratrix of the decedent was without any remedy at law in the premises, and could maintain a suit in equity against the heirs at law to compel them to specifically perform the contract made by the decedent.

4. *Hurd's Rev. St. 1903*, c. 29, § 4, providing that the representatives of a decedent who made a contract for the sale of land may obtain an order for a conveyance upon giving notice to the party to whom the deed is to be made, requires the service of notice on the vendee, but does not require such service on the heirs of the deceased vendor when they refuse to convey, and the vendee is ready and willing to perform.

5. It is immaterial whether an agent had original written authority to sell land or not, where the principal, with full knowledge of the sale

and of the terms thereof, ratified the same in writing.

6. Where agents had authority to make a sale of land on certain terms, and entered into a contract with a purchaser whom they knew, such contract was binding on the principal, although he did not know who the purchaser was.

7. The right of an administratrix to sue the heirs to compel them to specifically perform a contract of decedent for the sale of land is not dependent on the fact that the funds to be derived from the sale are necessary for the payment of the debts of the decedent.

8. The fact that a widow instituted a suit for specific performance of a contract for the sale of her deceased husband's land, that she might obtain, under the statute of distributions, the whole of the proceeds of the sale, as personalty, whereas, preserving the property as realty, she would be entitled to only one-half thereof, does not affect her right to specific performance as against the heirs.

Appeal from Circuit Court, Macon County; James W. Craig, Judge.

Bill by Florence Butman, as administratrix of Jonathan W. Butman, deceased, and in her own right, against Thomas H. Butman and others. From a decree dismissing the bill, complainant appeals. Reversed.

Appellant, Florence Butman, as administratrix of the estate of Jonathan W. Butman, deceased, and in her own right as widow and heir at law of said Butman, filed a bill in chancery to the January term, 1904, of the circuit court of Macon county, for the purpose of compelling the specific performance of a contract to convey certain real estate. The bill alleges that Butman in his lifetime owned a certain residence property in Decatur, with a frontage of 65 feet on West William street; that during his lifetime he made a contract with one John N. Hill to sell the said property for \$6,000, but that, before the contract could be consummated by making a deed, Butman departed this life, on October 12, 1903. It is also alleged that Butman died intestate, leaving no child or children, or descendants of a child or children, him surviving, but left Florence Butman, his widow, and Florence Butman and the appellees, Thomas H. Butman, Albert A. Kendall, Estella J. Vant, Millicent L. Barker, Amey Warner, Henry W. Jameson and William Jameson, as his sole and only heirs at law. The bill further alleges that John N. Hill, the vendee, is willing that the contract shall be performed, and to accept a deed for the property, if he can obtain a deed from all the heirs, or through a decree of court, but the heirs aforesaid refuse to make a deed for the property unless the proceeds are treated as real estate. The bill alleges that the proceeds of the sale and the right to enforce the contract are choses in action, to be collected by the administratrix, and to be accounted for in due course of administration.

The alleged contract is set out in the bill, and consists of numerous checks, telegrams, letters, and memoranda. The bill alleges that Butman authorized his agents, Jesse Le Forgee & Co., to sell the property for \$6,000;

¶ 1. See *Appearance*, vol. 3, Cent. Dig. § 37.

that they procured a purchaser for the property, in the person of John N. Hill, who agreed to pay \$6,000 cash upon delivery of a deed. As an evidence of said contract, and to make the same binding, John N. Hill on September 22, 1903, gave his check to Jesse Le Forgee & Co., payable to the order of Butman, for \$100, and the check recites on its face, "On purchase of his property through the agency of Jesse Le Forgee & Co." Jesse Le Forgee & Co. accepted the check on behalf of Butman as a binding payment upon the purchase price of the property. On the same day Le Forgee & Co. telegraphed to Butman, who was then in Cleveland, Ohio: "Have sold your property for \$6,000; answer if all right." On the next day, not having received a reply, they sent a second telegram: "Telegraphed you yesterday your property is sold for \$6,000; did you get it? Answer." Butman telegraphed a reply to his agents: "Your telegram received this morning; all right; letter coming to-day." At the same time Butman wrote his agents, confirming the telegrams, saying: "It is all right. * * * Glad you have found a customer. Try and bind the bargain so there will be no backing out. * * * Is it a cash or part time and part cash?" On receipt of this letter Le Forgee & Co. wrote Butman, saying: "We have taken a cash payment on the sale of your property that fully binds the party. * * * In regard to the price, it is \$6,000 cash on the delivery of the deed, you to furnish an abstract of title down to date showing a good title." On the same day, before receiving this last letter, Butman again wrote Le Forgee & Co.: "I told you the sale was all right, and told you to make arrangements with Mr. Hill about leaving the house. I told him I would give him thirty days, and more if the one that bought it could arrange with him to let him for any longer time." Hill had been occupying the house as a tenant. On September 25, 1903, Butman received the letter from Le Forgee & Co. in regard to the terms of sale, and again wrote Le Forgee & Co., saying he expected to come home the last of the following week, and "it will be all right when I get there."

The bill further alleges that, in pursuance of the contract, Hill, on October 8, 1903, before Butman's return, deposited a check in escrow with the Millikin National Bank, to the order of Butman, for \$6,000, to be delivered upon the execution of a deed and the surrender of the \$100 check, and that Le Forgee & Co. were notified of the deposit of the check. It is also alleged that the property mentioned in the letters, telegrams and checks as "your property," "his property" and "the Hill property" was the property which is specifically described in the bill, which had been occupied by Hill as a tenant, but whose lease expired October 1, 1903. It is also alleged that after October 1, 1903, Hill remained in possession, claiming under

his contract, and that he had more than sufficient money in the bank to pay the check. It is further alleged that Hill was shown all of the letters and the telegrams received by Le Forgee & Co. from Butman, and knew that Butman had therein and thereby ratified and confirmed the sale made by the agents to him. The bill alleges that by reason of the letters, telegrams, and checks a contract was created, binding upon Hill and Butman, and that upon Butman's return to Decatur upon October 9, 1903, he was informed that Hill was the purchaser, but that, before the papers could be prepared to consummate the sale, Butman departed this life.

A general and special demurrer was filed by the heirs to the bill, and the same was sustained by the court. An amended bill was also filed, to which a demurrer was also sustained. Appellant filed a second amended bill, and her suit was dismissed for want of equity. Appellant prayed an appeal from the order sustaining the demurrer to the second amended bill, and dismissing the amended bill for want of equity, to the Supreme Court, and has assigned the following errors: (1) The court erred in sustaining the demurrer to the second amended bill of complaint; (2) the court erred in dismissing the said amended bill of complaint for want of equity; (3) the court erred in entering a decree for costs against the complainant.

Hugh Crea and Hugh W. Housum, for appellant. E. S. McDonald, for appellees.

RICKS, C. J. (after stating the facts). As this bill was dismissed upon demurrer, and the assignments of error relate only to the action of the court in sustaining the same, our consideration will be directed to the grounds of the demurrer.

Ten special grounds were urged. In the first the point is made that as the service was by publication, and the proceeding one in personam, and not in rem, the court did not have jurisdiction of the persons of the defendants. To this ground it is sufficient to say that all of the defendants, except those personally served and defaulted or personally answering, interposed demurrers to the original, amended, and second amended bills, and their appearance in court was unlimited, and the jurisdiction as complete as though there had been personal service. *Protection Life Ins. Co. v. Palmer*, 81 Ill. 88.

In the second ground of demurrer it is urged that there is misjoinder of complainants, in that Florence Butman as administratrix, and Florence Butman in her own right as widow and heir at law of Jonathan W. Butman, are joined. It would be novel to find authorities sustaining the proposition that Florence Butman, as administratrix, could sue herself, as widow and heir, for the enforcement of the contract of the decedent. It is sufficient that the heirs may be

made parties, so that they may be heard and their rights adjusted; and it is immaterial whether they join with the personal representative as complainants, or are made defendants to the bill. *Duncan v. Wickliffe*, 4 Scam. 452; *Burger v. Potter*, 32 Ill. 66.

It is next urged that the appellant had a remedy at law to recover upon the contract. This could not be so. The purchaser did not refuse to perform, but, according to the bill, is now and at all times has been ready and willing and able to perform, while appellant, as personal representative of the decedent, is unable to perform, and has been since the death of the decedent, because of the refusal of the heirs to join in the conveyance. The decedent was to furnish an abstract showing title and make a deed, and the purchaser was to pay when that was done. Before the decedent returned home, and before the deed was required to be made, the purchaser placed a check for the money in escrow, where it has since remained. We have no doubt that this is the proper form of procedure. *Hulshizer v. Lamoreux*, 58 Ill. 72.

As to the next ground, appellees cite and rely upon section 4 of chapter 29 of Hurd's Revised Statutes of 1903, which provides: "The executor, administrator or heirs of any deceased person who shall have made such contract, bond or memorandum in writing, in his lifetime, for the conveyance of land, for a valuable consideration, * * * when such consideration has been paid and fulfilled as aforesaid, or a conveyance ought to be made, may, upon application in writing, obtain such order upon giving notice to the party to whom such deed is intended to be made, and under the same condition as is provided in this chapter." Under this objection it is contended that sufficient is not shown by the bill to bring the case within the requirements of this statute, and it is said, among other things, that no notice was served upon the appellees, and that payment has not been made. The statute does not require service upon appellees, who represent the vendor, but the requirement is that the notice shall be to the vendee. The allegations of the bill are that the vendee is ready and willing to perform, and that the appellees refuse to join in the conveyance, and they are in court, were served by publication, and voluntarily subjected themselves to the jurisdiction of the court. No authority is offered in support of the contention, other than the construction of the statute placed upon it by counsel for appellees, and we are unable to adopt the view of the statute urged by him.

The fifth ground of demurrer is that the bill fails to disclose a valid agency existing between the vendor and Jesse Le Forgee & Co., the agents who sold the property. The bill alleges that the decedent listed the land with the agents for sale; that they did make a sale, notified their principal thereof

and of the terms of the sale; and that he, in various written telegrams and letters signed by him, confirmed and ratified the same. Under such circumstances, it would seem immaterial whether the agent originally had written authority to sell or not. *Fowler v. Fowler*, 204 Ill. 82, 68 N. E. 414. It may be further remarked that the bill is silent as to whether the original authority was written or verbal. The allegation is that "during his lifetime, and shortly prior to his death, the said Jonathan W. Butman listed his real estate with John E. Patterson and Jesse Le Forgee & Co., doing business under the firm name and style of Jesse Le Forgee & Co., as real estate agents in the city of Decatur, and suggested that they procure a purchaser for said real estate." There are also the further allegations, in substance, that the agents did procure a purchaser, and did sell, and these allegations are admitted by the demurrer. The case of *Fowler v. Fowler*, supra, was very similar to the case at bar, and it was there contended that the dismissal of the bill was proper, because the bill did not show upon its face whether the agent was authorized in writing to act, and it was there said (page 108, 204 Ill., page 420, 68 N. E.): "But it will not be presumed that his authority was a mere verbal one, and within the statute of frauds, because the bill does not allege that his authority was in writing. 'The benefit of the statute of frauds as a defense can be taken by demurrer only when it affirmatively appears from the bill that the agreement relied upon is not evidenced by a writing duly signed.' *Hamilton v. Downer*, 152 Ill. 651, 38 N. E. 733. Inasmuch as it does not affirmatively appear from the bill in this case that the authority of Underwood is not evidenced by a writing duly signed, the statute of frauds cannot be used as a defense by demurrer." As we have said, we do not think it material whether the agent's authority was in writing or not, as the principal, with full knowledge of the sale and the terms and conditions thereof, ratified the same in writing, and it is as binding as though he had given written authority in the first instance to make the sale.

The sixth and seventh grounds relied on by appellees are that the letters, telegrams, and various written documents set out in the bill did not constitute a contract of sale for the lands described in the bill. Supporting this contention, the appellees point out that Butman, the vendor, so far as disclosed by the writings, had no communication with Hill, the vendee, and had no knowledge that he had become the purchaser. We do not think this fact, if it is a fact, is controlling. If it should be assumed that the agents had written authority to make the sale, it would be immaterial whether the vendor of the property knew the name of the purchaser or not. If the sale was made by his authority to any person, he

would be bound to perform. The bill clearly disclosed that a sale was made, and that he was apprised of it in all its details, save the name of the purchaser; and, without inquiring as to the identity of the purchaser, he ratified the acts of his agents in such manner as can leave no doubt in the mind of the court that, so far as the vendor was concerned, the name of the purchaser was to him a matter of indifference. The price, the terms of sale, and the time of performance were the matters upon which he dwelt, and not the identity of the purchaser. The object uppermost in his mind seemed to be that the purchaser, whoever he might be, would be so bound and in such condition as he could and would pay the purchase money, as in his first letter he says: "Glad you have found a customer; try and bind the bargain so there will be no backing out." The bill alleges that, before Mr. Butman returned to Decatur, by arrangements with his agents the purchaser placed in the Millikin Bank, in escrow, his check for the full amount of the purchase money. This cannot be looked upon in any other light than the performance by his agents of his direction to bind the bargain so there would be no backing out. He also in the same letter directed his agents to arrange with Mr. Hill, the occupant of the premises, for vacating them, as he had agreed to give him 30 days' notice of any sale. Taking the letters of Mr. Butman, and giving them their ordinary interpretation, we can come to no other conclusion than that the agents were carrying out and acting within the written authority conferred upon them by the letters. The agents had unmistakable authority to make the sale upon the terms stated, and they knew the purchaser, and what they knew, within their authority, was sufficient to bind their principal.

It is further said that in some of his letters decedent expressed doubt as to the time he would come home, and that from that fact the inference must be drawn that he did not regard the transactions as a sale, but only looked upon them as negotiations for a sale. We do not regard this construction as warranted by the letters, but look upon them as the prudent remarks of one absent from home, whose presence was necessary for the transaction of important business, and yet the exact time of whose return was uncertain, but was not to be beyond a week or so.

By the eighth, ninth, and tenth grounds of demurrer it is urged that the bill does not disclose that the sale was necessary for the payment of debts of the estate; that it does disclose that the appellant is seeking to convert real estate into personal property, so that she may, under the rule of descent, derive a greater portion thereof than she would

if it should remain real estate; and that, as between the parties, the equities require that the property should remain and be treated as real estate. No authority is cited, and none can be, as we believe, sustaining the proposition that a bill for specific performance of this contract could not or should not be allowed unless the funds arising therefrom are necessary for the payment of the debts of the decedent. Whether the property be regarded as real or personal, appellant was materially and directly interested therein in her individual capacity. If treated as real estate, she is the owner of half of it in fee, and, if personal property, the whole of it, subject, of course, in both cases, to the payment of the debts of the decedent. The owner of property may, by deed, will, or other conveyance, dispose of it as to him seems best; but, if he die without making any disposition of it, it takes the course directed by the statute of descent. As to the policy of the statute that gives to the widow of an intestate who leaves no child or children, or descendants thereof, half of his real estate and all of his personal property, that matter is referable to the legislative authority, and not to the courts. We are not authorized to withhold or grant relief upon the ground that we disapprove of or approve the policy of the legislative act. While it is true that many authorities may be found in which it is declared that the courts are vested with a large discretion in the consideration of bills for specific performance, it has been nowhere intimated that their notions of the policy of a valid law shall be in any part the basis upon which such discretion is predicated. The court may take into consideration the effect upon the parties who are interested in the property, under the law, and the result to the property itself, and the equities of the parties as controlled by the law, in the exercise of its discretion. By this demurrer it is in no way pointed out to the court that it will be disadvantageous to the property interests or to the individual interests of those having a legal claim upon this property if the prayer of the bill is granted. It is not shown that the consideration is not fair, that the estate will suffer any prejudice or wrong, or that the creditors who may have claims against the estate will be prejudiced by it. What may be developed upon a trial, we are not called upon to anticipate. It is sufficient that we regard the bill as stating a case to entitle the appellant to the relief prayed. It was error to sustain the demurrer, and the decree dismissing the bill will be reversed, and the cause remanded for such further proceedings as to law and justice shall appertain.

Reversed and remanded.

(212 Ill. 579)

GRAHAM v. BROCK et al.

(Supreme Court of Illinois. Dec. 22, 1904.)

ADMINISTRATION OF ESTATES—SALE OF LAND FOR PAYMENT OF DEBTS—TIME TO FILE PETITION—LACHES—EXCUSE—SUFFICIENCY.

1. Though there is no statutory limitation of the right to file a petition for the sale of the realty of a decedent for the payment of his debts, it must be done within a reasonable time, and a failure to do so for seven years constitutes laches defeating the right, unless a sufficient excuse is given for the delay.

2. A delay for 19 years after the death of an intestate to file a petition for the sale of his land incumbered by the widow's dower for the payment of his debts is not excused by merely showing that the land was practically worthless for many years, and had recently increased in value.

Appeal from Mercer County Court; W. T. Church, Judge.

Petition by William N. Graham, administrator of Benjamin F. Brock, deceased, against Mary E. Brock and others, for an order for the sale of real estate owned by the deceased for the payment of his debts. From a decree dismissing the petition, the petitioner appeals. Affirmed.

I. N. Bassett, for appellant. McArthur & Cooke and Graham & Burgess, for appellees Brock and others. Frank M. Carnahan, for appellee Stephen N. Adams.

CARTWRIGHT, J. The county court of Mercer county dismissed the petition of appellant, administrator de bonis non of the estate of Benjamin F. Brock, deceased, filed in that court against the appellees, praying for an order to sell real estate owned by said Benjamin F. Brock at his death for the payment of debts of his estate, and appellant prosecuted this appeal.

Benjamin F. Brock died intestate on August 30, 1884, leaving the appellee Mary E. Brock his widow, and seven children, his heirs at law. Letters of administration were issued on September 3, 1884, to August L. Craig and James M. Brock, who filed an inventory of the real and personal estate. The chattel property was taken by the widow on her award, leaving a balance due her. Claims were allowed against the estate, which, together with a judgment recovered against the administrators in the circuit court of Mercer county, amounted to over \$5,000. On January 2, 1885, the administrators filed a report showing the condition of the estate, and a petition for an order to sell real estate of the deceased to pay debts. The court found that the widow was entitled to a homestead in a certain block in the city of Aledo and dower in all the real estate, and commissioners were appointed, who assigned to her the homestead in said block, and set off to her as dower certain blocks and lots in Aledo involved in this proceeding. The administrator sold all the real estate under the

decree in that proceeding except the portion set off to the widow for homestead and dower, and the sales amounted to \$703.30. On April 28, 1887, the administrators made a final report showing payment of the expenses of administration, and that all claims, except the widow's award and first-class claims, were wholly unpaid. On August 28, 1887, the administrators were discharged by the court, and nothing was done toward any further administration of the estate until January 4, 1904, when appellant was appointed administrator de bonis non. After the discharge of the administrators all of the property except one block was conveyed to third parties, and that block was conveyed to one of the heirs, in 1898, for a consideration of \$400, by the widow and other heirs. On January 20, 1904, appellant filed his petition for the sale of the lots and blocks set off to the widow for her homestead and dower. It was averred in the petition that the widow had abandoned the homestead in 1899, but appellant afterward dismissed his petition as to the homestead, and the only property involved in the proceeding is that which was assigned to her for her dower. Part of the land was claimed by third parties under conveyances by the widow and heirs, and all of it was claimed under the statute of limitations by virtue of claim and color of title and payment of taxes for seven years. The defendants answered, setting up their claims to the property, and a hearing resulted in the dismissal of the petition.

Nineteen years had elapsed after the death of Benjamin F. Brock and after the original petition was filed for the sale of real estate to pay debts when the petition in this case was filed, and unless a good reason was given for the delay the proceeding was barred by laches. There is no statutory limitation of the right to file such a petition, but it must be done within a reasonable time, and seven years has been adopted by this court as the proper time within which application shall be made. The bar arises from laches rather than legal limitation, and if sufficient excuse is given for the delay the mere lapse of time will not bar the proceeding. The determination of the question must depend largely upon the circumstances of each case. *Bursen v. Goodspeed*, 60 Ill. 277. The explanation offered in the petition in this case was that when the dower was assigned the real estate set off was located in a part of the city where there were a great many vacant lots and but few buildings, which were of an inferior quality; that there was but little demand for lots, and they were of very little value; that at the time of the sale of the other real estate the property subject to dower would not have sold for more than enough to pay the expenses of the sale, but that the property had recently advanced materially in value and would sell for \$600 or \$700 a block, subject to the widow's life estate, which had not been extinguished. On the hearing it

¶ 1. See *Executors and Administrators*, vol. 22, Cent. Dig. §§ 1376-1378.

was proved that the property formerly would have sold for but little subject to the dower, but that there had been a material increase in value in recent years, so that the property would then bring a substantial sum.

The only excuse offered to the court, in the petition or proof, for the long delay, was, in substance, that the property was practically worthless for many years, and for that reason the creditors did not care to have it sold, and practically abandoned all intention of proceeding against it, but, finding that it had increased in value, they concluded to institute the proceeding and appropriate it to the payment of their debts. We do not regard the fact that the property had recently advanced in value as explaining the delay or offering any excuse for not proceeding at an earlier date. There was nothing in the land itself, or its situation, or the condition of the title, to justify or excuse delay; but appellant's position is that the creditors did not want to proceed against the land as long as it was of little value, and if its value had remained the same would never have done so, but are now moved to institute the proceeding merely because of the increase in value. The property is still incumbered by dower, and in that respect the case is like that of *McKean v. Vick*, 108 Ill. 373. In that case there was a delay of nearly 13 years in making the application. The explanation offered was that a lot had been assigned to the widow as a part of her dower and had been occupied by her as a homestead. The explanation was not deemed satisfactory, and the court said that if the fact that the lot was incumbered by the widow's dower and homestead was ever a reason why it should not be sold the reason still existed. The interest of the heirs in the remainder had neither yielded them anything nor been augmented or rendered more available, while the debt had grown, by the accumulation of interest, until it was almost doubled.

Counsel have found no case where such an excuse as was offered here has been regarded sufficient. It was decided in *Dorman v. Lane*, 1 Gilman, 143, that a delay by an administrator for 15 years to proceed against the real estate for the payment of a claim allowed to himself constituted gross laches, which, being wholly unaccounted for, was a bar to his application. In *Moore v. Ellsworth*, 51 Ill. 308, there was a delay of eight years, but it was satisfactorily explained by showing that the settlement of the estate had been necessarily delayed by litigation, which ended less than a year before the petition was filed. In *Bursen v. Goodspeed*, supra, letters of administration were granted on February 5, 1856, and the petition was presented on September 27, 1869. The land had been occupied by the widow, under her right

of homestead and dower, up to her death, about two months before the petition was filed. A sale of the land in a proceeding instituted for that purpose in 1858 had been resisted by certain creditors on the ground that it would not sell for more than \$2,000, of which the widow would be entitled to \$1,000 in lieu of homestead and her dower besides. The land still remained in the hands of the heirs, and no valuable improvements had been put upon it, and the original proceeding had been continued from time to time, and merely suspended without being finally disposed of. It was said that the creditors were not bound to resort to a fruitless and destructive sale, and the land being disencumbered of the homestead and dower, and no intervening rights having been innocently acquired, the explanation was sufficient. In *Bishop v. O'Connor*, 69 Ill. 431, where there had been nothing to prevent a resort to the county court to compel the administrator to subject the lands to the payment of debts, it was held that the complainants were barred by laches. There was a delay of nearly 10 years in the case of *Furlong v. Riley*, 103 Ill. 628, and the reason offered for the delay was that the records of the court and the files relating to the estate had been destroyed by fire. This was not regarded as a sufficient excuse, since the petitioner might at any time have had the lost papers and records restored, and then have proceeded to sell the land. In the case of *Judd v. Ross*, 146 Ill. 40, 34 N. E. 631, the lands which the petitioner sought to have sold had been set off to the widow as her dower and homestead, and she occupied them until her death, in 1892. As soon as she died and the land was released of the homestead and dower rights the proceeding was instituted. It appeared that the lands, if offered for sale while incumbered, would not have sold for more than enough to pay the costs, and the land would have been sacrificed. This was deemed a sufficient explanation for a long delay. The reason given in that case was not that the land was worthless and had recently advanced in value, as in this case, the fact that the land could not have been reached by the creditors at all in satisfaction of their debts was held to be a sufficient reason in *People v. Lanham*, 189 Ill. 326, 59 N. E. 610, for waiting more than 20 years, until the homestead was extinguished. The premises occupied by the widow as a homestead were not worth more than \$1,000, and were exempt from sale until the homestead estate terminated, and as application was made as soon as the land could be made subject to the debts there was no laches.

We are satisfied with the conclusion of the county court and the decree is affirmed. Decree affirmed.

(36 Ind. App. 26)

CINCINNATI, R. & M. R. CO. v. MILLER.

(No. 5,010.)¹(Appellate Court of Indiana, Division No. 1.
Dec. 15, 1904.)

HIGHWAYS—OBSTRUCTIONS—INJURY TO ADJACENT OWNER—COMPLAINT—SUFFICIENCY—CONSTRUCTION OF RAILROAD TRACK ON WAY—CONSENT OF MUNICIPAL AUTHORITIES—EFFECT ON LIABILITY TO INJURY TO ADJACENT OWNER—DAMAGES—PLEADINGS—MOTIONS TO MAKE MORE DEFINITE—DISCRETION OF TRIAL COURT.

1. The granting or refusing of a motion to make a pleading more specific is so far discretionary that a reversal will not follow unless the rights of the complaining party have suffered.

2. A complaint in an action for damages for the obstruction of a private way, which alleges that for more than 30 years plaintiff has been in the continuous and uninterrupted enjoyment of the way, is not insufficient for failing to allege where and how the user began.

3. An averment in a pleading that a way existed as appurtenant to an owner's land is an averment of a fact.

4. A complaint in an action for the obstruction of a public highway which became such more than 30 years before the alleged obstruction need not allege how the highway came into existence as such.

5. A complaint in an action for the obstruction of a public highway, which alleges that it was used by the public, and that its use and occupancy by defendant for its railroad track cut off plaintiff's means of ingress to and egress from his adjacent property, sufficiently shows his special interest in the highway, entitling him to maintain the action.

6. In a suit for the destruction of means of ingress to and egress from plaintiff's property by the construction of a railroad track on a way, the jury specially found that plaintiff purchased the undivided two-thirds of the property in 1873, and that she had since that time occupied the same; that prior thereto a fence was built, and had since been maintained on the line between the land and the towpath of a canal forming the boundary thereof; that the towpath was about 14 feet wide along plaintiff's property; that defendant's track was 4 feet and 8½ inches wide, the center of which was about 4 feet from the bank of the canal; that defendant owned in fee a portion of the canal embracing that part along plaintiff's premises, including the banks, basins, and towpaths originally owned by the canal; that the remote grantor of defendant became the owner thereof about 30 years before the construction of the railroad track. *Held*, that defendant was not entitled to a judgment notwithstanding the general verdict that there was a way along plaintiff's property at the time defendant built its road, the special verdict not negating the presumption that the right to use the way, though on a part of the towpath of the canal, came into existence in a legal way, and the right to use the towpath as a means of ingress and egress to plaintiff's property not being inconsistent with the use of the towpath by the canal.

7. A railroad company authorized by the council of a city to construct and operate a track on a way within the limits of the city has no authority to interfere with the property rights of an adjacent owner to use the way as a passageway to and from the adjacent property without making compensation therefor.

8. In an action for the destruction of the means of ingress to and egress from an owner's property by the construction of a railroad track on the adjacent towpath of a canal, evidence relating to the owner's putting in crossings over the canal and railroad track was admissible on the question whether the owner's means of in-

gress to and egress from the property had been destroyed.

9. Where an owner of land had the right to use a way on adjacent property as a means of ingress to and egress from the land, and as appurtenant to it, and a railroad company built its track on the way, thereby obstructing the same, the owner was entitled to damages on the theory of a permanent depreciation in the value of the land occasioned by the obstruction of the way.

Appeal from Circuit Court, Miami County; Nott N. Antrim, Special Judge.

Action by Matilda D. Miller against the Cincinnati, Richmond & Muncie Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Robbins & Starr and Loveland & Loveland, for appellant. Cox, Reasoner & O'Hara and Albert Ward, for appellee.

ROBINSON, P. J. Suit for damages for the destruction of means of ingress to and egress from appellee's property. The first paragraph of complaint avers that appellee owns, and has owned for more than 30 years, in fee, certain land occupied and improved as a residence for appellee and her family. The land is described as "commencing at a point on the Wabash river, being the southwest corner of the corporation of the town of Peru as said town was laid out and incorporated on the 21st day of January, 1876, running thence north on said corporation line to the Wabash and Erie Canal, thence west along the said Wabash and Erie Canal two hundred and thirty-three feet, thence south to the Wabash river, thence east along the meanderings of the said river to the place of beginning"; that during this time there existed as appurtenant to the land a right of way for travel and for ingress and egress to the same "along the towpath of the said canal" to a public street; that such right of way was 16 feet wide from the bank of the canal; that appellee has been in continuous and uninterrupted enjoyment of such way from the date of the purchase of the land until October, 1901, when appellant entered upon and took possession of the same, graded and placed its track thereon, occupying the same for its railroad, which has totally destroyed the way as a means of egress and ingress, leaving appellee without any means of reaching the same with any wheeled vehicle, and without any means of reaching the same from the streets or public highways except over appellant's road, rendering appellee's property of no value. The second paragraph avers that the way was a public highway, and that appellant, without right or authority, took and holds possession of the same for its railroad.

It is first argued that appellant's motion to make the complaint more specific should have been sustained. But we fail to see wherein the substantial rights of appellant were affected by the court's refusal to make the complaint more specific. While the

Transfer to Supreme Court denied.

¹Rehearing denied, 73 N. E. 1001.

granting or refusing of such a motion is not a matter wholly within the discretion of the trial court, yet it is so far discretionary that a reversal will not follow unless it appears that the rights of the complaining party have suffered. *Phoenix Ins. Co. v. Rowe*, 117 Ind. 202, 20 N. E. 122. It does not necessarily appear from the first paragraph that the way was upon the towpath of the canal. In that paragraph appellee claims to have been the owner of the land for more than 30 years, and that "from the date of the purchase" of the land appellee has been in continuous and uninterrupted enjoyment of the way. In the second paragraph appellee claims to have become the owner of the land in January, 1876, and at that time a public highway connecting two certain streets was in use, and that the same was in continuous use by appellee and the public for travel until October, 1901. It was not necessary in the first paragraph to aver more particularly where and how the user of the way began, and the averment in that paragraph that the way existed as appurtenant to appellee's land we think is the averment of a fact. If the way, in the second paragraph, was a public highway, it was not necessary to plead how or when it became such. It is averred that it was a public highway in 1876, and whether it came into existence as such by user, or dedication, or judicial proceedings, if material, would be matter of proof. As this is not a proceeding to establish a way, we fail to see how appellant was harmed in not having a more particular description of the way and highway. In the first paragraph the width is given, and the public street to which the way led, and in the second paragraph it is averred to be a highway used by the public, and that by its use and occupancy by appellant for its roadbed and track appellee's ingress and egress to her property has been entirely cut off. This paragraph shows sufficiently the special interest appellee had in the public highway.

We think the first and second paragraphs are each sufficient against a demurrer, as they show appellee entitled to some relief. The first paragraph shows the existence of a way, and its possession and use without interruption for more than 30 years, its seizure and destruction by appellant, and the resulting injury to appellee. Whether there was such a way, and how it came into existence, must be determined as any other fact. In *Mitchell v. Bain*, 142 Ind. 604, 42 N. E. 230, it is said: "If there has been the use of an easement for 20 years unexplained, it will be presumed to be under a claim of right, and adverse, and be sufficient to establish the title by prescription, and authorize the presumption of a grant, unless contradicted or explained. *Washburn, Easements* (4th Ed.) § 81, p. 56. If the use be unexplained, it will be presumed to be adverse." As we have already said, this paragraph does not necessarily show that the

way and the towpath were identical, nor was it necessary for appellee to plead the evidence showing how the way came to be established. The second paragraph shows the existence and use of a public highway, the special interest appellee had in the highway, its destruction by appellant, and the injury to appellee. As the jury found, in answer to an interrogatory, against appellee on the third paragraph of complaint, it is unnecessary to consider it further.

It is next argued that appellant's motion for judgment on the answers to interrogatories should have been sustained. Appellee's husband purchased the land and took possession in 1866. In 1873 she purchased from the administrator of the estate of her deceased husband the undivided two-thirds, and has since owned and occupied the land as her home. A fence was built in 1866, and has since been maintained on the line between the land and the towpath, which is along the south bank of the canal, and which is 14 to 15 feet wide along appellee's property. Appellant's track is 4 feet 8½ inches wide, the center of which is 10 feet from the northwest corner of the land. The center of the track is 4½ to 5 feet from the bank of the canal. Appellant owns in fee, as remote grantee of one Fleming, a certain portion of the canal, embracing that part along appellee's premises, including the banks, basins, and towpaths originally owned by the canal. Fleming became the owner in 1876 by purchase at the master's sale under a decree of the United States Circuit Court. Appellant purchased the canal property in 1901.

There is nothing in the above answers inconsistent with the fact found by the general verdict that there was a way along appellee's property at the time appellant built its road. They do not necessarily show that appellee's right to the way, if one existed, was acquired by user as against the canal. The right to use the way as a means of ingress and egress to her property, although a part or all of it was upon the towpath of the canal, may have come into existence originally in some legal way. The presumption is that it did. The answers do not negative this. The right of appellee to use the towpath as a means of ingress and egress to her property and the use of the towpath by the canal are not necessarily so inconsistent that they could not coexist. *Shirk v. Board*, 106 Ind. 573, 5 N. E. 706, 7 N. E. 251; *City of Logansport v. Shirk*, 88 Ind. 563. The answers show that appellant has placed no obstruction in the traveled way except its railroad iron and ties so constructed into its railroad track. But the question is not whether the road was constructed in a proper manner and place. The question is whether appellant has voluntarily constructed its road so as to injure necessarily the property of appellee. It is true appellant had permission of the city council to use the way for its

roadbed, but the council could grant no authority to appellant to injure and interfere with the private property rights of appellee without making compensation therefor. The right of access over this way is an incident to the ownership of the premises, and it could not be taken away or destroyed without liability to the extent of the damage actually incurred. It is an injury to her special and individual property interests, one not suffered by the public in general, for which she sues. An answer to an interrogatory shows that the only damages assessed were those resulting from the obstruction of appellee's means of ingress and egress to and from her property. See *Indiana, etc., Ry. Co. v. Eberle*, 110 Ind. 542, 11 N. E. 467, 59 Am. Rep. 225; *Evansville, etc., R. Co. v. Dick*, 9 Ind. 433; *Egbert v. Lake Shore, etc., Ry. Co.*, 6 Ind. App. 350, 33 N. E. 659; *Pittsburgh, etc., Ry. Co. v. Noffsger*, 26 Ind. App. 614, 60 N. E. 372; *Decker v. Evansville, etc., Ry. Co.*, 133 Ind. 493, 33 N. E. 349.

We see no reversible error in permitting appellee to introduce evidence relating to the putting in of crossings over the canal and railroad track, and appellant's opposition thereto. This evidence might have some bearing upon the question of whether appellee's means of ingress and egress to and from her premises had been destroyed, but, whether competent for that purpose or not, we cannot say that its admission was prejudicial error. A street commissioner might legally be ordered to make a certain crossing by a common council without any record of the order being made. If the order was made, and no record of it could be found, parol evidence would be admissible to show what the order was. *City of Logansport v. Dykeman*, 116 Ind. 15, 17 N. E. 587; *City of Frankfort v. Irvin* (Ind. App.; decided December 13, 1904) 72 N. E. 652.

It is also insisted that damages should not have been allowed upon the theory of a permanent injury to appellee's property. Appellee had a distinct interest in the way in front of her premises, which included the right to have the way kept open as her means of ingress to and egress from the land. In so far as this way was a necessary means of access to her land, it was no less a valuable property right than the land itself. Appellant had the right to build its road where it did build it, but in so doing it could not destroy or interfere with this individual property right without making compensation for any injury or damage directly resulting from such interference or destruction. As to appellee, the railroad track is an unlawful obstruction. Her rights are in no wise affected by the permission given by the public authorities. Her private and individual interest in the way had not been acquired. The injury to her property is permanent. By her suit for damages she recognizes the right of appellant to continue the use of the way for its road, and is entitled to

damages on the theory of a permanent depreciation in the value of the property that has been injured. See *Indiana, etc., Ry. Co. v. Eberle*, 110 Ind. 542, 11 N. E. 467, 59 Am. Rep. 225, and cases there cited; *Pittsburgh, etc., Ry. Co. v. Noffsger*, supra; *Ross v. Thompson*, 78 Ind. 90; *Harding v. Cowgar*, 127 Ind. 245, 28 N. E. 799.

Some question is made that the verdict is not sustained by sufficient evidence. But a careful consideration of the record discloses some evidence to support the verdict. We find no reversible error in the record.

Judgment affirmed.

(35 Ind. App. 455)

SILVER, BURDETT & CO. v. INDIANA
STATE BOARD OF EDUCATION et
al. (No. 5,238.)*

(Appellate Court of Indiana. Dec. 13, 1904.)

SCHOOLS—TEST BOOKS—CONTRACT FOR REVISION—ESSENTIALS OF CONTRACT
—ESTOPPEL.

1. Burns' Ann. St. 1901, § 5890, provides that whenever the contractor for furnishing school books shall have filed with the State Superintendent of Instruction his consent in writing to a revision, and the State Board of Schoolbook Commissioners shall determine that a revision is needed, it shall be lawful for such board to order a revision. It is provided that the board shall select a competent author to revise the books, that the cost of such revision shall be paid by the contractor, and the cost be first agreed on by the board and contractor. Section 5891 provides that the manuscript of the revision shall be furnished to the acceptance and satisfaction of the board, and by section 5895 a written contract is required for the furnishing of the revised books, and the contractor is to execute a bond. A contractor who had been furnishing a certain text-book for the schools wrote a letter to the board consenting to a revision of the book. Thereafter the board resolved on a revision to be made satisfactory to the board, and subsequently the board wrote the contractor that it was willing to co-operate with him in revising the book, and suggested two persons as proper men to make the revision, but left the actual selection to the contractor, whereupon the contractor employed the persons suggested, who made the revision. Held, that such transactions did not constitute a contract enforceable against the board, the conditions of the statute not being complied with.

2. One dealing with the State Board of School Commissioners, the power of which is merely statutory, is bound to know the laws governing the powers of the board, and no estoppel can be created by the acts of such board in excess of its statutory powers.

3. In order to constitute an estoppel by conduct, there must be knowledge on the part of the one sought to be estopped, and want of knowledge on the part of the other, or some concealment or misrepresentation on the part of the former.

Appeal from Superior Court, Marion County; J. L. McMasters, Judge.

Suit by Silver, Burdett & Co. against the Indiana State Board of Education, to enjoin the State Board of School Commissioners, and the members thereof, from making a contract with a publisher to furnish certain text-books for the public schools. From a

*Rehearing denied. Transfer denied.

judgment in favor of defendants, complainant appeals. Affirmed.

On rehearing, see 71 N. E. 667.

Robert W. McBride, for appellant. C. W. Miller, C. C. Hadley, L. G. Rothschild, W. C. Geake, and Jas. W. Noel, for appellees.

WILEY, J. On the joint petition of the parties, this cause was advanced.

Appellant brought a suit in equity to enjoin the State Board of School Commissioners, and the individual members thereof, from entering into a contract with D. C. Heath & Co., a book publishing corporation, to furnish certain text-books for the use of the public schools of the state. A temporary restraining order was issued; appellees appeared and filed a demurrer to the complaint, which demurrer was sustained; the appellant refused to plead further; the temporary injunction was dissolved, and judgment rendered against appellant for costs.

The only question presented by the assignment of error is the overruling of the demurrer to the complaint. The cause is of such importance, not only to the parties litigant, but to the public as well, that a full statement of the facts relied upon should be made.

By its complaint, appellant avers that it is in the business of publishing and selling the arithmetic known as "Normal Course in Numbers, by John W. Cook and Nebraska Cropsey"; that the appellee the Indiana State Board of Education is a board created by statute, and clothed with powers relating to the administration of the public school system; that the appellee the Indiana State Board of Education constitutes ex officio the State Board of School Commissioners, with certain powers concerning the selection and adoption of text-books, and of causing, from time to time, revisions to be made thereof, and with the power to contract for the supply of said books for use in the public schools.

It is further averred that on the 27th of April, 1899, the appellees entered into a written contract with appellant, by virtue of which appellant agreed to furnish certain books for use in the public schools, among them being the "Normal Course in Numbers, by John W. Cook and Nebraska Cropsey"; that by said contract appellant further agreed to furnish said books in exchange for books of corresponding grades in the hands of the pupils of the schools at designated prices. The contract bound appellant to maintain and furnish said books, equal in all respects to the standard text-books, as provided by law. Further, that, in compliance with the law, appellant entered into a bond, with approved surety, in the penalty of \$30,000, conditioned for the faithful performance of its contract; that by said contract appellant acquired the right, for a term of five years, to furnish the books therein described for

all the public schools of the state, and that it has kept all of the requirements and performed all of the conditions of its contract.

It is next averred that on the 14th of November, 1902, the said board took the following action, as exemplified by its record, to-wit:

"As the state's contracts with certain publishing companies will expire in about one year and a half, it was deemed advisable to consider for a time, in a preliminary way, the question of ordering a revision of some of the text-books. The whole subject was discussed informally at some length.

"Heretofore, when extensive revisions have been ordered, it has been found that the time allowed for such revisions has not been sufficient, and in a number of cases the revised books were not ready for distribution on the opening of the schools at the beginning of the year. That more time may be given for revising any texts that it may be found necessary to revise, and thus have them ready in good time for use in the schools, it was resolved by the board to meet on Thursday, December 18, at 10:30 a. m., as a board of school text commissioners, to decide whether any of the text-books now in use shall be revised and the contracts for the same renewed.

"The following committee was appointed to consider and report to the board at its December meeting, in general, what revisions would be necessary to make the books more acceptable to the board and the teachers of the state; also to ascertain whether the publishers would consent to such revisions as the board might think proper to order:

"Arithmetics: Presidents Parsons and Bryan and Supt. Cooley.

"* * * And thereafter the following action was taken, as shown by the minutes of a meeting of said board held December 17, 1902, as follows:

"The committee on the revisions of arithmetic submitted the following report:

"To the State Board of School Commissioners—Gentlemen: On the 14th day of last November we were appointed a committee to consider and report to the board at its December meeting—first, whether the publishers of the arithmetic now in use in public schools of the state would consent to such revisions as the board might think proper to order; and, second, what revisions in general would be necessary to make the books more acceptable to the board and the teachers of the state. We beg to report as follows:

"First. As the correspondence herewith submitted and made a part of this report shows, Silver, Burdett & Company, the publishers of the arithmetics, express their entire willingness to make any changes in either or both of the arithmetics which this board may direct, or that will meet the approval of the board.

"Second. On educational and economic grounds the committee is in favor of retaining the books and contracting for the same for another period of five years, if they can be made acceptable to the State Board of School Commissioners. We favor the revision and the readoption of these books, upon the following conditions:

"(1) The responsibility for making the books acceptable to the board shall rest entirely with the publishers, and not with this board or a committee of the same.

"(2) That the omissions, insertions of new matter of all kinds, and all proposed changes in the books now in use, be presented to the board for its consideration not later than January 1, 1904.

"(3) The board expressly reserves the right to reject the books as revised if, when submitted at the time named—January 1, 1904—they should not be acceptable, and to receive and consider bids from other publishers to furnish texts in arithmetic.

"(4) A committee of three shall be appointed by the president of the board to confer and advise with the publishers as the revision proceeds, and to serve as a medium of communication between the publishers and the board; but such committee shall have no power to bind the board in accepting any of the changes or revisions proposed, or in the final acceptance or rejection of the books.

"(5) If, when revised books shall be presented to the board for adoption or rejection, it shall be considered by the board impracticable to use both the revised books and the old books with the same classes, the publishers shall agree to give an exchange price of twenty-five cents on the elementary arithmetic, and thirty-five cents on the advanced arithmetic."

The complaint then alleges that, after the foregoing meetings of said board, appellant addressed to it a letter dated November 29, 1902, in which it expressed its consent to a revision of the arithmetics. We copy the following from the letter: "We shall be pleased to co-operate with your board, acting as a whole or represented through a committee, to the fullest extent possible in making such revision in the arithmetics as your board may decide will best meet the interests and requirements of the schools of your state. In short, whatever changes in the line of revision in the present editions may seem necessary to your board, we, as publishers of the arithmetics, will cheerfully make."

It is further averred that at a meeting of the board a motion was made and unanimously adopted that the Cook-Cropsey Arithmetic then in use be revised, and that an advisory committee of three be appointed for consultation with the publishers, provided that neither the committee nor the board of education should be committed to the adoption of the revised text-books unless they should be made satisfactory to the board on

or before January 1, 1904; and provided, further, that satisfactory exchange conditions be made in case the revised books could not be used in classes with the old books. It is then averred that said committee was appointed, and consisted of W. W. Parsons, W. L. Bryan, and F. W. Cooley.

The complaint then avers that on the 13th of January, 1903, the president of the Indiana State Board of Schoolbook Commissioners addressed a letter to appellant, in which he acknowledged the receipt of appellant's letter, consenting to a revision of the books named, and communicating the fact that the board had passed a resolution to the effect that the Cook-Cropsey arithmetics should be revised; that a committee had been appointed for that purpose; and further advising appellant that neither the board nor the committee should be committed to the adoption of the revised books unless they should be made satisfactory to the board on or before January 1, 1904; and, further, that satisfactory exchange conditions could be made. In that letter the appellant was further advised that the board would be glad to have addressed to its president a communication from appellant accepting the conditions and terms of the order so made, and advising appellant to proceed with the committee named.

It is further averred that on the 17th of January, 1903, appellant replied to that letter, giving its consent, and accepting the conditions and terms imposed for the revision of the books.

It is then averred that on the 3d day of February, 1903, the said advisory committee addressed a letter to appellant as follows: "The committee of the State Board of Education on the revision of arithmetics held a meeting in this city yesterday. You will recall that the original action of the State Board of Education leaves the publishers of the various text-books wholly responsible for making revisions acceptable to the State Board. Heretofore committees have been appointed that have supervised the work of revising the books, but by this recent action the matter of revision is wholly in the hands of the publishers. The committee is an advisory committee only, but it is quite willing to co-operate as fully as possible with the publishers in their efforts to revise the books in the most satisfactory manner. The committee takes the liberty to suggest that Prof. O. L. Kelso, of the department of mathematics in Indiana State Normal School, and Dr. Robert J. Aley, of the department of mathematics in Indiana University, would, in the opinion of the committee, be excellent men for you to employ to make this revision. You are at entire liberty, however, if you desire to do so, to employ other persons for this work. The committee only suggests and recommends these gentlemen for your consideration, leaving the matter of selecting the revisers and the work of revision entirely

in your hands." That on the 19th of February, 1903, appellant replied to that letter as follows: "We have been pleased to act upon the suggestion made by your committee, and have entered into an agreement with Dr. Robert J. Alely, of the Indiana University, and Prof. O. L. Kelso, of the Indiana State Normal School, to conduct the revision of the books, and we feel assured that the work will be done in a thoroughly satisfactory manner. We can assure your committee that we shall co-operate with these gentlemen and aid them to the best of our ability in the work that they have undertaken."

The complaint then avers that, acting on the suggestion of said committee, it employed Robert J. Alely and Oscar L. Kelso to perform the necessary work of revision; that the said boards, nor either of them, agreed with appellant upon the cost and expense of such revision, nor did they or either of them suggest such agreement, but that appellant voluntarily contracted and agreed with said Alely and Kelso to make said revision for the compensation of \$2,500, which it paid, and that said revisers, acting under and in pursuance of their contract, entered upon a complete revision of said books; that said revision when completed was submitted to the Indiana Board of Education and said State Board of School Commissioners on the 1st day of January, 1904.

Appellant further avers that all the cost and expense of said revision, aggregating \$5,000, was paid by it. The complaint then makes the following averment: "Plaintiff further avers that by reason of the premises, and by reason of its compliance with each and all of the aforesaid requirements made by said Indiana State Board of Education and said State Board of School Commissioners for the state of Indiana, it became and was entitled to a renewal of its said contract for another term of five years, and that by virtue thereof its said contract was thus renewed and extended, and the valuable rights secured to it by said contract were in like manner, and for said full additional period of five years, thus renewed and extended."

It is further averred that appellees, in utter disregard of appellant's rights in the premises, and before January 1, 1904, advertised for bids from publishers of school-books for furnishing said books to take the place of said books thus revised, and that on the 8th and 9th days of March, 1904, acting as a state board of school commissioners, awarded to D. O. Heath & Co. a contract for supplying to the schools of the state a set of books designed and intended to take the place of those which plaintiff is and was under contract to furnish to said schools, and thereby undertook and assumed to abrogate and annul plaintiff's rights in the premises, and to cancel and set aside plaintiff's said contract, which had, by the revision

of said books, been continued and renewed for an additional period of five years from the 27th day of April, 1904. That the rights which said board thus attempted to take from appellant were of the value of \$15,000 per annum, and that the action thus taken, if appellees are permitted to consummate the same, would work a great and irreparable injury to appellant, for which it could not be compensated in damages.

It is further averred that the books attempted to be adopted by appellees, and for which said contract had been awarded to Heath & Co., were and are imperfect and incomplete, and that in the adoption of said books, and in the order directing and making the contract for awarding the same, it was by said board directed that the contract with Heath & Co. should be executed only after said imperfections and defects had been corrected and remedied, and that said board authorized and directed appellees Cotton and Parsons, respectively, the president and secretary of the said board, to execute the contract with said Heath & Co. on behalf of the state after such corrections had been made.

It is finally averred that notwithstanding appellant's rights in the premises, and notwithstanding the condition attached to the order of said board providing for the corrections of said errors and imperfections in said books proposed to be contracted for, appellees are now proposing and threatening at once to execute a contract with Heath & Co. without said errors and imperfections having been completed, the effect of which, if duly executed, would be to set aside plaintiff's contract and to deprive it of all the valuable rights secured to it thereby, and that it is informed and believes, and so charges as a fact, that, unless a temporary injunction be issued, said contract will be at once executed, to its detriment, etc.

While appellant's learned counsel has stated several propositions, and ably and earnestly discussed them, the groundwork of his entire argument is substantially laid under the first, and we give it in his own language: "The appellants, by their contract of April 27, 1899, acquired not only a contract right for the period of five years specified in the contract, but, also, by the statute, acquired a contingent contract right extending indefinitely beyond the term of five years by virtue of the following, which we quote from section 5891, Burns' Ann. St. 1901, supra: 'And at the expiration of any contract now in existence, or which may hereafter be made by the State Board of School Book Commissioners for furnishing books in the common schools of the state of Indiana, the books then in use in the common schools of this state under such contract shall be continued in use therein, at the same price, and upon the same terms and conditions, until such time or times as the State Board of School-book Commissioners shall determine that a

revision thereof is necessary for the best interests of the school, when such revision shall be made or a new book contracted for and introduced for use in the schools as hereinbefore specified." Counsel further contends that under the statute the board is required to choose between one of two courses, viz., (a) revise the books in use, or (b) advertise for new books. In view of this position assumed, counsel asserts that the "revision adopted by the board December 17, 1902, and the written acceptance by the appellants [appellant] dated January 17, 1903, and filed with the board, constituted a complete and valid contract, into which the law entered as an essential part"; that that contract bound the board to have the books revised under its direction, and that it could pursue no other course. If we have not mistaken appellant's contention, we have fairly stated it.

The decision of the questions involved depends largely upon the construction of certain statutes by virtue of which the State Board of Education and State Board of Schoolbook Commissioners are authorized to act and provide for schoolbooks to be used in the public schools. These two boards are creatures of statutes, and their duties and powers are wholly prescribed by statute. It is therefore important first to look to the statute for guidance.

For some years prior to 1889 the school-book question in this state had attracted much attention, and was of such vital importance that the Legislature wisely asserted its authority, and in 1889 passed the initial act, by virtue of which the state might prescribe the books that should be used. Acts 1889, p. 74, c. 50. In 1891 (Acts 1891, p. 99, c. 80), the Legislature passed an act supplementary to the act of 1889 (Acts 1889, p. 74, c. 50), supra, by which additional duties were imposed upon the State Board of Schoolbook Commissioners, and additional provisions made for furnishing books for the public schools. In 1893 (Acts 1893, p. 168, c. 93, § 9) the Legislature passed another act pertaining to the same subject-matter. Counsel refer to this latter act as an amendment to the former act or acts, but it is not an amendment, but, as indicated by the title, it is an act "further regulating the furnishing of books for use in the common schools; * * * providing for the revision of such books at the cost of the contractors, when deemed necessary by the State Board of School Commissioners, and their continuance in use when so revised," etc.

Those provisions of the statute which pertain to the revision of the books in use are the only ones to be considered, for the rights of the parties must be determined by them. The statutes under which the parties are contending for their respective rights have not been the subject of judicial interpretation or construction, and hence the questions involved are, to that extent, pioneer. The

language of the statutes is plain, and we do not think they are difficult to interpret or construe.

That the duty and authority of the board in the premises may clearly appear, we quote the statute in full, upon which we must determine whether or not a binding contract was entered into between it and appellant whereby the latter revised the books it had been furnishing, and whether or not the board was required to contract for the books, so revised, for an additional period of five years. The section providing for the revision of school books is section 9, c. 93, p. 168, of the act of 1893, being section 5890 of Burns' Ann. St. 1901, and it is as follows:

"Whenever the contractors for furnishing books for use in the common schools, under the provisions of existing laws hereinbefore specified, shall have filed with the State Superintendent of Public Instruction, their consent in writing to the revision, or the introduction of an intermediate book, as hereinafter provided, duly executed by them, and the State Board of School Book Commissioners shall determine that a revision is needed of any or all of the books in use in the common schools under contract made pursuant to law, or that an intermediate grammar or language lessons is needed, then it shall be lawful for the State Board of School Book Commissioners to order a revision to be made of any or all of such books as in their judgment may be found necessary for the welfare of the common schools of the state, in the manner and under the conditions following: The said Board of School Book Commissioners shall select a competent author or authors to perform the work of revision of the subject-matter of such book or books so ordered to be revised. The entire cost of such revision, including the manuscript, illustrations, engravings, maps and plates therefor, shall be paid by the contractor or contractors who may, at the time of such revision be required to furnish such book or books under their contract with the state. The cost and expense, however, of such revision shall first be agreed upon by the State Board of School Book Commissioners and the contractor or contractors before such work of revision is commenced: provided, if said board and contractor or contractors shall, for a period of sixty days after an estimate of the cost of any proposed revision has been furnished by such State Board to the contractor, be unable to agree upon an amount, which, in the opinion of such State Board, would be necessary to cover the cost of any such revision, then the said State Board may advertise for bids from publishers of school books for furnishing such book or books, the cost of revision of which could not be agreed upon; and in such advertisement, selecting and contracting for such book or books, the said board shall be governed by the provisions of law now in force respecting such matters. * * *

So much of section 10, c. 93, p. 169, of the act of 1893 (section 5891, Burns' Ann. St. 1901), as is pertinent to the decision of the questions involved is as follows:

"Whenever the revision of any book or series of books shall be determined upon by the State Board of School Book Commissioners, and they shall have contracted with an author or authors to furnish the manuscript for such revision, sufficient time shall be given to the author in which to perform the work of revising the subject-matter of such book to the acceptance and satisfaction of such board. * * *

"And at the expiration of any contract now in existence or which may hereafter be made by the State Board of School Book Commissioners for furnishing books for use in the common schools of the state of Indiana, the books then in use in the common schools of this state under such contract shall be continued in use therein at the same price, and upon the same terms and conditions, until such time or times as the State Board of School Book Commissioners shall determine that a revision thereof is necessary for the best interests of the schools, when such revision shall be made or a new book contracted for and introduced for use in the schools as hereinbefore specified.

"Provided, that at the expiration of any such contract the State Board of School Book Commissioners shall require such contractor or contractors furnishing such books to execute a new bond, conditioned that they will continue to execute such contract in all regards as they had theretofore executed the original contract. * * *

"And, provided, further that nothing in this act contained shall be construed to prevent the State Board of School Book Commissioners from exercising their discretion in deciding whether they shall order any of the books already in use under contract to be revised, or whether instead they shall advertise for books to be adopted instead of said books already in use."

While section 14, c. 93, p. 173, of the act of 1893 (section 5895 Burns' Ann. St. 1901), may not have direct bearing upon the decision of the case, yet we quote it, because it indicates the final step in the proceedings for a revision of schoolbooks. It is as follows:

"5895. Whenever any book or series of books shall be revised by order of the State Board of School Book Commissioners, such book or books, when completed and ready for use in the schools shall be equal in every respect to the standard now fixed by law as to subject-matter, material, style of binding and mechanical execution, and said State Board, when contracting for any such revision, shall require the contractor or contractors to enter into a written agreement for the furnishing of such books and to execute bond with resident freehold sureties to the acceptance of the Governor of this state for

the faithful compliance with their contract, such bond to be in such amount as said board shall deem sufficient for the purposes contemplated."

Under these statutes and the averments of the complaint, the learned counsel for appellant asserts, as a basic proposition, that appellant, by its contract of April 27, 1899, acquired not only a contract right for the period of five years, but also, by the express provisions of the statute, acquired a contingent contract right extending indefinitely beyond the term of five years. The correctness of this proposition depends upon the question whether or not appellant has shown any contract existing between it and appellees by which a revision of the books furnished by it was made, and this embraces the question whether or not it was made in harmony with the provisions of the statute, and, if so made, it should, in justice to all parties, be enforced. The statute to which we have referred embraces two distinct and separate contingencies, viz.: (1) That, after a series of books have been used for a period of five years, the board shall determine upon a revision of the books in use, or (2) that a new book or books shall be contracted for, under the terms prescribed by the statute, and introduced into the schools. In any event, after a book has been agreed upon by the board and introduced into the schools, it shall remain in use for a period of five years, and then it may be revised and continued in use as revised, or a new book contracted for. This is unquestionably both the letter and the spirit of the statute.

The first and all important question for decision is: Has appellant shown by the averments of its complaint a valid and existing contract between it and appellees by which the books it had been furnishing under its contract of April 27, 1899, were to be revised, and, as revised, continued in use for an additional period of five years? A correct answer to this inquiry will determine the rights of the respective parties.

The State Board of Education and the State Board of Schoolbook Commissioners are creatures of legislative enactment. They exist by virtue of the statute, and they have no power, and cannot exercise any authority, except that which is conferred upon them by statute. They may be regarded as agents of the state, by virtue of which they act for the state in the interest of all the people. The scope of their agency is prescribed by statute, and by the statute they are commissioned to do specific things, and are directed as to the manner in which they must be done. Beyond the bounds of the statute they cannot go, and can only bind the state while acting within their authority. With these general propositions there is no well-grounded contention.

By the original act creating the board and defining its duties and prescribing its powers, a specific method was provided by which

the board could contract with publishers to furnish text-books for the use of the pupils in the public schools; and, by the supplementary act of 1893, provision was made for a revision of books in use, should such revision be deemed advisable by the board, and the manner of making such revision was specifically and fully provided. It is earnestly and ably contended by the learned Attorney General that under the provisions of the statute no contract to revise the books was ever entered into between appellant and appellees, and hence appellant acquired no contractual rights under the facts pleaded. This contention is based upon the proposition that important provisions of the statute were not complied with, and in the absence of such compliance no legal contract could be made. It is insisted that the steps taken, as disclosed by the complaint, were only tentative and preliminary to the execution of a contract, as required by statute.

Appellant is chargeable with a knowledge of the law, and hence it knew that the board could only act and bind the state by acting in compliance with the law. It was bound to know the scope and bounds of the board's authority. Looking to the revision of school-books as provided by statute, it is important to comprehend just what is required to be done, and this we must gather from the statute itself. Section 9, c. 93, p. 168, of the act of 1893, *supra*, provides that, after the contractor shall have filed his consent in writing for a revision with the State Superintendent of Public Instruction, it "shall be lawful * * * to order a revision to be made * * * in the manner and under the conditions following." The "manner" and "conditions" are prescribed by statute, and are these: (1) The board must select a competent author or authors to perform the work of revision. (2) The entire cost of such revision shall be paid by the contractor or contractors, "who may, at the time of such revision, be required to furnish such book or books, under their contract with the state." (3) The cost and expense of such revision "shall first be agreed upon by the State Board of School Book Commissioners and the contractor or contractors, before such revision is commenced." (4) Such board shall contract with an author or authors to furnish the manuscript for such revision, "to the acceptance and satisfaction of such board." (5) Said board, when contracting for any revision, "shall require the contractor or contractors to enter into a written agreement for the furnishing of such books and to execute a bond * * * for the faithful compliance with their contract, such bond to be in such sum as said board shall deem sufficient," etc. While it is not essential to inquire into the intention of the Legislature in thus placing these conditions and restrictions upon the board, yet the Attorney General has made some pointed suggestions which seem to be pertinent, and which we

quote, as follows: "They are required for the public benefit, and for the reason of public policy. They are intended to secure (a) the best ability for the work of revision; (b) fair compensation for good services; (c) independence of the publisher on the part of the author; (d) accountability of the author to the State Board, to whose acceptance and satisfaction the work must be done; (e) security to the state that the publisher would not abandon the contract if it should prove unprofitable to it; (f) publicity as to the work and expense, which would prevent dishonest collusion." An important provision of the law, and one which has not been discussed by counsel in connection with the point we have in mind, is that which requires the board to contract with the author or authors to furnish the manuscript for the revision to the "acceptance and satisfaction of the board." There is but one reasonable construction that can be placed upon that provision, and that is, that before the manuscript shall go into the hands of the contractor for publication, it must first be submitted to the board for their approval. The manuscript for the revision must be to the "acceptance and satisfaction" of the board, and this could not be without its submission to and examination by it. This is an important provision, in that the board is chargeable with furnishing for use in the public schools the best possible books at its command, and in this instance, the board having reached a conclusion that the books furnished by appellant required revision, it was the duty of the revisers, and the duty of the board to demand, that the manuscript of the revision be first submitted to it, to the end that it might be determined whether or not it was acceptable and satisfactory. The language of the statute will not admit of any other construction.

Referring again to the "manner" and "conditions" under which a revision may be made, it is important to note that, so far as the complaint shows, neither of the five above noted were complied with, except the second. The board did not select an author or authors, but merely suggested the names of two gentlemen whom it recommended as being competent to do the work. The cost and expense of the revision was not "first" agreed upon by the board and the appellant before the revision was commenced. The board did not contract with the author or authors to furnish the manuscript to the "acceptance and satisfaction" of the board. The board did not require the contractor to "enter into a written agreement" to furnish books as revised, nor exact from it a bond condition for a "faithful compliance with their contract." The "manner and conditions" indicated must be regarded as conditions precedent to authorize the board to contract for such revision, and the Legislature having prescribed such "manner and conditions," and the board being a creature

of the Legislature, it could only bind the state while acting in harmony with the statute which created it and conferred upon it all the power and authority it possesses. The statute was not complied with, either in substance or effect. The "manner and conditions" upon which a revision may be made, as prescribed by statute, were wisely ingrafted into the law to safeguard the best interests of the public in raising the standard and efficiency of the public schools, and should not and must not be lightly disregarded.

As far as the complaint goes in showing a strict compliance with the statute is that it shows that appellant consented to the revision, and paid the entire cost thereof. It is the firmly established rule that by statutory boards or statutory officers, acting under statutes prescribing their duties and conferring upon them powers, the manner prescribed must be adopted and followed. *Wrought Iron Bridge Co. v. Board*, 19 Ind. App. 672, 676, 48 N. E. 1050; *Platter v. Board*, 103 Ind. 360, 2 N. E. 544; *Leonard v. Am. Ins. Co.*, 97 Ind. 299; *Board v. Gillies*, 138 Ind. 667, 673, 38 N. E. 40; *Peck-Williamson, etc., v. Steen School Tp.*, 30 Ind. App. 637, 66 N. E. 909; *Clinton School Tp. v. Lebanon Nat. Bank*, 18 Ind. App. 42, 47 N. E. 349.

In the case of the *Wrought Iron Bridge Co. v. Board*, supra, the boards of commissioners of two counties contracted for the construction of a bridge over a stream dividing the two counties. A contract was let, the bridge constructed and accepted, but it was held that the appellant could not recover, because the two boards had not complied with the provisions of the statute in letting the contract. In that case the court said: "The only authority the boards of the two counties had to construct a joint bridge is to be derived from the statute. * * * The conditions therein enumerated must be performed before the exercise of this authority. If the statute prescribes the manner in which the power shall be exercised, and the method prescribed is disregarded, and a contract entered into, such contract is void. In the case at bar the contract was made in disregard of express provisions of the statute, and although the bridge may be worth the agreed price, and was accepted and used by the two counties, yet the contract, being void, could not afterwards be ratified and made binding." That was a much stronger case for the appellant than the one now before us, for there a contract was actually made, and the work accepted. Here no contract was made as contemplated by statute, and the revised books were not accepted.

Statutory boards and officers must act within the scope of their authority and in obedience to the dictates of the statute under which they exercise authority, and when a statutory method is prescribed they have no discretion to say when the statute may be strictly complied with, and when it may not

be followed. Such boards and officers can only discharge the full measure of their duties by doing that which the statute commands, and doing it in the manner prescribed.

Thus in *Board, etc., v. Gillies*, 138 Ind. 667, 38 N. E. 40, it was said: "Boards of county commissioners are themselves but the creatures of the Legislature, and they must pursue and exercise their powers in strict compliance with the letter and spirit of the statute. It is theirs to obey, not to disregard the commands of the lawmaking power of the state."

In *Wrought Iron Bridge Co. v. Board et al.*, supra, this court said: "It will not do to say that in any given case the board may determine for itself whether it will follow the statute, or disregard the statute and follow a method of its own, although the method adopted and carried out might produce equally as good results as that provided by statute."

In *Turnpike Co. v. Board, etc.*, 72 Ind. 226, in speaking of a duty of boards of county commissioners as prescribed by the statute, the court said: "The mode in which the county is bound to perform that duty is specifically pointed out by the statute, and a contract which contravenes that mode must be void."

A township trustee is a statutory officer, and it has many times been held that he can bind the township only when he does what the statute authorizes, and does it in the manner prescribed. If he exceed his authority, he cannot bind his township by estoppel or otherwise. *Clinton School Tp., etc., v. Lebanon National Bank*, supra, and authorities there cited.

In *First Nat. Bank v. Adams School Tp.*, 17 Ind. App. 375, 46 N. E. 832, it was said: "A school trustee, like a board of county commissioners, whose duties are defined and circumscribed by statute, cannot do any act which is not expressly or impliedly authorized by statute." See, also, *Beard v. Fertich*, 18 Ind. App. 1, 46 N. E. 699; *Snoddy v. Wabash School Tp.*, 17 Ind. App. 284, 46 N. E. 588; *Board, etc., v. Allman*, 142 Ind. 573, 42 N. E. 206, 39 L. R. A. 58; *Gavin v. Board, etc.*, 104 Ind. 201, 3 N. E. 846.

The statute under consideration grants a new power and confers new and additional authority upon the board of schoolbook commissioners, and prescribes the manner and conditions upon which that authority may be exercised, and in such case it cannot lawfully be exercised in any other way. *Sutherland on Stat. Con.* § 454; *Head v. Ins. Co.*, 2 Cranch, 127, 2 L. Ed. 229; *Best v. Gholson*, 89 Ill. 465; *Franklin Glass Co. v. White*, 14 Mass. 286. This statute, passed in the interest of the public, will be regarded mandatory, and mandatory statutes must be strictly pursued. Compliance with the conditions of such statutes is a condition precedent, and this means that the validity of acts done un-

der a mandatory statute depends upon a compliance with its requirements. An eminent text-writer, discussing the subject, says: "When a statute is passed authorizing a proceeding which was not allowed by the general law before, and directing the mode in which the act shall be done, the mode pointed out must be strictly pursued. It is the condition upon which alone a party can entitle himself to the benefit of the statute, and its directions shall be strictly complied with. Otherwise the steps taken will be void. * * * Enabling statutes, on the principle of *expressio unius est exclusio alterius*, impliedly prohibit any other than the statutory mode of doing the acts which they authorize." Sutherland Stat. Const. § 454. This proposition is sustained by many cases, cited by the author, and is well grounded in reason.

Where statutory officers act without a compliance with the precedent conditions imposed, they exceed their powers and act without authority. *City of Madison v. Smith*, 88 Ind. 502. The disobedience of a public officer, as stated by Judge Elliott in *Platter v. Board*, 108 Ind. 360, 2 N. E. 544, creates an incurable difficulty. In the case of the Board, etc., v. Gillies, *supra*, appellant undertook to let a contract for county printing. It was contended that it did not comply with the provisions of the law conferring upon it authority to make such contract. It was disclosed by the special finding of facts that it let the contract without complying with the law, and it was held that the contract could not be enforced, and in the decision the court said: "The third proposition advanced by counsel is that the statute is directory and not mandatory, and that the intent and policy of the act have not been violated. If the position here taken were tenable, it would amount to a total abrogation of the law in question. The statute requires that statements should be filed with the board by the several county officers, showing the supplies needed. The court finds that no such statements were filed, and that none were requested by the board. The statute requires, further, that 10 days' notice should be given bidders for supplies. The court finds that no notice was given. The statute also requires that bids should be received for supplies. The court finds that the appellee's bid and that of Burford & Co. were not received or examined by the board. The statements by the officers, the notice to bidders, and the reception and examination of the bids are the essence of the law. If these are disregarded as being merely directory, the statute disappears. The statutes of the state are not to be wiped out in that manner. Boards of county commissioners are themselves but the creatures of the Legislature, and they must pursue and exercise their powers in strict compliance with the letter and spirit of the statute. It is theirs to obey, not to disregard, the com-

mands of the lawmaking power of the state."

Appellant's learned counsel makes the following admissions in his brief: "That the State Board of Schoolbook Commissioners possesses only such powers to make contracts as is expressly given it by the statute; that its contracts, to be valid and binding, must be made in the manner prescribed by the statute; that persons contracting with it are bound to take notice of the statute, and of its limitations upon the power of the board; that a contract made in violation of the statute, or that is not made in substantial compliance with its requirements, is *ultra vires* and void; and that the board cannot be estopped to question the validity of an *ultra vires* contract." He seeks, however, to parry the force and effect of such admissions by asserting and arguing with such force and ability that the facts stated in the complaint "show a complete and valid contract, made in exact and strict conformity with the statute; a contract that was complete in all of its terms when the board, having entered upon its record its order for a revision, * * * received, accepted, and spread upon its records the written consent of the contractors to the revision; the remaining terms of the contract being found in the statute itself, which, by its own force, entered into and became an essential part of the contract." With this assertion we cannot agree, and the principles and propositions of law we have had under consideration, which are so firmly established, and so abundantly and well fortified by the authorities, lead us to the conclusion that no valid and binding contract was made between appellant and appellees for a revision of the books which appellant had furnished under its former contract. Upon this branch of the case we do not deem it necessary or profitable to pursue the inquiry further.

This leaves for consideration the only remaining question discussed by counsel, and that is the question of estoppel. We do not think the doctrine of estoppel, under the facts pleaded, is applicable here. Appellant dealt with appellees at arm's length. There was no inequality between them. Appellant was bound to know the law, and hence knew the scope and bounds of the authority of the board. It knew its powers, and the duties and obligations laid upon it by the statute, and was bound to know that it could only act within and according to the prescribed limits of the statute. Appellant was dealing with a statutory board, clothed only with statutory power, and it was bound to take notice of the scope and extent of authority conferred upon it. *Baldwin v. Shill*, 8 Ind. App. 291, 297, 29 N. E. 619; *Wrought Iron Bridge Co. v. Board*, 19 Ind. App. 372, 678, 48 N. E. 1050; *Julian v. State*, 122 Ind. 68, 28 N. E. 690; *Honey Creek School Tp. v. Barnes*, 119 Ind. 213, 21 N. E. 747; *Platter v. Board*, 108 Ind. 360, 381, 2 N. E. 544; *Dillon, Mun. Cor.* (4th Ed.) § 447. The general rule, as

stated by Mr. Bigelow, is that "clearly the state cannot be estopped by the unauthorized acts of its officers." Bigelow on Estoppel (5th Ed.) p. 341. The Supreme Court of Alabama, in the case of *State v. Brewer*, 64 Ala. 287, say: "Estoppels against the state cannot be favored. They may arise from its express grants (*Magee v. Hallett*, 22 Ala. 699), but cannot arise from laches of its officers; not on the motion of extraordinary prerogative, but upon a great public policy. *U. S. v. Kirkpatrick*, 9 Wheat. 735 [6 L. Ed. 199]. All who deal with the officers or agents of the government must inquire, at their peril, into the extent of their power." In *Platter v. Board*, etc., 103 Ind. 360, 2 N. E. 544, the board of commissioners made an order authorizing the sale of county infirmary. In the advertisement of the sale the county auditor did not state the minimum price which it was the duty of the board to fix on the property, nor the kind of security which the purchaser was required to give. Such proceedings were had as that the land was sold to appellant, the money paid and accepted, and a deed made. On appeal by the taxpayers, it was held that the sale was void, because the mode prescribed by statute was not followed. Appellant invoked the doctrine of estoppel, and in passing upon this branch of the case the Supreme Court said: "The appellant cannot successfully build upon the doctrine of estoppel. For this conclusion there are at least two satisfactory reasons: First. He dealt with public officers with limited, naked, statutory powers; he was bound, at his peril, to ascertain the scope of their authority, and cannot found any claim upon acts done by those officers in excess of their statutory authority. This general rule is thus stated by the Supreme Court of the United States: 'Individuals, as well as courts, must take notice of the extent of authority conferred by law upon a person acting in an official capacity.' The rule is well established by our own decisions. *Union School Tp. v. First Nat. Bank*, 102 Ind. 464 [2 N. E. 194]; *Reeve School Tp. v. Dodson*, 98 Ind. 497; *Axt v. Jackson School Tp.*, 90 Ind. 101; *Pine Civil Tp. v. Huber*, etc., Co., 88 Ind. 121. * * * There is a well-defined distinction between public and private corporations, and the general doctrine of estoppel does not apply to the former class of corporations. *Union School Tp. v. First Nat. Bank*, supra; *Cummins v. City of Seymour*, 79 Ind. 491 [41 Am. Rep. 618]; *Driftwood*, etc., *Turnpike Co. v. Board*, etc., 72 Ind. 226." In *Rissing et al. v. City of Fort Wayne*, 137 Ind. 427, 37 N. E. 328, the Supreme Court quoted with approval the language used and rule there declared. To the same effect, also, are the following: *Union School Tp. v. First Nat. Bank*, supra; *Axt v. Jackson School Tp.*, supra.

But upon another ground the doctrine of estoppel is not applicable to the facts pleaded, and that is: "To constitute a valid es-

toppel by conduct, there must be knowledge on the part of the party sought to be estopped, and want of knowledge on the part of the party relying upon estoppel." *Greensburgh, etc., Co. v. Sidener et al.*, 40 Ind. 424. In this case, as was said in *Platter v. Board*, supra, there was neither concealment nor misrepresentation, nor was there knowledge on the one side and ignorance on the other. There is therefore an entire absence of these elements of estoppel. In *Leonard v. American Ins. Co.*, 97 Ind. 306, it was said: "It is well settled that, where both parties to a transaction have equal knowledge, or means of knowledge, of all the facts, there can be no valid estoppel." Under the authorities and upon principle, appellant is not in a position to invoke the equitable doctrine of estoppel.

Counsel for appellant urge that his client has expended large sums of money in carrying forward and completing the revision in compliance with the directions of appellees, and in fulfillment of what it asserts was a valid contract, and that it has no other redress except in the enforcement of such contract. Appellant's expenditure of money in that regard, with a knowledge of the facts and the law, with which it was chargeable, was at its own risk, and for which it has no remedy. If, as counsel for appellant says, the resolution of the board to revise the books, and appellant's consent thereto, constituted a binding contract, into which the law entered as an essential part, it was incumbent upon appellant to show by its complaint that it had fully complied with all the terms of the contract, including those which its counsel says were injected into it by the law. The primary law by which the rights of the parties must be determined is the statute alone, under which the board was authorized to contract for a revision. That statute specifically prescribes the "manner" and "conditions" under which such revision may be made, and the complaint is silent as to whether the "manner" and "conditions" prescribed by statute were complied with. There is no averment that the subject-matter of the books revised was "to the acceptance and satisfaction of such board," nor that the manuscript was furnished "to the acceptance and satisfaction of such board," and the statute requires this. Neither is there any averment that the revised books were "equal in every respect to the standard now fixed by law as to subject-matter, style of binding and mechanical execution," and this the statute also requires. Section 5895, *Burns' Ann. St.* 1901. Neither is it shown that the board required "the contractor * * * to enter into a written agreement for the furnishing of such books and to execute a bond * * * for the faithful compliance with its contract." It is evident from this last quotation from the statute that the Legislature did not anticipate or intend that the expressed determination of the board to revise certain books,

and the written consent of the publishers thereto, should constitute a binding contract, for it went further and provided that after that the parties should make a contract, and defined the conditions that should enter into the contract. *Mann v. Rochester*, 29 Ind. App. 12, 63 N. E. 874. There are other conditions made by the statute, to which we have already adverted, and which the complaint fails to show were complied with. No facts are alleged from which it can be reasonably deduced that it was the duty of the board to accept and approve the revised books.

Appellant's contention that a determination of the board that a revision should be made, and the written consent of appellant thereto, constituted a contract from which the state might not be released even though the work of revision should not prove acceptable, is not consistent with the plain provisions of the statute, nor supported by reason or logic. Such a construction of what appellant's counsel contends constitutes the contract would defeat the plain intent of the law, and be subversive of the best interests of the public schools.

Counsel takes the position that, after determining to have the books revised, the board was bound to continue the revision, if not at first satisfactory, and so continue ad infinitum. This would destroy the plain purpose and intent of the statute, and place upon the public schools the burden of using books which the board had, in its judgment, said should not be used because of obvious defects. The Legislature, in enacting the statute we have had under consideration, had for its primary object the betterment of the public schools, and it will not do to say that the board which the statute created, in carrying out its provisions, and persons dealing with it, can disregard its provisions and still bind the state. Such a doctrine would nullify the statute, and destroy the healthful purpose it was intended to serve. These considerations lead us to the conclusion that appellant's complaint does not state a cause of action, and that the demurrer to it was correctly overruled.

Judgment affirmed.

COMSTOCK, C. J., and ROBINSON, MYERS, and BLACK, JJ., concur. ROBY, J., concurs in the result.

(187 Mass. 144)

GARST v. CHARLES.

(Supreme Judicial Court of Massachusetts.
Worcester. Jan. 5, 1905.)

SALES—LIMITATION ON BUYER—FRAUD—EQUITY JURISDICTION—INJUNCTION—DAMAGES.

1. Defendant procured a retail druggist to make a contract with plaintiff, a manufacturer of a proprietary medicine, for the purchase of the medicine, the contract of sale providing that the medicine should not be sold by the purchaser or his vendees at less than a specified

price, as defendant knew. The sale was made to the retailer, and the retailer turned over the medicine to defendant at the purchase price for sale, and defendant advertised and made sales thereof at less than the price stipulated in the contract between the plaintiff and the retailer, who was cognizant of defendant's purpose. *Held*, that the scheme was fraudulent as between plaintiff and defendant, entitling plaintiff to injunction to restrain defendant from selling the medicine at less than a specified price and damages for the injury suffered.

Appeal from Superior Court, Worcester County; Elisha B. Maynard, Judge.

Bill by Julius Garst against Clarence A. Charles for injunction and damages for sale of proprietary medicine at less than stipulated price. From a decree for plaintiff, defendant appeals. Affirmed.

Webster Thayer, Hollis W. Cobb, and Fred A. Walker, for plaintiff. E. H. Vaughan, for respondent.

KNOWLTON, C. J. The plaintiff, being the owner and manufacturer of a proprietary medicine known as "phenyo-cafein," sold it to purchasers only under contracts in which they agreed not to sell it at retail at less than a specified price, and he undertook to stipulate that purchasers from his purchasers should obtain and sell it only under such an agreement. His right to secure such advantages to himself, so far as possible, by contracts in proper form, is not now questioned. See *Garst v. Harris*, 177 Mass. 72, 58 N. E. 174; *Park & Sons Co. v. The National Wholesale Druggists' Association*, 54 App. Div. 223, 64 N. Y. Supp. 276; 66 N. Y. Supp. 615. The defendant is a retail druggist, who knew that all phenyo-cafein was sold by the plaintiff under the contracts referred to, and with notices affixed to the small boxes and to the larger packages showing the understanding of the plaintiff and of the purchasers as to the price at which it might be sold. After buying a quantity of medicine from the plaintiff, he returned it, in accordance with the terms of his contract, under which he had a right to return it if he wished to discontinue the business of selling it, and he notified the plaintiff's agents that he should not keep the medicine. He then procured one Bickford, who was a retail druggist, to buy a large quantity of the medicine from the plaintiff's agents, and Bickford entered into a contract such as has been referred to, and agreed that he would fulfill all the terms of the contracts and notices affixed to the boxes and packages, one of which was that he would act as the agent of the plaintiff, and would not sell the medicine at less than the specified price. He purchased the goods at a much less price, which was the discount rate made by the manufacturer to the retail trade, as stated in the contract. He then turned it over to the defendant at the purchase price, and the defendant has been selling it and advertising it for sale at retail at less than the specified price.

All this was in pursuance of a conspiracy between the defendant and Bickford that Bickford should make this contract and should break it, to the injury of the plaintiff, for the benefit of the defendant. A conspiracy to deprive one of the benefit of a contract with another is unlawful. *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287; *Walker v. Cronin*, 107 Mass. 555; *Vegelahn v. Guntner*, 167 Mass. 92, 44 N. E. 1077, 35 L. R. A. 722, 57 Am. St. Rep. 443; *Plant v. Woods*, 176 Mass. 492, 57 N. E. 1011, 51 L. R. A. 339, 79 Am. St. Rep. 330. The defendant's arrangement with Bickford that he should break the contract was a wrong upon the plaintiff, intended for the defendant's advantage. The scheme was fraudulent. The purpose of the defendant was to induce the plaintiff to part with his property at a comparatively low price to a person who was in fact a retail druggist, and who represented by his words and conduct that he wanted the medicine to sell at retail, and who agreed not to sell it at less than the regular retail price, when in fact he was obtaining it under an arrangement to turn it over to the defendant at the wholesale price, to be sold by him at retail at less than the regular price. The defendant was a party to this scheme of fraud, and presumably was the author of it. He should be held liable for the wrong. *Exchange Telegraph Co. v. Central News* (1897) 2 Ch. 48; *Dodge Co. v. Construction Information Co.*, 183 Mass. 62, 66 N. E. 204, 60 L. R. A. 810, 97 Am. St. Rep. 412. In this respect the case is very different from *Garst v. Hall & Lyon Co.*, 179 Mass. 588, 61 N. E. 219, 55 L. R. A. 631. See, also, *Laddy et al. v. Sterious et al.* (1908) 1 Ch. 354. The suit is one which calls for relief in equity. The damages are of a kind that cannot be accurately computed or easily estimated. The remedy at law is not complete and adequate, and an injunction with damages for the injury already suffered gives the only proper relief.

Decree affirmed.

(187 Mass. 124)

GOMES v. NEW BEDFORD CORDAGE CO.

(Supreme Judicial Court of Massachusetts.
Bristol. Jan. 3, 1905.)

SERVANT'S INJURIES—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—EVIDENCE—OPINION EVIDENCE.

1. In an action for injuries to a servant owing to his fingers having come in contact with a cogwheel, evidence held sufficient to warrant a finding that the master was negligent in leaving the cogwheel unguarded.

2. In an action for injuries to a servant owing to his fingers having come in contact with a cogwheel, evidence considered, and held, that the question whether plaintiff was negligent in failing to discover the absence of a guard from the cogwheel was one for the jury.

3. In an action for injuries sustained by a servant owing to his fingers having come in contact with a cogwheel, a witness who had worked in the mill was asked whether it were possible for one's hand to come in contact with the

gear when the cover was on. Held, that the question was not objectionable for the purpose of obtaining a description of the machine.

Exceptions from Superior Court, Bristol County; Lorumus E. Hitchcock, Judge.

Action by Manual A. Gomes against the New Bedford Cordage Company. Judgment in favor of plaintiff, and defendant brings exceptions. Exceptions overruled. The questions to witnesses referred to in the opinion were questions put to witnesses, who had worked in defendant's mill, as to whether one's hand could be caught in the gears, which occasioned the injury, if they had been covered.

Doran & Bannon, for plaintiff. Andrew J. Jennings and Arthur E. Perry, for defendant.

KNOWLTON, C. J. The accident to the plaintiff happened from his putting his fingers in contact with a cogwheel as he was moving a fork, through which a belt ran, in order to throw off the belt. As the machine was constructed, there was a wooden box which covered the gearing in which his fingers were caught, but this box had been off for a considerable time before the accident. Its absence increased the danger to persons working about the machine, and the jury might have found that the defendant was negligent in leaving it off.

Another question is whether there was evidence that the plaintiff was in the exercise of due care. There was abundant evidence that he was in the performance of his duty, doing that which was frequently done by operators in running such machines, and which would have been perfectly safe if the box had been in its place. He testified that he supposed the box was there until his fingers were caught, and, if this part of his testimony is true, there is nothing to show that he was negligent, unless he was careless, as matter of law, in not discovering the absence of the box before his fingers touched the gearing. The machines which he was tending were spinning frames, five in number, each frame being made up of two machines. They were set in a row, near together, with a narrow passage between them and the wall of the building, and with narrow passages between every two adjacent frames. The plaintiff was set to work to take the place of a man who was temporarily absent, and he had no reason to suppose that there was any frame without its box to cover the gearing. He had been at work on these machines only about three-quarters of an hour when the accident happened. During this time he had been engaged in mending threads which broke upon some of the machines. It certainly cannot be said, as matter of law, that he was negligent in failing to discover the absence of the box from one of the frames before he started to change the belt. It would be a mere chance if he

discovered the defect, while working as he was, in the short time before the accident. Nor can we say, as he described the accident, that he was necessarily careless in taking hold of the fork to change the belt, without looking particularly enough to notice that the box was gone. We are of opinion that the evidence was rightly submitted to the jury.

If the questions objected to had been put to the witnesses as experts, they well might have been excluded, as the subject to which they relate is not a matter for expert testimony. But we do not understand that they were put for the purpose of introducing opinions as such; but we suppose they were asked as a simple and convenient mode of obtaining a description of the machine, in reference to the parts which were important for the consideration of the jury. We are of opinion that the evidence was competent.

Exceptions overruled.

(187 Mass. 182)

HAYES v. NEW YORK, N. H. & H. R. CO.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 4, 1905.)

INJURIES TO EMPLOYE—CONTRIBUTORY NEGLIGENCE—SUFFICIENCY OF EVIDENCE.

1. Where the work of transferring freight to a freight car through several intervening freight cars, using skids between the cars, is left to a gang of workmen, the employer furnishing sufficient materials for placing cleats on the skids to keep them from slipping, the employer is not liable for injuries to one of the workmen resulting from the absence of such cleats.

2. Evidence in an action by an employé for injuries resulting from the absence of cleats on a skid used in transferring freight from one car to another, etc., held sufficient to show that defendant furnished its employé sufficient materials with which to cleat the skids.

Exceptions from Superior Court, Suffolk County; Chas. W. Bell, Judge.

Action for personal injuries by one Hayes against the New York, New Haven & Hartford Railroad Company. There was judgment for defendant, and plaintiff brings exceptions. Exceptions overruled.

Walter B. Grant, for plaintiff. Choate, Hall & Stewart, for defendant.

LORING, J. The plaintiff was one of a gang of workmen employed in loading freight from the house where it was received by the defendant into the cars which were to carry it to its destination. There were several tracks laid parallel with the side of the freight house, and the course of business was to use the intervening cars as a bridge to reach a car in the train on the outside track. Skids were placed from the house to the first car, and between cars on the intervening tracks. On the day of the accident the plaintiff was directed to carry a large case on his truck to the car on the fourth track. The case was so large that it had to be pla-

ced on the iron end of his truck, in place of being loaded on the inside of that end; and the plaintiff had to move forward in a stooping position in pulling the truck, to prevent it from tipping off the end of the truck. As he passed over the skid between the car on the third and that on the fourth track, the skid slipped, and the plaintiff, the skid, and the case he was pulling, fell to the ground, causing the injuries complained of. This was the first time he had been over this skid on that day. The jury were warranted in finding that the skid slipped because it was not cleated. On the conclusion of the plaintiff's evidence the presiding judge directed a verdict for the defendant, and the case is here on an exception to that ruling.

There was evidence that the defendant's rule was that all skids should be cleated. The skids in house No. 7 were fitted with iron pins at each end of the skid to keep the skid in place. But those in use at house No. 6—the house in question—had no pins. The practice had been to nail down cleats across the ends of these skids, to keep them from slipping when the cars were not of the same height, but not to cleat them when they were even in height. It also appeared that the matter of laying skids and of cleating them was left to the workmen. The defendant's contention is that it was not liable for the skid in question not having been cleated; that it had left that matter to the workmen, and had provided them with the necessary material.

So far as the skids were concerned, over which the plaintiff had to go from the warehouse to the car on the outside track, the safety of the plaintiff was dependent on the temporary adjustment of instrumentalities in the course of the work on which the plaintiff was employed. If the employer leaves such a matter to the workmen, furnishing them with the means of making the instrumentality safe, his duty to his employé is performed. Without citing all the cases, it is enough to refer to *Johnson v. Towboat Co.*, 135 Mass. 209, 48 Am. Rep. 458, and to the last cases on the point; *Miller v. N. Y., N. H. & H. R. Co.*, 175 Mass. 363, 56 N. E. 282; *Haskell v. Cape Ann Anchor Works*, 178 Mass. 485, 487, 59 N. E. 1118.

One witness testified that the defendant had not supplied hammer, nails, and boards for this purpose; but on cross-examination he testified that "all that you need to cleat a board is a little piece of wood nailed down so as to keep the running board steady. Sometimes there are lots of blocks there. You can find a few blocks and pieces of wood about the house, and they could get nails and things to drive them in if they wanted."
* * * There is generally lumber on the outside platform, right by the door of the house, and any one could get that lumber that wanted to." Another of the plaintiff's witnesses testified on direct examination: "There were no special boards furnished for

that purpose. He would go into the house and find some kind of a board and break it up for a cleat. There would be boards that he could find there, and sometimes he might have a hard time in finding any. Sometimes he might have to go outside of the house to get the board, but he would go where it was handiest to find them—that is, find them the quickest way he could do so; that the gang would keep working." Again: "Upon the day of the accident he didn't have any hammer. No carman in that house carried a hammer especially. He had to go to different parts of the house to get nails and hammer, and, if he saw a board that he thought needed cleating, he would go and hunt up the hammer and nails. He would have to go to different parts of the house. The hammer and nails were lying in a box." And on cross-examination: "There were plenty of nails in the house, and, though he had none with him, he could get them, if he wanted to, and he could get all the boards that he wanted. There were plenty of them." On this evidence, we are of opinion that the defendant had furnished the material necessary to cleat the skids. See, in this connection, *Callahan v. Phillips Academy*, 180 Mass. 183, 62 N. E. 260. What distinguishes this case from *Murphy v. N. Y., N. H. & H. R. Co.* (Mass.) 72 N. E. 330, is that in that case the matter of adjusting the brow used as a skid was left to a superintendent, and there was evidence that he was negligent in regard to the placing of the brow.

Exceptions overruled.

(187 Mass. 191)

COMMONWEALTH v. CLANCY et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 4, 1905.)

**APPEAL AND ERROR—WAIVER OF EXCEPTIONS—
LARCENY—FALSE PRETENSES—EVIDENCE—
CONSPIRACY—EVIDENCE OF OTHER CRIMES—
PRESUMPTION OF INNOCENCE—REQUESTED IN-
STRUCTIONS.**

1. Where a case is before the court on bill of exceptions and submitted on briefs, exceptions as to which defendants' brief contains no statement will be considered waived.

2. On a prosecution for larceny by obtaining money by false pretenses in the sale of a business, the fact that the volume of business is much less at once after the sale than it had been represented to be before the sale may be considered on the question of the falsity of the representations.

3. On a prosecution for larcenies by obtaining money from different persons at different times by false pretenses in the sales of business establishments, there being evidence of a conspiracy in pursuance of which defendants had acted throughout the transactions, on which question all the evidence in the case may be considered, the jury, if they find there was such a conspiracy, may consider the acts of either or both of defendants in any of the transactions, at least on the question of the knowledge of each of the falsity of the representations made, and of the intention of each to cheat each purchaser by means of them.

4. A requested instruction as to the presump-

tion of innocence, being given in substance, need not be given in terms.

5. A request to instruct that defendant is presumed to be innocent, and all evidence against him must be weighed with this presumption in the minds of the jurors from the beginning of the trial to the moment that the jury concludes, if it does so conclude, that defendant is guilty, is not a request to instruct that the jurors' minds must be kept open and free from any conclusion till after the jury has heard all the evidence.

Exceptions from Superior Court, Suffolk County; Daniel W. Bond, Judge.

One Clancy and another were convicted of larceny, and bring exceptions. Exceptions overruled.

Frederic H. Chase, Second Asst. Dist. Atty., for the Commonwealth. John B. Moran and Michael J. Sullivan, for defendants.

BARKER, J. The trial was upon an indictment in six counts, charging the defendants with the commission of larcenies by securing money from three different persons by false pretenses, namely, from one Pickard in October, 1899, from one Campbell in February and March, 1900, and from one Brases in March, 1903. The general nature of the false pretenses charged was concerning the value of a business, upon the sale of which the money was paid. The case is here upon a bill of exceptions, of which some relate to evidence, and others to the charge to the jury and to the refusal of requests for instructions. The case having been submitted upon briefs, and that of the defendants containing no statement as to their exceptions as to evidence, we consider those exceptions as waived.

The false pretenses relied on to show that the getting of the money from Pickard in October, 1899, was a larceny, were, in short, that Clancy was then the owner of a certain business, the weekly cash receipts of which amounted to \$800; that Murphy had been trying to buy the business, and that Clancy had been unwilling to sell until then; that Clancy's price was \$5,000; that Murphy had \$2,500 to put into the business; that Clancy desired to retire because he had made money enough there, was too old, and had outside interests; that it was strictly a cash business; that the sales averaged \$800 a week, or more, and that the profit on sales was at least 25 per cent.; that the sales for the week ending October 14, 1899, amounted to nearly \$800; that there were then on hand about \$1,200 worth of groceries and from \$300 to \$500 worth of meats; that the fixtures had cost, and were then worth, about \$1,000; that Clancy had worked up the business by years of hard work; that Murphy knew Clancy only as a customer of Murphy's; that Murphy then did a wholesale provision business, and that Clancy was a good customer of his, and had bought nearly all the meat for Clancy's store of Murphy for several years. The evidence tended to show that by

¶ 1. See Criminal Law, vol. 15, Cent. Dig. § 3012.

means of these false pretenses Clancy and Murphy, in confederation with each other, cheated Pickard out of his money in this way: Murphy got in communication with Pickard by means of an advertisement which Murphy inserted in a newspaper, giving notice that there was "Wanted, a good honest man with \$2,500 to join in purchasing a good grocery and provision store," and making other representations in the line of the false pretenses charged. Pickard was then induced to join with Murphy in buying the business from Clancy, Pickard paying his half of the price in cash, and Murphy falsely pretending to pay his half also, and Pickard and Murphy, after the business was turned over to them, going on with it for a short time. It was at once found that the receipts were but little, the stock of goods much smaller than had been represented, and that the business was practically worth nothing. Thereupon Murphy declared that they had been cheated, and that the only way out was to sell it back to Clancy for what he might be willing to pay, and it was so resold for the sum of \$550. The false pretenses charged to have been made to Campbell to induce him to pay out his money in February and March, 1900, related to the same business then being carried on by Clancy in the same store. They were of the same general kind as those made to Pickard, and the steps of the cheat, from the newspaper advertisement to the resale to Clancy, were upon the same model as those by which Pickard had been defrauded. The transactions with Brazee in March, 1903, were also the sale of a business for an exorbitant price which Brazee was induced to pay by false pretenses, and its resale upon the discovery by the purchaser that he had been cheated. But this time the business was located at a different place, and was represented to be a wholesale meat and produce business carried on by Clancy and Murphy as partners for seven years, and in which Murphy, before he became a partner, had been employed by Clancy. Again the scheme began with a newspaper advertisement, beginning this time as follows: "\$3000. For sale. Retiring partner's interest in a wholesale and produce business." This time Clancy posed as the retiring partner, who had first taken Murphy into his employment as a boy. There was a sale of Clancy's interest for \$2,000; a speedy demonstration that the purchaser had been cheated. In this instance the finale varied, Clancy, under compulsion, repaying \$2,000 to the purchaser. In this instance the pretense was that the business never had been less than \$55,000 a year, and the profit never less than \$4,000 a year, and that the sales for the first week of March, 1903, had been \$990, for the next week \$1,030, and for the third \$1,014.

1. The first exception argued upon the defendants' brief is to the refusal of the court to instruct the jury that the fact that the business, while conducted by the purchaser

after he took possession, did not bring in as much money daily, weekly, or monthly as defendants had stated it did up to the time of sale, was no evidence that defendants' statement of what it brought in was false. The court instructed the jury that it would not follow, as a matter of course, that the sales had not previously been so much as represented because for the next week or two after the sale they had been less, but allowed the jury to take the fact that they were less at once after the sale into consideration upon the question whether the amount of sales previous to the transfer had been represented falsely, saying to them that, if the falling off was accounted for or explained by the conduct of the purchaser or any other circumstances, they were not to draw any inference that the sales before the transfer were not as represented. We think the request was refused rightly. The whole matter was one to be dealt with by the jury in applying to the question their knowledge and experience. In the usual course of events it is not to be expected that an established business of the kind in question will at once seriously diminish without some good cause. Its sale with the good will gives reason to expect that its value will be at first, at least, substantially unchanged. Whether it was so in these instances was a question of fact for the jury, and, if the volume of business was substantially unchanged, it was a fair inference that the representations that it had been very much larger up to the transfer were false.

2. The next exception is to the refusal to give this request: "The defendants' innocence or guilt is to be determined as to each count separately, and in considering the Pickard transaction the jury must not draw inferences as to it from the evidence as to the other transactions; and so as to each of the other transactions." We are of the opinion that the evidence stated in the bill of exceptions justifies the conclusion that, before the false pretenses had been made to Pickard, the defendants had entered into a general conspiracy to cheat by means of selling out for cash an interest in some business which by false representations they should induce some purchaser to believe to be established and prosperous, and to belong to one or both of the defendants, and in which one of the defendants should continue to be interested with the purchaser, with a view to cheat him further when he should discover that he had been cheated into making his purchase, and that all three of the transactions charged in the indictment were cheats perpetrated by the defendants in the execution of this conspiracy. This aspect of the case was dealt with in the charge, and the jury were told that such a conspiracy could be proved by circumstantial evidence, and that, upon the question whether such a conspiracy existed, they could consider all the evidence in the case. This instruc-

tion was right. *Commonwealth v. Smith*, 163 Mass. 411, 418, 40 N. E. 189. If the jury should find that the defendants had formed and acted throughout in pursuance of such a conspiracy, the acts of either or both in any one of the three transactions were relevant, certainly upon the question of the knowledge of each of the falsity of the representations made, and of the intention of each to cheat each purchaser by means of them. *Commonwealth v. Blood*, 141 Mass. 571, 6 N. E. 769; *Commonwealth v. White*, 145 Mass. 392, 395, 14 N. E. 611; *Commonwealth v. Robinson*, 146 Mass. 571, 577, 16 N. E. 452; *Commonwealth v. Smith*, 163 Mass. 411, 418, 40 N. E. 189. The distinction between the present case and that of *Commonwealth v. Jackson*, 132 Mass. 16, cited by the defendants, where evidence of other sales was held to have been improperly admitted for the purpose of showing the intent with which the sale charged in the indictment was made, is this: There *Jackson* was acting alone, and the sales were independent transactions, although all were managed similarly. Here there was evidence of a conspiracy, and that each of the three transactions were included in its general purpose. For this reason the instruction requested was rightly refused.

3. The remaining exception is to the refusal to give in terms the following requests: "The defendant is presumed to be innocent, and all evidence against him must be weighed with this presumption in the minds of the jurors from the beginning of the trial to the moment that the jury concludes, if it does so conclude, that the defendant is guilty." While not given in terms, the substance of the request was given in the charge. The jury were reminded that they had been told over and over again that they ought not to start with the idea that the finding of the indictment, or any previous investigation of the case, was evidence of guilt; that none of the proceedings prior to the time when the defendants came before them are to be considered in any way as showing guilt; that "the jury start with the presumption that the defendants are not guilty until the evidence satisfies you differently; but when the evidence * * * satisfies you beyond any reasonable doubt—the evidence introduced by the government and the evidence of the defendants—when you are satisfied on that evidence that the defendants are guilty, then you should say so, otherwise you say the case is not proved and return a verdict of not guilty." In their brief the defendants contend that the jurors' minds must be kept open and free from any conclusion until after the jury has heard all the evidence, the arguments, and the charge. However that may be, it is plain that no such ruling was asked for by the request. We are of opinion that the charge dealt properly with the subject of the presumption in question. Exceptions overruled.

Exceptions overruled.

(187 Mass. 136)

PALMER v. COYLE.

(Supreme Judicial Court of Massachusetts.
Bristol. Jan. 3, 1905.)

SERVANT'S INJURIES—FURNISHING SERVANT VICIOUS HORSE—DEFECTIVE HARNESS—EVIDENCE—COMPETENCY—SUFFICIENCY.

1. In an action for injuries sustained by plaintiff by a vicious horse, or defective harness furnished him by defendant while in the latter's employ, evidence held to warrant a finding that plaintiff was employed by another employé with the knowledge and consent of defendant or of his brother, who had authority to act for him.

2. Where plaintiff, employed as assistant on a delivery wagon, was injured owing to the driver of the wagon having selected a defective harness when he might have selected a sound one, plaintiff could not recover for the injuries.

3. In an action for injuries sustained by plaintiff owing to an alleged defective harness furnished for his use while in the employ of defendant, held that, under the evidence, the question whether the harness was defective was one for the jury.

4. It is to be presumed on appeal that a case was submitted to the jury under sufficient instructions, where it is not claimed in the exceptions that they were not proper.

5. Where, in an action for injuries sustained by a servant, the declaration alleged that defendant furnished plaintiff a horse that was "wild, vicious, unruly, and accustomed to kick," and that defendant knew or ought to have known of such habits, it was incumbent on plaintiff to prove such allegation.

6. In an action for injuries sustained by a servant owing to the master having furnished him a vicious horse, single instances when the horse exhibited vicious traits, both before and after the accident, were admissible in proof of its general character.

7. In an action for injuries sustained by a servant owing to a vicious horse having been furnished him by defendant, after evidence had been introduced to show vicious traits, further evidence of the reputation of the horse was admissible to prove defendant's knowledge of his qualities.

8. It was competent to show that because of vicious propensities the horse was driven with another horse when used by defendant's servants, as it was not thought safe to drive him alone.

9. It was proper to introduce in evidence a conversation in defendant's presence, when reference was made to the horse in question as the "runaway."

Exceptions from Superior Court, Bristol County; LORAMUS E. HITCHCOCK, Judge.

Action by William Palmer, by his next friend, against Patrick Coyle. Judgment in favor of plaintiff, and defendant brings exceptions. Exceptions overruled.

J. B. Tracy and W. A. Swift, for plaintiff.
F. S. Hall and E. F. Coughlin, for defendant.

BRADLEY, J. At the close of the evidence the plaintiff waived the third count of his declaration, in which he sought to recover under Rev. Laws, c. 106, § 71, and the case was submitted to the jury on the first and second counts at common law for injuries caused to him by a vicious horse or a defective harness, each furnished for his use

¶ 2. See Master and Servant, vol. 24, Cent. Dig. § 567, 570-572.

while in the employment of the defendant.

Under either count he would be required to prove that the relation of master and servant existed between them, and for this purpose he introduced evidence that the defendant, who was a baker, employed a large number of men, among whom was one Charles Campbell, an uncle of the plaintiff, who drove one of the bakery wagons, and was a witness at the trial. He testified that the defendant told him that in his absence he could ask the defendant's brothers for such further instructions in the conduct of the business as might be necessary. In consequence of this direction, Campbell asked the defendant's brother, Owen Coyle, about an assistant to aid him on the team in the delivery of goods, and to take the place of a boy who had previously acted in this capacity, but was absent at the time. Before this, in a talk with the defendant himself, the witness had stated that he probably "could get the Palmer boy," and that the defendant said, "All right," and in the talk with the defendant's brother the witness said, "Probably I could get a boy," to which the reply was, "All right." After these conversations, and finding it necessary to have an assistant, the witness then asked the plaintiff to accompany him as such, and told him that he would receive as wages "fifty cents a day and his meals." The plaintiff complied, and was injured on the first day of his employment, while riding with his uncle and assisting him in his work. From this evidence, notwithstanding the defendant's denial, it could be found that the plaintiff was hired by Campbell, either with the knowledge and assent of the defendant or of his brother, who had authority to act for him in his absence. *Thomas v. Wells*, 140 Mass. 517, 5 N. E. 485.

By his contract of service the plaintiff assumed the risk of injury from the negligence of a fellow servant, and if Campbell was careless in selecting, or using, a defective harness, when he might have taken or used a sound one, and the plaintiff was thereby injured, he cannot recover. But the only evidence that at the time all the harnesses from which a choice could have been made were sound came from the defendant and his witnesses, whom the jury were not bound to believe. It appeared that the wagon would not have gone forward and let the whiffletree come into contact with the horse if the breeching strap had not broken at the buckle, and this, taken in connection with the statement that the harness was an old one, was some proof for the consideration of the jury that it was defective. It must be presumed that the case was submitted to the jury under sufficient instructions, as no reference is made in the exceptions that they were not full and proper, and a verdict on this count, as matter of law, could not have been ordered for the defendant. *Devine v. Murphy*, 168 Mass. 249, 46 N. E. 1066.

The first count does not charge the defendant with negligence in furnishing a vicious horse as an industrial appliance for the plaintiff's use. See *Green & Coates Railway Co. v. Bresmer*, 97 Pa. 103; *Gray v. Floersheim*, 164 Pa. 508, 30 Atl. 397. But the right to recover rests on the ground that the horse was "wild, vicious, unruly, and accustomed to kick," and that the defendant knew, or in the exercise of reasonable care ought to have known, of these habits. *Popplewell v. Pierce*, 10 Cush. 509, 511. It was thus incumbent on him to prove this allegation.

In this state it has been held that the reputation of human beings cannot be shown by proof of specific incidents of misconduct. *Miller v. Curtis*, 158 Mass. 127, 32 N. E. 1039, 35 Am. St. Rep. 469; *Connors v. Morton*, 160 Mass. 333, 335, 35 N. E. 860, and cases cited. This rule, however, does not apply where the disposition of an animal is in issue. For this purpose single instances, of which there were several, when the horse exhibited many of the traits described, both before and after the accident, were admissible in proof of its general character. *Todd v. Rowley*, 8 Allen, 51, 58; *Maggi v. Cutts*, 123 Mass. 535; *Broderick v. Higginson*, 169 Mass. 482, 48 N. E. 269, 61 Am. St. Rep. 296.

How far a horse addicted to the habits of shying or running away would for this reason be more likely to act in a vicious manner when subjected to the experience of a wagon pressing against him, and a whiffletree dropping upon him while he was being driven, was a question of fact. As a result of common observation it could not be said that such a horse would be less susceptible to fright from this cause, or that his previous habits would not tend to produce a nervous condition that would indicate his probable action on this occasion, or that kicking might not be a part of his usual conduct previous to running away. His former vicious acts, which included kicking, might be considered as indicative of his disposition, and to furnish a forecast of what he would do when exposed to such an accident. *Lynch v. Richardson*, 163 Mass. 160, 39 N. E. 801, 47 Am. St. Rep. 444. Compare *Eastman v. Scott*, 182 Mass. 192, 64 N. E. 968.

After evidence had been introduced tending to show an exhibition of the specific traits charged in the declaration, the sufficiency of which to support the issue was for the jury, further evidence of the reputation of the horse became admissible to prove the defendant's knowledge of his vicious qualities. *Monahan v. Worcester*, 150 Mass. 439, 23 N. E. 228, 15 Am. St. Rep. 226; *Broderick v. Higginson*, *ubi supra*.

For a similar purpose, it was competent to show that because of such propensities the horse was driven with another horse when used by the defendant's servants, as it was not thought safe to drive him alone, as well as the fact of the conversation, in the defendant's presence, when reference was made

to him as the "runaway." *Sumner v. Gardiner*, 184 Mass 433, 436, 68 N. E. 850.

The weight to be given to the evidence is not before us, and, while a verdict for the defendant might well have been returned, we cannot say that there was any error of law in submitting the case to the jury on the various issues that have been discussed.

Exceptions overruled.

(71 Ohio St. 141)

HOPKINS v. CLYDE et al.

(Supreme Court of Ohio. Dec. 6, 1904.)

MORTGAGE — FORECLOSURE — LIMITATIONS — WHO MAY PLEAD.

1. One who, by either private or judicial sale, has become the owner of the interests in real estate belonging to one or more of the heirs at law of a mortgagor, may plead the statute of limitations in bar of an action to foreclose the mortgage on the real estate so acquired, although each and all of such heirs at law are parties to the action, and neglect or refuse to interpose the plea.

(Syllabus by the Court.)

Error to Circuit Court, Miami County.

Action by George M. Clyde against Helen Clyde and others to foreclose a mortgage. W. A. Hopkins was made party defendant. Judgment for plaintiff, and Hopkins brings error. Reversed.

The action in the court of common pleas was brought by George M. Clyde, as administrator of the estate of W. J. Clyde, deceased, to foreclose a mortgage on certain real estate in the city of Troy, Miami county, Ohio, executed on the 22d day of June, 1885, by George C. Clyde and his wife, to secure the payment to said W. J. Clyde of a promissory note of even date with the mortgage for the sum of \$2,530, due one year from date, with 8 per cent. interest. This mortgage was left for record and was duly recorded in the records of mortgages for said Miami county. The mortgagor, George C. Clyde, died intestate several years after the maturity of the note, and several years before the action to foreclose was commenced, leaving Helen Clyde, his widow, and N. C. Clyde, Sadie Evans, Kate C. Davis, and Elizabeth Lee, his heirs at law, who were made defendants in said action, and who are also made defendants in error here, as they were in the circuit court. The action in foreclosure was commenced in the court of common pleas on the 20th day of May, 1902, more than 15 years after the maturity of the debt secured by the mortgage. The prayer of the petition is "that in default of payment of the amount now due and payable under said mortgage, or that may become due and payable before judgment herein, said mortgage may be foreclosed, and said premises sold free from all claims of the defendants, and the proceeds applied to the payment of the debt due plaintiff, and for such other relief as is just and proper in

the premises." On July 5, 1902, on his application, W. A. Hopkins, now plaintiff in error, was made a party defendant to the action, with leave to plead by the 10th day of July, which he did. The widow and heirs of the mortgagor, George C. Clyde, so far as disclosed by the record, made no defense. The answer and cross-petition of the plaintiff in error alleges, in substance, that said mortgagor, George C. Clyde, died intestate, and seised of the premises covered by the mortgage, leaving the widow and heirs above named, to whom his estate descended, and proceeds as follows to plead the statute of limitations against the mortgage: "The defendant the Henry St. Clair Company, on the 14th day of February, 1898, recovered a judgment by the consideration of the common pleas court of Miami county, Ohio, against the defendant Kate C. Davis in the sum of \$304.87 and costs of suit. On the 25th day of February, 1898, execution was issued upon said judgment and levied upon the defendant Kate C. Davis' undivided one-fifth part of said real estate in the petition described. After said judgment became a lien on said real estate, the said Kate C. Davis conveyed her said interest in said real estate to the defendant Neva O. Coppock. Thereafter the defendant the Henry St. Clair Company, on the 19th day of October, 1901, commenced an action in the common pleas court of Miami county, Ohio, in the nature of a creditors' bill against the defendants Kate C. Davis and Neva O. Coppock to enforce said judgment lien upon said real estate, and marshal liens. Such proceedings were thereafter had in said case that the court ordered said one-fifth part of said real estate appraised, advertised, and sold as upon execution, and the same was duly appraised, advertised, and on the 24th day of May, 1902, sold by the sheriff of Miami county, Ohio, to this defendant, for the sum of \$405. Said sale was thereafter confirmed by the court, and the sheriff of said county was ordered to convey said real estate to this answering defendant, and said sheriff did convey said real estate to this defendant, and he is now the owner and holder of the fee-simple legal title to said undivided one-fifth part of said real estate inherited by the defendant Kate C. Davis from her father, George C. Clyde, plaintiff's mortgagor. The said W. A. Hopkins for further answer says that the note described in the petition and secured by said mortgage herein sued upon was due more than fifteen years before the commencement of this action, and that the said note and said mortgage securing the same are both barred by the statutes of limitation. This answering defendant says further that said mortgage has not been canceled of record, and casts a cloud upon his title to said real estate. Wherefore the defendant W. A. Hopkins prays that he may go hence without day as to the plaintiff's action set forth in

the petition, and that the court on this cross-petition order said mortgage canceled of record in so far as it affects this defendant's title to said real estate, and quiet this defendant's title in and to said real estate as against said mortgage." To this answer and cross-petition the administrator (plaintiff below) filed a general demurrer "for the reason that the same does not constitute a defense to the petition of the said plaintiff." The court of common pleas sustained the demurrer and dismissed the answer and cross-petition. On error to the circuit court this judgment was affirmed. This case is here on error to reverse both judgments.

Gilbert, Shipman & Campbell, for plaintiff in error. Sherman T. McPherson, for defendants in error.

PRICE, J. (after stating the facts). It is not seriously questioned that the mortgagor, George C. Clyde, if living, could make the plea of the statutory bar against both the note and the mortgage securing the same, if more than 15 years had elapsed between the maturity of the debt and the commencing of the action to foreclose the mortgage. Nor can it be seriously argued that the widow and heirs at law of the mortgagor could not successfully interpose the plea in their behalf against the mortgage, because they are in undoubted privity of estate with the mortgagor, which estate vested in them at his decease. The authorities are unanimous in support of the latter proposition, and, while the right to plead the statutory bar to the promissory note is a personal privilege to be exercised by its maker or his legal representative, when the action seeks the sale of real estate which has vested in the widow and heirs at law either by will or by descent they or either of them may make the plea in protection of their estate from foreclosure and sale. But it is urged in this case that the plaintiff in error does not stand in such privity of estate with the mortgagor or his heirs at law as entitles him to make this defense. What are the facts he alleges? On the 14th of February, 1898—more than three years prior to the filing of the action to foreclose—the Henry St. Clair Company recovered a judgment in the court of common pleas of Miami county against Kate C. Davis, one of the heirs of the mortgagor, for \$304.87 and costs of suit. On the 25th of February of same year an execution was issued on this judgment, and it was levied on the undivided one-fifth of the real estate covered by the mortgage, which was the interest of said Kate C. Davis in the premises. After the judgment and levy Mrs. Davis conveyed her interest to Neva O. Coppock. In October, 1901, the judgment creditor commenced a suit against Kate C. Davis and her said grantee to enforce the judgment, and in that suit an order of sale was issued, and on the 24th day of May, 1902, the said one-fifth interest

formerly owned by Mrs. Davis was sold by the sheriff to the plaintiff in error, which sale was confirmed by the court, and in pursuance of its order the sheriff executed and delivered to him a deed for said interest in said mortgaged premises. By virtue of the judgment against Kate C. Davis, the execution, order of sale, the sale by the sheriff, its confirmation, and the deed of the sheriff, the plaintiff in error became seised of all the rights, title, and interest which she had theretofore held in the premises as one of the heirs of the mortgagor, and he became a tenant in common with the other heirs of the mortgagor, entitled as against them to bring and maintain proceedings for the partition of the real estate, and to enforce any and all the rights and be subject to the liabilities of a tenant in common, which might accrue under his new relation. It is true the plaintiff in error did not receive a deed directly from Kate C. Davis, and thus connect himself with the title of the mortgagor, yet he became seised of all her interest just as effectually by the legal proceedings referred to. Our statute so provides in section 5402, Rev. St. 1892, where it is said: "The deed [sheriff's] shall be prima facie evidence of the legality and regularity of the sale; and all the estate and interest of the person whose property the officer so professed to sell and convey, whether that interest existed at the time the property became liable to satisfy the judgment, or was acquired subsequently, shall be thereby vested in the purchaser." Both by common law, and surely by virtue of this statute, the purchaser at such judicial sale acquires all the right and title of the judgment debtor in the real estate. Of course, such purchase and the deed acquired thereunder do not of themselves free the premises purchased in this case of the prior mortgage lien for what may be due upon the mortgage, but does the purchaser thereby have such relation to the mortgaged estate that he may show in protection of his interest in the premises that the action to foreclose the mortgage is barred by lapse of time? It is argued by counsel for defendant in error that the grounds of defense against the mortgage, including the right to plead the statutory bar, which belonged to Kate C. Davis, did not pass by the judicial sale of her interest in the premises, because the title of plaintiff in error is not one in privity with the title of the mortgagor. The first part of the proposition may be true, namely, that the right to plead the statutory bar which she possessed did not pass as part of the interests acquired at the judicial sale; but it is equally true that her estate which was covered by the mortgage, and which would be taken from the plaintiff in error, did pass to and vest in him at the judicial sale. It is no longer a plea against the personal liability on the note, but a plea against the enforcement of a mortgage, which, but for the justness of the plea, would deprive the pur-

chaser at judicial sale of his property. It therefore is not so much an inquiry as to whether the judicial sale carried with it the right of Mrs. Davis to plead the statute of limitations as it is whether he may not assert it in his own right as a purchaser of part of the mortgaged premises.

We think a summary of the authorities on the subject indicates the general rule that any one in privity with the lien sought to be enforced against the premises, and any one who can be said to stand in the place of the person in whose favor the statute runs, is entitled to plead it. As said in *Corbey et al. v. Rogers, Jr.*, 152 Ind. 169-171, 52 N. E. 743, 749: "The general rule is that the right to plead the statute of limitations is a personal privilege, but persons standing in the place of the party having the personal privilege, such as grantees, mortgagees, executors, administrators, trustees, heirs, devisees, or other persons holding under him, may set up such defense." The court then cites in support of the rule numerous cases decided in other jurisdictions. Had Mrs. Davis retained her share of real estate, it is conceded she could have pleaded the statute in bar of foreclosure. Why? Because she would be holding under the mortgagor, and in privity of estate with him. So does her grantee hold under him, and in this sense the purchaser at judicial sale is her grantee, and stands in her place in the chain of title, and therefore he holds under the mortgagor. We think it has been well decided in several cases that the holder of a junior mortgage may plead the statutory bar against the enforcement of a senior mortgage. See 19 Am. & Eng. Ency. Law, 185; *Lent v. Shear*, 26 Cal. 361-370; *Hill v. Hilliard*, 103 N. C. 34, 9 S. E. 639. Two sections of the syllabus in the latter case are: "(2) A subsequent mortgagee or purchaser of the equity of redemption has the right to avail himself of the statute of limitations as a defense to the first mortgage, and after the rights of the first mortgagee are barred by the statute no act or acknowledgment on the part of the mortgagor can revive the mortgage as to subsequent mortgagees or purchasers. (3) A subsequent mortgagee or purchaser of the equity of redemption can avail himself of the protection of the statute of limitations against a prior mortgage, although the mortgagor is a party to the action and refuses to plead the statute." The opinion in that case cites *Jones on Mortgages*, § 1509; *Lent v. Shear*, 26 Cal. 361; *Medley v. Elliott*, 62 Ill. 532; *Fox v. Blossom*, 17 Blatchf. 352, Fed. Cas. No. 5,008. If a junior mortgagee may so defend, so may a subsequent purchaser.

In the case at bar, while the death of the

mortgagor occurred before the statute had fully run, yet it had run its full course at the date of the order of sale and the sale of the interests of Mrs. Davis in the mortgaged premises. At that time she and the other heirs at law of the mortgagor held but the equity of redemption. The equity of redemption in favor of Mrs. Davis was certainly sold to the plaintiff in error and he acquired it at the judicial sale above referred to. Hence, on the ground that he holds the equity of redemption in one-fifth of the incumbered premises, he is entitled to plead the statutory bar for the protection of his title. The authorities to support the doctrine of this opinion are very numerous, if not unanimous, as witness *Trimble v. Fariss*, 78 Ala. 280; *McCarthy v. White et al.*, 21 Cal. 495, 82 Am. Dec. 754; *Lent v. Shear et al.*, 26 Cal. 361; *Houston et al. v. Workman*, 28 Ill. App. 626; *Schmucker v. Sibert*, 18 Kan. 110, 26 Am. Rep. 785. We quote from the latter case the following: "Again, when the note is barred, the mortgage is also barred, and a grantee of the mortgagor may interpose this defense to an action to foreclose the mortgage whether the mortgagor does or not. He may protect the property conveyed to him by a plea of the statute, as to any lien sought to be charged against it. He cannot interpose the plea beyond the extent of his interest, and therefore only to prevent a foreclosure. In *Coster v. Brown*, 23 Cal. 142, the court decided that 'a purchaser of an estate subsequent to the mortgage may intervene and plead the statute'; and, further, 'when the debt to secure which a mortgage is given is barred by the statute of limitations, the mortgage is also barred, and if an action is brought to foreclose it, one who has purchased or acquired a lien on the property subsequent to the mortgage has a right to intervene in the action and plead the statute of limitations.'" See, also, *Ewell v. Daggs*, 108 U. S. 143-147, 2 Sup. Ct. 408, 27 L. Ed. 632. It would seem that, reasoning from any viewpoint we may have of the question, the answer and cross-petition of plaintiff in error contains a good defense against foreclosure as to his share of the premises, and, if true, that he is entitled to have the cloud of the mortgage thereon removed.

The judgments of the lower courts are reversed, and the demurrer to the answer and cross-petition overruled, and the cause is remanded to the common pleas court for further proceedings according to law.

Judgment reversed.

SPEAR, C. J., and DAVIS, SHAUOK, and CREW, JJ., concur. SUMMERS, J., not sitting.

(163 Ind. 687)

**GAGNON et al. v. FRENCH LICK
SPRINGS HOTEL CO. (No.
20,284.)**

(Supreme Court of Indiana. Dec. 29, 1904.)

**INJUNCTION — INTERLOCUTORY ORDERS — AP-
PEAL—SUBTERRANEAN WATERS—WASTE.**

1. Several interlocutory orders made in the same cause, granting an injunction or overruling a motion to dissolve an injunction, may be included in a single appeal, taken within the time prescribed by statute as to each order.

2. To sustain an interlocutory injunction it is enough that the evidence shows the act complained of a proper subject for investigation by a court of equity.

3. An interlocutory injunction against the pumping of subterranean waters is authorized by evidence that the pumping is for the purpose and with the result of preventing the flow of springs on the lands of another, and that the water pumped is merely wasted.

Appeal from Circuit Court, Orange County; T. B. Buskirk, Judge.

Action by the French Lick Springs Hotel Company against George S. Gagnon and others for injunction. From interlocutory orders, defendants appeal. Affirmed.

George Shirts and W. H. Talbott, for appellants. John W. Kern, Smith & Korbly, McCart & McCart, W. J. Buskirk, and Field & Kurrie, for appellee.

DOWLING, C. J. On July 22, 1903, the appellee, the French Lick Springs Hotel Company, together with four other persons, filed its complaint in the Orange circuit court against the appellants, George S. Gagnon, the Baden Lick Sulphur Springs Company, John L. Howard, and John C. Howard, asking that the defendants be temporarily restrained and enjoined from pumping water on the premises of the defendants, and from doing other acts alleged to be wrongful and injurious to the property of the plaintiffs, and that on the final hearing the injunction be made perpetual. On the same day, without notice, an emergency being disclosed, in the vacation of said court the judge thereof issued a temporary restraining order pursuant to the prayer of the complaint, and fixed a day for the hearing of said application. On July 30, 1903, the day set for such hearing, the parties appeared, and the complaint was dismissed as to all the plaintiffs except the French Lick Springs Hotel Company, and that company as the sole plaintiff filed two additional paragraphs of complaint. The judge, having heard the proof upon the complaint as amended, on August 3, 1903, in vacation, granted a temporary injunction against all the defendants who had been served with process. On the first day of the next term of the Orange circuit court, which was October 26, 1903, an amended complaint was filed by the plaintiff, the French Lick Springs Hotel Company, against the same defendants, and the latter, excepting John C.

Howard, who had not been served with process, moved the court to dissolve the temporary injunction then in force, and also to modify it, which motion was overruled on said 26th day of October, 1903. On November 9, 1903, in term, the defendants again moved the court to dissolve said temporary injunction. Their motion was overruled, and, on the application of the plaintiff, the cause was continued until the next term for the closing of the issues and for service of process on the defendant John C. Howard. November 12, 1903, the defendants the Baden Lick Sulphur Springs Company and George S. Gagnon prayed an appeal from the several interlocutory orders, judgments, and decrees of the court in this cause. The appeal was granted, time was allowed for filing bills of exceptions, the amount of the appeal bond was fixed at \$500, and it was required to be filed during the current term of the court. Said bond was filed and approved November 13, 1903.

An appeal to the Supreme Court may be taken from an interlocutory order of any circuit court or judge thereof granting or dissolving or overruling motions to dissolve an injunction in term and granting an injunction in vacation. Clause 3, § 658, Burns' Ann. St. 1901. The appeal must be taken at the term of court at which the order is made; or, when made in vacation, it must be taken at the time the order is made or during the next term. No appeal can be granted until the party desiring to appeal has filed an appeal bond, as in other cases of appeal. Section 659, Burns' Ann. St. 1901. The decisions complained of and assigned for error are the overruling of the motion to dissolve the temporary injunction of October 26, 1903, the overruling of the motion to modify the injunction of October 26, 1903, the overruling of the motion to dissolve the injunction of October 26, 1903, and the granting of the temporary injunction of August 3, 1903.

It is objected by counsel for appellee that the appellants cannot bring before this court in a single appeal more than a single interlocutory order granting an injunction or overruling a motion to dissolve an injunction. As all the orders appealed from were made in the same cause, and the appeal as to each decision complained of was taken within the time prescribed by the statute, we think that all such orders are properly included in a single appeal. Upon an appeal from an interlocutory order granting or refusing to modify an injunction, it is not necessary that such a case should be made out as would entitle the plaintiff to relief at the final hearing. It is sufficient if the court finds upon the pleadings and evidence such a state of facts as makes the transaction a proper subject for investigation in a court of equity. *Spicer v. Hoop*, 51 Ind. 365; *The People's Gas Co. v. Tyner*, 131 Ind. 277, 283, 31 N. E. 59, 16 L. R. A. 443, 31 Am. St. Rep. 433; *Home, etc., Co. v. Globe Tissue Paper Co.*,

¶ 2. See *Injunction*, vol. 27, Cent. Dig. §§ 216, 222.

146 Ind. 673, 679, 45 N. E. 1108. Is this such a case? The French Lick Springs Hotel Company owns some 550 acres of land situated in a valley $2\frac{1}{2}$ miles long by three-fourths of a mile wide, known as "French Lick Valley," in Orange county, in this state. A group of springs, known as the "French Lick Springs," possessing healing and medicinal properties in a high degree, is situated on the lands of the appellee. The Baden Lick Company is the owner of 80 acres of land situated to the north and northeast of the lands of the French Lick Company, and adjoining the same. John C. and John L. Howard own a tract of land extending from the hilltops to the northeast of French Lick Springs down into said valley and to a point about 85 rods distant from the northeast corner of the lands owned by said French Lick Company. The waters flowing from the springs known as the French Lick Springs had for more than 30 years been known throughout the United States to possess healing and medicinal properties, and during that time had attracted many visitors to said valley from all parts of the United States, who came to drink and bathe in such waters. During all that time a hotel and health and pleasure resort had been maintained near said springs, which was added to and improved from time to time to accommodate the increasing number of guests attracted there by reason of the properties of said springs, which were natural flowing springs. On and before June 25, 1901, this hotel property, consisting of certain frame hotel buildings, the lands aforesaid, and the natural springs thereon, was owned by said French Lick Springs Company, of which corporation John L. Howard and John C. Howard, parties to this action, were stockholders, the said John C. Howard being an officer thereof. On the date last named the said French Lick Springs Company sold said property to the appellee corporation, the French Lick Springs Hotel Company, receiving therefor the sum of \$385,000, which was the fair cash value thereof, but that without said springs the fair cash value of said property would not have exceeded \$20,000; the said appellee corporation being induced to make said purchase and investment solely on account of the existence of said springs, their wide reputation, and the fact that so many guests were attracted thither by reason of their widely known medicinal properties. The appellee corporation, immediately upon taking possession of said property, began the erection of and has completed new hotel buildings thereon at an expense of \$140,000, and made other improvements thereon at an additional expense of \$125,000, and said property is now of the value of \$1,000,000, which value depends upon the continued existence of the said springs.

The overflow waters from said natural springs on the lands of the French Lick Company run from said springs in a well-

defined channel, with bed and banks, forming a surface stream through which said waters are carried to and emptied into French Lick creek. Underlying all the land in the said French Lick valley is a subterranean body of water, and the waters in the natural springs of the French Lick Company are forced upward through the rocks by the hydrostatic pressure of said body of water, and for more than 30 years said springs have had a natural flow resulting from said pressure. Within a year prior to the bringing of the action, the Baden Lick Company and the Howards have each sunk a well on their respective tracts of land in said valley for the purpose of tapping the body of water underlying said valley, and such wells were sunk to such depth as to penetrate such body of water; the Howard well being located at a point 85 rods northeast of the French Lick Company's premises, and 160 rods from the natural springs of said company, and the Baden Lick well being located at about one-half mile north of such springs. The Howard well was sunk by the Howards with a view of devising some method whereby they might intercept the flow of water into the said natural springs of the French Lick Company, and thereby destroy the value of its property. About the 18th of July, 1903, having theretofore placed in said well a powerful steam pump, they commenced to operate the same, pumping water from said subterranean body of water, knowing that the same was connected with such springs, and knowing that their said pump had sufficient power of suction to draw the underlying waters away from said springs and destroy the same; and with such knowledge continued to operate said pump day and night, drawing millions of gallons of water from said body of water, which they allowed to escape on the ground and run into French Lick creek and be wasted, and such pumping being continued up to the time of the commencement of this action. Some weeks prior to the 18th of July, 1903, the appellant the Baden Lick Company, by Gagnon, who acted for it, also placed a powerful pump in its said well, and operated the same almost continually up to, on, and after said last-mentioned date, drawing from said subterranean basin more than a half million gallons of water every day, and allowing all of the same to escape into French Lick creek and be wasted; such pumping continuing up to the time of the service of the temporary restraining order herein. Gagnon and the Baden Lick Company knew that the removal of a large quantity of water from said subterranean body would result in the destruction of the natural springs, and after the 19th of July they also knew that the joint action of the Howards and themselves in such pumping was resulting in the injury of such springs, and, with such knowledge, continued so to pump and waste said waters

until said natural springs of the French Lick Company ceased to flow, and became for the time practically worthless, and so remained until the service of the restraining order. Neither the Baden Lick Company nor the Howards had any use for the waters so pumped by them through their respective wells from said subterranean basin of water, but wasted all of it, and while their pumping was in progress they caused observations to be made to discover its effect on the natural springs of the French Lick Company; and when they learned that said springs were being exhausted by reason of such pumping they continued to pump and waste said waters until the flow of water in said springs stopped, and the value thereof for the time being was destroyed. The connection between the wells of the Baden Lick Company and the Howards and the said natural springs of the appellee through said subterranean body of water is so well defined that when the pumping from said wells from any cause ceased for a few hours, the waters would again begin to flow into and out of the said springs, and when said pumping was again resumed the suction from the pumps would again cause said springs to cease flowing. About 11 p. m. on July 21, 1903 (the day prior to the commencement of this action), while the pumps in both of the wells referred to were being operated, John L. Howard, one of the appellants, visited the natural spring of the French Lick Company known as "Pluto," and, finding, on examination that the same had ceased to flow, said to his companion, "We have got her down; she has gone to hell." John Stevens, Howard's manager, after the well was sunk on Howard's land, and prior to placing a pump therein, said to John C. Howard, "I want you to get me a good pump and put in there, and I will sink old Pluto to hell." After such pump was procured and placed in operation, and was operated until about the time of the commencement of this action, Stevens again declared, "I have them working on old Pluto, and I don't give a d—n if Pluto goes as dry as a chip." John L. Howard, before sinking the well referred to, said: "I will drill a hole up there deep enough to reach the sulphur water, and it doesn't matter whether it flows out natural or not, for I will put in a compressed air pump, and by this means I can lift the water from the bottom of the well instead of the top, and when this is done it will lower the fresh-water pressure here, and whenever you affect the fresh-water pressure Pluto will not run out." He again said, "I will have Pluto right here at my door." And again: "When we get through with them [referring to the French Lick Company], they will either take us back in the company or buy me out at my figures. * * * I know more about Pluto than anybody in this valley, and when I get through with my well they will want me, be-

cause I can control Pluto." On the 19th of July, 1903, John C. Howard inspected the three natural springs of the French Lick Company, and found that they had ceased to flow. July 20, 1903, the appellant Gagnon came to the Pluto Spring, and said to the attendant: "We are pumping you dry. We will make you break your back dipping after that water." On the following day Gagnon came to the Pluto Spring again, inquired about it, and said, "It is about as it was the other day when I was here." These conversations occurred one and two days before the commencement of this action. Both Howard and Gagnon were operating their pumps at these times, and continued to do so until they were restrained. After they were compelled to stop pumping, the water again began to flow out of the natural springs. On July 20, 1903, Gagnon, while on the premises of the French Lick Company inspecting the springs, talking about them and the premises, said, "They think it is a bluff, but I have the winning hand, and, by God, I'm going to play it out." Dr. John A. Ritter, an old resident of the valley, and landowner there, testified that in 1898 he sunk a well in the valley at a point about a mile and a quarter north of the French Lick Springs; that the group of springs in said valley known as the "West Baden Springs," and a spring owned by one E. B. Rhodes, were situated in the valley between his well and the French Lick Springs; that when his well penetrated to the underlying body of water it flowed a large stream, which came up with great force and in large quantities; that shortly afterwards the flow of water in the French Lick Springs greatly diminished, as did the flow in the West Baden Springs and the Rhodes Spring; that, to determine the fact definitely, he capped his well, and soon thereafter all of said springs increased in quantity of water and force, and flowed as before; that he again uncapped his well, and allowed it to flow, and the springs were again affected, and the flow thereof was diminished, whereupon he again capped his well, with the result that the said springs regained their natural flow.

The English and American cases cited by counsel for appellants undoubtedly state the general rules which have been applied by the courts to subterranean waters, and we have no inclination to question their wisdom and authority in the particular cases to which they apply. But there are well-recognized exceptions to these rules, and doubtless further exceptions and departures from them will from time to time be found necessary or expedient. Where the diversion of the water is purely malicious, and is detrimental to another proprietor, it may be prevented by injunction. *Miller v. Black Rock*, 99 Va. 747, 40 S. E. 27. So where the water is simply wasted. *Stillwater v. Farmer*, 89 Minn. 58, 93 N. W. 907, 60 L. R. A. 875, 99 Am. St. Rep. 541. If the water flows in a

definite channel under ground, the same rules apply to it as apply to surface streams, and the landowner cannot use or destroy it at his pleasure. *Southern Pacific R. R. Co. v. Dufour*, 95 Cal. 616, 30 Pac. 783, 19 L. R. A. 92, note. And the courts of New York have held that the drainage of land of a private owner by a city pumping works, which exhausts from all the ground in its vicinity the natural supply of underground or subterranean water, and thus prevents the raising on it of crops to which it was or would be peculiarly adapted, or destroys such crops after they are grown or partly grown, renders the city liable to the landowner for the damages he sustains, and entitles him to an injunction against the continuance of the wrong. *Forbell v. New York*, 164 N. Y. 522, 58 N. E. 644, 51 L. R. A. 695, 79 Am. St. Rep. 666. In *Willis v. Perry*, 92 Iowa, 297, 60 N. W. 727, 26 L. R. A. 124, it was held that a use for natural purposes takes precedence over artificial ones. A further exception to the rules laid down in *Acton v. Blundell*, 12 Mees. & W. 335, *Chasemore v. Richards*, 7 H. L. Cases, 340, and *Ewart v. Belfast*, 9 L. R. (Ireland) 172, was made in the recent case of *Katz, Ex'r, v. Walkingshaw* (Cal.) 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35, where it was declared that the owner of a portion of a tract of land which is saturated below the surface with an abundant supply of percolating water cannot remove water from wells thereon for sale, if the remainder of the tract is thereby deprived of water necessary for its profitable enjoyment. See, also, *Bassett v. Salisbury Mfg. Co.*, 43 N. H. 569, 82 Am. Dec. 179; *Dexter v. Providence Aqueduct Co.*, Fed. Cas. No. 3,804; *Smith v. Brooklyn* (Sup.) 40 N. Y. Supp. 141. The strong trend of the later decisions is toward a qualification of the earlier doctrine that the landowner could exercise unlimited and irresponsible control over subterranean waters on his own land, without regard to the injuries which might thereby result to the lands of other proprietors in the neighborhood. Local conditions, the purpose for which the landowner excavates or drills holes or wells on his land, the use or nonuse intended to be made of the water, and other like circumstances have come to be regarded as more or less influential in this class of cases, and have justly led to an extension of the maxim, "*Sic utere tuo ut alienum non lædas*," to the rights of landowners over subterranean waters, and to some abridgment of their supposed power to injure their neighbors without benefiting themselves.

The only conclusions which can fairly be drawn from the verified pleadings and evidence in this case is that a bitter rivalry exists between the parties to this action, their stockholders and officers, and that, without a real necessity therefor, the appellants dug wells and put machinery and appliances in them and pumped large quantities of water

therefrom for the purpose of stopping the flow of water of the mineral springs on the land of the appellee. The thinly disguised pretext that some of the acts complained of were done in an attempt to repair a well or stop a leak in it, is an insufficient explanation of the injurious proceedings of the appellants, and wholly fails to convince us of their good faith. It appears also from the evidence that the connection between the springs on appellee's land and the subterranean waters on the lands of the appellants is intimate and unmistakable, and that it has been demonstrated by actual experiment that an excessive flow of the waters on the lands of the latter, induced by artificial and unlawful means, exhausts the water, and entirely stops the flow of the springs on the land of the appellee. Following the lead of the later decisions, which, we think, proceed upon just and correct principles, we are satisfied that sufficient cause was shown by the appellee for the granting of a temporary injunction upon each application therefor, and that the case presented was such a one, at least, as was proper for the investigation of the court in the interests of justice. *Kerr's Injunctions*, 14-32. In view of the evidence in the case, the appellants were not entitled to a modification of the order of injunction.

In our opinion, the court did not err in any of its rulings, and the judgment is affirmed.

(164 Ind. 7)

SCHREIBER et al. v. WORM. (No. 20,328.)

(Supreme Court of Indiana. Dec. 29, 1904.)

**SUPREME COURT RULES—STATEMENTS IN BRIEF
—CONTRACTOR'S BOND—RELEASE
OF SURETY.**

1. Sup. Ct. Rule 22, subd. 5 (55 N. E. vi), requiring appellant's brief to contain "a concise statement of so much of the record as fully presents every error and exception relied on, referring to the pages and lines of the transcript." * * * The statement will be taken to be * * * sufficient for a full understanding of the questions presented for decision—is not satisfied, as regards the complaint claimed to be defective, by the statement in the brief; "The amended complaint, in one paragraph, will be found on pp. 3-11 of the transcript."

2. Under the rules of court, appellant having merely referred the court to the evidence as proving many changes in work without the written order required by contract, it is justified in not searching the record for the evidence.

3. Sureties on a contractor's bond, to be relieved of liability for violation or departure from the principal contract, must show damages therefrom, to the extent of which only will they be relieved. So failure of the owner to insure the building, as agreed, is immaterial, there having been no fire.

Appeal from Superior Court, Marion County; James M. Leathers, Judge.

Action by Albert R. Worm against Frederick Schreiber and others. Judgment for plaintiff. Defendants appealed to the Appellate Court, whence the case is transferred under Act March 13, 1901 (Acts 1901, p. 590,

c. 250; Burns' Ann. St. 1901, § 1837u). Affirmed.

H. N. Spaan and C. A. Dryer, for appellants. J. E. McCullough, for appellee.

DOWLING, C. J. The appellant Schreiber, as principal, and his co-appellants, Schaub and Ittenbach, as his sureties, executed to the appellee, Worm, a bond, in penalty of \$5,700, to secure the performance by Schreiber of a building contract. The condition of the bond was that the same should be void if Schreiber faithfully furnished the materials and labor and fully erected and completed a two-storied brick business block, with living rooms on second floor, at Nos. 1225 and 1227 Oliver avenue, in the city of Indianapolis, according to the plans and specifications therefor prepared by an architect, in all respects agreeably to a contract in writing between Schreiber and Worm for the construction of said block, subject to all such modifications, alterations, changes of, additions to, or omissions from, such plans and specifications as should be made agreeably to the said contract, and if he held Worm harmless from all claims on account of labor and materials, and from all loss, damage, cost, or outlay by reason of the erection of the said buildings. The contractor having done work and furnished materials under the contract to a considerable amount, but having failed to complete the buildings according to his agreement, and to pay certain claims for materials furnished, for which liens were taken under the statute, Worm brought his action upon the contract and bond against Schreiber, the contractor, and Schaub and Ittenbach, his sureties, to recover damages for the breaches alleged. Schreiber, the contractor, filed an answer in three paragraphs, the first being a general denial, the second a plea of payment, and the third addressed to so much of the complaint as alleged defects in the work, etc.; stating that Worm, the owner, had accepted the work without objection, and was bound by such acceptance. Schreiber also filed a set-off in two paragraphs for extra work, and for an additional \$200 alleged to have been promised him by Worm on account of a mistake by the architect in reporting to Schreiber the amount of a bid for the brickwork. The sureties, Schaub and Ittenbach, demurred to the complaint, and their demurrers were overruled. They filed a partial answer averring that the work had been accepted by Worm, and that he thereby waived the right to object to it. In addition to this pleading, they filed a general denial, and a further paragraph alleging various deviations from the plans and specifications, and certain alterations and violations of the contract without their knowledge, whereby they claimed to be discharged from their liability on the bond. Replies to all affirmative answers and to the set-

off were filed. The cause was tried by a jury, who returned a verdict for appellee, and, over a motion for a new trial, judgment was rendered on the verdict.

By joint and several assignments of error, the appellants seek to question the sufficiency of the complaint, and the correctness of the ruling of the court upon the several motions for a new trial. The complaint is not before us, and its supposed defects are not available to the appellants upon any assignment of error. The fifth specification of rule 22 of this court (35 N. E. vi) requires that the brief of the appellant shall contain "a concise statement of so much of the record as fully presents every error and exception relied on, referring to the pages and lines of the transcript. * * * The statement will be taken to be accurate and sufficient for a full understanding of the questions presented for decision, unless the opposite party in his brief shall make necessary corrections or additions." No such statement of the contents of the complaint is contained in the brief of counsel for these appellants. The only attempt to comply with the rule was the following laconic statement: "The amended complaint, in one paragraph, will be found on pp. 8-11 of the transcript." This memorandum bears no resemblance to the condensed statement of the substance of the complaint contemplated by rule 22. It is at most a copy of a single line of the index to the record. This is not what the rule intends. As applied to cases like this, it requires counsel for the appellant to incorporate in their brief so complete a statement of all the material allegations of the complaint as to be at once concise in form, accurate in details, and sufficient for a full understanding of the question presented without reference to or aid from the transcript. The reason and purpose of the rule is to enable each of the five judges of the court to examine every question presented in each case, and to form an opinion upon them, without removing the record from the hands of the judge to whom it has been distributed. When the rule was adopted, it was believed that it would insure a thorough and satisfactory investigation of every case by all the judges, and, where briefs are carefully prepared in accordance with its requirements, the results have been found fully commensurate with the benefits anticipated when the rule was adopted.

The sufficiency of the evidence to sustain the verdict is the next question presented. It is said by counsel for appellants that, "under the first, second, and third reasons for a new trial, the court is referred to the evidence, which proves that large and many changes and alterations, which were material and extensive, were made by plaintiff Worm, without the same having been made upon the written order of the owner. Neither was the value of the work, added or omitted, computed by the architect as re-

quired by the contract." While counsel assert that many material changes and alterations were made by the plaintiff without a written order for the same as required by the contract, they have failed to designate any of them, but refer us to the evidence for proof of their assertion. Under the rules of the court, we would be justified in declining to perform the labor sought to be imposed on us of searching a record of nearly 1,000 pages for the evidence counsel allege to exist. We have made the examination, however, and found that the evidence on the subject was conflicting, and that the appellee himself testified that he ordered none of the extra work, except three items of the same, and all three of these orders were in writing. This was sufficient to sustain the verdict in respect to those items. The value or cost of the only extra work authorized by the appellee, to wit, the extension of a wall, the furring of a wall, and the substitution of oak lumber for yellow pine for a ceiling, was computed by the appellant Schreiber, agreed to by the appellee, and reported to the architect, who seems to have adopted the computation agreed upon by the appellant and appellee. Both the contract and the bond expressly provided for modifications of the plans and specifications, and we are of the opinion that in the particulars named there was a substantial compliance with the contract.

An alteration of the contract by erasure of the words "and the west side and the porch and front stairway projection" is alleged, but it clearly appears that this alteration was made before the contract was signed or the bond delivered, and so the jury found. It is claimed by appellants Schaub and Ittenbach that the estimated total cost of the building was changed by the agreement of the appellee to pay the contractor \$200, in addition thereto, on account of the brickwork. But this agreement was made before the contract and bond were signed, and did not affect the liability of the sureties.

Objection is made by the sureties that the payments were in excess of the installments or amounts fixed by the contract, which limited them to \$1,000 or less, until the lower story should be ready for occupancy. But the payment of \$1,200 was made after notice to the sureties, and with their consent; \$1,889.30 was paid to discharge a judgment upon a mechanic's lien and to save appellee's property from sale; and the remaining estimates and payments were made after the lower rooms were substantially finished. All payments were shown to have had the indorsement and approval of the architect. The stone course to prevent dampness of walls was supposed by appellee to be provided for and required by the contract, and was put in by Ittenbach & Co., of which firm one of the sureties was a member. No contract for an extension of the time for the

completion of the building was shown. All that the appellee said was that he wished the contractor to rush the work on the two front rooms on the first floor, but that he didn't care about the upstairs until October. On all these points there was evidence which sustained the verdict, and, the jury having weighed the testimony and decided on which side the preponderance existed, we are not authorized to set aside their conclusion, nor, with the proof before us, would we feel inclined to do so. Building contracts are to receive a reasonable construction, and, where modifications are provided for and are made, or where there are slight deviations from the plans and specifications, such modifications or deviations will not ordinarily avoid the contract and discharge the sureties on the bond. *Hohn v. Shideler* (at this term) 72 N. E. 575, and authorities cited. The sureties upon a contractor's bond do not stand in the same relation to the principal contract as do the sureties upon a note or bond which itself constitutes the entire agreement between the parties. Their liability depends upon the undertaking and the conditions stated in the bond, and in that respect it is to be strictly construed. But where they ask to be discharged from liability because of some violation of or departure from the terms of the principal contract, they must, if they would succeed, show that they have sustained some damage by such breach, and then they are entitled to be discharged only pro tanto, or to the extent of the injury sustained. *Hohn v. Shideler*, supra. Therefore, if the appellee failed to insure the property for the benefit of the contractor, as the contract required, yet, if the building or materials were not injured or destroyed by fire, the sureties suffered no injury, and are entitled to no relief.

A careful reading of the instructions given and refused satisfies us that no error in this respect was committed by the court. Those given expressed in various forms a statement of the law governing this case, which coincides with the views set forth in this opinion, while those refused were wholly at variance with them. Other reasons for a new trial were stated in the motion therefor, but the points were waived by the failure to discuss them.

Finding no error, the judgment is affirmed.

(163 Ind. 671)

McKINSTER v. SAGER. (No. 20,377.)

(Supreme Court of Indiana. Dec. 16, 1904.)

SALES—SALE BY MERCHANT NOT IN COURSE OF TRADE—FAILURE TO COMPLY WITH STATUTE—RIGHTS OF CERTAIN CREDITORS—CONSTITUTIONAL LAW.

1. Act March 9, 1903 (Acts 1903, p. 276, c. 153), makes sales by a merchant of any of his stock, save in the usual course of trade, void as to creditors whose claims arise from a sale

of some of the stock, or from money loaned for the business, unless certain conditions as to a publication of a schedule of such creditors, etc., are complied with, and provides that the merchandise in the hands of the purchaser shall be liable to such creditors, and, if withdrawn, the purchaser shall be liable to such creditors of such seller to the value of the merchandise received by him and withdrawn. *Held*, that the statute is void, in that it creates preferred classes of creditors, in violation of Const. U. S. Amend. 14, prohibiting any state from denying the equal protection of the law, or depriving any person of life, liberty, or property without due process of law.

Appeal from Circuit Court, Bartholomew County; F. T. Hord, Judge.

Action by William D. Sager against Eldridge L. McKinster. From a judgment for plaintiff, defendant appeals. Reversed.

Everroad & Cooper, for appellant. John Rynerson, John W. Morgan, and Smith, Duncan, Hornbrook & Smith, for appellee.

GILLET, J. Appellee was the plaintiff below. His complaint was based on the provisions of an act of the General Assembly approved March 9, 1903 (Acts 1903, p. 276, c. 153). The record raises the question as to the constitutionality of that act. All of the essential provisions thereof are found in the first section, which (omitting the enacting clause) is as follows: "That it shall be unlawful for any merchant engaged in the buying and selling of merchandise, while he is indebted to any person who has in good faith given him credit for merchandise sold to him and to be used by him in the conduct of his business, or to any person for money loaned to him to be used in the conduct of such business, and which has been actually used in said business, to sell his entire stock of merchandise in bulk, or to sell the major portion thereof in value in one or more parcels or to one or more persons for the purpose and with the intention of ceasing to conduct said business in the same manner and at the same place as he has theretofore conducted the same, without first making a full and complete inventory of the merchandise so proposed to be sold, in which inventory the values shall be extended at the ruling wholesale market price thereof; and making a full, true and correct schedule of all persons to whom he is indebted for merchandise so sold to him, and of all persons to whom he is indebted for money loaned to him to be used in the conduct of such business, and which has been used therein, stating therein the postoffice address of each of said creditors and the amount owing to each of them; to which inventory and schedule there shall be attached the oath of the seller that the same is true and correct; or if the seller shall assert that he is not indebted to any person of the classes above designated, he shall make an affidavit to that effect and deliver the same to the purchaser with the inventory as hereinafter provided. The seller shall deliver said inventory and schedule

to the proposed purchaser and shall retain exact copies thereof in his own possession; the seller and the purchaser shall each preserve such inventory, schedule and affidavit for the period of six months after such sale and purchase and the same shall be opened to the inspection of the creditors of the seller. Five days before such sale shall be consummated and before the purchaser shall take possession of the merchandise so proposed to be sold the seller and proposed purchaser shall join in giving written or printed notice of the proposed sale and purchase of such merchandise to each of the creditors named in such schedule; such notice may be delivered in person to such creditors or transmitted to them by registered letter through the United States mail by being deposited in the United States postoffice at the place where the seller has heretofore conducted business, or nearest thereto, properly addressed to the respective creditors at the postoffice address given in such schedule, with proper postage affixed; such notice shall state the aggregate value of the merchandise proposed to be sold as shown by such inventory, the consideration to be paid therefor, and the time and manner of making such payment. If said seller shall fail to make such inventory of such merchandise; or if such inventory shall fail to state the true value of said goods as above required; or if said seller shall fail to make such true schedule of creditors as hereinbefore provided, and the purchaser shall have knowledge of the fact; or in event the seller shall assert that there are no debts of the character above specified; if the purchaser shall fail to require the affidavit above provided; or if the seller and purchaser shall fail to give each of said creditors named in said schedule the notice above required in the manner above provided; or if such notice shall not correctly state the amount of such merchandise proposed to be sold and the consideration to be paid therefor, and the time and manner of making the same; then and in either of such events such sale shall be deemed fraudulent and void as against the creditors of such seller on account of merchandise sold to him and money loaned to him to be used in the conduct of said business, and actually used in said business, and the merchandise in the hands of the purchaser, or any part thereof, if it shall be found in his hands, shall be liable to such creditors, and in event the same or any part thereof shall be withdrawn by said purchaser, then the purchaser himself, personally, shall also be liable to said creditors of such seller to the extent of the value of the merchandise so received by him and thus withdrawn."

In the case of *Sellers v. Hayes* (at last term) 72 N. E. 119, we had occasion to consider the underlying question in this case; but the importance of the principle involved is, as we believe, a sufficient reason for a further opinion upon the subject.

We have little doubt that the act is in vio-

lation of our state Constitution, but, as we are persuaded that it contravenes the fourteenth amendment to the federal Constitution, we prefer to consider the case from that viewpoint.

After the opening language relative to national citizenship and its rights, the amendment contains the following language: "Nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." It is settled that the adoption of said provisions did not carry into the framework of our government any new principle. The amendment is merely a check, and, as its terminology and meaning come from and are revealed by the past, we may appropriately (and for an especial reason in this case) refer to history in considering the question whether the act before us is in contravention of the Amendment. As was well said by Mr. Justice Story: "That government can scarcely be deemed to be free when the rights of property are left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require that the right of personal liberty and private property should be held sacred. At least, no court of justice in this country would be warranted in assuming that the power to violate and disregard them—a power so repugnant to the common principles of justice and civil liberty—lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people." *Wilkinson v. Leland*, 2 Pet. 657, 658, 7 L. Ed. 542. See *State ex rel. Jameson v. Denny*, 118 Ind. 382, and separate opinion by Elliott, C. J., 400, 21 N. E. 252, 258, 4 L. R. A. 79; *State ex rel. v. Fox*, 158 Ind. 126, 63 N. E. 19.

There is an absence of high-sounding phrases concerning freedom in Magna Charta, probably for the reason that it was largely declaratory of the fundamental law of England. 1 Blackstone, Com. *127; Coke, Inst., proem. The significance of the instrument depends largely upon the fact that its stipulations were wrung from the hands of an unwilling King by men with arms in their hands. Hence it is regarded as a historical monument of right, and it is called the "palladium of English liberty." The twenty-ninth chapter of Magna Charta, which Blackstone says "alone would have merited the title it bears, of 'Great Charter,'" provides: "No freeman shall be taken or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed or exiled or otherwise destroyed; nor will we pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land. We will sell to no man, we will not deny to any man, either justice or right." (As it now appears in the Statutes at Large.) Concerning the expression "the law of the land," Lord Coke has pointed out that it was not said in the

Great Charter "laws and customs of the King of England, lest it might be thought to bind the King only, nor of the people of England, lest it might be thought to bind them only, but that the law might extend to all, it is said 'by the law of the land,' i. e., England." 2 Inst. 50. In the old case of *Nightingale v. Bridges*, as reported in 1 Shower, 138, it appears that counsel for the plaintiff, in arguing the cause, said that it was a "fundamental rule that in life, liberty, and estate, every man who hath not forfeited them hath such a right that the law allows him to defend, and means for so doing; that, if it be violated, it gives an action to redress the wrong and punish the wrongdoer. The law is the highest inheritance which the King hath, for by it the King and all of his subjects are ruled, and, if the law were not, there would be neither King nor inheritance. The Kings of England have always claimed a monarchy royal, not a monarchy signoral. Under the first, the subjects are freemen, and have a propriety in their goods and freehold in their lands, but under the latter they are villeins and slaves; and, my lord, this propriety was not introduced into our land as the result of princes' edicts, concessions, and charters, but was the old fundamental law, springing from the original frame and constitution of the realm."

As far back as the year 1819, Mr. Justice Johnson said, in *Bank of Columbia v. Okley*, 4 Wheat. 235, 244, 4 L. Ed. 539: "As to the words from Magna Charta, incorporated into the Constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: That they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice."

It is well settled that under the modern law the phrases "law of the land" and "due process of law" are identical in import. *Murray v. Hoboken, etc., Co.*, 18 How. 272, 15 L. Ed. 372; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. Ed. 616; *Hurtado v. California*, 110 U. S. 516, 28 L. Ed. 232; *Oooley's Const. Lim.* 502; *Pomeroy, Const. Law* (3d Ed.) § 245.

It was said by Mr. Justice Brewer, speaking as the organ of the court in *Gulf, etc., R. Co. v. Ellis*, 165 U. S. 159, 17 Sup. Ct. 255, 258, 41 L. Ed. 686: "The first official action of this nation declared the foundation of government in these words: 'We hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness.' While such declaration of principles may not have the force of organic law, or be made the basis of judicial decision as to the limits of right and duty, and while in all cases reference must be had to the organic law of the na-

tion for such limits, yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government." There is no doubt that the words "life, liberty, and property," as used in both the fifth and the fourteenth amendments, were used as representative terms. Story on Const. (4th Ed.) § 1950. Of these words, "liberty" is undoubtedly the most comprehensive. "In a general way," says an authoritative writer, "it may be here stated as an explanation—not offered as a definition—that, when the term 'civil liberty' is used, there is now always meant a high degree of mutually guaranteed protection against interference with the interests and rights held dear and important by large classes of civilized men, or by all the members of a state, together with an effectual share in the making and administration of the laws as the best apparatus to secure that protection, and constituting the most dignified government of men who are conscious of their rights and of the destiny of humanity. We understand by 'civil liberty' not only the absence of individual restraint, but liberty within the social system and political organism—a combination of principles and laws which acknowledge, protect, and favor the dignity of man." And again that writer says: "We come thus to the conclusion that liberty, applied to political man, practically means, in the main, protection or checks against undue interference, whether this be from individuals, from masses, or from government. The highest amount of liberty comes to signify the safest guaranties of undisturbed legitimate action, and the most efficient checks against undue interference." Lieber, *Civil Liberty & Self-Government* (Woolsey's 3d Ed.) 24, 40.

"The third absolute right, inherent in every Englishman," says Blackstone, "is that of property, which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land." 1 Com. *138. Writing in a more philosophical spirit, Kent thus expresses himself: "There have been modern theorists who have considered separate and exclusive property, and inequalities of property, as the cause of injustice, and the unhappy result of government and artificial institutions. But human society would be in a most unnatural and miserable condition if it were possible to be instituted or reorganized upon the basis of such speculations. The sense of property is graciously bestowed on mankind for the purpose of rousing them from sloth and stimulating them to action, and so long as the right of acquisition is exer-

cised in conformity to the social relations, and the moral obligations which spring from them, it ought to be sacredly protected. The natural and active sense of property pervades the foundation of social improvement. It leads to the cultivation of the earth, the institution of government, the establishment of justice, the acquisition of the comforts of life, the growth of the useful arts, the spirit of commerce, the productions of taste, the erections of charity, and the display of the benevolent affections."

It was said in *People v. Gillson*, 109 N. Y. 389, 398, 17 N. E. 343, 345, 4 Am. St. Rep. 465: "The term 'liberty,' as used in the Constitution, is not dwarfed into mere freedom from physical restraint of the person of the citizen, as by incarceration, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare." It is not every equal law which is a just law, but, within limits, it may be said that equality is an attribute of liberty. In pronouncing the opinion of the court in *United States v. Cruikshank*, 92 U. S. 542, 554, 23 L. Ed. 588, Chief Justice Waite made use of the following language: "The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power." It was said in *Yick Wo v. Hopkins*, 113 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220, that the guaranty of the equal protection of the laws is a pledge of the protection of equal laws.

The guaranties found in the fourteenth amendment with respect to life, liberty, property, and equality are not to be treated as amounting to a composite, yet, taken together, they clearly evince the general purpose of the limitations. There seems to have been something of this view in the mind of the federal Supreme Court when it said in *Barbier v. Connolly*, 113 U. S. 27, 31, 5 Sup. Ct. 357, 359, 28 L. Ed. 923: "The fourteenth amendment, in declaring that no state 'shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all, under like circumstances, in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one, except as applied to the same pursuits

by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition; and that, in the administration of criminal justice, no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses." The effect of the guaranty of due process of law and of the equal protection of the laws is to prevent the state from exercising, by any of its departments, arbitrary and capricious power over persons or property. *Ex parte Virginia*, 100 U. S. 339, 25 L. Ed. 676; *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220; *Dent v. West Virginia*, 129 U. S. 114, 9 Sup. Ct. 231, 32 L. Ed. 623; *Duncan v. Missouri*, 152 U. S. 377; 14 Sup. Ct. 570, 38 L. Ed. 485; *Gulf, etc., R. Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666; *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780. The law of the land or due process of law cannot be taken to be the very act of legislation which wantonly deprives a person of his rights. *Wynehamer v. People*, 13 N. Y. 378. In *Loan Association v. Topeka*, 20 Wall. 655, 662, 22 L. Ed. 455, Mr. Justice Miller declared that there are rights in every free government which are beyond the control of the state, and, in continuing, the learned judge said: "A government which recognized no such rights—which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power—is, after all, but a despotism. It is true, it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism. It may well be doubted, if a man is to hold that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many." See, also, *De Tocqueville, Democracy in America*, 282.

We recognize to the full the doctrine declared in *Missouri v. Lewis*, 101 U. S. 22, 25 L. Ed. 989, with reference to the extent of the authority to classify; but, for the very reason that the amendment was designed to protect persons against the exercise of arbitrary and capricious power by any of the departments of state government, a legislature cannot enact a law which creates burdensome and invidious distinctions among persons who are subject to the jurisdiction of the state. The lines on which an enactment is built should have some relevancy to the subject-matter. "Arbitrary selection can never be justified by calling it classification." *Gulf, etc., Co. v. Ellis*, 165 U. S. 150, 159, 17 Sup. Ct. 255, 41 L. Ed. 666; *Cotting v. Kansas City, etc., Co.*, 183 U. S. 79, 22 Sup. Ct. 30, 46 L. Ed. 92;

Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679.

It is with these preliminary considerations that we take up the discussion of the effect of the enactment in controversy:

An examination of section 1 reveals the fact that it was the legislative purpose to provide a remedy for only two classes of creditors, namely, those who have in good faith given the merchant credit for merchandise sold to him, and persons who have loaned money to him; it being required that the merchandise or money should be for use in conducting the business, and that it should have been actually used for that purpose. It is also made manifest by the latter part of the section that it was the purpose to subject the stock remaining in the hands of the vendee to the payment of said two classes of creditors, and, for the same purpose, to render the vendee liable to them for the proceeds of intermediate sales. Considering the provision of the section that the sale shall be void as to such creditors, and the further provision that the merchandise shall be liable to them, and indulging the undoubted presumption that it was not intended that the vendee should be twice liable for the proceeds of intervening sales—once to such creditors, "to the extent of the value of the merchandise" disposed of by him, and once to general creditors who might in certain circumstances hold him liable—it is evident that one of the purposes of the enactment was, in practical effect, to cut off the right of general creditors to avoid the conveyance as actually fraudulent. But this consideration might be passed over, and the case disposed of on another ground, if, in the attempt to grant a remedy to set aside the conveyance although fraud did not exist in fact, the enactment is vicious in respect to the classification of creditors.

Counsel for appellee attempt to defend the classification by the claim that there is an essential unity about a business, and that it is within the range of the legislative discretion to determine that those who have contributed to build it up by extending to it credit shall alone be entitled to subject the stock to the payment of their debts; and, as a part of the contention suggested, appellee's counsel state that the act can be upheld on the same principle on which materialmen's liens and certain other statutory liens are allowed. The act in question does not proceed on the theory of confusion of goods. On the contrary, its terms are so general with reference to the rights attempted to be granted that it is immaterial whether any stock remains at the time of the sale that can be identified as having been unpaid for. So far as the act is concerned, it makes no difference for what length of time the debt of a favored creditor has remained unpaid. After merchandise sold or money loaned has not only passed into the corpus of the debtor's estate, but can no longer be traced.

what natural equity has a person who sold the goods or made the loan to a preference as against general creditors? It is to be recollected that money or goods obtained by a merchant ordinarily becomes in a short time indistinguishable, and that such an asset is not a constant quantity, since it is subject to all the mutations of the business. In all ordinary cases the proceeds of a particular sale finds its way into the merchant's cash drawer, and is ultimately deposited to the credit of his general bank account—an account which is checked against for the payment of his business obligations, and also to pay for multifarious outside needs. In many instances it would no more be possible to trace the benefit conferred by the credit, and determine how much of it was continued in the business and how much of it was dissipated in the business or was otherwise expended, or to determine whether it was the proceeds of that credit (perhaps remotely given), or was the business energy of the merchant or of his employes, transmuted into money, which had on a particular day produced a favorable balance in his bank account, than it would be to separate the waters of two rivulets at a point below their confluence. In fact, it is evident that a benefit conferred upon a merchant by extending him a credit will ordinarily and in a short time become, with the other influences, direct and indirect, which have contributed to build up the business, so profoundly ingrained with his own property that it is scarcely a figure of speech to say that the union is chemical. Why, then, should the classes of creditors described in the statute have an equity to take all, as against the various employes engaged in transacting the business, as against the owner of the building so used, or even as against those who have supplied the creature needs of the merchant and his family while he was engaged in the prosecution of the business? Suppose that, in point of fact, the amount realized by a merchant on a sale of goods purchased by him on credit could be shown to have been used by him in the purchase of groceries for his family, and that during some other portion of the time of his business endeavor he had incurred a debt in supplying his family with necessary groceries; can any reason be suggested why, as to the stock on hand at the time of a sale in bulk, the wholesaler should be entitled to his pay in full as against the grocer, when neither of them had contributed to the stock as it was at the time of the failure? In considering the demand of favored creditors that they be permitted to appropriate all of the stock, the fact must not be forgotten that in all ordinary cases the merchant has contributed to the business from his general estate, and that other persons are often his creditors for money loaned by them which was used in the business, although such lenders are not such as are de-

scribed in the statute. But it is unnecessary to particularize further. It seems to us that it must be apparent that, once the point is fairly passed where the proceeds of goods sold or of money loaned can be directly traced, there is no estimating the force of the currents within and without the business which have directly or indirectly contributed to build up the stock. Such a case is comparable to the fall of darkness, when all objects are indistinguishable. We perceive no resemblance between such a right as the act in question attempts to confer and the lien given by statute to a materialman. The latter right is in the nature of a *jus in re*; it is based on what is a fair assumption that the property is benefited to the extent of the materials bestowed upon it, that the property is a unit, and that it is not expedient that the materials should be removed; and, lastly, the notice of record is a warning to all the world, that may, in principle, be likened to the possession of a bailee. Although general liens bear some resemblance to the rights attempted to be granted by the statute in question, yet the difference is vital, and such liens, which are only rights of detention, find their justification largely in their ancient character and in usage, which implies a tacit agreement between the parties. It was laid down by Lord Ellenborough in *Rushforth v. Hadfield*, 7 East, 224, that attempts to enforce general liens beyond settled usages are not to be encouraged, since to establish a new right of that character would be to encroach upon the common law. Of course, the grant of legislative power implies a right to change the common law, particularly with reference to administrative and remedial processes, and a large, and in many respects uncontrollable, discretion exists in the legislative department to determine what is expedient; but, in determining what constitutes due process of law and equality before the law, proper consideration must be given to the ancient landmarks which were established for the protection of private rights. *Cooley*, Const. Lim. 505; *Maxwell v. Dow*, 176 U. S. 581, 20 Sup. Ct. 448, 44 L. Ed. 297; *Hurtado v. California*, 110 U. S. 513, 4 Sup. Ct. 292, 28 L. Ed. 232.

In its last analysis, the act is objectionable in that its classification as to the remedy of an action is too narrow, and in that it attempts, in effect, at least, to give the members of the favored class a preference on execution. The doctrine has been sanctioned by the Supreme Court of the United States that "every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void." *Ootling v. Kansas City, etc., Co.*, 183 U. S. 79, 22 Sup. Ct. 80, 46 L. Ed. 92. See, also, *Cooley*, Const. Lim. 559. As to the feature of the enactment which subjects the stock

to the full payment of the debts of the preferred classes of creditors, it must be said that the enactment is in derogation of the fundamental right of equality before the law. It was said by Marshall, C. J., in *United States v. Nourse*, 9 Pet. 8, 27, 9 L. Ed. 31: "An execution is the end of the law. It gives the successful party the fruits of his judgment." We have reasoned in vain, if it does not yet appear that this statute, calculated as it is unwarrantably to deny to creditors the ancient common-law right to collect their debts by process of execution; thus forbidding to them the authority to reclaim their own, unnecessarily hampering their movements within the social organism, and making of them a proscribed class, large though it may be, is unconstitutional and void. If there is one occasion more than another which calls upon a court to vindicate the fundamental law, it is upon the complaint of a suitor who shows that there has been an attempt by hostile and discriminative legislation to bar his right to the ultimate process of the court, for such enactments strike at the very root of justice.

There is, and always will be, in every representative government, a struggle going on between the various interests of society with reference to legislation. This but evinces the necessity for the existence of a co-ordinate department of government, also acting under the responsibility of an oath, to determine, when called on to enforce legislation, whether it operates unequally. Hamilton declared that: "It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. . . . Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit." 51 *Federalist*.

In concluding this opinion, we are impressed with the fact that the following language used by Judge Cooley in deciding the case of *People v. Salem*, 20 Mich. 452, 486, 4 Am. Rep. 400, is most apposite: "But the discrimination by the state between different classes of occupations, and the favoring of one at the expense of the rest, whether that one be farming or banking, merchandising or milling, printing or railroading, is not legitimate legislation, and is an invasion of that equality of right and privilege which is a maxim in state government. When the door is once opened to it, there is no line at which we can stop and say with confidence that thus far we may go with safety and propriety, but no further. Every honest employment is honorable. It is beneficial to the public. It deserves encouragement. The more successful we can make it, the more does it generally subserve the public good. But it is not the business of the state to make discriminations in favor of one class against another, or in favor of one employment

against another. The state can have no favorites. Its business is to protect the industry of all, and to give all the benefit of equal laws."

Judgment reversed, with a direction to sustain appellant's demurrer to complaint.

BOARD OF COM'RS OF LAPORTE COUNTY et al. v. WOLFF et al. (No. 20,832.)¹

(Supreme Court of Indiana. Dec. 29, 1904.)

FREE GRAVEL ROADS—RESTRAINING ACCEPTANCE OF WORK—SUFFICIENCY OF COMPLAINT—ACTION AGAINST CONTRACTORS—EQUITABLE JURISDICTION—DEMANDING ACTION BY COUNTY BOARD—DEDUCTIONS FROM PRICE—CONCLUSIONS OF LAW.

1. A complaint by taxpayers alleging the letting of a contract by the county board for the construction of a free gravel road, stating wherein the contractors failed to perform the contract according to its terms, and that the county board acted collusively with the contractors in fraud of the rights of the taxpayers, sufficiently connects the contractors with the proceedings to justify making them defendants.

2. Where the complaint by taxpayers against the county board and contractors for the construction of a free gravel road alleges the making of the contract, the violation thereof by the contractors by performing defective work, and collusion between the board and the contractors to defraud the taxpayers, a case is made within the equity jurisdiction of the court to prevent the board from accepting the work, even if an appeal could be taken from the action of the board in accepting the work.

3. Where the complaint by taxpayers alleged that the county board was in collusion with the contractors for the construction of a free gravel road in the violation of the contract, the failure of plaintiffs to demand action against the contractors by the board is sufficiently excused.

4. The taxpayers have the right to have deducted from the contract price for the construction of a free gravel road the amount the contractors saved to themselves by their failure to construct the road in accordance with the contract.

5. Contractors for the construction of a free gravel road, who have failed to perform the work according to contract, cannot complain of the conclusion of the court giving them an option to complete certain portions of the work within a specified time, or deduct the cost thereof from the contract price.

Appeal from Circuit Court, Marshall County; A. C. Capron, Judge.

Action by Charles Wolff and others against the board of commissioners of Laporte county and others. From a judgment for plaintiffs, defendants appeal. Transferred from Appellate Court under Act March 13, 1901 (Acts 1901, p. 590, c. 259; section 1337u, Burns' Ann. St. 1901). Affirmed.

F. E. Osborn and W. A. McVey, for appellants. C. E. & J. B. Collins and J. F. Gallaher, for appellees.

DOWLING, C. J. This suit was brought by Charles Wolff and others, described as residents, citizens, voters, and taxpayers of the townships of Springfield, Coolspring, and Michigan, in the county of Laporte, Ind., against the board of commissioners of the

¹ Superseded by opinion, 76 N. E. 247. Rehearing denied.

county of Laporte, John R. Weaver, William Steigely, and James H. Taylor, alleged to be the members of the said board at the time of the commencement of the suit, and Arlantis Runyan, Thomas W. Sullivan, and Calvin L. Cree, as copartners, who were the contractors with said board for the construction of certain free gravel roads in said townships of Laporte county. The suit was dismissed as to the defendant Calvin L. Cree. The purpose of the action was to enjoin the board from allowing and causing to be paid claims of the contractors for work alleged to have been done under their contract. The complaint was in a single paragraph, and the answer was a general denial, under which it was agreed that all proper evidence, original or in rebuttal, should be admitted. The venue of the cause was changed to the Marshall circuit court. At the request of the appellants, the court made a special finding and stated its conclusions of law thereon. Motions for a new trial were overruled, and judgment was rendered for appellees. Runyan and Sullivan appealed, making the board of commissioners a party, and serving it with notice of appeal, but the board has taken no steps to obtain a reversal of the judgment. The errors assigned by the appellants Runyan and Sullivan jointly call in question the sufficiency of the complaint, the correctness of each conclusion of law, and the rulings of the court on the motions to modify the judgment and for a new trial. The separate assignments of error of the appellants are the same as the joint assignment, except that they omit to charge error in the conclusions of law.

The material allegations of the complaint, after naming and describing the parties, are as follows: That on March 19, 1900, a petition for the construction of certain free gravel or macadamized roads in said townships of Springfield, Coolspring, and Michigan and asking that an election be held as provided by law, signed by the requisite number of persons having the necessary qualifications therefor, was filed in the office of the auditor of Laporte county. That thereupon said board of commissioners of said county appointed a surveyor and two disinterested freeholders of said county as viewers to locate and view the said roads as petitioned for. That said roads were located and viewed agreeably to said order, and maps and profiles of the grades of said roads and the widths thereof, with the estimate of said viewers of the cost of construction, the materials to be used, and the manner of using them, with the depth thereof, were duly made and reported to said board; and that all the proceedings of said viewers were adopted by said board, and published and posted as required by law. That in pursuance of said petition and the orders of said board, after due notice, an election was duly held in said townships to determine whether said roads should or should not be constructed. That a majority

of the legal voters voting at said election voted in favor of the construction of said roads. That such vote was canvassed, and reported to said board, which thereupon ordered the construction of said roads, the work and contract therefor to be let to the lowest responsible bidder; and that notice of the letting of the contract was duly given by publication and posting as required by law. That on the opening of the bids on June 14, 1900, the day fixed for that purpose, it was found that the appellants Runyan and Sullivan were the lowest responsible bidders for said work, and their bid, amounting to \$83,675, was accepted by said board. That on said day a contract was entered into and executed by and between said board and said appellants Runyan and Sullivan, whereby said appellants, in consideration of \$83,675, agreed to construct the said roads in accordance with the plans, specifications, and profiles theretofore adopted by said board, copies of which are attached to the complaint. That said roads were designated, respectively, as "Road No. 1," "Road No. 2," "Road No. 3," "Road No. 4," "Road No. 5," and "Road No. 6"; the routes, termini, location, and grades of such roads being particularly stated in the pleading. That the total length of the highways to be improved under said contract was about 25 miles. That the appellants proceeded with the execution of said work, and that work has been done on all of said roads, the greater part of which has been left as completed, as the appellants pretend. That from time to time, on estimates given by the engineer, the board has made allowances to said contractors, amounting in the aggregate to \$46,000, and more than one-half of the total contract price. That the said board and the engineer placed in charge of said work by said board, in disregard of their duties and of the interests of the appellees and all the taxpayers of said townships, negligently and willfully permitted said contractors to perform and complete said work in a defective and unworkmanlike manner, not in accordance with the plans and specifications and in violation of said contract, wholly with a view to the profit of said contractors. That said work was not properly inspected as the work progressed. That a large part of said work was done without inspection, and as to a large part thereof the said board failed to sustain the inspector as against said contractors, but took sides with the contractors against the inspector, and permitted and acquiesced in such violations of said contract and specifications by said contractors. That the contractors failed to grade the roadbeds according to the profiles, but followed generally the surface of the lands over which they passed. That such grading, if properly done according to the contract, would amount to 40,000 yards, costing \$10,000, and that said contractors are entitled to no compensation therefor, and said sum should be deducted from the contract

price of said work. That said contractors have failed to roll the surface of said roads, after full completion, with a roller of not less than six tons' weight, which would have cost them and would have been worth \$5,000, which sum should be deducted from any amount found due them. That said contractors failed to conform to the plans and specifications concerning side slopes, cuts, and fills for the roadbeds; also as to side ditches on each side of the roads, and as to the construction of the roadways four feet beyond the metal. That by failing to make such cuts said contractors saved themselves an outlay of \$5,000; by failing to make said ditches they saved themselves \$2,000. That the roadways are worth \$3,000 less than they would have been if the roadbeds had been made to extend four feet on each side beyond the metal, which sums should be deducted from any amount found due them. That by their failure to put in tile drainage according to their contract the contractors saved themselves an outlay of \$5,000, which should be deducted from any sum found to be due to them. That by putting in three culverts only, instead of eighteen, as required by their contract, said contractors saved to themselves \$8,000. And that by their failure to properly macadamize said roads according to their contract said appellants saved themselves an outlay of \$5,000. That by failing to flood said roadways said contractors saved themselves an outlay of \$5,000. That none of the work has been done in conformity to the contract, plans, and specifications, and that, as constructed, said roads are not of half the value they would have been if built according to the contract. That the said board was at all times cognizant of the manner in which the said work was being done, but, notwithstanding, they permitted such violations of the contract, and made to the contractors large allowances in defiance of the contract. That the appellees and other taxpayers of the said townships frequently notified said board of the violations of the contract by said appellants, but the board failed to stop said work, or to cause it to be done properly, but continued to make allowances to said contractors until the amount paid them exceeds \$46,000, which is in excess of all the work done and materials furnished on and for said roads, and more than said contractors are entitled to receive for the same. That all these wrongful acts and proceedings were done in fraud of the rights of the appellees and the taxpayers of said townships, in pursuance of a fraudulent and collusive agreement entered into between said board and said contractors. That the board negligently and fraudulently intends to accept said work on said roads, and to pay to said contractors the full amount which would be due them if they had complied with their said contract. That said contractors have filed in the office of the auditor of Laporte county claims on final and partial estimates

on said several roads amounting to \$17,940, and that, unless said board is restrained by the court, it will accept, as completed according to the contract, the roads for the construction of which final estimates have been made; they will allow the partial estimate of \$10,640 on road No. 3, as claimed by said contractors, and will grant to said contractors other large sums of money. The remaining allegations charge that the appellees and taxpayers of the townships will sustain irreparable damage if said roads are accepted and paid for under the contract; that, in that event, they will not be able to enforce the completion of the roads according to the contract; that they cannot give notice of the application for an injunction, etc. The complaint concludes with a prayer that the board be restrained from accepting or approving any of said roads as completed under the contract, and from allowing further sums of money to the contractors, or further estimates or warrants on account of work on said roads, until the further order of the court, and that on a final hearing said board may be enjoined from paying any money to said contractors, and from accepting any of said roads until said contractors shall have constructed them in accordance with said contract.

The specifications of each violation of the contract by the appellants are given much more in detail than in this abstract of the complaint, and all exhibits, including copies of all proceedings before the board, and the contract, plans, and specifications are not a part of the complaint. The sufficiency of the complaint is denied by the appellants for the reason that it contains, as they aver, no allegations against them; that it states no cause of action requiring the interference of a court of equity, because it appears that the appellees might have appealed from any allowances made to the contractors; that the board exercised its discretionary powers in these proceedings; that it does not appear that the board has refused to assert its right of action; that no demand upon the board to take action is alleged; that the complaint does not state a cause of action in the corporation, or in the commissioners as a collective body, against the appellants, and therefore states no cause against appellants; that the allegations in regard to past payments to the contractors do not authorize an injunction; that the complaint should have stated the allowance by formal orders of the moneys, the payment of which was sought to be restrained, or that the auditor and treasurer were also derelict in their duty, and that an allowance would be equivalent to payment.

There is no merit in any of these objections. Every allegation of wrongdoing in the complaint is directed against the appellants Runyan and Sullivan, or connects them with the unlawful acts of the board as the beneficiaries of such acts. It is both

directly charged and fairly inferable from the complaint that the board were acting collusively with the contractors, and in fraud of the rights of the appellees and the other taxpayers of the county. The further proceedings of the board which the court was asked to enjoin were the approval and acceptance of the work already done, and the allowance of the claims of the contractors for the defective work then pending before the board or which might afterwards be filed, as well as the payment of such claims by the order of the board. In approving and accepting the work done on these roads and in directing its payment the board acted in its administrative capacity as the agent and representative of the several townships named, and it was alleged that the allowances and payments would be made by the board to the appellants. *Deweese v. Hutton*, 144 Ind. 114-118, 43 N. E. 13; *Bishop v. Moorman*, 98 Ind. 1-6, 49 Am. Rep. 731; 10 Am. & Eng. Ency. of Law, 911; 2 High on Injunctions, p. 1177; 10 Ency. Pl. & Pr. 912; *Hutchinson v. Burr*, 12 Cal. 103; *Board v. Spangler*, 159 Ind. 575, 65 N. E. 743; *Board v. Beaver*, 156 Ind. 450, 60 N. E. 150; *Board v. Connor*, 155 Ind. 484, 58 N. E. 828; *Board v. State*, 147 Ind. 476, 46 N. E. 908. As the board acted in its administrative capacity in approving and accepting the work on the roads and in granting estimates and making allowances to the contractors, perhaps an appeal was not proper or possible. But, even if an appeal could have been taken, such proceeding would not have prevented the board from approving and accepting the work, which was one of the wrongful acts anticipated by the appellees. The case made by the complaint is one which falls within the equity jurisdiction of the court, and clearly authorized the relief demanded. *Zuelly v. Casper*, 160 Ind. 455, 67 N. E. 103, 63 L. R. A. 133; *Kimble v. Board* (Ind. App.) 66 N. E. 1023. The facts stated in the complaint excuse the failure of the appellees to make a demand upon the board that it should bring an action against itself or against the contractors. It was a principal wrongdoer. But for its betrayal of the interests of the taxpayers of the county no suit would have been necessary. It had the control of the affairs of the county, and its delinquencies were the very ground and gravamen of the action. A demand on the board would have been idle and unavailing, and therefore it was not necessary to allege or prove it. *Bronnenburg v. Rinker*, 2 Ind. App. 391, 28 N. E. 568; *Lent v. Padelford*, 10 Mass. 230, 6 Am. Dec. 119; *Galvin v. Galvin*, etc., Works, 81 Mich. 16, 45 N. W. 654; 20 Encyl. Pl. & Pr. 781; *Dillon, Mun. Corp.* (4th Ed.) § 915. It is not true that the board exercised a discretionary authority in the proceedings under examination, and therefore that its acts were not subject to judicial examination and control. It had no discre-

tion to do wrong, or to aid and abet contractors upon public works to perpetrate a gross fraud upon the taxpayers of the county. If it attempted or threatened to do so, the right of the taxpayers to enjoin such an unlawful appropriation of the public funds was clear and indisputable. *Zuelly v. Casper*, 160 Ind. 455, 67 N. E. 103, 63 L. R. A. 133, and cases cited. The complaint shows a cause of action in the board and against the contractors. It appears that the contractors had violated their contract in the most flagrant manner, and had incurred liability to the board by reason of such breaches. The fact that they were enabled to practice these frauds by the collusion of the members of the board, who were equally guilty with themselves, did not destroy the right of action in the board. If the facts stated in the complaint were true, the board could have maintained an action against the contractors for damages, and, if necessary, for injunctive relief, but that they would not bring such suit was perfectly clear.

No injunction affecting payments already made to the contractors was contemplated by the complaint. It related exclusively to the future acts and proceedings of the board and the contractors. While it is true that a present intention of a municipal corporation not to perform a future duty is not generally a sufficient ground for judicial interference, that rule does not apply in this case. The threatened acts of the board which the court was asked to enjoin were purely ministerial and administrative, and therefore proper subjects for the jurisdiction of a court of equity.

The next point made by counsel for appellants is that the court erred in each of its conclusions of law on the finding of facts. These conclusions were as follows:

"First. That as to the right of the plaintiff to have deducted from the contract price for the construction of said roads the amount which the contractors have secured and saved to themselves by reason of their failure to construct said roads in accordance with the contract, plans, and specifications, the law is with the plaintiffs and against the defendant.

"Second. That there should be deducted from the contract price agreed upon for the said roads, to wit, \$83,685, the following sums: The sum of \$11,489 for and on account of the money saved to themselves by said contractors by not grading the said roads as required by the said contract, plans, and specifications; the sum of \$361.95 for and on account of the money saved to themselves by said contractors by not rolling that portion of the subgrade of said roads which could have been rolled as required by said contract, plans, and specifications; the sum of \$20,117 for and on account of the money saved to themselves by said contractors by not placing on said roads macadam to the depth required

by said contract--making a total sum of \$31,967.95, which should be deducted from said contract price by reason of the said work which the said contractors have failed to construct and perform in accordance with their said contract, plans, and specifications, and the balance of said contract price over and above the amount already paid to said contractors and remaining after the deductions herein provided for, to wit, \$3,402.05, should be paid to said contractors on the further construction of the uncompleted portions of said roads in accordance with the contract, plans, and specifications.

"Third. That said contractors should have the option to comply with said contract by being given the opportunity, to wit, till September 1, 1902, to place the following quantity of stone on the following roads and portions of roads, to wit: On all of roads Nos. 1, 2, 5, and 6, and on all of road No. 4 except 1,000 feet at the north end thereof, and on all of road No. 3 except from station 0 to station 84, and from station 154 to station 294, and from station 367 to station 378, plus 50, there shall be placed macadam of sufficient quantity to make it of a depth of 7 inches on the sides and 9 inches in the center after being thoroughly flooded and rolled and filled and covered with a top dressing of screenings as provided in said contract; and upon the said contractors complying with the above requirements, then the amount of deduction made in the second conclusion of law herein should be reduced in the sum of \$20,117, which amount was deducted from said contract by reason of the failure of said contractors to place on the said portions of said roads the amount of macadam required by their said contract.

"Fourth. That no deductions should be made from said contract price on account of any failure of said contractors to construct the bermes and ditches on said roads; that said contractors intend to perform their said contract in this relation.

"Fifth. That by the terms of the contract and specifications adopted and approved for the construction of said roads the macadam thereon should be 7 inches in depth at the sides and 9 inches in depth at the center, excepting on road No. 3 from station 0 to station 50, where the macadam should be 8 inches in depth at the sides and 10 inches in depth at the center; said macadam to be of such depths after it has been thoroughly rolled and compacted by a series of flooding and rolling with a roller of not less than 6 tons weight.

"Sixth. That the board of county commissioners of Laporte county and the defendants William Steigely, John R. Weaver, and James H. Taylor, as the members of the said board of commissioners, and their successors in office, should be restrained and enjoined from accepting said roads as completed without first having deducted from the contract price thereof the said sum of \$31,967.95, and

should be further enjoined from paying to said contractors any sum or sums for the completion of said roads except such portion of the unpaid balance of the contract price as shall remain after the deduction as herein stated of said sum of \$31,967.95.

"Seventh. That the said board of commissioners of Laporte county and said defendants William Steigely, John R. Weaver, and James H. Taylor, as the members of the said board of county commissioners, should be enjoined and restrained from accepting as completed and from allowing payment to the contractors for the completion of the following portions of said roads, to wit: From station 50 to station 84, and from station 154 to 294, and from station 367 to 378, plus 50, all on road No. 3, and north 1,000 feet of road No. 4, until the said contractors have placed thereon macadam of the depth of 7 inches at the sides and 9 inches in depth at the center after being screened and thoroughly rolled and flooded as provided by their said contract, plans, and specifications."

The first and second conclusions are to the effect that the cost to the contractors of certain work required to be done by their contract, and which they failed to perform, should be deducted from the contract price of the completed work. We think this is in accordance with the rule in such cases. *Manville v. McCoy*, 3 Ind. 148; *Swift v. Williams*, 2 Ind. 365.

The third conclusion is that the contractors should be allowed time until September 1, 1902, to complete certain work, placing stone on the roads, and flooding and rolling the same; and that, in case they do so complete this work according to their contract, the deductions from their compensation stated in the second conclusion of law shall be reduced \$20,117. This conclusion is certainly as favorable to the appellants as they have the right to ask, and mitigates to a very considerable extent the rigor of the second conclusion. If they did not wish to do so, the appellants were not bound to avail themselves of it.

The fourth conclusion is wholly in favor of the appellants.

The fifth conclusion is the court's construction of one of the provisions of the contract, and we are satisfied that it is correct.

The sixth conclusion is that the board of commissioners of Laporte county, the members of the board, and their successors in office, should be restrained and enjoined from accepting the said roads as completed without first deducting from the contract price thereof the sum of \$31,967.95, and from paying to the contractors any sum or sums for the completion of the roads except such portion of the unpaid balance of the contract price as shall remain after the deduction of the said sum of \$31,967.95. We perceive no valid objection to this.

The seventh and last conclusion is that the board and its members should be enjoined

from accepting, in their present state, as if completed, certain parts of the said roads, until the contractors shall have done certain further work upon the same, described in the conclusion. There is no error in this.

It is apparent upon a review of the facts found and the conclusions of law that in all the particulars referred to the board of commissioners, acting in collusion with the contractors, was guilty of gross official negligence amounting to a fraud upon the rights of the taxpayers of the townships affected by their proceedings. Their acts were beyond the possibility of explanation or justification. Bad faith on their part and gross fraud on that of the contractors were proved. There was here no innocent mistake or misconstruction of the contract on one side or error of judgment on the other, but the administrative and ministerial powers of the board were illegally and unconscientiously exercised, not for the benefit of the taxpayers, but for the profit of the contractors. The course of the dealings between the board and the contractors from the beginning of the transactions until the commencement of this suit left no room for doubt of their purpose to excuse all of the delinquencies of the contractors, submit to all violations of the contract, and accept the roads as if completed, allow the unjust claims of the contractors, and direct their payment. This suit was brought seasonably, but it was not commenced until the appellees had exhausted all means within their reach to obtain relief from the board. As we have before said, a previous demand upon the board to bring suit against the contractors would have been an idle and useless formality, and such demand, under the circumstances, was not required. We have carefully examined the judgment, and are of the opinion that the motion to modify it was correctly overruled.

Finding no error, the judgment is affirmed.

UNITED STATES EXPRESS COMPANY v. JOYCE et al. (No. 20,492).¹

(Supreme Court of Indiana. Dec. 29, 1904.)

CARRIERS—SHIPPING CONTRACT—CONSTRUCTION—LIMITATION OF LIABILITY—VALUATION OF PROPERTY—PARTIAL LOSS—APPORTIONMENT OF LOSS.

1. Where an appellee assigns no cross-error on a ruling against him, his objections thereto cannot be considered on appeal.

2. Where plaintiff, in an action against a carrier, founds his claim on a shipping contract with defendant, he cannot contend that he was not bound by its terms.

3. Where the contract between a shipper of horses and the carrier provided that the latter should be liable only to the extent of actual damage, which should in no case exceed the valuation of the shipment declared by the shipper, and there was a partial loss, but the horses thereafter brought the full declared value, the carrier was not exempt from liability, but the shipper was entitled to recover such a propor-

tion of the actual loss as the declared value of the shipment bore to the actual value.

4. The contract between a shipper of horses and a carrier provided that the shipper should value the stock, and carriage charges be based thereon; that the charges on the shipment should be for horses of a value not exceeding \$75 each, \$225, and that when the value declared by the shipper should exceed such value an addition should be made according to a schedule which followed. Thereafter in the contract it was stated that the shipper declared values "hereinafter mentioned to be the true values of said animals, to wit, \$2,100," for each car load lot, and it was stipulated that the shipper released the carrier from all liability save actual damage not to exceed the valuation declared by the shipper. *Held*, that the valuation of \$75 each was for the purpose of determining the carriage rate, while the valuation of \$2,100 on the whole lot was intended to fix the basis of liability.

Hadley and Gillett, JJ., dissenting.

Appeal from Circuit Court, Gibson County; O. M. Welborn, Judge.

Action by John E. Joyce and others against the United States Express Company. From a judgment for plaintiffs, defendant appeals. Transferred from Appellate Court under specification 2, § 10, c. 247, p. 565, Acts 1901 (section 1337), Burns' Ann. St. 1901). Reversed.

See 69 N. E. 1015.

Baker & Daniels and Fields & Harmon, for appellant. Buskirk & Brady and Embree & Benson, for appellees.

DOWLING, C. J. Action by the appellees against the appellant for damages to two car loads of horses shipped by the appellees under special contracts with the appellant as a common carrier. Demurrers to the amended complaint were overruled, and the appellant answered in three paragraphs; the first being a general denial; the second and third alleging facts upon which the appellant based its denial of liability, except in the nominal sum of \$5. Demurrers to the second and third paragraphs of answer were sustained. The cause was tried by the court, and a special finding of facts was made, with its conclusions of law thereon. To each of the five conclusions of law the appellant excepted, and the second, third, fourth, and fifth conclusions are now assigned by it as error.

The court found that the appellees were, on and prior to May 23, 1901, partners engaged in the business of buying, selling, and shipping horses; that on said date they owned 30 high-grade carriage horses, which they had collected, and were preparing to ship to Buffalo, N. Y., there to be disposed of at a special sale, which was advertised for May 25, 1901; that on said 23d day of May, 1901, the appellees applied to the appellant express company, a common carrier, for the transportation of said horses from Princeton, Ind., to Buffalo, N. Y., to be delivered at the latter point to the appellees' agents having charge of the special sale; that said horses were thereupon delivered to the appellant by the appellees, the rate of compensation being

¹ 2. See Estoppel, vol. 19, Cent. Dig. § 163.

² Opinion stricken from files and cause remanded to Appellate Court, 76 N. E. 1117.

agreed upon in the sum of \$225; that before receiving said horses, the appellant produced a live stock contract, signed by its agent, and requested the appellees to sign the same, which they did; that among the provisions and requirements of said contract were the following: "Notice to Shippers. The shipper will value his stock, which valuation will be inserted in this contract, and the charge for carriage will be based on such valuation. * * * Limited Liability live stock contract. * * * The Express Company undertakes to forward to the point reached by the Express Company which is nearest to destination, the animals and paraphernalia hereinafter mentioned, * * * to wit, twenty-eight horses, * * * for the sum of two hundred and twenty-five dollars, * * * which charge is fixed by and based upon the value of said animals and paraphernalia as declared by the shipper, as hereinafter mentioned. * * * The charges on the shipment described above at the values specified below will be as follows: For horses, jacks or mules of a value not exceeding \$75 each, \$225. * * * When the value declared by the shipper exceeds the value stated above, an addition to the above-mentioned charge will be made according to the following schedule, to wit: [Here follows a table of charges graduated in proportion to excess of valuation.] * * * The shipper, in order to avail himself of said alternative rates, and in consideration thereof being asked by the Express Company to value said property, now declares the values hereinafter mentioned to be the true values of said animals and paraphernalia so to be shipped as follows, to wit: * * * (Number and kind): Twenty-eight horses, value \$2,100. * * * The shipper hereby releases and discharges the Express Company from all liability for delay, injuries to, or loss of, said animals and paraphernalia from any cause whatever, unless such delay, injury, or loss shall be caused by the negligence of the agents or employees of the Express Company, and in such event the Express Company shall be liable only to the extent of actual damage, which shall in no event exceed the valuation herein declared by the shipper." The court further found that before the appellees signed this contract they objected to the valuation being fixed at not to exceed \$75 per head, claiming the stock was worth much more, and asked that this valuation be stricken out; but were informed by the appellant's agent that this was the only form of contract he had, and the horses would not be shipped without a valuation inserted. That the appellees thereupon delivered 30 horses to the appellant for shipment under said contract, but the same were not delivered at Buffalo in time for such special sale, but, by reason of the negligence of the appellant, the horses were injured through the overturning of the car in which they were being carried, and were thereby rendered unfit to be put on the

market at said sale. That, if the horses had been delivered in good condition, and pursuant to the contract of shipment, in time for such special sale, they would have been of the average value of \$200 per head, or \$170 per head if delivered in good condition on the 25th day of May, 1901, at other than a special sale; that said horses were on May 27, 1901, sold by the agents of the appellees for the gross sum of \$3,470, and the net amount received therefor by the appellees was \$2,916.20. The court also found that another contract of shipment, exactly the same in its general provisions as that of May 23, 1901, was entered into between the same parties on June 13, 1901, under similar circumstances, except that it does not appear that the shippers objected to the insertion of the \$75 per head valuation; that 28 horses were delivered to the appellant under the latter contract, and were delivered by it in Buffalo, N. Y., on June 16, 1901, in a damaged condition, owing to the negligence of the appellant; that thereafter, on June 17, 1901, the agents of the appellees sold said 28 horses for the gross sum of \$3,615, or the net sum of \$3,322.70, which latter amount was paid over to the appellees; that, if the horses had been delivered at their destination in good condition, they would have been worth on an average of \$170 per head; that all of said horses were handled by the agents of the appellees to the best advantage, and realized their full value in their damaged condition.

The court, upon the foregoing findings of fact, stated its conclusions of law as follows: "(1) The court finds that by the written contract executed May 23, 1901, plaintiffs are concluded as to the number of horses shipped of that date, and that for the purposes of this action, no more than twenty-eight can be considered, and that as to the damages to said two horses, amounting to \$205.50, plaintiffs cannot recover. (2) The plaintiffs are not precluded from showing the actual value of said horses at the city of Buffalo at said special sale of May 25, 1901, or their value in said city within a reasonable time for their arrival at said city after their departure from Princeton, but that the damages cannot exceed the sum of twenty-one hundred dollars, with interest added. (3) That the plaintiffs are entitled to recover on the first and third paragraphs of their complaint the sum of two thousand one hundred dollars (\$2,100), together with interest at the rate of six per cent. per annum thereon from date of written notice to the defendant of said injuries; in the aggregate, the sum of \$2,195. (4) That the plaintiffs are not precluded from showing the true value of the horses in good condition shipped June 13, 1901, in the city of Buffalo, within a reasonable time for their arrival at said city, from the time of their departure from Princeton, but that the damages for any injury thereto occasioned by defendant's negligence cannot exceed the sum of \$2,100. (5) That the plain-

tiffs are entitled to recover from defendant on account of the injuries complained of in the second paragraph of their complaint the sum of one thousand four hundred and thirty-seven and $\frac{30}{100}$ dollars, together with interest at the rate of six per cent. per annum thereon since the date of the written notice by plaintiffs to defendant of said injuries; in the aggregate the sum of \$1,499.80."

The questions presented by this appeal are: First. In an action brought by a shipper against a carrier for injury to goods shipped, is the former precluded from showing their real value when he has previously signed a contract for their transportation providing that the carrier shall be liable only for actual damage suffered, and in no event for a greater amount than the valuation of the property declared by the shipper and inserted in the contract? Second. If he is not so precluded, what is the measure of his damages for a partial loss of the goods where they have realized in their damaged condition a sum equal to or greater than their declared value?

The position of the appellant is that, inasmuch as the appellees placed a value upon their own property, they are thereby estopped from proving a greater value; and, if the property in its damaged condition brought the full declared value, interest, and freight charges, there can be no recovery. The appellees contend, first, that they are not bound by their valuation, since no real choice was offered them between a limited liability contract and one unlimited in its terms; second, if they are so bound, the measure of their recovery is the difference between the real value of the animals in a sound condition and the price realized upon their sale in a damaged condition; such recovery not to exceed the declared value of \$2,100. The trial court enforced that term of the contracts, which limited the total amount of damages recoverable to \$2,100 per car load, and, since the appellees have not assigned cross-errors on this appeal, their first contention cannot be considered. Besides, as the appellees found their claim and action on the shipping contract, they cannot be heard to say they were not bound by its terms.

Whether appellees are estopped from proving the real value of the property will depend upon the purposes for which a definite valuation was inserted in the contracts of shipment. Such clauses are intended to secure the basis for calculating freight charges; to apprise the carrier of the degree of care and vigilance necessary for the safe transportation of the property; to establish a convenient measure of the damages recoverable, so that evidence of such damage, in case of total loss, shall be dispensed with; and to protect the carrier from fanciful overvaluations asserted after the property is damaged or destroyed. *Hart v. Pennsylvania R. R. Co.*, 112 U. S. 331, 5 Sup. Ct. 151,

28 L. Ed. 717; *Johnstone v. Richmond R. R. Co.* (S. C.) 17 S. E. 512; *Durgin v. American Express Co.* (N. H.) 20 Atl. 323, 9 L. R. A. 453, 455; *The Hadji* (D. C.) 18 Fed. 459. If the valuation is fairly and reasonably made, it will be upheld as fixing the largest amount to which the carrier is answerable in damages. *Rosenfeld v. Peoria Ry. Co.*, 103 Ind. 121, 2 N. E. 344, 53 Am. Rep. 500; *L. & N. R. R. v. Oden*, 80 Ala. 38; *Harvey v. T. H. & I. R. R. Co.*, 74 Mo. 538; *Zouch v. Ry. Co.* (W. Va.) 15 S. E. 185, 17 L. R. A. 116. Here the appellant limited the maximum damages to \$2,100 per car load, and received freight charges calculated upon that basis. The company does not even suggest that by reason of fraudulent concealment of the true value of the horses it was misled respecting the degree of care required for their safe carriage, or that, if the actual value had been stated, the property probably would not have been injured; and it is adequately protected from fanciful overvaluation, since, under these contracts, there never could be a greater recovery than the limit of \$2,100 for each car lot. Hence every legitimate purpose of the restricted liability clause applicable to this controversy is fully subverted if the appellees are forbidden in case of partial loss to recover more than the agreed valuation. Accordingly, it is not perceived why, as the appellant contends, the appellees are estopped to show the real value of the property as a factor in determining the amount recoverable, if thereby none of the purposes of the limitation clause is violated. In the leading case of *Hart v. Pennsylvania R. R. Co.*, 112 U. S. 331, at pages 340 and 341, 5 Sup. Ct. 156, 28 L. Ed. 717, the court uses language which appears to support the appellant's position; the expression being: "The shipper is estopped from saying the value is greater [than the amount declared]. The articles have no greater value for the purposes of the contract of transportation between the parties to that contract;" and similar statements occur in opinions of other courts. See *Richmond v. Payne* (Va.) 10 S. E. 749, 6 L. R. A. 849; *Johnstone v. Richmond R. R. Co.* (S. C.) 17 S. E. 512. But in each of these cases the question involved related to the validity of a limitation contained in the valuation clause, and the respective courts decided that the shipper was prevented by his contract from recovering more than the agreed value. In no instance was the court announcing an absolute proposition that, when once the shipper has agreed upon a valuation of his property, he is thereafter estopped, under all circumstances, from asserting the real value to be greater; for, if such were the law, a carrier might convert the property, and, when sued for its real value, deny liability except to the amount declared by the owner in the contract of shipment. The estoppel only operates to prevent the shipper from first obtaining the benefit of reduced freight rates based upon

a low declared valuation, and then, after loss or injury, seeking to recover the total actual value or damage, though such may far exceed the agreed value.

The next proposition of the appellant, depending upon the doctrine of absolute estoppel, previously invoked, is that, since the appellees' goods brought their full declared value, there can be no recovery whatever, for there is, under these circumstances, no "actual damage"; and the contract limited recovery to actual damage suffered, which must be construed to mean the depreciation, if any, under the declared value occasioned by the carrier's negligence. This view finds support in certain decisions of the federal courts, notably *The Lydian Monarch* (D. C.) 23 Fed. 298; *Pearse v. Quebec S. S. Co.* (D. C.) 24 Fed. 285; *The Styria* (D. C.) 95 Fed. 698; *Jennings v. Smith*, 106 Fed. 139, 45 C. C. A. 249. We are not satisfied that these cases announce the correct rule for the assessment of damages. It is a startling doctrine if a carrier, who has chanced to receive costly goods at a small declared valuation, may with perfect impunity negligently cause their depreciation to any extent whatever, so long as he leaves a remnant of them of sufficient actual value to equal their declared worth; and it would seem that such a doctrine, if at all sound, might logically be extended to hold that, even though he willfully appropriated a portion of the goods, he could do so without liability if he left enough to satisfy the appraisal contained in the contract. The language employed in another connection in *Pearse v. Quebec Steamship Co.* (D. C.) 24 Fed. 285, at page 288, is applicable: "If the construction contended for by the claimants were the proper meaning of this liability clause, it would be void upon grounds of public policy, as unreasonable, and as affording a direct encouragement to the theft or nondelivery of the shipper's goods; for on every shipment, whether there was a loss or not, the carrier might, without accountability, appropriate to his own use enough of the owner's goods to reduce the aggregate value of what remained in the foreign market to the invoice value of the whole—a result destructive of all commerce, because enabling the carrier to appropriate all its profits." We conclude, therefore, the appellees were not estopped by the mere execution of a contract declaring the value of their horses to be \$75 each from showing their real value, provided the maximum liability of the appellant was not sought to be increased by such proof above the sum named in the agreements of shipment.

It does not follow that the appellees may here recover to the full limit of the appellant's stipulated liability by showing that the difference between the true value of the animals if sound and the net proceeds from their sale is a sum equal to the largest

amount for which the appellant agreed to be liable. The contract, it is true, expressly provided that the appellant would answer to the extent of actual damages, not to exceed \$2,100 per car load; and in *Brown v. Cunard Steamship Co.*, 147 Mass. 58, 16 N. E. 717, *Starnes v. Louisville Co.*, 91 Tenn. 516, 19 S. W. 675, and *Nelson v. Great Northern Ry. Co.* (Mont.) 72 Pac. 642, it was held that there might be a recovery, even in case of partial loss, up to the agreed limit of liability, irrespective of the value of the goods in their damaged condition or the amount ultimately realized from their sale; but this view does not commend itself to our minds. It is unreasonable to suppose that the carrier agreed to pay the full measure of the damages recoverable in case of a total loss, when the loss was only partial.

It was certainly contemplated by both parties that the amount of recovery should vary in case a horse was killed outright and in the event that only an eye was injured. When the parties agreed upon a valuation, it may fairly be said that they each assumed a portion of the risk of injury in case of a total or partial loss. The carrier's liability was fixed, not arbitrarily by the appellant, but in a sum mutually agreed upon as the largest amount which he would be called upon to pay in any event. The liability of the shipper was equally well understood, though not expressed, to be the difference, if any existed, between the value so declared by the shipper and the actual value of the goods. If a total loss occurred, both were to bear the burden in these respective amounts; the carrier responding to the full extent of his agreed liability, and the shipper losing the difference between the value he placed upon the goods and the value they really possessed. If the loss should be partial, it is only just that the parties should bear it in proportion to their several express or implied liabilities. Hence the true method of ascertaining the damages would be to throw upon the carrier such a proportion of the real loss as the declared value bears to the actual value; that is to say, as the declared value of the injured property is to its actual value, so the amount of recoverable damages is to the amount of the real loss. Such is the method adopted in marine insurance to ascertain the proportions in which the insurer and the insured shall sustain a partial loss under a valued policy. The same rule, though in different terms, is stated by the Supreme Court of the United States as follows in *London Assurance v. Companhia De Moagens Do Barreiro*, 167 U. S. 149, 17 Sup. Ct. 785, 42 L. Ed. 113: "The damaged goods, upon reaching their destination, must be at once sold for the best price that can be had. It is then to be determined what the goods must have been worth in the same market had they been sound, and the difference between the sound value and the proceeds of the sale of the

damaged articles gives the ratio of deterioration, and the underwriter is to pay this ratio or percentage of loss on the policy value." The above mode of determining the damages recoverable upon a partial loss appears to be recognized in *Goodman v. M. K. & T. Ry. Co.*, 71 Mo. App. 460, at page 463, where the court says: "By the terms of the special contract shown in this case the plaintiff could not have recovered, if there had been a total loss of any article of furniture, more than \$5 per one hundred pounds. It is clear that for a partial loss of such article he should not recover on a basis of the actual value of the goods, but only the *proportionate value* [our italics] fixed by the contract, and so the trial court instructed the jury. But the jury seems not to have heeded such instruction. The evidence in plaintiff's behalf tended to show the actual loss or damage to the goods, without reference to the limit fixed by the contract, and the verdict shows that he was permitted to recover the actual amount of damages without reference to a proportionate reduction made necessary by the contract." In *St. L. & S. Ry. Co. v. Lesser*, 46 Ark. 238, at page 243, the court, in a case similar to the present, held that the following instruction should have been given: "For a partial loss the measure of damages is, what proportion of \$100 [the declared value] said horse was lessened in value by reason of the injury." The contract in that case provided for the payment of \$100 in case of total loss, and that "in case of injury or partial loss the amount of damages claimed shall not exceed the same proportion." Adopting this method of apportioning the loss, upon the first shipment of May 23, 1901, the actual value of the 28 horses was \$4,700; their declared value \$2,100. The net amount realized from the sale of said 28 horses was \$2,721.76. The actual loss was therefore \$2,038.24, and of this the appellant is answerable in the amount of \$899.22, interest to be added. Upon the second shipment of June 13, 1901, the actual value of the 28 horses shipped was \$4,700; their declared value \$2,100. The net amount realized from the sale of said 28 horses was \$3,322.70. The actual loss was therefore \$1,437.30, of which amount the appellant is answerable in the sum of \$634.10, interest to be added—making, with the loss on the first shipment, a total of \$1,533.32, with interest.

A careful reading of the shipping contract satisfies us that the valuation of \$75 each, placed upon the horses, was exclusively for the purpose of determining the charge or rate of shipment; while the valuation of \$2,100 on the whole lot or car load was intended to fix the basis of the liability of the carrier in case of damage or loss. Had there been a valuation of each horse as a basis of such liability, a different question would have been presented.

The judgment is reversed, with instructions to the trial court to restate its conclu-

sions of law numbered 3 and 5 in accordance with this opinion, and for further proceedings not inconsistent herewith.

HADLEY and GILLETT, JJ., dissent.

(185 Ind. 140)

KNICKERBOCKER ICE CO. v. GRAY.

(No. 20,329.)¹

(Supreme Court of Indiana. Dec. 29, 1904.)

APPEAL—BRIEFS—FAILURE TO SET OUT DEMUR-
RES—OVERRULING OF DEMURRES—REVIEW OF
OBJECTION—NEW TRIAL—MAKING COMPLAINT
MORE CERTAIN—REFUSAL TO GRANT MOTION
—DEPOSITIONS—COMPETENCY TO TAKE DEP-
osition — ATTORNEY'S CLERK—COMPETENCY
TO WRITE DOWN DEPOSITIONS—WAIVER OF
INCOMPETENCY.

1. The overruling of a demurrer to the complaint cannot be considered on appeal where neither the demurres itself nor its substance is set out in the brief of defendant's counsel.

2. Refusal to require a complaint to be made more certain is no ground for a new trial.

3. Burns' Ann. St. 1901, § 433, provides that a deposition shall bear a certificate by the officer taking the same stating by whom the deposition was written, and, if written by the deponent, or some disinterested person, that it was written in the officer's presence and under his direction; and by section 8040 the official certificate of a notary is presumptive evidence of the facts therein stated in cases where he is authorized to certify such facts. *Held*, that a notary's certificate that the third person by whom the deposition was written down was disinterested was not prima facie evidence of that fact, the notary not being authorized by law to certify such fact.

4. Under Burns' Ann. St. 1901, § 433, providing that a deposition shall be written down by the officer or deponent, or some disinterested person, a clerk or stenographer in the employment of the attorney of one of the parties to the action cannot be considered a disinterested person.

5. A deposition taken before a clerk and stenographer in the office of the attorney for one of the parties is subject to a motion to suppress the same, though during the time the clerk was actually engaged in taking the deposition he was not receiving wages from his employers, and he was paid for his services by the client.

6. The fact that an attorney appeared and cross-examined a witness who was giving a deposition did not waive the right to suppress the deposition on account of the incompetency of the notary.

7. Assignments of error on instructions given and refused will not be considered where it is not shown by the record that all the instructions are embraced in the transcript.

Appeal from Superior Court, Laporte County; H. B. Tuthill, Judge.

Action by George Gray against the Knickerbocker Ice Company. From a judgment in favor of plaintiff, defendant appeals. Transferred from Appellate Court under Act March 13, 1901 (Acts 1901, p. 590, c. 259; section 1337u, Burns' Ann. St. 1901). Reversed.

Stuart MacKibbin, for appellant. Crumpacker & Moran, for appellee.

DOWLING, C. J. This is an appeal from a judgment for damages for a personal in-

¹ 4. See Depositions, vol. 12, Cent. Dig. § 57, 22.

² Rehearing denied. See 84 N. E. 341. Rehearing denied.

jury recovered by the appellee against the appellant. The errors complained of are the rulings of the court on appellant's demurrer to the fourth paragraph of the complaint and its motion for a new trial.

Counsel for appellee have filed a motion for the dismissal of this appeal on the ground that after the transcript was completed and certified by the clerk of the Laporte superior court material allegations were made in it without authority, and without the knowledge of counsel for appellee, or the clerk who prepared it. An unpleasant controversy on the subject has occurred between the attorneys of the respective parties, and affidavits and counter affidavits have been filed in support of the motion and in opposition to it. The return of the clerk of the Laporte superior court to the writ of certiorari issued in this case shows that the transcript, as it came here, was not true or correct, but that material and unauthorized alterations and interpolations had been made in it. While we shall overrule the motion to dismiss the appeal, we condemn in the most emphatic manner the method of preparing a transcript which renders possible any controversy of this kind. In the consideration of the case the alterations and additions so made will, of course, be disregarded, and the transcript as corrected by the return to the writ will be treated as the true record in the case.

The first error alleged is the overruling of appellant's demurrer to the fourth paragraph of the complaint. Counsel for appellee object to our consideration of this error for the reason that neither the demurrer itself nor its substance, is set out in the brief of counsel for appellant. The objection is well taken. *Chicago Terminal Transfer Co. v. Walton* (this term) 72 N. E. 646; *Perry, etc., Stone Co. v. Wilson*, 160 Ind. 435, 67 N. E. 183.

The first reason for which appellant demanded a new trial was the refusal of the court to require the complaint to be made more certain. This is not one of the reasons for which a new trial may be granted. It is a ruling relating to the pleadings, and should be assigned as an independent error.

The next ground for which a new trial was asked was the overruling of appellant's motion to suppress the deposition of Ernest Hart, taken on behalf of appellee. The reasons given were that the deposition was written by the office clerk of appellee's attorneys at their office at Hammond, Ind., and that the certificate of the notary was defective. This motion was verified by affidavit, and the court also heard oral testimony on the question. The facts were these: The deposition was taken before one E. S. Harney, a notary public of the state of Illinois, at his office in the city of Moline, in that state. The appellant appeared by its attorneys, and cross-examined the witness. At the request of the notary, the testimony was taken down in shorthand by one William C. Harrison, who was a

clerk or stenographer in the office of appellee's attorneys. The shorthand report of the testimony was afterwards printed on a typewriting machine by Harrison, and, after due notice to the attorneys of the appellant, the typewritten copy of the testimony was read to the witness, and was then signed by him. The fees of the stenographer were paid by the notary, and he received no compensation for his services from the appellee or his attorneys. The appellant had its own stenographer present when the witness was examined, and the testimony was taken down in shorthand by him also. The certificate of the notary stated, among other things, "that his [Hart's] testimony was taken down in shorthand by William C. Harrison, a disinterested person, in my presence, and under my direction, and the said shorthand notes of such testimony were afterwards transcribed into typewriting under my direction and supervision." It is not asserted that the copy of the evidence made by Mr. Harrison was incorrect or unfair in any particular. The statute requires that the deposition shall be written down by the officer, or by the deponent, or by some disinterested person, in the presence and under the direction of the officer. Section 433, Burns' Ann. St. 1901. It is also provided that the officer shall annex a certificate to the deposition, stating, among other facts, "by whom the deposition was written; and, if written by the deponent or some disinterested person, that it was written in the presence, and under the direction of the officer." When the deposition is written down by a third person, the statute does not require nor authorize the notary to certify that the person by whom it was written was, in fact, disinterested; and if, in such a case, the notary certifies that the third person by whom the deposition was written down was disinterested, this statement in the certificate is not even prima facie evidence of the fact so stated, because the notary is not authorized by law to certify to that fact. Section 8040, Burns' Ann. St. 1901. It follows that in the present case the statement in the certificate of the notary that the "testimony was taken down by William C. Harrison, a disinterested person," is not evidence of the fact that Harrison was disinterested. The duty of taking down the testimony of a witness for the purposes of a deposition is a duty connected with the administration of justice, and therefore the statute should be so construed as to secure its obvious intention, the impartiality of the person performing this duty, and his freedom from bias, and from liability to influence by either of the parties. A clerk or stenographer in the employment of the attorneys of one of the parties to an action in which a deposition is taken, and whose duties, as such clerk or stenographer, require him to spend most of his time in the office of his employers, who looks to such attorneys for his salary, wages, or compensation, and who is subject

to dismissal by them for any breach of duty, cannot be regarded as a disinterested person within the meaning of the statute in question. If called as a juror in an action to which his employers were parties, he could be challenged for cause proper affectum. 3 Blacks. Com. 363; Bicknell's Pr. 230. In *Cawood v. Wolfley*, 56 Kan. 282, 43 Pac. 236, 31 L. R. A. 538, 54 Am. St. Rep. 590, a clerk was held to be a servant of the person employing him, and a claim for his wages entitled to preference as such against a decedent's estate. A policy of fire insurance provided that, in case of disagreement upon the amount of a loss, the same should be ascertained by "competent and disinterested appraisers." The court held in *Bradshaw v. Agricultural Ins. Co.*, 137 N. Y. 137, 32 N. E. 1055, that the term "disinterested" did not mean simply the absence of pecuniary interest, but required the appraiser to be one not biased or prejudiced. A similar provision in a policy issued by another insurance company came under review in this court in *Insurance Co. of North America v. Hegewald*, 161 Ind. 631, 66 N. E. 902, and it was held (pages 638, 639, 161 Ind., page 905, 66 N. E.) that: "It clearly appears that appellant, by and through its adjusting agent, who was acting for and in its behalf, did not, in the first instance, nominate and select in the person of Millikan a competent and disinterested appraiser, within either the meaning of the terms or conditions of the policy or the agreement made between the appellee and appellant to submit the controversy over the loss to arbitration. It appears that the appraiser, at the time he was selected as such, was unknown to appellee. Appellant, however, is shown to have represented that he was a competent and disinterested person, when in truth such representations were not true. While it does not appear that he was pecuniarily interested in the matter, still it does appear that he was interested in behalf of appellant by reason of the alleged fact that he at the time was one of its employes. * * * It is certainly essential, in order to render a person competent as an arbitrator in a disputed matter, that he be disinterested and also impartial. In fact, the authorities assert that bias and strong partiality on the part of one or more of the appraisers constitute a serious objection to the award made in a matter of arbitration. * * * Appraisers in cases like the one at bar are considered as acting in a quasi judicial capacity, and in discharging their sworn duties they must act free from bias, partiality, or prejudice in favor of either of the parties." A student at law of an attorney in the cause has been held incompetent to take a deposition in the office and presence of the attorney. *Glanton v. Griggs*, 5 Ga. 424. Where commissioners to take depositions appointed as their clerk to reduce the testimony of the witnesses to writing a clerk to one of the solicitors or parties, it was held that this

was sufficient ground for the suppression of the depositions. *Newton v. Foot*, Dick, 793, 21 Eng. Reprint, 479; *Cook v. Wilson*, 4 Madd. 380; *Shaw v. Lindsey*, 15 Ves. Jr. 380, 33 Eng. Reprint, 798; 13 Cyc. 852; *Tillinghast v. Walton*, 5 Ga. 835.

The reason for the requirement that the deposition shall be written down by a disinterested person is evident. Bias or partiality might cause the scribe to change the language of the deponent, to omit some important statement, or to supply an omission in the testimony. A third person, called upon by the notary to take down the testimony in writing, is not sworn, and does not act in an official capacity. The parties and the court have no security against fraud or material mistakes in his work, except his personal integrity, and his care and accuracy as a clerk. Where long depositions are taken in shorthand, the necessity for a strict compliance with the rule requiring the clerk of the notary to be disinterested is much greater. The opportunity for altering the testimony is safer, and more tempting. Stenographers sometimes have difficulty in reading their notes, and, if unable to do so, the temptation to ask for assistance or suggestion from the attorney and employer, who was present when the witness was examined, would be natural and strong. So, too, if a controversy should arise between the attorneys of the respective parties, or with the witness, concerning the testimony given, the attorneys employing the stenographer would in many cases have a decided and unfair advantage over their opponents. For these reasons, we think that a clerk or stenographer in the employment of the attorneys of one of the parties to an action cannot be considered a disinterested person, and therefore that he is incompetent to write down the testimony at the request of the notary before whom the deposition is taken. The deposition of the witness Hart having been taken down by a clerk and stenographer in the employment of the attorneys for the appellee, the motion to suppress it should have been sustained.

The appellant also moved to suppress the deposition of Thomas Muldoon for the reason that the same was taken before William O. Harrison, who was at the time a clerk and stenographer in the office of the attorneys for the appellee. The court erred in overruling this motion. The clerk of the attorneys was as much disqualified to take the deposition as the attorneys themselves. It made no difference that during the time he was actually engaged in taking the deposition and in transcribing his notes he was not receiving wages from his employers, or that he was paid for his services by the client, and not by the attorneys. He was none the less the employé of the attorneys; and, while there was a temporary suspension of wages, there was no suspension of the influence to which his relation to his

employers subjected him. 9 Am. & Eng. Ency. Law, 305. The fact that the attorneys of the appellant appeared and cross-examined the witness did not operate as a waiver of their right to suppress the deposition on account of the incompetency of the notary. They could make no effectual objection until the deposition was filed in the court where the suit was pending, and it appears that they moved its suppression at the proper time. It is not claimed in this case that any improper influence was exerted, or that the report of the evidence taken and transcribed by Mr. Harrison was not perfectly true and correct; but the result in other cases, and under other conditions, might be different, and the only safe rule is one which declares every such clerk an interested person, and hence incompetent to act. Although the trial court decided upon the affidavits and the other evidence before it that the clerk and stenographer who wrote down the testimony of the witness Hart, and who, as a notary public, took Muldoon's deposition, was a disinterested person, we cannot be bound by its decision upon a state of facts which admits of only one conclusion.

The errors next discussed relate to instructions given and refused. They will not be examined, because it is not shown by the record that all the instructions are embraced in the transcript.

Another ground of the motion for a new trial was that the verdict was not sustained by sufficient evidence. As the case must be tried again, and as other or different testimony may be introduced, we deem it inadvisable to express an opinion on the point so presented.

Other questions are presented by the assignment of errors and are discussed in the briefs of counsel, but, as they may not arise upon another trial, we will not examine them.

For the error of the court in overruling the motion for a new trial, the judgment is reversed, with directions to the court to sustain the motion for a new trial, and for further proceedings in conformity to this opinion.

GILLETT, J., did not participate in this decision.

(184 Ind. 12)

TUTHILL SPRING CO. et al. v. HOLLIDAY et al. (No. 20,405.)

(Supreme Court of Indiana. Dec. 29, 1904.)

OBJECTIONS TO COMPLAINT—REVIEW—SUFFICIENCY OF BRIEF—SALE BY BROKER—VALIDITY OF CONTRACT.

1. Objections to a complaint will not be reviewed where appellant's brief does not contain a condensed statement of the contents of the complaint, as required by Sup. Ct. rule 22 (55 N. E. v. vi).

2. Where a manufacturer authorizes its broker to sell its goods at specified prices on com-

mission, and the broker takes an order pursuant thereto, directing shipment direct to the buyer, the acceptance of the order by the manufacturer constitutes a contract of sale between the manufacturer and the buyer.

3. A manufacturer in September, 1898, contracted with brokers that the latter should take orders for hardware at specified prices on commission to be paid by the manufacturer; the hardware to be shipped direct to the buyer. In April, 1899, the brokers took an order from plaintiff for a bill of goods at the prices fixed in the contract between the manufacturer and broker, which order was accepted by the manufacturer. Held, that the contract of sale thus made through the broker did not violate a statute prohibiting contracts for options to sell or buy commodities at a future time, etc.

Appeal from Circuit Court, Hamilton County; John F. Neal, Judge.

Action by William J. Holliday and others against the Tuthill Spring Company, defendant, and the Lincoln Carriage Company and W. Hare & Sons, garnishees. There was judgment for plaintiff, and defendants appeal. Transferred from the Appellate Court under Act March 13, 1901 (Acts 1901, p. 590, c. 3; Burns' Ann. St. 1901, § 1337u). Affirmed.

Kane & Kane, for appellants. Jameson & Joss and H. J. Brandon, for appellees.

DOWLING, C. J. Action by appellees against appellant the Tuthill Spring Company for damages for breach of contract to deliver merchandise. The Lincoln Carriage Company and the firm of W. Hare & Sons were made garnishees in a proceeding in attachment incidental to the principal case. The complaint was in 11 paragraphs, the first being a general denial. Demurrers were sustained to the sixth and seventh paragraphs, and overruled as to the others. Reply in denial. Trial by the court, and special finding of facts, with conclusions of law thereon. Motions for a new trial overruled. Judgment for \$2,126.74 in favor of appellees and against appellant. Judgment against garnishees. Motion for modification of judgment overruled.

Errors are assigned upon the rulings on the demurrers to the third, fourth, fifth, eighth, ninth, tenth, and eleventh paragraphs of the complaint, the conclusions of law, and the motions for a new trial, and for a modification of the judgment.

We cannot consider the objections to the complaint. Counsel for appellant have failed to include in their brief a condensed statement of the contents of the several paragraphs of that pleading, as required by rule 22 of this court (55 N. E. v. vi), and, because of their failure to comply with the rule, the supposed errors in the rulings on the demurrers are not available. Chicago, etc., R. Co. v. Walton, 72 N. E. 646, and cases cited this term.

The finding of facts is very long, and it would serve no useful purpose to set it out in detail. Its substance was as follows:

At the dates named in the complaint the

plaintiffs were partners under the firm name of W. J. Holliday & Co., and carried on the business of wholesale jobbers and dealers in iron, heavy hardware, carriage and wagon springs, etc., in the city of Indianapolis. The defendant the Tuthill Spring Company was a corporation organized under the laws of Illinois, a nonresident of Indiana, and was engaged in the manufacture of carriage and wagon springs at its factory, in the city of Chicago, Ill. Its course of business was to take orders and make contracts in advance for the sale of the product of its factory. At the same time Robert K. Carter and Frank R. Beauvelt were copartners under the firm name of R. K. Carter & Co., residing and carrying on business in the city of New York. Their business was that of brokers and agents for manufacturers and others in the making of contracts for the sale of hardware, including carriage and wagon springs; they having nothing to do with the handling, delivering, or receiving of any goods, but acting only in the making of contracts and taking and placing orders for such merchandise, and in the conduct of their business employing and using their own firm name in such transactions, although acting for others. All the facts concerning the business and their manner of carrying it on and conducting it were well known to the defendant, the Tuthill Spring Company, W. J. Holliday & Co., and to all the parties to the action. In the regular course of business, R. K. Carter & Co., being desirous of obtaining the right to sell on commission the product of the Tuthill Spring Company at certain prices, on September 24, 1898, presented to the Tuthill Spring Company their written proposal to the effect that said company should enter their orders as they should send them in, at the prices named in said proposition, and on the terms named therein, the said R. K. Carter & Co. to be paid a commission of 5 per cent. on sales, and stipulating that the prices named should remain in force so long as R. K. Carter & Co. should sell; 30 days' notice of any change to be given by R. K. Carter & Co. to the Tuthill Spring Company. Thereupon the Tuthill Spring Company accepted this proposition in writing indorsed thereon, signed by said Tuthill Spring Company, all of which was done at the office of R. K. Carter & Co., in New York. A copy of the proposition, with the written acceptance, is set forth in the finding. A mistake having been made in drafting the last sentence of the proposition, it was afterward corrected by mutual consent so as to read: "It is agreed that these prices are to remain in use as long as you can sell, and should you make a change you are to give us thirty days' notice." On December 5, 1898, the Tuthill Spring Company notified R. K. Carter & Co. that they would remodel, as stated in their letter, the prices on certain seat and wagon springs fixed by the agreement of September 24, 1898, excepting some of the large

hardware trade, where the former price was absolutely necessary, and giving R. K. Carter & Co. discretionary power to fluctuate in prices, and stating that on these conditions the contract of September 24, 1898, would be in force for the year ending September, 1899. A copy of the letter is set out. The modification was accepted by R. K. Carter & Co. Acting under these agreements, R. K. Carter & Co. made sales and contracts of sale of carriage, wagon, and seat springs to various persons, taking such contracts in their own name, notifying the Tuthill Spring Company of all such sales and contracts, with the names of the actual purchasers, and giving shipping directions; and the Tuthill Spring Company filled such orders and contracts, and charged, billed, and shipped such goods to such actual purchasers accordingly, receiving payment from them, and paying R. K. Carter & Co. 5 per cent. commission on such sales. At all times in the finding mentioned, the business of the plaintiffs' firm, of W. J. Holliday & Co., was of the kind and class of trade referred to in the Tuthill Spring Company's letter of December 5, 1898, as the special heavy hardware trade. In 1897 R. K. Carter & Co., in the course of their business, sent to the subscribers thereof price lists containing descriptions and quotations of articles of hardware generally, of the manufacturers represented by them, and W. J. Holliday & Co. became subscribers for said price lists, and so continued until the commencement of this action. R. K. Carter & Co. were never in any way employed by W. J. Holliday & Co. R. K. Carter & Co. explained to W. J. Holliday & Co. that the term "usual confident beyond" meant a discount of 2½ per cent. from R. K. Carter & Co.'s commission on the sale. Afterward R. K. Carter & Co. told W. J. Holliday & Co. that, as they were anxious to send in a good many orders to the Tuthill Spring Company, they would give them all their commissions, being 5 per cent. January 12, 1899, R. K. Carter & Co. sent to their subscribers, including W. J. Holliday & Co., a price list as follows:

"Carriage and Wagon Springs.

Seat—1¼x2x24 at 28 cts. pair.
 1½x2x25 at 28 cts. pair.
 1½x2x26 at 28 cts. pair.
 1½x2x28 at 33 cts. pair.
 1½x3x28 at 48 cts. pair.

"F. O. B. Chicago. Terms, 60 days, 2 per cent. 10 days and usual confidential beyond.

Carriage—Black at \$2 75
 Half Bright 2 85
 Bright 3 10

"F. O. B. Chicago. Terms 4 months or 3 per cent. cash 30 days, and our usual confidential beyond. On large orders can make special prices."

These prices were those fixed by the appellant by its contract with R. K. Carter & Co. of September 24, 1898, as modified and increased by appellant's letter to R. K. Carter & Co. of December 5, 1898.

February 28, 1899, W. J. Holliday & Co. sent R. K. Carter & Co. their written order for 500 pairs of seat springs, $1\frac{1}{2}$ inches wide, 2 plate, 26 inches long, at 28 cents per pair, and 25 pairs seat springs, $1\frac{1}{2}$ inches wide, 3 plate, 28 inches long, at 48 cents per pair. This order, with special shipping directions and memorandum of terms of payment, was sent by R. K. Carter & Co. to appellant, which accepted same, and shipped a part of the merchandise ordered. April 28, 1899, W. J. Holliday & Co. sent to R. K. Carter & Co. another order for springs, with special shipping directions, which was forwarded to appellant, who acknowledged the receipt of the same. All the said orders from W. J. Holliday & Co. for springs were accepted by R. K. Carter & Co., agreeably to their contract with appellant; and appellant accepted them by its president, stamping them "O. K.," and adding his initials, "F. H. T."

During these transactions there was a statute of the state of Illinois prohibiting contracts for options to sell or buy at a future time any grain or other commodity, stock of any railroad or other company, or gold; prohibiting, also, forestalling of markets by spreading false rumors to influence the price of commodities therein, or the cornering or attempting to corner the markets in relation to such commodities—under a penalty of not less than \$10 or more than \$1,000 or confinement in the county jail not exceeding one year, or both, and declaring void all contracts made in violation of the act.

On June 15, 1899, W. J. Holliday & Co. sent to the appellant a written order for a lot of springs, part of which were rubber head springs, and the remainder open head springs. The rubber head springs were shipped to, and received and paid for by, W. J. Holliday & Co. The price for the rubber head springs was $3\frac{1}{2}$ cents per pound. On receipt of the order of W. J. Holliday & Co., appellant wrote them that it would not accept the order for the open head springs at the prices at which they were ordered, but offered to furnish them at $4\frac{1}{4}$ cents per pound free on board cars at Chicago, Ill., which offer was accepted by W. J. Holliday & Co. None of the springs so contracted to be sold and delivered by appellant to W. J. Holliday & Co. on the 8th, 9th, 10th, and 11th findings were furnished or delivered by appellant to W. J. Holliday & Co., excepting 25 pairs of seat springs named in finding No. 8, and certain rubber head springs mentioned in finding 11. Appellant refused to deliver said springs, although required by W. J. Holliday & Co. to do so, and said firm were ready, able, and willing to receive and pay for them in accordance with their several contracts. The court next finds the prices and value of the springs which appellant refused to deliver, with the amount of damage sustained by W. J. Holliday & Co. on account of such failure. In its thirteenth and last finding, the court states the amount of the indebtedness

of the garnishees to appellant at the time they were served with process of garnishment.

The conclusions of law were as follows: "First. That valid and binding contracts were entered into between the plaintiffs and defendant the Tuthill Spring Company for the manufacture, sale, and delivery by the latter for and to the former of all the springs mentioned in said findings eighth, ninth, tenth, and eleventh. Second. That said statute of the state of Illinois does not apply to, nor make invalid, the said contracts. Third. That actionable breaches of said contracts were committed by said defendant, in the failure to make and deliver the said portions of said springs as stated in the findings. Fourth. That plaintiffs are entitled to recover of said defendant, as damages for said breaches of said contracts, the sum of \$2,126.74, together with all their costs herein, with relief. Fifth. That the proceedings in garnishment have been sustained, and that plaintiffs are entitled to have applied in payment on said judgment the said sum of money paid into court by said garnishees, Hare & Sons, and are entitled to judgment against said Lincoln Carriage Company, as garnishee, in the sum equal to the remainder of their recovery against the principal defendant, to wit, \$1,642.06 and costs."

The propositions on which counsel for appellant mainly rely for a reversal of the judgment are (1) that it appears that their contracts were with R. K. Carter & Co., and not with W. J. Holliday & Co., and that the latter were bound to look to R. K. Carter & Co., and not to them for damages for any failure to deliver the springs under their accepted orders; (2) that R. K. Carter & Co. were not their agents in the transactions with W. J. Holliday & Co., and could not bind them by any order or agreement; (3) that appellant had the privilege of changing the prices of the merchandise; (4) that W. J. Holliday & Co. first violated the contract by their refusal to pay for certain springs ordered by them; and (5) that the contract entered into by appellant for the sale and delivery of springs was a gambling contract, and void under the statute of Illinois.

The special findings were fully sustained by the evidence, which is clear and conclusive upon every fact found. Nothing could be plainer than that R. K. Carter & Co. were the brokers and agents of appellant, and that they were so treated and recognized by them until the present controversy arose. The statement of the appellees W. J. Holliday & Co. that they would hold R. K. Carter & Co. responsible did not alter the relation of R. K. Carter & Co. to the appellant or to W. J. Holliday & Co. Whether they could hold R. K. Carter & Co. responsible, or not, is immaterial. Appellant's contracts for the sale and delivery of the goods in controversy were with W. J. Holliday & Co., and R. K. Carter & Co. had no interest in them, be-

yond their commissions which appellant had agreed to pay them for obtaining the orders. Appellant had the privilege of changing the prices of springs, but, under the corrected agreement of December 5, 1898, it could do this only after 30 days' notice to R. K. Carter & Co., and no such notice was given. The evidence shows no violation of the agreement by W. J. Holliday & Co., and their refusal to agree to pay increased prices wrongfully demanded by appellant was not a breach or violation of their contract. The agreements of the appellant with W. J. Holliday & Co. were not such as were prohibited by the laws of Illinois, and were regular and legal in every respect. The conclusions of law were correct, and were the only conclusions authorized by the finding. The motion to modify the judgment was destitute of merit.

We can hardly conceive of a case where the right of the plaintiff to recover damages could be clearer. The nature of the transaction set forth in the proof is perfectly simple. The appellant, by its duly authorized agents, made a lawful contract with the appellees W. J. Holliday & Co., to deliver certain merchandise. They failed and refused to perform their agreement, and the appellees were damaged by such failure to the amount stated in the finding, the conclusions of law, and the judgment. W. J. Holliday & Co. fully performed the contract on their part. The conclusion arrived at by the court upon the evidence was inevitable, and was clearly right. None of the rulings complained of were errors.

The judgment is affirmed.

(163 Ind. 631)

PENNSYLVANIA CO. v. COYER. (No. 20, 411.)

(Supreme Court of Indiana. Dec. 18, 1904.)

ACTION FOR WRONGFUL DEATH—SUFFICIENCY OF COMPLAINT—PERSONS ENTITLED TO SUE—PASSENGER ON CONSTRUCTION TRAIN—PRESUMPTIONS.

1. Under Burns' Ann. St. 1901, § 285, providing for an action for wrongful death, and that the damages shall inure to the benefit of the widow or widower and children, if any, or next of kin, the complaint in an action for the death of an unmarried man, alleging that he left a mother, brothers, and sisters, naming them, sufficiently shows the interest in the life of decedent in the persons so named.

2. Where a person is allowed by a railroad company to ride in the caboose of its work train gratuitously, the company is bound to exercise ordinary care for his safety.

3. All persons are required to take notice that railroad work trains are not intended for the transportation of passengers, and to recover for injuries to a person while traveling on such train it must be shown that he was rightfully there, and that the company owed him the duty of carrying him safely.

4. Where decedent, an employé of a construction company, received notice from a railroad company of a rule prohibiting the employés of such construction company from rid-

ing on a work train, the habitual disregard of such rule by such employés and the trainmen in charge of the work train will not render the railroad company liable for the death of decedent, in the absence of proof that the company had knowledge of such disregard, and acquiesced therein.

5. The mere fact that a person is on a railroad train does not necessarily raise the presumption that he is there rightfully.

Appeal from Circuit Court, Porter County; W. C. McMahan, Judge.

Action by Delphine Coyer, administratrix, against the Pennsylvania Company. From a judgment for plaintiff, defendant appeals. Transferred from the Appellate Court under Act March 13, 1901 (Acts 1901, p. 590, c. 3; Burns' Ann. St. 1901, § 1337u). Reversed.

Zollars & Zollars, for appellant. T. H. Heard, for appellee.

DOWLING, C. J. Action by the appellee, as administratrix of the estate of Charles Coyer, deceased, against the appellant, the Pennsylvania Company, for damages for a personal injury resulting in the death of Coyer. Demurrer to each paragraph of complaint overruled. Answer in denial. Trial by a jury. Verdict for appellee, with answers to interrogatories. Motion for judgment on special answers and for a new trial overruled. Judgment on verdict. All question discussed in brief of counsel for appellant are properly presented by the assignment of errors.

The complaint charged that the death of Charles Coyer, appellee's decedent, was caused by the wrongful act and omission of the appellant. Each of its three paragraphs alleged, among other things, that Coyer, an employé of a firm engaged in the construction of a second track for appellant, "after working hours, * * * as had been his custom, and with the consent of defendant company, did go upon and board defendant's work train," etc., "and with the knowledge and consent of the defendant and its employés in charge of said train did climb in and upon the caboose of said work train * * * for the purpose of being carried to his home in the city of Plymouth; * * * that the said Charles Coyer was twenty years old, strong, active, able-bodied, and intelligent, and capable of earning ninety dollars per month, and did so long before and at the time of his death; that * * * more than a year prior to his death he was fully emancipated and given his time by his mother (a widow), and allowed to do business for himself; that he used and did as he pleased with his wages, and collected and received the value of his services; * * * that the said Charles Coyer * * * died intestate, leaving as his only heirs at law and next of kin his mother, Delphine Coyer, and his brothers, Peter Coyer, William Coyer, and George Coyer, and his sisters, Emma Carter, Neoma Coyer, and Ida Coyer."

The first objection to the complaint by

counsel for appellant is that it does not show that the next of kin suffered any injury for which the law will award damages. The action is founded upon section 285, Burns' Ann. St. 1901, which authorizes the personal representative of one whose death is caused by the wrongful act or omission of another to maintain an action therefor in certain cases, and which provides that the damages must inure to the exclusive benefit of the widow or widower (as the case may be) and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased. It has never been held in this state that the complaint must show the fact that the widow, widower, children, or next of kin of the deceased had a pecuniary interest in his life, or the nature or extent of that interest. This court said in the case of the Indianapolis, etc., R. R. Co. v. Keely's Adm'r, 23 Ind. 133, 136, 137, that: "In New York, under a statute conferring the same right of action on the personal representative of the deceased person, 'the sum recovered to be for the exclusive benefit of the widow and next of kin,' it has been held that the complaint should show that 'there are persons entitled by law to claim the indemnity,' and that their names should be stated. *Safford v. Drew*, 3 Duer, 627. The New York statute may furnish one reason why the persons entitled to the damages recovered should be named in the complaint that does not exist under our statute, in this: The statute of New York provides that 'the jury may give such damages as they shall deem a fair and just compensation, not exceeding \$5,000, with reference to the pecuniary injuries resulting from such death to the wife and next of kin of the deceased person.' A different rule seems to prevail under our statute. See *Long v. Morrison*, 14 Ind. 595, 77 Am. Dec. 72. In view, however, of the whole question, we think the better rule of practice requires that the names of the persons and their relation to the deceased should be stated in the complaint. It imposes no hardship on the plaintiff, and only requires to be stated in the complaint the facts that must be proved on the trial to justify a recovery." Again, in the *Jeffersonville*, etc., R. R. Co. v. *Hendricks' Adm'r*, 41 Ind. 48, 77, this court said that: "We are of the opinion that it will be sufficient to allege in the complaint and prove on the trial that there are persons who are entitled under the statute to the damages. We hold that it is not necessary to give the names of such persons in the complaint, but such allegation would not vitiate." It was averred in the complaint under review that the deceased was unmarried, that he died intestate, and that he left surviving him, as his heirs at law and next of kin, his mother and brothers and sisters, naming each of them. This was a sufficient allegation of interest in the life of the deceased in the persons so named and described, and it authorized proof of such pecuniary loss as the per-

sons so related sustained by his death. This view seems to be entirely in harmony with the authorities. *Stewart, Adm'r, v. The Terre Haute, etc., R. R. Co.*, 103 Ind. 44, 2 N. E. 208; *The Louisville, etc., Ry. Co. v. Goodykoontz*, 119 Ind. 111, 21 N. E. 472, 12 Am. St. Rep. 371; *The Commercial Club v. Hilliker*, 20 Ind. App. 239, 242, 243, 50 N. E. 578; *The Salem Bedford Stone Co. v. Hobbs, Adm'r*, 11 Ind. App. 27, 38 N. E. 538; *The State ex rel. Meriwether, Adm'r, v. Walford*, 11 Ind. App. 392, 39 N. E. 162; *Conant v. Griffin*, 48 Ill. 410; *McGlone v. New Jersey, etc., Co.*, 87 N. J. Law, 304; *Keller v. New York Cent. R. Co.*, 24 How. Prac. 172; 5 Encyl. Pl. & Pr. 868, 869, 870; *Cincinnati, etc., R. R. Co. v. Carper*, 112 Ind. 26, 13 N. E. 122, 14 N. E. 352, 2 Am. St. Rep. 144, and notes; *Alabama R. R. Co. v. Yarbrough*, 83 Ala. 238, 3 South. 447, 3 Am. St. Rep. 715.

It is next contended that the complaint does not show that Coyer was a passenger, nor that he was otherwise rightfully upon the train, so as to make appellant liable upon the ground of negligence. It does appear that he was not an employe of the appellant, and the averment is that he was in the habit of riding upon the train, and was in the caboose with the knowledge and consent of the defendant company for the purpose of being carried to his home. If he was on the work train with the knowledge and consent of the appellant for this purpose, he was neither a trespasser, a licensee, nor a servant of the company. Although he paid no fare, he was a person carried gratuitously, and the appellant was bound to exercise at least ordinary care for his safety. *Gillenwater v. The Madison, etc., R. R. Co.*, 5 Ind. 339, 61 Am. Dec. 101; *The Louisville, etc., Ry. Co. v. Faylor*, 126 Ind. 126, 130, 25 N. E. 869; *Cleveland, etc., R. R. Co. v. Ketcham*, 133 Ind. 346, 33 N. E. 116, 19 L. R. A. 339, 36 Am. St. Rep. 550; *Ohio, etc., R. R. Co. v. Selby*, 47 Ind. 479, 17 Am. Rep. 719; *Ohio, etc., R. R. Co. v. Nickless*, 71 Ind. 271; *Rosenbaum v. St. Paul, etc., R. R. Co.*, 38 Minn. 173, 36 N. W. 447, 8 Am. St. Rep. 653; *St. Joseph, etc., R. R. Co. v. Wheeler*, 35 Kan. 185, 10 Pac. 461; *Chicago, etc., R. R. Co. v. Frazer*, 55 Kan. 582, 40 Pac. 923; *Keating v. Michigan Cent. R. R. Co.*, 97 Mich. 154, 56 N. W. 347, 37 Am. St. Rep. 323; *Lawrenceburgh, etc., R. R. Co. v. Montgomery*, 7 Ind. 474; *Ohio, etc., R. R. Co. v. Dickerson*, 59 Ind. 317; *Ohio, etc., R. R. Co. v. Muhling*, 30 Ill. 9, 81 Am. Dec. 336; *Hazard v. Chicago, etc., R. R. Co.*, 1 Biss. (U. S.) 503, Fed. Cas. No. 6,275; *Fitzpatrick v. The New Albany & Salem R. R. Co.*, 7 Ind. 436; *Lake Shore, etc., R. R. Co. v. Brown*, 123 Ill. 162, 14 N. E. 197, 5 Am. St. Rep. 510; *McGee v. Missouri Pac. R. R. Co.*, 92 Mo. 208, 4 S. W. 739, 1 Am. St. Rep. 706. The demurrer to the complaint was properly overruled.

While many of the special answers of the jury were apparently antagonistic to the general verdict, they were not irreconcilable

with it. Evidence might have been introduced under the issues which would have rendered them consistent with the conclusion that the appellee was entitled to recover upon the pleadings. *Princeton, etc., Coal Co. v. Roll*, 162 Ind. 115, 120, 121, 66 N. E. 169; *Albany Land Co. v. Rickel*, 162 Ind. 222, 228, 70 N. E. 158.

Did the court err in overruling appellant's motion for a new trial? One of the reasons assigned for the motion was that the verdict was not sustained by sufficient evidence. It will not be necessary to set out or consider the evidence in detail, as we think there was a failure of proof upon a vital point, which must cause a reversal of the judgment. The complaint, as we have seen, alleged that Coyer, with the consent of the appellant, went upon the work train with the permission of appellant's servants in charge of said train, the custom being to convey Coyer and other employes of P. T. Clifford & Sons, the contractors, to and from their work. It was proved without contradiction that a rule of the appellant expressly prohibited the employes of P. T. Clifford & Sons from riding on the work train without the special permission of the superintendent, and it was shown that notice of the existence of this rule was given to Coyer some time in the year 1900, and within one year before the occurrence of the collision by which he was killed. Work trains are not ordinarily intended for the transportation of passengers, and it is a generally recognized fact that the perils of accident are much greater on such trains than on those designed and commonly used for the conveyance of passengers. A railroad company has the right and the strongest reason to protect itself against the dangerous liability likely to arise from accidents to such trains by altogether excluding passengers from them; and the most reasonable and effective method of accomplishing this result would seem to be the adoption and promulgation of a rule prohibiting all persons from riding on work trains. When such a rule is made, and notice is given to the persons intended to be excluded from the train or trains, it is not necessary that these persons should afterward be reminded of the existence of the rule. After notice that they are not permitted to ride on such trains, if they violate the rule, they do so at their own risk, and, if injured by an accident to the train, ordinarily there can be no recovery. Disregard of the rule and a failure to enforce it by the conductor or other persons having charge of the train will not render the company liable for an accidental injury. All persons are required to take notice of the fact that work trains are not intended for the transportation of passengers, and persons traveling on them, if injured and seeking damages, must show that they were rightfully there, and that the company owed them the duty of carrying them safely. Much more, after express notice of a rule of the

company prohibiting them from riding on such trains, is it incumbent on them, if they seek to make the company responsible for an injury, to show by clear and satisfactory evidence that the rule had been abrogated, and that the plaintiff was rightfully on the train? Nothing of the kind appears in the present case. There was proof that the persons in charge of the work train violated the rule prohibiting the employes of P. T. Clifford & Sons from riding on the cars, but there was no evidence that such disregard of the rule, whether occasional or habitual, was known to the appellant, or that it occurred under such circumstances as to raise a presumption of knowledge of such disregard of the order and acquiescence of the appellant in it. On the contrary, the evidence that the company had no such knowledge was uncontradicted. No rule of law imposes upon a railroad corporation the duty of maintaining a constant surveillance upon its employes to ascertain whether or not its rules are complied with. It has the right to assume that they will be observed and enforced, and it is rarely the case that notice of a habitual disregard of such rules and acquiescence in such breach of duty can justly be presumed from evidence that violations of the rules have occurred, or have been connived at by faithless servants. *Murray v. Fry*, 6 Ind. 371; *Rapp v. Kester*, 125 Ind. 79, 25 N. E. 141; *Streets v. The Grand Trunk Ry. Co. (Sup.)* 78 N. Y. Supp. 729; *Springer v. Byram*, 137 Ind. 15, 36 N. E. 361, 23 L. R. A. 244, 45 Am. St. Rep. 159; *Cooper v. Lake Erie, etc., R. R. Co.*, 136 Ind. 306, 36 N. E. 272; *Evansville, etc., R. R. Co. v. Barnes*, 137 Ind. 306, 36 N. E. 1092; *Smith v. Louisville, etc., R. R. Co.*, 124 Ind. 394, 24 N. E. 753; *White v. The Evansville, etc., R. R. Co.*, 133 Ind. 480, 33 N. E. 273; *Lake Shore, etc., R. R. Co. v. Foster*, 104 Ind. 293, 316, 4 N. E. 20, 54 Am. Rep. 319; *Stalcup v. Louisville, etc., Ry. Co.*, 16 Ind. App. 584, 45 N. E. 802.

Many of the instructions given by the court are complained of as erroneous. The nineteenth was in these words: "It is charged in the complaint that while said Charles Coyer worked for P. T. Clifford & Sons upon the right of way of the defendant company west of Plymouth, the defendant company provided and furnished to him and other employes working for said Cliffords transportation between Plymouth and said work upon its cars and trains; that upon the invitation and consent of the defendant company said Charles Coyer went upon and aboard one of the defendant's work trains to be carried from the work to Plymouth; that he had a right to do so; and that while on one of said work trains he was killed by the negligence of the employes handling that train and another train with which it collided. The simple fact that Charles Coyer was killed upon one of the work trains belonging to the defendant and being operated by its employes does not show, nor tend to show, that

said Coyer was by the defendant invited to be upon said train. Nor will the simple fact that Charles Coyer was killed while at work upon a train of the defendant, which was operated by its employees, alone prove, nor tend to prove, that he was upon that train with the consent or knowledge of the defendant. But the court instructs the jury that a person found upon a train, whether it be a passenger, freight, or work train, is presumed to be there rightfully." The latter part of this instruction, namely, "that a person found upon a train, whether it be a passenger, freight, or work train, is presumed to be there rightfully," is not a correct declaration of the rule of law in such cases. It is said in *Elliott on Railroads*, § 1578, that: "The presumption that a person on a train is a passenger does not prevail in cases where the train is one on which passengers are not ordinarily carried; as, for instance, a construction train, an oil train, or the like. It has been held, and, in our opinion, justly so held, that a person in the caboose of a freight train cannot be presumed to be a passenger; but it may, of course, be shown that passengers were carried on such train." *Eaton v. The Delaware, etc., R. R. Co.*, 57 N. Y. 382, 389, 15 Am. Rep. 513; *Atchison, etc., R. R. Co. v. Headland (Colo.)* 33 Pac. 185, 20 L. R. A. 822; *White v. Evansville, etc., Ry. Co.*, 133 Ind. 480, 486, 33 N. E. 273.

Graham v. Toronto, Grey & Bruce Railway Co., 23 Up. Can. 514, cited by the court in *Hoar v. Maine Cent. R. R. Co.*, 70 Me. 65, 35 Am. Rep. 209, is much in point upon the question we are now considering. There the defendants agreed with the contractor for the construction of their railway to furnish a construction train for ballasting and laying the track for a portion of their road then under construction; the company to provide the conductors, engineer, and fireman; the contractors to furnish the brakemen. On October 31, 1872, after work for the day was over, and the train was returning to Owen Sound, where the plaintiff, one of the contractor's workmen, lived, the plaintiff, with the permission of the conductor, but without the authority of the defendant, got on. Through the negligence of the person in charge of the train an accident happened, and the plaintiff was injured. In deciding the case, *Hogarty, C. J.*, said: "The fact that the defendant's engine driver or conductor allowed him to get on the platform, does not alter my view of the case. I cannot distinguish it from the case of a cart sent by its owner under his servants' care to haul bricks or lumber for a house he is building. A workman, either with the driver's assent, or without any objection from him, gets upon the cart. It breaks down, or by careless driving runs against another vehicle or a lamp post, and the workman is injured. I cannot understand by what process of reasoning the owner can, in such case, be held

to incur any liability to the person injured; nor, in my opinion, would the fact that the owner was aware that the driver of his cart often let a friend or a person doing work at his house ride in his cart, make any difference. * * * It could never be, I think, in the reasonable expectation of these defendants, that they were incurring any liability as carriers of passengers, or that they should provide against contingencies that might affect them in that character. A similar question arose in *Sherman v. Toronto, Grey & Bruce Railway Co.*, 34 Up. Can. 451, where one of the workmen was being carried, without reward, on a gravel train, and was injured so that he died. It was held that the deceased was not lawfully upon the car with the consent of the defendant, and a nonsuit was directed. "The workmen," observes *Wilson, J.*, "were not lawfully upon the cars. They were not passengers being carried by the defendants. They were acting on their own risk, not at the risk of the defendants; and, however unfortunate the disaster may have been, it is only right the legal responsibility should fall on those who ought to bear it, and not upon those upon whom it does not rest. In this case it appeared that it was not necessary the defendants should carry the men to and from their work, and that they never agreed to do more than to provide cars for carrying ballasting and material for track laying. * * * No one becomes a passenger except by the consent, express or implied, of the carrier." In *Duff v. Allegheny Valley R. R. Co.*, 91 Pa. 458, 36 Am. Rep. 675, the facts were that the conductor of an accommodation train, at the request of a brakeman, permitted a lad of 15 to ride free, daily, on the train, to sell newspapers. Under the company's rules this was beyond the scope of the conductor's authority. After this practice had continued five or six months, the boy was killed in an accident to the train, caused by the alleged negligence of the company. In an action by the boy's mother to recover damages it was held that under the evidence the boy was neither a passenger nor an employé, but was a mere trespasser, to whom the company owed no duty, and that the plaintiff could not recover. *Springer v. Byram*, 137 Ind. 15, 27, 36 N. E. 361, 23 L. R. A. 244, 45 Am. St. Rep. 169; *Elliott on Railroads*, § 1580.

Other errors are discussed by counsel for appellant, but we do not deem it necessary to consider them. Many of them relate to instructions given by the court upon the subject of the rights acquired by the deceased by reason of the fact that, when injured, he was traveling on the train of the appellant. Our views upon this branch of the case have been fully stated elsewhere in this opinion, and need not be repeated. So far as the instructions given conflict with them, they must be condemned.

For the error of the court in overruling

the motion for a new trial the judgment is reversed, with direction to the court to sustain the motion, and for further proceedings not inconsistent with this opinion.

GILLETT, J., did not participate in this decision.

(164 Ind. 21)

WEST MUNCIE STRAWBOARD CO. et al.
v. SLACK et al. (No. 20,406.)

(Supreme Court of Indiana. Dec. 29, 1904.)

WATERS AND WATER COURSES—POLLUTION—NUISANCE—DAMAGES—INSTRUCTIONS—APPEAL—HARMLESS ERROR—CURE OF ERRORS—LIABILITY OF JOINT TORT FEASORS—PLEADINGS—CONSTRUCTION—SUFFICIENCY.

1. One who creates a public nuisance is responsible to individuals specially damaged, not only for the actual loss he alone has occasioned them, but also for the damages caused by similar acts of third persons which independently concur in causing the injury complained of.

2. Under Burns' Ann. St. 1901, § 2154, providing that whoever unlawfully diverts any stream of water from its natural course or state, to the injury of others, shall be fined, etc., persons who maintain paper factories on the banks of a creek, and discharge chemicals into the creek, destroying the fish in it, polluting it and connecting streams, and rendering their water unfit for stock, are guilty of maintaining a public nuisance.

3. A complaint must be construed according to its general scope and tenor, as appears from its averments, and the prayer is not controlling or determinative of its validity.

4. When the trial court has placed a reasonable construction upon the averments of a complaint which is susceptible of two constructions, the Supreme Court will be disposed to adhere to the construction so placed upon it.

5. A complaint alleging that defendants were polluting streams with large quantities of injurious substances, which, mingling together, and depositing themselves upon plaintiffs' land adjoining one of the streams, rendered it less available for purposes of agriculture and stock raising and as a place of residence, states a cause of action for damages.

6. The fact that a water course is already contaminated does not entitle other persons to aid in its contamination, or preclude persons injured thereby from recovering of them damages for the injury.

7. Any delay, short of the statutory period of limitation, in instituting suit to recover damages for the maintenance of a nuisance, constitutes no defense to the suit when instituted.

8. In an action for damages for the pollution of a stream, the refusal to charge that the jury, in assessing damages, might consider plaintiffs' failure to complain to defendants before instituting suit, was harmless, where the court did charge that there could be a recovery of such an amount only as would compensate plaintiffs for injury sustained by reason of the acts complained of.

9. In an action for damages for the pollution of a stream, a charge that the jury could not include in its assessment of damages any sum for the fish which might have been in the stream was properly refused, as likely to mislead the jury into assuming that the right to fish in the stream was not a substantial right to abutting owners, interference with which was no element of damages.

10. A charge indicating that the jury are under the duty of considering the interest of witnesses is harmless, where the jury are further charged that they are the exclusive judges of the evidence and of the credibility of witnesses.

11. In an action for damages to abutting property caused by the pollution of a stream, the difference between the value of the land prior to the acts complained of and its value thereafter is a proper element of damage.

12. Any error in the statement of counsel in argument as to the submission of interrogatories to catch the jury napping is cured by a charge that the interrogatories are submitted by the court, and that any statement of counsel that they were submitted by one of the parties should not influence the jury.

Appeal from Circuit Court, Henry County; John M. Morris, Judge.

Action by John K. Slack and others against the West Muncie Strawboard Company and others. From a judgment for plaintiffs, defendants appeal. Transferred from the Appellate Court, under Burns' Ann. St. 1901, § 1837u. Affirmed.

E. H. Bundy, Blackledge, Shirby & Wolf, Ryan & Ryan, W. A. Brown, and A. W. Brady, for appellants. Gray & Taughinbaugh and Forkner & Forkner, for appellees.

DOWLING, C. J. This action was brought by the appellees against the appellants to recover damages for injuries alleged to have been sustained by the former by the pollution of certain waterways, on one of which the appellees owned land, and to secure an injunction to prevent the further commission of the acts complained of. Demurrers to the complaint being overruled, the cause was tried by a jury, over the objection of the appellants, and a verdict returned in favor of the appellees for \$500. for which sum judgment was rendered against the appellants jointly. The errors assigned, and not waived, question the action of the trial court in permitting the suit to proceed, and judgment to be rendered against the appellants jointly, in overruling the demurrers to the amended complaint, in submitting the case to a jury, and in overruling the appellants' motion for a new trial.

The amended complaint, in substance, alleges ownership by appellees as tenants in common of farming land upon White river, which stream is a natural water course. Prior to the commission of the acts complained of, this stream was well adapted to the watering of cattle and to other agricultural purposes, and was well stocked with fish; that in 1890 the appellant the Muncie Pulp Company erected a paper factory upon Buck creek, a tributary of White river, above the land of the appellees, and, at about the same time the other appellants, respectively, constructed somewhat similar mills at certain points upon White river, also above the appellees' property; that each of the appellants, in the operation of their respective mills, discharged large quantities of chemicals and other deleterious substances into the waters of Buck creek and White river, thereby destroying the fish in said streams, creating noxious vapors, and

breeding large numbers of flies and other insects; that the refuse from these three factories intermingled in the waters of White river above the land of the appellees, and thence flowed in an indistinguishable mass over and upon said land, rendering the water of the stream unfit for stock purposes, and causing deposits of sediment upon the appellees' premises, thereby killing the vegetation and damaging the soil.

Objection is made by the appellants that the acts alleged, if done at all, were performed severally and independently by them, and hence there can be no joint liability therefor. It is probably true that an action at law for the recovery of money damages, as distinguished from a suit in equity, cannot be maintained jointly against various tortfeasors among whom there is no concert or unity of action and no common design, but whose independent acts unite in their consequences to produce the damage in question. *Miller v. Highland Ditch Co.*, 87 Cal. 430, 25 Pac. 550, 22 Am. St. Rep. 254; *Lockwood Co. v. Lawrence*, 77 Me. 297, 52 Am. Rep. 768; *Sloggy v. Dilworth*, 38 Minn. 179, 36 N. W. 451, 8 Am. St. Rep. 656; *Martinowsky v. City of Hannibal*, 35 Mo. App. 70; *Chipman v. Palmer*, 77 N. Y. 51, 33 Am. Rep. 566; *Blaisdell v. Stephens*, 14 Nev. 17, 33 Am. Rep. 523; *Long v. Swindell*, 77 N. C. 176; *Little Schuylkill Co. v. Richards' Adm'r*, 57 Pa. 142, 98 Am. Dec. 209; *Draper v. Brown* (Wis. 1902) 91 N. W. Rep. 1001; *The Debris Case* (C. C.) 16 Fed. 25. And see *Sellick v. Hall*, 47 Conn. 260. A distinction, however, is recognized between such acts which are wrongful only because injurious to individual rights, and those which combine and constitute a public nuisance. *Simmons v. Everson*, 124 N. Y. 319, 26 N. E. 911, 21 Am. St. Rep. 676; *Irvine v. Wood*, 51 N. Y. 224, 10 Am. Rep. 603; *City of Valparaiso v. Moffitt*, 12 Ind. App. 250, 255, 39 N. E. 909, 54 Am. St. Rep. 522. In the former class of cases each separate wrongdoer is chargeable with his own acts alone, in the absence of a joint purpose among the participants; in the latter, each may be answerable in a joint and several action, not only for what he himself does, but likewise for the acts of those who, with him, violate public as well as private rights. If a party deliberately places himself in opposition to the entire community by performing an act which, in combination with the independent wrongful acts of others, violates an express statute and creates a public nuisance, he is not in a position to assert that he should be held responsible to individuals specially damaged for only the actual loss he alone has occasioned them. He must have anticipated the natural and probable consequences of his acts, namely, the violation of a public right; and the public interest requires he shall, if need be, even in a civil action, bear the full burden of the wrong he has assisted in inflict-

ing. Nor is it material that his act of itself, and without reference to the co-operation of others, would create a public nuisance. He must be deemed to know, in a case such as the present, that, if this wrong combines with similar acts of third parties, the result will be to intensify the public and private injury. The welfare of the community demands that he who thus intentionally and aggressively assists either in creating or maintaining a public nuisance in defiance of positive enactments shall answer in civil damages for all injurious consequences proximately resulting therefrom to private individuals who bring themselves within the requirements of the law. There can be no question that the acts of the appellants constituted a public nuisance (*Burns' Ann. St. 1901, § 2154; City of Valparaiso v. Moffitt*, 12 Ind. App. 250, 256, 39 N. E. 909, 54 Am. St. Rep. 522), and hence they could be held jointly and severally liable at the suit of parties specially damaged.

The second and third grounds relied upon for reversal are that the primary purpose of the action was to obtain an injunction, and that the prayer for damages was merely incidental; that the complaint was insufficient as an application for injunctive relief, and, even if sufficient, the cause was one triable by the court, and not by a jury. The trial court evidently construed the action as a suit at law for damages, and ignored the prayer for an injunction. In so doing, we cannot hold that there was reversible error. As was said in *Comegys v. Emerick*, 134 Ind. 148, at page 152, 33 N. E. 899, at page 900, 39 Am. St. Rep. 245: "A complaint must be construed according to its general scope and tenor, as appears from the averments, and the prayer will not control and determine its validity. When the trial court has placed a reasonable construction upon the averments of the complaint, which might bear two constructions, this court will be disposed to adhere to the construction which it received by the trial court." See, also, *Davis v. Severance*, 49 Minn. 528, 52 N. W. 140. Assuming that the complaint sought a recovery of legal damages, its averments were ample to constitute a cause of action, inasmuch as it was alleged that the appellants were, by their manufacturing establishments, polluting the streams in question with large quantities of injurious substances, which, mingling together, and depositing themselves upon the appellees' land adjoining White river, rendered it less available for purposes of agriculture and stock raising and as a place of residence. *Weston Paper Co. v. Pope*, 185 Ind. 394, 57 N. E. 719, 56 L. R. A. 899; *Muncie Pulp Co. v. Martin*, 23 Ind. App. 558, 55 N. E. 796; *Indianapolis Water Co. v. American Strawboard Co.* (C. C.) 53 Fed. 970.

The last assignment of error is based upon the overruling of appellants' motions for a new trial, involving, among other reasons,

the giving of certain instructions, and the refusal by the court to give those tendered by the appellants. Of the latter, the eighth, ninth, tenth, eleventh, fifteenth, sixteenth, and seventeenth all proceed upon the theory that the appellants' liabilities are several and not joint, which, as shown above, is an erroneous assumption. Hence the court properly refused to so instruct the jury.

By the twelfth, thirteenth, and fourteenth instructions offered by the appellants, it was in effect stated that, if the streams in question were already impure and polluted before the appellants deposited their refuse matter therein, the appellees could not recover, unless it was shown that the acts of the appellants rendered the waters of such streams more impure than they would otherwise have been. If so instructed, the jury might well have understood that the acts of the appellants were lawful, provided these water courses were being contaminated by other parties also. Such is not the law. As stated in *Weston Paper Co. v. Pope*, 155 Ind. 394, at page 402, 57 N. E. 719, at page 721, 56 L. R. A. 899, "The fact that a water course is already contaminated from various causes does not entitle others to add thereto, nor preclude persons through whose land the water flows from obtaining relief by injunction against its further pollution." To the same effect, see *Dennis v. State*, 81 Ind. 291, 293; *Strobel v. Kerr Salt Co.*, 164 N. Y. 303, 58 N. E. 142, 51 L. R. A. 687, 79 Am. St. Rep. 643. So far as the instructions in question, as well as the nineteenth and twentieth, attempted to direct the jury in determining the measure of damages, they were sufficiently covered by the third, sixth, ninth, tenth, and sixteenth given by the court, in which the liability of the appellants was confined to the actual damage inflicted upon the appellees, consequent solely upon the appellants' own acts.

By the twenty-first and twenty-second instructions tendered by the appellants and refused, the jury were told that, both in arriving at a verdict and in assessing the damages, they might consider the failure of the appellees, before instituting this suit, to complain to the appellants concerning the acts of the latter in polluting the streams in question. In so far as these instructions suggested that delay on the part of the appellees, short of the statutory period of limitation, constituted a defense, they were clearly erroneous; and, as bearing upon the matter of damages, their rejection was harmless, since the jury were distinctly informed by the court that, if they found in favor of the appellees, there could be a recovery of such an amount only as would compensate the appellees for the injury, if any, which they sustained by reason of the acts complained of.

The twenty-third instruction requested by the appellants was covered by the fourteenth given by the court, which directed the jury

to consider the interest which any witness had in the result of the suit in determining the weight to be given to his testimony.

The twenty-fourth instruction which the appellants tendered, informed the jury that, "If you should find a verdict in favor of the plaintiffs, you cannot include in your assessment of damages any amount for any fish which were or might have been in White river." This was properly refused, as the jury might by it have been misled into assuming that the right to enjoy the waters of the stream in question for purposes of fishing was not a substantial right possessed by the appellees as owners of abutting property, and that an interference with it was no element of damage to the riparian land.

The matters referred to by the twenty-fifth and twenty-sixth instructions requested by the appellants were sufficiently covered by that given by the court in which the jury were directed that, in the event they returned a verdict for the appellees, they were to assess such damages as should compensate them for the injury actually sustained because of the acts of the appellants.

The twenty-seventh instruction tendered and refused purports to define the rights of a riparian owner in the reasonable use of a stream for manufacturing purposes, which subject was properly presented by the court in another instruction given; and the same may be said of the twenty-ninth, thirtieth, and thirty-first, which restricted the appellees' recovery to damages resulting to them from the acts of the appellants. The court, in its instructions numbered twelve and sixteen, fully presented the law upon this subject.

Of the instructions given by the court and excepted to by the appellants, the third and sixth correctly charged the appellants with joint and several liability, and, in so far as the sixth instruction failed to indicate what would constitute a justification for the acts complained of, it was adequately supplemented by a subsequent charge.

The fourteenth instruction, if open to any criticism because indicating that the jury are under a duty to consider the interest a witness has in the result of the suit, was rendered entirely harmless by the additional instruction that the jury are the exclusive judges of the evidence and the credibility of the witnesses.

Counsel for appellants are in error in asserting that instruction numbered 16 assumes certain facts to have been proved against them. The jury could not have been misled by this charge into presuming that the appellants caused a change in the condition of the streams, as counsel claim, but were, in effect, directed to compare the value of the appellees' land prior to the acts complained of with its value after their commission, and to assess such damages as were sustained by reason of such acts. In this the court did not err.

We have examined the several rulings excepted to in the admission and rejection of evidence, and are satisfied that none of them involves prejudicial error upon which this court would be justified in reversing the cause.

The alleged misconduct of counsel was not so flagrant as to require correction by the trial court, and, whatever undue effect might have been produced upon the jury by counsel's saying, "I trust that these gentlemen did not put these interrogatories in here to catch you napping," was removed by the court's instruction that the interrogatories were submitted by the court, and that any statement of counsel that they were submitted by one of the parties should have no influence upon their minds.

Finding no error in the record, the judgment is affirmed.

(164 Ind. 30)

MUNCIE PULP CO. v. MARTIN et al.
(No. 20,427.)

(Supreme Court of Indiana. Dec. 29, 1904.)

WATER COURSES—POLLUTION OF WATER—DAMAGES—INJUNCTION—RIGHT TO TRIAL BY JURY—EVIDENCE—ADMISSIBILITY—APPEAL—HARMLESS ERROR.

1. Where a complaint for pollution of the water of a stream charges the destruction of timber, the diminution in rental and market values of plaintiff's real estate, sets forth the interference with the beneficial use and enjoyment of the premises, and alleges damages specifically, neither an averment that the defendant intends to and will continue to flow noxious and poisonous substances into the stream, nor a prayer for injunctive relief, is sufficient to render the case one exclusively of equitable cognizance, and hence the plaintiff has a right to trial by jury.

2. Under a complaint for damages for pollution of the waters of a stream, alleging that the rental and market value of the plaintiff's lands had been diminished in a certain amount, a recovery for temporary loss of use of the land was warranted.

3. In an action for pollution of the waters of a stream, where witnesses testified from their own observations that before the establishment of defendant's mill the stream flowed pure and clear water, and that after the defendant began operating the mill the water was turbid and polluted, their opinions were admissible as to what the rental value of the plaintiff's premises would have been during the years the pollution was charged to have continued if the stream had flowed pure water, and as to their value in the condition which prevailed from the time the pollution began till the beginning of the suit.

4. Any error in the admission of the opinions of witnesses as to what the rental value of the plaintiff's premises would have been if the stream had flowed pure water, and as to their value in the condition which prevailed from the time the pollution began, without the testimony being limited to depreciation due exclusively to the pollution of the stream by defendant, was cured by a charge that the jury were not bound by the opinions of the witnesses.

5. Samples of sediment taken from the stream within the period for which damages were claimed were admissible, though considerable time had elapsed since they were withdrawn from the stream.

Appeal from Circuit Court, Delaware County; Joseph G. Leffler, Judge.

Action by Samuel I. Martin and others against the Muncie Pulp Company. From a judgment for plaintiffs, defendant appeals. Transferred from Appellate Court under Act March 13, 1901 (Acts 1901, p. 590, c. 259; section 1387u, Burns' Ann. St. 1901). Affirmed.

J. W. Ryan and W. A. Thompson, for appellant. Gregory, Silverburg & Lotz, for appellees.

DOWLING, C. J. The appellees, by a complaint in two paragraphs, sought to recover damages from the appellant on account of the alleged pollution of a nonnavigable stream on which the farm of the appellees was located, and into which the appellant discharged large quantities of water after the same had been used by it in the manufacture of wood pulp. There was a prayer for an injunction, in addition to a demand for substantial damages. Demurrers to both paragraphs of the complaint were overruled, answers were filed, the cause submitted to a jury for trial, and a verdict returned for \$800, of which the appellees remitted \$150. and judgment was thereupon rendered for \$650. The prayer for an injunction was denied by the court. The errors relied upon for reversal, and not waived, are the overruling of the demurrers to the complaint, the overruling of appellant's motion to submit the cause to the court for trial without the intervention of a jury, and the overruling of appellant's motion for a new trial.

The first paragraph of the complaint, in substance, alleges ownership by the appellees, as tenants by the entirety, of 117 acres of land lying on the borders of Buck creek, a small nonnavigable stream emptying into White river; that the land, prior to the wrongful acts of the appellant complained of, was suitable for stock raising during more than six years last past; that to such purposes the waters of Buck creek were a valuable incident; that the appellant, a riparian owner, has so polluted the waters of said creek by discharging therein refuse matter from its pulp manufactory as to render them unfit for agricultural and domestic purposes, or for the purpose of watering stock; that large quantities of sediment, by reason of such pollution, have been deposited upon the land of the appellees, and have rendered worthless about 20 acres of the tract, destroying growing timber upon the premises, and diminishing the rental and market value of said land to the extent of \$2,000. The complaint further charges the emission of noisome and unhealthful odors from said stream because of the appellant's acts, the destruction of fish therein, serious interference with the comfortable habitation of the premises, the reduction in the market value of the farm as an entirety in the sum of \$2,000, and prays damages in the amount of \$3,000. The sec-

and paragraph is substantially the same in its averments.

It is objected by the appellant that the lower court erred in permitting the cause to be submitted to a jury, inasmuch as an injunction had been prayed for, hence the case was exclusively of equitable cognizance and should have been tried by the court. As germane to the same contention, appellant insists that the complaint was insufficient, as an application for an injunction, in its averment of facts, and accordingly should have been held bad upon demurrer.

When the trial court has placed a reasonable construction upon a pleading which is open to two interpretations, and has proceeded to a determination of the cause upon such an understanding of its scope, this court will not be forward to adopt a different construction and reverse the case. *Comegys v. Emerick*, 134 Ind. 148, at page 152, 33 N. E. 899, at page 900, 39 Am. St. Rep. 245; *West Muncie Strawboard Co. v. Slack* (decided at the present term) 72 N. E. 879. As stated in *Monnett v. Turpie*, 132 Ind. 482, 485, 32 N. E. 323, 329: "The court will construe the pleading as proceeding upon the theory which is most apparent and most clearly outlined by the facts stated. The complaint will, if possible, be given such construction as to give full force and effect to all of its material allegations, and such as will afford the pleader full relief for all injuries stated in his pleading." Thus construed, the complaint in the present case seems to have been framed with an especial view to the recovery of damages. Four times in the first paragraph is the amount of damages specifically alleged; the destruction of timber, the diminution in rental and market values, and the interference with the beneficial use and enjoyment of the premises are clearly set forth. While the pleader has prayed for an injunction, this alone will not necessarily characterize the pleading, nor draw the entire matter into equity so as to require a trial by the court. "Whenever the cause of action is one that can only be enforced by invoking the equitable powers of the court, then the right of trial by jury does not maintain; but if the cause of action does not depend on the equitable jurisdiction of the court, then a jury trial may be demanded." *Martin v. Martin*, 118 Ind. 227, at page 237, 20 N. E. 763, at page 768. Here, so far as the main allegations of the complaint are concerned, the appellees do not base their action upon a necessity for equitable interference, and their complaint will not be stamped as an application for an injunction merely because of an isolated averment that the appellant intends to and will continue to flow noxious and poisonous substances into the stream in question, or because of a prayer for injunctive relief. *Miller v. Burket*, 132 Ind. 469, 474, 32 N. E. 309.

What has already been said disposes of the

rulings of the court below upon the demurrers addressed to the complaint as an application for an injunction. No question is raised respecting its sufficiency as a complaint for legal damages.

It is next urged by the appellant that the court erred in overruling its motion for a new trial, as the verdict was not sustained by sufficient evidence. The jury, in assessing damages, evidently proceeded upon the hypothesis that the appellees should be compensated for loss of the beneficial use and enjoyment of the land in question, and on which they resided; or, in the phrase employed upon the trial, for diminution in the "rental value" of the premises; and, in fact, this seems to have been the general understanding of all the parties to the action concerning its purpose and theory. Appellant, however, now argues that the complaint alleged only permanent injuries to the land, and not those inflicted by a continuous wrong, hence all proof of injury to the use and occupation thereof was outside the issues; and, since such was the only proof of damage, the appellees failed to establish their complaint. Among its averments is a statement that the "rental and market value of said lands" had been diminished by the acts of the appellant to the amount of \$2,000. This, with other allegations, shows that the damages sought to be recovered were not exclusively for permanent injuries to the real estate itself, but chiefly for such as temporarily interfered with the present use of the premises for residential and farming purposes, and for the raising of stock, to which objects the land was adapted at the time the acts complained of were committed. Moreover, the very nature of these acts, as alleged in the complaint, depriving the appellees of the beneficial enjoyment of their land, the use of the water from this stream, and the comfort of living upon the premises, constituted them a continuing nuisance rather than a permanent injury to the property, and the measure of damages would be the depreciation in rental value caused thereby (*Eufaula v. Simmons*, 86 Ala. 515, 6 South. 47; *Ferguson v. Firmenich Co.*, 77 Iowa, 576, 42 N. W. 448, 14 Am. St. Rep. 319; *Barton v. Union Cattle Co.*, 28 Neb. 350, 44 N. W. 454, 7 L. R. A. 457, 26 Am. St. Rep. 340); for it has been held that where the nuisance in question is one which can be abated, as in the case at bar, the measure of recovery is the loss in rental value occasioned by its continuance (*Cleveland Co. v. King*, 23 Ind. App. 574, 576, 55 N. E. 875; *Park v. Chicago Co.*, 43 Iowa, 636; *Pinney v. Berry*, 61 Mo. 359; *Chipman v. Palmer*, 9 Hun, 517; *Francis v. Schoellkopf*, 53 N. Y. 152; *Jutte v. Hughes*, 67 N. Y. 267; *Baltimore Co. v. Fifth Baptist Church*, 108 U. S. 317, 335, 2 Sup. Ct. 719, 27 L. Ed. 739). We conclude, therefore, that the appellees were entitled to recover for temporary loss of the use of their land, under the form of

their complaint, and that there was evidence amply sufficient to sustain the verdict of the jury respecting such damage.

A further reason advanced in support of the motion for a new trial is that the court erred in permitting certain witnesses to testify concerning what would have been the rental value per acre of the appellees' land between September, 1897, and June, 1900, if the water of the stream had been pure and clear. No less than eight witnesses testified, from their own observations, that before the establishment of the appellant's mill Buck creek flowed pure and clear water, and that after the appellant commenced operating this manufactory the water was turbid and polluted. They then stated what the rental value of the appellees' premises would have been, between the years specified, if the stream had flowed pure water; and also testified to their value with the creek in the condition which prevailed from 1897 until the commencement of the suit. In so doing, the witnesses were not speculating upon a value existing under conditions which they had never observed, but were basing their opinion upon a state of facts known to and observed by them. There was no error in permitting them thus to testify. *Yost v. Conroy*, 92 Ind. 464, 47 Am. Rep. 156; *City of Lafayette v. Nagle*, 113 Ind. 425, 15 N. E. 1; *Chicago R. Co. v. Brown*, 157 Ind. 544, 547, 60 N. E. 346. Nor can it properly be said that these witnesses were stating what the land would have been worth between 1897 and 1900 if the conditions existing prior to 1898 had continued unchanged. The testimony elicited evidently referred to the rental value of the land between 1897 and 1900 if the stream had not been polluted by the appellant, and what its value was with the stream contaminated by appellant's refuse. We are not favorably impressed with appellant's objection that these answers respecting value assumed that the depreciation in rental value was due exclusively to the pollution of the stream by the appellant. At the time the questions were asked, there had been no proof of pollution of Buck creek, or of any other circumstance tending to reduce the value of appellees' land, except the acts of the appellant; and, if other damaging factors were operative during the period in question, it was incumbent upon the appellant to introduce evidence of them by way of defense, rather than require the appellees to bring them forward in the examination of their own witnesses. If, however, the court erred in admitting the evidence, the error was rendered practically harmless by an instruction given to the jury, in which they were told that they were not bound by the opinion of any witness regarding rental value, but that they might and should determine this fact from all the evidence, including not only such opinions, but also the kind and character of the soil, the location of the

lands, the improvements thereon, and all other facts relating to the value of their use.

The last reason advanced in support of the motion for a new trial rests upon the exhibition of certain samples of sediment to the jury. In this there was no error, as the samples were shown to have been taken from the stream in controversy within the period for which damages were claimed; they were properly identified; and, though a considerable time had elapsed since they were withdrawn from the creek, and hence some slight change in their composition may have intervened, this consideration related rather to the weight of the evidence than to its admissibility.

Finding no error in the record, the judgment is affirmed.

(71 Ohio St. 173)

PINNEY v. MERCHANTS' NAT. BANK OF DEFIANCE et al.

(Supreme Court of Ohio. Dec. 6, 1904.)

MORTGAGES—RECORDING—ASSIGNMENT—FORECLOSURE—PARTIES—JUNIOR ASSIGNEE—RIGHTS OF INNOCENT PURCHASERS.

1. Section 4135, Rev. St., as amended April 16, 1888 (85 Ohio Laws, p. 284), authorizes the assignment of a mortgage to be recorded on the margin of the record thereof in the office of the county recorder. Such record is notice to all interested in the mortgaged premises, including mortgagees and subsequent purchasers, of the equitable right of the assignee in the mortgage, and that he is a necessary party to a suit brought to foreclose another lien upon the premises. But where such assignee fails to have his assignment so entered of record, and a senior mortgagee of the same premises brings an action to foreclose, he is, in the absence of notice or knowledge that the junior mortgagee has parted with his interest, justified in regarding the record as showing that the junior mortgagee remains the absolute holder of the mortgage, and in bringing him in as a party to the action. He is not required, at his peril, to ascertain whether or not some other person has an interest in the mortgage, and make him a party.

2. Where in such case the apparent owner of the junior mortgage is made a party, and a sale is made of the premises, founded upon proceedings in all respects regular, to an innocent purchaser, such purchaser will take title free and clear from the claim of the assignee of the junior mortgage.

(Syllabus by the Court.)

Error to Circuit Court, Paulding County.

Action by the Merchants' National Bank of Defiance against Charles O. Pinney and others. Judgment for the bank, and defendant Pinney brings error. Reversed.

The action out of which the present error proceeding arises was brought by the defendant in error, the Merchants' National Bank of Defiance, against the defendant in error John D. Lamb and the plaintiff in error, Charles O. Pinney, and others, to recover against Lamb as maker of a promissory note, and to obtain foreclosure of a mortgage given by said Lamb upon 400

acres of land in Paulding county. Demand was also made for an accounting of rents and profits. Lamb made no answer, but was in default. The plaintiff in error, Penney, answered, denying the claim of the bank, and setting up title to a portion of the land by virtue of a sheriff's sale and deed upon foreclosure of a mortgage prior to that claimed to be held by the bank. He also set up that, if the bank's claim should prevail, he should be allowed for lasting and valuable improvements upon the land, made by him and his predecessors in title, and for taxes and assessments paid on the same. Other parties appeared, but their controversies are not brought to this court, and we have to do only with the contention between the bank and Pinney. Their controversy involves the question whether or not the mortgage claimed to be owned by the bank was foreclosed, and the bank's rights determined, by the foreclosure and sale above referred to. Upon trial on appeal in the circuit court at its May term, 1906, the issues were found generally for the bank, and judgment in its favor entered. The circuit court made a finding of facts separate from its conclusions of law, and from that finding the following pertinent facts are gleaned:

On December 21, 1892, John D. Lamb was the owner of a 400-acre tract of land in Paulding county; being the west half and the southwest quarter of the northeast quarter and the northwest quarter of the southeast quarter of section thirteen in Harrison township. On that day said Lamb (his wife, Florence B., joining) executed and delivered to one Dickinson a mortgage on the land to secure a note for \$5,000 at the same time executed and delivered. On December 26th following, the mortgage was duly recorded in the mortgage records of Paulding county. Thereafter, for value, the note and mortgage were duly sold and assigned to one Woodhead. On July 6, 1893, Lamb and wife executed and delivered to one J. P. Buffington their note for \$2,500, and a mortgage upon the same premises to secure it (the note coming due one year from date), which mortgage was duly recorded July 15, 1893. July 20, 1893, Buffington transferred and assigned the note and mortgage to the Merchants' National Bank as collateral security for a pre-existing debt then amounting to about \$4,200. The assignment was in writing upon the mortgage, but the same was never recorded in the office of the county recorder of Paulding county. The indebtedness of Buffington to the bank still exceeds the amount of the note secured by the mortgage. On January 1, 1894, Woodhead, as the owner of the first-named note and mortgage, commenced an action in foreclosure in the court of common pleas of Paulding county, making Lamb and others defendants. The petition alleged that J. P.

Buffington claimed an interest in the premises, but that the same was subsequent and inferior to that of Woodhead. Buffington's name did not appear in the caption of any of the pleadings. Buffington did not file any pleading, nor does the record of the common pleas show the issuing of any summons against Buffington on the petition; but the record, under date of April 28, 1894, upon a hearing upon divers answers and cross-petitions and the evidence, does show that the court found that Buffington had been served with summons and was in default. The record also shows, under date of July 28, 1894, upon a further hearing upon divers answers and cross-petitions and the evidence, that the court found that Buffington had been duly served with summons and was in default. The record of the common pleas further shows that upon final hearing, September 24, 1894, upon the amended and supplemental petitions and the evidence, that John D. Lamb and Florence B. Lamb had been served with summons and were in default, and that Buffington had waived the issue and service of summons and voluntarily entered his appearance herein, and was in default. A judgment in favor of Woodhead (plaintiff) for \$5,459.49 was then rendered, and decree for sale was thereupon taken. The bank was not made a party to the action, nor brought in as such in any manner.

Sales were duly made under the order, the west half (the land now in controversy) being sold to one Francisco for \$6,401; and, upon confirmation and payment of the purchase money by the purchasers, deeds were made to them, respectively, and they thereupon entered into possession, and, with their successors in title, including Pinney, have been and still are in possession under and by virtue of said proceedings. This final decree adjudged that the title of Francisco to the tract so by him purchased was free and clear from all claims of Buffington and all persons claiming under him, and that said title ought to be and was quieted as against said Buffington and all persons claiming under him, and they were enjoined from interfering with the title or possession of Francisco to the premises. Thereafter, on January 12, 1895, pursuant to an order of the court, and in accordance with section 4139, Rev. St., the clerk of the court caused satisfaction of the mortgage set forth in the petition and of the Buffington mortgage to be entered upon the record thereof in the office of the county recorder. Pinney, the plaintiff in error, became the owner of the west half of section 13 by mesne conveyances from Francisco, the purchaser. At the time of sale the lands were neither cleared nor drained, and were wholly unimproved. Pinney and his predecessors in title from Francisco placed lasting and valuable improvements on the land, to the value of \$9,005, and paid

taxes and assessments thereon to the amount of \$2,210.29. The purchase price paid by Francisco (\$6,401) was applied to the payment of taxes then due, costs, the amount due on the judgment in favor of Woodhead on the Dickinson mortgage, and other liens, all of which were prior and superior to the lien of the Buffington mortgage, a portion of which prior liens still remains unpaid. Neither Woodhead, Francisco, nor Pinney, nor any of the holders of title to any of the premises, had any knowledge that the bank claimed to have any interest in the note or mortgage to Buffington, or that he had transferred any interest to any one, until the commencement of the bank's suit. A few weeks after the sale of the lands and the taking possession by the purchasers, Buffington talked to the cashier of the bank, or the bank officers, in regard to the sale of the lands at sheriff's sale.

On these facts the circuit court found that the mortgage set forth in the petition of the bank is a good, valid, and subsisting lien for the amount due, viz., \$4,433.33, including interest to date, and for interest thereon at 8 per cent. until paid; that the conditions of the mortgage have been broken; and that the bank is entitled to a foreclosure thereof. The court found as to the other issues between the bank and Pinney that the latter was entitled to be subrogated to the lien of the state for taxes and assessments, and the rights of the lienholders whose claims were paid in the action of Woodhead to the extent of the purchase money paid by Francisco; also that he had a lien to the extent that the improvements exceed in value the rents, all of which is superior to the lien of the bank. Judgment was rendered accordingly. It was adjudged that, of the amount due the bank, there should be apportioned against the land owned by Pinney the sum of \$3,740.78. It was further adjudged that unless the sum found due the bank, and so apportioned, with interest at 8 per cent., be paid by June 1, 1903, an order of sale issue to the sheriff to sell the premises. As to John D. Lamb, the court found that he has no equities to be let in to redeem; his equity of redemption being foreclosed and his right to redeem barred by the decree in Woodhead v. Lamb et al. From this judgment and decree, error is prosecuted to this court by Pinney.

Snook & Wilcox, Waters & Bayliss, and Spriggs & Spriggs, for plaintiff in error. Sutphen & Sutphen, for the bank. John D. Lamb, in pro. per.

SPEAR, C. J. (after stating the facts). At the outset we meet the question whether or not the bank has any standing in court to maintain this suit; the contention of the plaintiff in error being that the Buffington mortgage was necessarily foreclosed by the suit brought by Woodhead upon the Dickinson mortgage, a prior incumbrance. If this

is so, then clearly the bank has no standing, and can be afforded no relief as regards the plaintiff in error.

It will be observed that the circuit court does not attempt to determine whether or not Buffington was a party to the Woodhead suit. Its findings are of evidentiary facts appearing of record in the proceedings of the court of common pleas in that suit, but it nowhere determines the ultimate fact. The common pleas record finds with distinctness, and by repetition which is almost suspicious, that Buffington had become a party to the case. As against this plain finding, we are not at liberty to indulge in surmises, but must accept the finding of the common pleas as conclusive of the fact that Buffington, mortgagee, was a party to that foreclosure suit, and it follows that he could have no standing now to dispute the conclusive effect of that adjudication. The question, then, is, does the bank stand in any better position? being the owner of the Buffington note and mortgage at the time that suit was commenced and determined; its assignment, however, not being upon record, and neither the parties to the suit nor the purchaser having any knowledge or notice of the transfer by Buffington to the bank. The bank's claim rests upon the proposition that it is necessary in all cases, in order to adjudicate finally the rights of all parties to title to real estate, that the real parties in interest, and all of them, be brought before the court, and that, inasmuch as at the time of the commencement of the Woodhead suit, and afterward, the bank was the lawful assignee of the Buffington note and mortgage, it was a necessary party, and, not being made a party, its rights are not affected by the judgment. The proposition rests for authority upon *Holliger v. Bates*, 43 Ohio St. 437, 2 N. E. 841, decided by this court at the January term, 1885. It is there held that, where a senior mortgagee forecloses his mortgage and sells the property without making a junior mortgagee a party or giving him notice, the purchaser acquires his title subject to the right of redemption by the junior mortgagee, and the same rule applies where the junior mortgagee has assigned all his interest in the mortgage and the note secured by it to a third person, who is not a party, and is without notice of such proceedings and sale; that the latter may foreclose and sell, and the fact that he did not take a written assignment of the mortgage and have it recorded does not defeat the mortgage, nor estop him from foreclosing. It is probable that the judgment of the circuit court was based upon that decision. Upon full consideration, however, we are satisfied that this case does not rule the case at bar. A number of points of distinction as to the facts may be noted. The notes secured by the mortgage in that case were not due at the time of the sale, which fact is specially emphasized by

the learned judge who reported the case. In the case at bar the note was due. Another distinction is that in the former case the owner of the notes secured by the second mortgage was a bona fide purchaser before maturity and for value. In this case the note and mortgage were transferred to the bank as collateral security for a pre-existing debt, thus leaving the bank to have recourse upon Buffington, its assignee. A further distinction is that the purchaser in the former case at judicial sale remained the owner until the action to foreclose the second mortgage was commenced, while in the case at bar the title had passed to successive purchasers, all of whom purchased after the entry was made on the mortgage record by the clerk showing that the Buffington mortgage had been satisfied by foreclosure and sale. In the former case the purchaser could be made whole by being subrogated to the rights of the lienholders to the extent of the purchase price paid by him, while in the case at bar Pinney would be limited in his right of subrogation to such right as was vested in Francisco, without reference to the amount he himself paid as purchaser. It is not to be forgotten, also, that in this case the bank had knowledge, within a few weeks after Francisco purchased, of the proceeding and sale, and yet it kept still and made no demand for over five years, knowing, or having the means of knowing, that Francisco, the purchaser, was in possession, and that extensive and valuable improvements were being made, and that innocent purchasers were buying property on the faith that the proceedings and sale insured a good title. While it is probable that it was too late then to overturn the judgment and sale, it was not too late to advise the purchasers of its claim, and thus arrest the expenditure of money in improvements and in the payment of purchase money, and good faith required that it should speak out.

But a more vital distinction arises from the change in the statute law. At the time of the *Holliger v. Bates* decision there was no provision of statute which authorized the entering of an assignment of a mortgage in the mortgage record in the recorder's office, and what legal effect would have been given to such entry, had such been made, we need not here discuss. But the amendment to section 4135, Rev. St., of April 16, 1888 (85 Ohio Laws, p. 284), permits such assignment to be entered on the record direct, or recorded where such assignment is on the mortgage itself, and makes it the duty of the recorder, where a release is intended by the assignee, to record on the margin the assignment before entering the release. What is the scope and purpose of this legislation? We think it is in furtherance of the purpose expressed by this court in *Coe v. Erb*, 50 Ohio St. 259, 52 N. E. 640, 69 Am. St. Rep. 764, where it is said that the recording acts "rest upon a recognition of the policy that

there shall somewhere be found a record which will disclose the state of the title of all lands within the county. For conveyances, mortgages, leases, etc., resort is had to the office of the county recorder," etc. " * * * The business public, therefore, has a high interest in the maintenance of such a system as will enable every person, by the ordinary inquiry—that is, an examination of the records—to ascertain the condition of titles."

The necessity and wisdom of such legislation is still more apparent when we consider the method pursued in obtaining loans by mortgage on land. In the great majority of cases it is now done through agents or brokers. The notes and mortgage are taken in the name of the agent. The notes he transfers by indorsement without recourse. On the mortgage he signs both the printed blank assignment and the printed blank release, and in this condition the papers are delivered to his customer. After this the securities may, and often do, pass from hand to hand, frequently being sent out of the state. In such cases, when the mortgage is satisfied the blank release is filled up, and it is then entered of record as the act of the mortgagee, the agent; the real owner not appearing of record anywhere in the transaction. It results that it is exceedingly difficult, sometimes practically impossible, to ascertain the real owner of the claim. To put this burden on those who have other claims upon the land, and especially upon those who have prior liens, is unreasonable; and to require them, in case of foreclosure, to ascertain at their peril the then owner of the junior claim, is unjust as well as unreasonable. Much fairer is it to require the assignee of the mortgage, if he is not satisfied to rest upon the good faith of the assignor, to put his assignment upon the record, so that the world can see; and this we believe is the purpose and the proper construction of the amendment of April 16, 1888. Such construction is in furtherance of the purpose indicated in the citation from *Coe v. Erb*, supra, and entails no serious hardship upon any one. It is but the application of an equitable principle—that, where one of two innocent parties must suffer, the loss should fall upon him who has by his negligence permitted one to repose confidence in a public record which fails to speak the whole truth.

Our conclusion finds support, we think, in the case of *Swartz v. Leist*, 13 Ohio St. 419. It is there held that "where the mortgagee, retaining the legal interest in the mortgage, subsequently enters satisfaction and a discharge upon the record of the mortgage, such discharge operates to cancel the record of the mortgage, as against subsequent purchasers and mortgagees in good faith and without notice, and, as against them, the assignee of the note cannot assert his equitable lien." It is true that the statute au-

thorizing the entry of a release upon the mortgage record more fully expresses the purpose of the Legislature with respect to the effect of such entry than is expressed by the clause which applies to an assignment of the mortgage, but the purpose is the same. It is to secure a record which will apprise all interested of the real condition of the title with respect to incumbrances. In the case above cited the holder of the note (Swartz) negligently permitted the mortgagee (Little) to retain the legal title, and omitted to indicate upon the record the fact of his equitable title; thus leaving the latter the power of control over it. Leist, the purchaser, having no reason to suspect fraud, was held to be justified in relying upon the record as speaking the truth, and therefore in regarding the release as legally made. So in the case at bar the bank had the right, under the statute, to have its assignment entered of record, which would have been notice of its equitable rights under the assignment to other mortgagees and subsequent purchasers. The means were thus at its hand to protect its own interest and to prevent others from being misled. Ordinary diligence required this. But it negligently permitted the record to indicate that Buffington remained the owner of the claim, and parties interested innocently relied upon that record. We think that the statute justifies and that fair dealing requires the rule that where the recording act authorizes the assignment of mortgages to be recorded, and the assignment is duly entered of record, such record shall be held to be notice to mortgagees and subsequent purchasers, but, where such assignment is not so entered, mortgagees and subsequent purchasers, in the absence of notice otherwise, are justified in relying upon the record as they find it, and in acting accordingly. As in the Swartz Case that party was left to bear the loss, so in this case the bank should be held to bear the loss. *Childs v. Childs*, 10 Ohio St. 339, 75 Am. Dec. 512, and *Stewart v. Johnson*, 30 Ohio St. 24, are cited. Neither case touches the question we have here.

The circuit court committed no error in its judgment as to John D. Lamb.

Respecting the controversy affecting the plaintiff in error, the conclusion hereinbefore indicated renders it unnecessary for us to discuss the claims as to expenditures for improvements and taxes and the matter of rents and profits. Plaintiff in error is entitled not only to a judgment of reversal, but to a final judgment quieting his title against the bank, and dismissing the petition of the bank, and for costs, and judgment will be so entered accordingly.

Judgment reversed, and judgment for plaintiff in error.

DAVIS, SHAUCK, PRICE, CREW, and SUMMERS, JJ., concur.

(71 Ohio St. 92)

BALTIMORE & O. R. CO. v. JOLLY BROS. & CO.

(Supreme Court of Ohio. Dec. 6, 1904.)

CONTRACT—IMPROVEMENTS ON RAILROAD LINE—STIPULATION AS TO ALTERATIONS—AUTHORITY OF RAILROAD ENGINEER—MISREPRESENTATIONS BY RAILROAD—PERFORMANCE WITH KNOWLEDGE OF FRAUD—WAIVER.

1. The provisions in a contract that:

"This contract shall in no wise be affected by verbal agreements, or inferences from conversations previous to or subsequent to its execution.

"All alterations, amendments, or modifications of this contract in any particular whatever must be in writing.

"No claims shall be allowed for any extra work unless the same shall have been done in pursuance of a written order from the engineer.

"The chief engineer may make such allowances and estimates as he deems just for any loss or damage to the contractor resulting from delays of any kind, whether caused by failure to procure right of way, borrow pits, or material required to be procured by the company, or to furnish plans, or from alterations in plans, or from any other cause whatever"—do not authorize such engineer to waive written orders for extra work, or to make allowances for loss or damage resulting from the doing of work for which the price is specifically fixed by the contract, or to bind his principal by a parol modification.

2. A party to an executory contract procured by false representations, who, after knowledge that the representations are false and fraudulent, performs, or, without necessity, completes performance, of the contract, and accepts payment according to its terms, thereby waives the fraud.

(Syllabus by the Court.)

Error to Circuit Court, Richland county.

Action by Jolly Bros. & Co. against the Baltimore & Ohio Railroad Company. Judgment for plaintiffs, and defendant brings error. Reversed.

In the year 1899 the railroad company planned extensive improvements upon a line of its road in certain parts of the state of Ohio, comprising a change of grade, a large amount of excavating, and the constructing of new roadbed. The amount of excavating was estimated at 400,000 cubic yards, 238,000 cubic yards of which was a little north of the village of Fredericktown in what is known as the "Fredericktown Cut." It invited proposals for doing the work, and on the 10th of April entered into a contract therefor with Jolly Bros. The contract was on the printed form of the company, and is quite lengthy, covering 88 pages of the printed record. So much of it as is necessary to an understanding of the questions determined is as follows:

"(5) Excavation will be unclassified and so bid and paid for, unless otherwise specified, in which case classification will be made in accordance with the following, viz:

"Earth will include clay, sand, loam, gravel, all hardpan that can be ploughed, and all earthy matter, or earth containing loose stones, or boulders intermixed which do not exceed in size three cubic feet.

"No haul will be allowed, as contractors are expected to make such personal examination of the work to be performed as will enable them to make such bids for excavation and other work as will cover the cost of hauling the materials and the disposition of the same."

"(2) The quantities of graduation and masonry, piling, etc., exhibited to the contractor at the letting are merely approximate; they furnish only general information and will in no way govern or affect the final estimate of the work, which will be made out upon its completion from exact measurement and established facts, not now in the possession of anyone, nor possible to be obtained at the time of drawing up these specifications."

"(9) Whenever in this contract the words 'chief engineer' are used, it will be understood to mean the engineer of construction; and whenever the word 'engineer' is used, it is to be understood as applying to the local or resident engineer having charge of the particular work for the time being."

"(13) All alterations, amendments or modifications of this contract in any particular whatever must be in writing and called a supplement, which shall have proper reference to the contract, by date and description of work, and be duly signed, in which supplement shall be fully described the particular work to be affected by such alterations, amendment or modification."

"(15) No claims shall be allowed for any extra work unless the same shall have been done in pursuance of a written order from the engineer, and copies of such orders must be attached to the bills of the contractors for extra work, and no bill will be entertained unless accompanied by such copy."

"(17) The classification of all excavations, masonry, etc., shall be made by the engineer, or chief engineer, and their decision in regard to the same shall be final and binding, and from it no appeal shall be taken."

"In lieu of waiving the usual ten (10) per cent. on monthly estimates, the contractors agree to furnish a bond in the sum of thirty thousand dollars (\$30,000) of a guarantee company acceptable to the said company and receivers. Said bond shall be furnished within thirty (30) days from date of this contract and before any money is paid on account of this contract."

"Free transportation will also be furnished to said first parties from and to Pittsburgh, also on trans-Ohio division, for such materials as are termed grading outfit. The rate of three (3) mills per ton per mile will be charged for all other materials and supplies used in the construction of said work."

"The above payments shall be made in the following manner—that is to say, during the progress of the work and until it is completed, there shall be a monthly estimate made, by the aforesaid engineer, of the quantity, character and value of the work done during

the month, or since the last monthly estimate, to be made by actual measurement or simple estimate, or both combined, as by said engineer may be deemed expedient, * * * of which value shall be paid to said parties of the first part, at such places as the chief engineer may appoint; but it is expressly agreed that the amounts of the said monthly estimates shall in no wise be deemed payable (except as determined by the chief engineer), nor shall the same be in any manner assignable or transferable, either by the act of the parties of the first part, or by operation of law as a subsisting debt or liability of the parties of the second part, until the final estimate shall have been made and become payable as hereinafter provided; and when the said work is completed and so accepted by the said chief engineer, there shall be a final estimate made, by the engineer, of the quantity, character and value of said work, agreeably to the terms of this agreement, when the balance appearing to be due to the said parties of the first part shall be paid to them upon their giving a release under seal to the said company from all claims or demands whatsoever growing in any manner out of this agreement. And it is further agreed between the parties hereto, that said monthly and final estimates shall not be payable, and said parties of the first part shall not be entitled to receive any portion of the said estimates, until said parties of the first part shall have paid in full all persons and laborers and subcontractors in the employ of said parties in the said work, for all work and labor done up to and including the date for which the preceding estimate or estimates may have been made, and shall give evidence of such payment by filing with the chief engineer or engineer in charge, the pay rolls for said laborers or persons, receipted in full by the same. And it is further agreed that the chief engineer shall have the right, at any time, if he sees fit, of paying said laborers and persons the amounts due them by said parties of the first part, and deducting the sums so paid from the amounts payable under said estimate. And it is expressly understood that the monthly and final estimates of said engineer, as to the quantity, character and value of the work, shall be conclusive between the parties to this contract, the former for the time being and the latter for all time, without further recourse or appeal (the monthly estimates of the engineer being, however, subject to correction by him in any subsequent monthly, or in his final estimate, for the reason that the monthly or current estimates being merely made out as basis for payment on account, will necessarily be only approximately correct, pains being taken, however, to make them as accurate as possible); unless the chief engineer may deem it proper at any time to revise and alter the monthly or final estimate of said engineer, in which event the estimate of said chief

engineer shall be substituted to all intents and purposes, in place of the estimate of said engineer, and shall be final and conclusive on the parties, without further recourse or appeal, it being, however, wholly optional with the said chief engineer to exercise such power of revision or not.

"And it is mutually agreed and distinctly understood, that the decision of the chief engineer shall be final and conclusive in any dispute which may arise between the parties to this agreement relative to or touching the same; and each and every one of said parties do hereby waive any right of action, suit or suits, or other remedy in law or otherwise, by virtue of the covenants and provisions herein, so that the decision of said chief engineer, shall in the nature of an award, be final and conclusive on the rights and claims of said parties.

"Before signing the foregoing contract, the undersigned contractors have carefully read the same, and understand all the provisions thereof.

Jolly Bros. & Co.

"By J. K. Jolly."

Jolly Bros. commenced the work some time in May, 1899, and continued at it until February, 1900, when they quit, and commenced an action against the railroad company for damages. The first cause of action, as set out in the amended petition, omitting the averments that the plaintiffs are partners and the defendant a corporation, is as follows:

"The said defendant, on and prior to the 10th day of April, 1899, proposed changing the grades of the said railroad track from station 550 to station 700, near the village of Utica, and from station 900 to station 1140, near said station of Hunt, and from station 1340 to station 1410, near the city of Mt. Vernon, and also from station 1690 to station 1900, near said village of Fredericktown, on what was known and called the 'Lake Erie Division' of the said railroad company. In pursuance of said object the said defendant sent an invitation to the said plaintiffs to bid on the work of said construction, and in accordance with the said request of said defendant the said plaintiffs came to Zanesville, Ohio, and met the officials and agents representing the said railroad company, and with the said agents and officials they passed over and casually examined the said proposed improvement desired to be made by the said defendant. That the said work consisted in changing the grade of the said railroad from and between the stations hereinbefore stated, in constructing a roadbed, and in making certain excavations, which necessitated a large amount of work and labor. One David Lee was the engineer of maintenance of way on said Lake Erie Division, and one A. M. Kinsman was the engineer of construction on said Lake Erie Division. Said Lee and Kinsman were the duly authorized agents of the said defendant, and represented said defendant in

said proposed improvement, and in making representations on behalf of said company with reference to the character of said proposed improvement, and in entering into a contract for the same with said plaintiffs. Said Lee and Kinsman were each well acquainted with the character of the material to be excavated and removed, and from which the roadbed was to be constructed. At the time plaintiffs made a casual examination of the said proposed improvement the ground was frozen, and covered with snow, and along much of the said improvement the excavation to be made was from thirty to forty feet deep, and plaintiffs were compelled to and did rely upon the representations of the said agents of the said defendant as to the kind and character of the material to be excavated and removed. Plaintiffs inquired of said agents of said defendant as to the kind and character of said material so to be excavated and removed, and said agents informed plaintiffs that where said excavation was the deepest north of the village of Fredericktown on said Lake Erie Division that the material was dry bank gravel, easy to be excavated and removed; that near Hunt Station on said Lake Erie Division, which was about eight miles south of Mt. Vernon, there was some hardpan, but almost all of said material to be removed south of the city of Mt. Vernon was gravel, sand, or loam. Said agents of said defendant, for the purpose of inducing plaintiffs to enter into a written contract with said defendant, falsely and fraudulently represented to plaintiffs that not only was the material to be excavated and removed north of said village of Fredericktown dry bank gravel, but that there was no water to interfere with said proposed improvement or the removal of said material and the construction of said roadbed. They further represented to plaintiffs that the defendant had made a careful examination of said material so to be excavated and removed north of said village of Fredericktown; that they had caused test holes to be dug along the line of said proposed improvement to ascertain the kind and character of said material, and that it was dry bank gravel. Plaintiffs further aver the fact to be that it was true that said defendant had caused test holes to be dug along the line of said proposed improvement to ascertain the kind and character of the material to be excavated and removed, and the defendant did know the kind and character of said material, but defendant, by and through its said agents, falsely and fraudulently represented to plaintiffs that said material to be removed was dry bank gravel, and that there was no water to interfere with the excavation and removal of said material, when in truth and fact said material to be removed was blue mud, quicksand, and wet excavation; and said defendant, through its said agents, so falsely and fraudulently represented the facts to be, as hereinbefore

set forth, that there was no water to interfere with said excavation and removal of said material, and that the same was dry bank gravel, to induce plaintiffs to enter into a written contract with defendant at a price for said work greatly below the value of the same; and plaintiffs did rely upon said false representations, and did enter into a written contract with said defendant on the 10th day of April, 1899, relying wholly and entirely upon the said false and fraudulent representations of the said agents of the defendant, and agreed to excavate and remove said material at the price of seventeen and one-half cents per cubic yard; that said sum of seventeen and one-half cents per cubic yard was a fair and reasonable price for the excavation and removal of dry bank gravel or sand and loam, but was not a fair and reasonable price for blue mud, quicksand, and wet excavation.

"Plaintiffs further say that, relying upon said false and fraudulent representations of said agents of said defendant, that in the month of May, 1899, at great expense, and with a large force of men and teams, and with three steam shovels, six small locomotives, 250 cars, and the necessary picks, shovels, and tools, they commenced work on said proposed improvement, and proceeded diligently to complete the same; that on or about the 20th day of May, 1899, in the prosecution of said work north of the village of Fredericktown they ascertained for the first time that said representations so made by said Lee and Kinsman with reference to the kind and character of the said material so to be removed and the condition and quantity of the water which permeated a large part of the said material was false. Instead of said material so to be excavated and removed north of said village of Fredericktown being dry bank gravel, the greater part of it was blue mud, quicksand, and wet excavation; and in attempting to excavate and remove the same it adhered to the dippers of the steam shovels, and was difficult to load into the cars and difficult to dump from the cars, for the reason that it adhered to said dippers and the said cars, and often intermingled with said blue mud was large chunks of a very hard substance that could not be removed in the dippers on the steam shovels, and much of the time the men in performing said work were compelled to and did work in water and mud above their knees; and instead of the usual number of four men working in advance of the steam shovels, to each shovel, plaintiffs were required to have and did have eight men so working in mud, water, and quicksand.

"As soon as plaintiffs ascertained that the said representations so made by the said agents of said defendant with reference to the kind and character of said material to be excavated and removed were false, they at once notified A. M. Kinsman, who was

the said agent of said defendant, and who was duly authorized by the said defendant to enter into the said written contract with plaintiffs, and who was duly authorized to make and enter into contracts with said plaintiffs for the performance of said work, and who had entered into said written contract on behalf of said defendant with said plaintiffs, plaintiffs notified said Kinsman that the kind and character of said material so to be removed north of said village of Fredericktown was not dry bank gravel, as represented by him and said David Lee, but was blue mud, quicksand, and wet excavation; and said A. M. Kinsman, on or about the 1st day of June, 1899, with plaintiffs, went over said work that was being performed by plaintiffs north of said village of Fredericktown, and plaintiffs then notified said Kinsman that they had been greatly damaged by said false representations, and that they would abandon said work and contract and claim damages for the fraud perpetrated upon them. Said Kinsman then and there informed plaintiffs that the material that they were removing north of said village of Fredericktown was not as represented by him and said David Lee to plaintiffs, and if they would continue the work that they should be paid for the excavation and removal of the said material what the same was reasonably worth; and he further stated to plaintiffs on or about the 1st day of June, 1899, that if they would continue the performance of said work, and excavate and remove said material, that he would see that they were allowed what the same was reasonably worth, together with other material removed and excavated by them, and that they should be paid therefor between the 10th and 15th of each month for the amount of the material excavated and removed on the preceding month. Plaintiffs further say they relied on this new promise so made by the said A. M. Kinsman, and he was duly authorized to make said promise. He was the agent of said company that had entered into the written contract with plaintiffs on behalf of said defendant, and was duly authorized to make allowances to plaintiffs for any and all work performed by them what the same was fairly and reasonably worth. Plaintiffs, relying upon said promise, continued in the performance of said work thereafter, but were not allowed by the said defendant, or the said A. M. Kinsman, as its agent, what the said work was reasonably worth, nor were they allowed any extra amount for the removal of said blue mud, quicksand, and wet excavation. Plaintiffs repeatedly called upon said A. M. Kinsman, and requested that they be paid for the said work so performed, and in the month of October, 1899, said Kinsman promised plaintiffs that they should be allowed for the same in the month of November, 1899, but defendant did not allow plaintiffs for said work. Plaintiffs

continued in the prosecution of said work through the month of December, 1899. Said Kinsman, for said month of December, 1899, made an allowance to apply on work done in month of December, 1899, the sum of \$1,954.05, which he promised would be paid on or before the 15th day of January, 1900, but no part of the same was paid. Plaintiffs continued the prosecution of said work through the month of January, 1900, and the said Kinsman again informed plaintiffs that he had made another estimate to apply on their said work of \$1,273.75 for the said work done in the month of January, 1900, which would be paid on or before the 15th day of February, 1900, but no part of the same was paid. Plaintiffs frequently demanded payment not only of said two several estimates for the month of December, 1899, and the month of January, 1900, amounting to \$3,227.80, but also for the whole amount due them for said work so performed for said defendant under said verbal contract so made with said A. M. Kinsman, but said defendant refused to pay the same, or any part of the same, and has ever since refused to pay the same, or any part of the same. Plaintiffs notified defendant that they would not complete said work, and would remove their grading outfit from the same, unless defendant paid them for the work they had already performed, but defendant refused to pay plaintiffs the amount due them, or any part of it, and thereupon plaintiffs quit said work, and removed their grading outfit from the same.

"Plaintiffs further say that they excavated and removed in the work of said improvement and in the construction of said road-bed 840,000 cubic yards of material, of which 26,800 cubic yards was called hardpan by the said A. M. Kinsman, and an allowance of 22 cents per cubic yard was made for the same by the said A. M. Kinsman, or \$5,786 for the excavation and removal of the said 26,800 cubic yards of hardpan; 4,400 cubic yards of loose rock or shale, which was fairly and reasonably worth 28 cents per cubic yard, or \$1,232, for the excavation and removal of the said 4,400 cubic yards of loose rock; 174,080 cubic yards of earth, gravel, sand, and loam, which was fairly and reasonably worth 17½ cents per cubic yard, or \$30,455.25 for the excavation and removal of said 174,080 cubic yards of earth, gravel, and loam; 4,870 cubic yards of solid rock, which was worth 50 cents per cubic yard, or \$2,435 for the excavation and removal of the said 4,870 cubic yards of solid rock. Plaintiffs further say that under the verbal contract so made by said A. M. Kinsman on or about the 1st day of June, 1899, they excavated and removed 130,000 cubic yards of blue mud, quicksand, and wet excavation, which was fairly and reasonably worth 40 cents per cubic yard for the removal of said blue mud, quicksand, and wet excavation, and the removal of said 130,000 cubic yards

was worth the sum of \$52,000, of which \$10,278.95 was paid on account of said excavation and removal of blue mud, quicksand, and wet excavation, leaving remaining due and unpaid for said 130,000 cubic yards of blue mud, quicksand, and wet excavation the sum of \$41,721.05; and the total amount of said material of all kinds so removed by them in the construction of said work was fairly and reasonably worth \$91,658.25, which was all due and payable on or before the 15th day of February, 1900. Plaintiffs further say that they received from time to time from said defendant, to apply on said work so performed by them, the sum of \$49,937.20, and that there is a balance due them from said defendant for said work the sum of \$41,721.05, in addition to the December, 1899, estimate of \$1,954.05 and the estimate of January, 1900, of \$1,273.75, with interest thereon from February 15, 1900, for which they pray judgment."

The second cause of action was for \$2,014.20 for extra work and material.

The third cause of action was for \$400, retained for freight on the grading outfit.

The fourth cause of action was for damages in the sum of \$2,200 for not permitting plaintiffs to perform a contract for excavating made with the defendant on May 10, 1899, and the whole amount prayed for was \$49,563.12.

The railroad company answered as follows:

"The defendant also admits that the said David Lee and the said A. M. Kinsman held offices on said Lake Erie Division, as stated in said amended petition, but it denied that the said Lee and Kinsman had any authority to make any representations to the said plaintiffs with reference to the work upon which they were about to bid, and it denies that the said Lee and Kinsman made any such representations. And the defendant avers that no agent or officer of the said defendant had any authority to make any representations or statements with regard to the work which was to be done, except such as were contained in the contract which was signed by the said plaintiffs and this defendant in duplicate, one of which has at all times been and now is in the possession of the plaintiffs and the other in the possession of this defendant, the terms of which were to some extent explained by the said David Lee to the said plaintiffs, and as a result of such explanation the bid of the said plaintiffs for said work was increased in several particulars. And the said defendant says that it is not true that the said plaintiffs were compelled to rely and did rely upon any statements made by it or any of its officers or agents with reference to the character of the earth to be removed in the performance of their said contract. And the defendant says that the test holes referred to in said amended petition were not made for the purpose therein stated, but for an entirely dif-

ferent purpose. And the defendant says that no representations, true or otherwise, were authorized by this defendant, and none such were made under its authority. And the defendant says that the said plaintiffs did not rely upon such representations, and had no authority, as they were advised, to rely upon any such representations. And the defendant says that it is not true that said plaintiffs, on or about the date named in said amended petition, discovered the kind and character of the material to be removed under their said contract, and it says that, if such is the fact, that it was owing to the negligence and want of proper care upon the part of the said plaintiffs in bidding upon the said work without having full knowledge with reference to such kind and character of material. And the said defendant denies each and all of the other averments contained in said amended petition, and says that the same are not true. And the defendant further avers and says that the said plaintiffs, without the consent of this defendant, and without any excuse for so doing, abandoned the performance of their said contract, and refused to proceed with or complete the same, and that they are not, therefore, entitled to recover anything by reason of any of the matters averred in said amended petition. And for answer to the second cause of action contained in said amended petition the said defendant says that the said A. M. Kinsman had no authority to make a contract with said plaintiffs for the extra work referred to in said cause of action, and it denies that he made any such contract. And for answer to the third cause of action contained in said amended petition the defendant denies each and all of the averments therein contained. And for answer to the fourth cause of action contained in said amended petition the said defendant, admitting the execution of the contract referred to therein, and the commencement by the said plaintiffs of work thereunder, denies each and all of the other averments therein contained, and says that the same are not true."

The jury found for the plaintiffs on the first cause of action, \$42,526.16; on the second, \$2,261.98; on the third, \$454.13; and on the fourth, \$1,505.01. Motion for new trial was made and overruled, and judgment entered on the verdict. The circuit court found the judgment excessive in the amount found due on the third cause of action, and as to all but \$354.13 of the amount found due on the fourth, and, upon the plaintiffs entering a remittitur of those amounts, the judgment as to the remainder was affirmed.

F. A. Durban and Cummings, McBride & Wolfe, for plaintiff in error. Jenner & Weldon and L. C. Stillwell, for defendants in error.

SUMMERS, J. (after stating the facts). It is difficult to determine from the charge of

the court and the arguments of counsel whether this was an action for damages for false representations or an action for the amount due under a written contract as subsequently modified by parol, the alleged fraudulent representations being set out merely to show a consideration for the modification. Conceding that a party may, without electing to pursue one of two remedies, plead the facts and recover whatever he may be entitled to under the proof (a course sometimes as difficult to pursue as to try to sit upon two chairs), it becomes necessary to consider whether upon either theory he is entitled to recover. It is manifest from the petition that Jolly Bros. based their claim on the parol contract. They aver that upon ascertaining that they had been deceived as to the character of the material in the big cut, they notified Kinsman that they would abandon the contract and claim damages for the fraud that had been perpetrated upon them. That Kinsman then promised that, if they would continue the work, they should be paid for the excavating of the material of which they complained what the same was reasonably worth, and that they should be paid for that and other work done by them between the 10th and 15th of each month for the work done in the preceding month. That they relied upon that promise, and performed the work "under said verbal contract so made," and that they quit the work because the railroad company failed to pay them the amount due under this new contract. That this is so is manifest also from the fact that such a contract would waive the fraud. *Robb v. Vos*, 155 U. S. 13, 15 Sup. Ct. 4, 39 L. Ed. 52; *McLean v. Clapp*, 141 U. S. 429, 12 Sup. Ct. 29, 35 L. Ed. 804; *Pintard v. Martin*, 1 Smedes & M. Ch. 128. The court instructed the jury that the suit was not upon the contract, but for fraud, and then charged them that, if they found for plaintiffs on the fraud, and that this new arrangement had been made, they should allow plaintiffs for the material, as to which the price was changed, removed by them, what it was reasonably worth to remove it, not exceeding 40 cents per cubic yard. The court also, at the request of plaintiffs' counsel, gave the jury the following instruction: "If the jury find by a preponderance of the evidence that the defendant, by its authorized agents, agreed to pay plaintiffs for the material excavated and removed by them on or before the 15th day of each succeeding month, and defendant refused to comply with said contract and pay plaintiffs in accordance with the terms thereof, then plaintiffs were authorized to quit said work, and the defendant would be liable to them for all the work performed by plaintiffs under said contract." Assuming that the plaintiffs could recover for the alleged false representations, the direction of the court that the jury should allow plaintiffs what it was reasonably worth to remove

the blue mud, not exceeding 40 cents per cubic yard, was perhaps not prejudicial to the railroad company.

Conceding, but not deciding, that the acts of an agent, within the scope of the authority apparently incident to the position he holds, are deemed the acts of the principal, and that a stipulation in a written contract that it shall not be affected by inferences from conversations previous to its execution, will not shield a party from his false representations (in other words, that the Baltimore & Ohio Railroad Company is bound by a contract made in its name by an agent having apparent authority to make the contract, and is responsible for his false representations respecting the subject of the contract notwithstanding a stipulation therein that the contract is not to be affected by inferences from conversations), and conceding also that a failure to make payments at the time stipulated in the contract would relieve the other party from the obligation to go on—we proceed to inquire what authority, real or apparent, Kinsman had to contract for the Baltimore & Ohio Railroad Company.

The negotiations resulting in this contract were between Jolly Bros. and Joseph M. Graham and David Lee on the part of the railroad company. Graham was superintendent of the Trans-Ohio Division, and afterward chief engineer. Lee was engineer of maintenance of way on that division. Graham says he got his authority to make the contract from Underwood, the general manager; and after the negotiations were closed, after Jolly Bros. had submitted one bid on April 1st, and then another, and had modified that on April 5th, the question of accepting their bid was considered, and a day or two before April 10th Graham directed Lee to enter into the contract, and Lee directed Kinsman to sign the company's name to the contract, which he did. Kinsman had been in the employ of the company only a few weeks, and had seen the location of the improvements but once, and that from the rear coach of a train on his way over the road. The company, at the time, had no chief engineer. Kinsman was to be engineer in charge of the construction of these improvements, and the printed form of contract was changed by a provision to the effect that whenever the words "chief engineer" were used they should be understood to mean the engineer of construction. Nothing had occurred prior to the execution of this contract to warrant an inference that Kinsman had authority to contract for the Baltimore & Ohio Railroad Company, and plaintiffs' counsel do not so contend. So that the question is as to the extent of Kinsman's powers as delimited by the contract, and the contention of plaintiffs' counsel is: that Kinsman had the authority of the chief engineer. That by the terms of the contract: "The chief engineer may make such

allowances and estimates as he deems just for any loss or damage to the contractor resulting from delays of any kind, whether caused by failure to procure right of way, borrow pits, or materials required to be procured by the company, or to furnish plans, or from alterations in plans, or from any other cause whatever; and it is expressly understood that the contractor agrees to accept such allowances and estimates in full satisfaction of such loss or damage, the decision of the chief engineer as to the amount of such loss or damage being final and conclusive and binding on both parties. (17) The classification of all excavations, masonry, etc., shall be made by the engineer, or chief engineer, and their decision in regard to the same shall be final and binding, and from it no appeal shall be taken. And it is mutually agreed and distinctly understood, that the decision of the chief engineer shall be final and conclusive in any dispute which may arise between the parties to this agreement relative to or touching the same; and each and every one of said parties do hereby waive any right of action, suit or suits, or other remedy in law or otherwise, by virtue of the covenants and provisions herein, so that the decision of said chief engineer, shall in the nature of an award, be final and conclusive on the rights and claims of said parties." That these provisions invested him with authority to decide disputes, to determine the classification of the blue mud, and, notwithstanding technically it fell under the classification "earth excavation," to place it in a more expensive class. But clearly this is authority only to decide disputes and to make allowances for loss or damages growing out of the performance of the contract, and not authority to make new contracts. It gave him no authority to decide that the contract was voidable because of false representations, and it would be surprising that a contract which the superior officers of the company had thought it important to hedge with so many provisions might be set aside by the engineer of construction, and the company be bound by one simply to pay whatever the work was reasonably worth. And an agreement by Kinsman to put work admitted to belong, under the specifications, to one class in a higher class, would be a fraud on, and not binding upon, the company.

It follows that there could be no recovery on the alleged parol contract, and the next question to be determined is whether the judgment can be upheld on the basis of damages for false representations. There are cases in which it is said that a person who has been defrauded by another in making an executory contract is not barred of a remedy for his damages for the fraud by a subsequent performance of it on his part with knowledge of the fraud, acquired subsequent to the making and previous to the performance; that the extent of the rule is that the party defrauded, by performing

his part of the contract with knowledge of the fraud is deemed to have ratified it, and is precluded thereby from subsequently disaffirming it. But by the better reason, if not the weight of authority, the performance of an executory contract after knowledge of facts making it voidable on the ground of fraud in its procurement is a waiver of any right of action for damages for the fraud. There are cases of part performance before discovery, and where it was impracticable to stop, in which it is held that performance was not a waiver. As stating that performance is not a waiver the following may be cited. *Mallory v. Leach*, 35 Vt. 156, 82 Am. Dec. 625; *Parker v. Marquis*, 64 Mo. 38; *Nauman v. Oberle*, 90 Mo. 666, 3 S. W. 380; *St. John et al. v. Hendrickson*, 81 Ind. 350; *Johnson, Adm'r. v. Culver, Adm'r.*, 116 Ind. 278, 19 N. E. 129; *Whitney v. Allaire*, 4 Denio, 554; *Whitney v. Allaire*, 1 N. Y. 305. And as holding that performance is a waiver: *Saratoga & S. Railroad Co. v. Row*, 24 Wend. 74, 35 Am. Dec. 598; *People v. Stephens*, 71 N. Y. 527; *Selway v. Fogg*, 5 M. & W. 83; *Nounnan v. Sutter County Land Co.*, 81 Cal. 1, 22 Pac. 515, 6 L. R. A. 219; *Sellar et al. v. Clelland et al.*, 2 Colo. 532; *Sell v. Miss. River Logging Co.*, 88 Wis. 581, 60 N. W. 1065; *Gilchrist v. Manning*, 54 Mich. 210, 19 N. W. 959. Here the facts were known within a week or two after the commencement of the work, and the plaintiffs could not go on with the work, accept payment at the prices stipulated in the contract, and then, when it proved a losing venture, quit, and sue for damages, on the ground that their loss was caused not by themselves in electing to go on with the work, but by the false representations of the defendant. This court is not required to pass on the weight of the evidence. However, speaking for myself alone and in view of the charge of fraud, I think it proper to do so—I am of the opinion that the verdict on the question of false representations is against the manifest weight of the evidence, and that it is quite apparent from the plaintiffs' evidence alone that the contract was not induced by fraudulent representations, but that the plaintiffs were not as careful as they should have been in ascertaining the character of the material to be moved, and that, when a losing venture stared them in the face, Kinsman urged them to go on with the work, and promised to intercede with his superiors for an additional allowance on the bad material in the big cut. They did go on for six months, until their payments were held up because, so it is contended, of attachments and subcontractors' liens, when they quit.

The action not being maintainable either on the alleged parol contract or for damages for the alleged fraudulent representations, may a recovery be had on the written contract? The contract provided for payments on monthly estimates, but it was agreed by

the plaintiffs that the monthly estimates, or any part thereof, should not be payable until they had furnished evidence to the engineer that they had paid in full all laborers and subcontractors in their employ. It is contended that this provision of the contract is not pleaded, and that it is not averred that the payments were withheld because of attachment or subcontractors' liens. However, it is averred that the plaintiffs, without the consent of the defendant, and without excuse, abandoned the performance of the contract, and refused to complete the same. This averment, possibly, is broad enough to make relevant proof of attachments or liens. Such proof was offered, and the court erred in excluding so much of it as tended to prove the existence of such claims at the time the plaintiffs abandoned performance of the contract. The plaintiffs averred that by the parol modification of the contract they were to be paid on the 15th of the month, and the court charged the jury that, if they found the defendant, by its authorized agent, so agreed, and the defendant did not pay as so provided, the plaintiffs could quit the work, and recover for what they had done; but, as has been already determined, the parol contract was not binding on the company. The question as to whether, and how much, if anything, the plaintiffs may recover on the written contract, does not appear to have been considered, and we have not critically examined the record to see whether it clearly appears that plaintiffs can recover nothing on the written contract, being of the opinion that it will be in the furtherance of justice to remand the case for further proceedings, so that the question of plaintiffs' rights under the written contract may be determined independently of any questions of modification or fraud.

As to the second cause of action, which is for extra work, the provision of the contract as to written orders for such work was for the benefit of the railroad company, and could not be waived by the engineer of construction. In *Woodruff et al. v. Roch. & Pitts. Railroad Co.*, 108 N. Y. 39, 48, 14 N. E. 832, 834, where a similar question was under consideration, Earl, J., says: "This was one of the terms of the contract, and we are unable to perceive that the engineers had any power or authority to alter or change it. It was inserted in the contract to protect the defendant from claims for extra work, which might be based upon oral evidence, after the work was completed, and when it might be difficult to prove the facts in relation thereto. If the engineers in charge had an unlimited authority to change the contract at their will, and to make special agreements for work fairly embraced therein, then the defendant had very little protection from the reduction of their contract to writing. If these engineers were the agents of the defendant, they were its agents with special powers, simply to do the engineering work

and to superintend and direct as to the execution of the contract. But they had no power to alter or vary the terms of the contract or to create obligations binding upon the defendant not embraced in the contract." *Campbell v. Cincinnati So. Railroad*, 6 S. W. 337, 9 Ky. Law Rep. 739; *Sanitary Dist. of Chicago v. McMahon & Montgomery Co.*, 110 Ill. App. 510.

As to the fourth cause of action. The contract, in substance, provided that the company, giving 10 days' notice, might at any time, for any reason that seemed to it sufficient, and without fault on the part of plaintiffs, annul the contract, in which event the plaintiffs were to be paid in full the estimates for the work done, and such annulment was not to give them any claim for damages against the company. It appears from the evidence that plaintiffs furnished pipe of the value of about \$300, on requisition of the company, for the work to be done under the contract of May 19th, and for that it is presumed part of the judgment on this cause of action was affirmed by the circuit court; but there are no allegations in the pleadings to support a judgment for the value of the pipe. It appears, therefore, that the plaintiffs could not recover on the parol contract for want of authority in Kinsman to bind the company, nor for damages for false representations, because, if proven, it appears from the petition that plaintiffs waived the fraud; nor on the contract of May 19th, because they therein agreed that the company might annul it without giving them any claim for damages; and it follows that the judgment is reversed, and the cause remanded for further proceedings.

Remanded.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, and CREW, JJ., concur.

(71 Ohio St. 122)

VILLAGE OF PLEASANT HILL et al. v.
COMMISSIONERS OF MIAMI
COUNTY et al.

(Supreme Court of Ohio. Dec. 6, 1904.)

COUNTY COMMISSIONERS—AUTHORITY TO CONSTRUCT A DITCH IN MUNICIPAL LIMITS.

1. Except as provided in section 4483 or 4485 of title 6, c. 1, Rev. St., county commissioners are without jurisdiction or authority to locate and construct a county ditch within the corporate limits of a municipality.

(Syllabus by the Court.)

Error to Circuit Court, Miami County.

Petition by Mary E. Faulkner to the board of county commissioners of Miami county for the location of a ditch. From an assessment levied against the village of Pleasant Hill and certain property holders in said village, the village and the landowners appeal. Verdict for the location of the ditch was set aside by the Supreme Court, and the judgment was affirmed by the court of common

pleas and the board of commissioners, and Mary E. Faulkner brought error to the circuit court, which reversed the judgment, and the village of Pleasant Hill and the landowners therein bring error. Judgment of circuit court reversed and of court of common pleas affirmed.

The defendant in error Mary E. Faulkner filed her petition with the board of commissioners of Miami county, Ohio, praying for the location and construction of a county ditch having its commencement, and its course, except for a short distance near the point of outlet, entirely within the corporate limits of the village of Pleasant Hill, in said Miami county. Thereafter such proceedings were had before said board of commissioners that the prayer of said petition was granted, and said ditch was ordered to be constructed. To meet the cost of the location and construction of said ditch, an assessment was levied by said board against the village of Pleasant Hill as a corporation, and a separate assessment levied against each of the property holders in said village whose lands the commissioners found would be benefited by said improvement. An appeal was taken by the village and about 40 of the landowners to the probate court of Miami county. In that court the cause was submitted to a jury, and a verdict returned in favor of the location and establishment of said ditch. A motion was then filed by the appellants asking that said verdict be set aside, and challenging the authority and jurisdiction of said board of commissioners to locate and establish a ditch within the corporate limits of the village of Pleasant Hill. This motion was sustained by the probate court, and an order made remanding the proceedings to the board of commissioners, with directions to dismiss the same for want of jurisdiction. This judgment and order of the probate court was affirmed by the court of common pleas. Error was then prosecuted by the defendants in error, the board of commissioners and Mary E. Faulkner, to the circuit court of Miami county, which court reversed the judgments of the court of common pleas and probate court for the reasons, as stated in its entry of reversal, that: "The said probate court of Miami county, Ohio, erred in finding that said board of county commissioners has no jurisdiction, power, or authority to entertain said petition filed by said property owner, nor to grant the prayer of said petition and order the construction of said ditch, and has no power or authority to proceed in said matter or to construct said ditch, and the probate court erred in sustaining said motion and in remanding said proceedings to the board of county commissioners of said county to be dismissed by said board of county commissioners for want of jurisdiction. The probate court erred in ordering the board of county commissioners to pay the costs of said proceedings. The court of common pleas erred in affirming

the said findings, judgment, and proceedings of said probate court." To reverse this judgment of reversal and obtain an affirmance of the judgments of the common pleas and probate courts this proceeding is prosecuted.

Gilbert, Shipman & Campbell, for plaintiffs in error. T. M. Campbell, for defendants in error.

CREW, J. (after stating the facts). The printed record in this case presents for determination this single question: "Did the board of commissioners of Miami county have jurisdiction and authority to entertain the petition of Mary E. Faulkner, to grant the prayer thereof, and to order the location and construction of the ditch therein prayed for?" This question was answered by the probate court and the court of common pleas in the negative, and judgments were rendered accordingly. The circuit court, being of opinion that said board of commissioners had jurisdiction in the premises, reversed the judgments of the lower courts, and remanded the cause to the probate court of Miami county for further proceedings. In this finding and judgment of the circuit court we think there was error. The boards of county commissioners of the several counties and the municipal authorities of the several cities and villages within this state, in the matter of the location and construction of drains and ditches, have such jurisdiction and authority, and such only, as is given them respectively by statute, and the power and authority of each is limited to the power and authority so conferred.

It would seem to be conceded in the present case that whatever authority was conferred upon or possessed by the board of commissioners of Miami county to locate and establish the ditch in controversy was conferred upon said board by the provisions of section 4447, Rev. St., which section is as follows: "The commissioners of any county at any regular or called session may, in the manner provided in this chapter, when the same is necessary to drain any lots, lands, public or corporate road or railroad, and will be conducive to public health, convenience or welfare, cause to be located, and constructed, straightened, widened, altered, deepened, boxed or tiled, any ditch, drain or water course, or box or tile any portion thereof or cause the channel of all or any part of any river, creek, or run, within such county to be improved by straightening, widening, deepening or changing the same, or by removing from adjacent lands any timber, brush, trees or other substance liable to form obstruction therein."

It is the contention of counsel for defendants in error that by virtue of this section county commissioners are authorized and empowered to locate and construct at any place within the county, either within or without the corporate limits of a municipal

ity, and, where within such limits, without the consent of the municipal authorities, any ditch, drain, or water course, provided only the same will be conducive to public health, convenience, or welfare. We cannot concur in this interpretation of this statute. To so interpret the language of this section as to give it such meaning is, we think, to overlook, or wholly ignore, other provisions of the statutes hereinafter noticed, by which municipalities, as such, are clothed with full power and authority over drains, sewers, and ditches within their respective municipal limits. Furthermore, such interpretation ignores the fact that the authority conferred upon the board of county commissioners by this section is, by the express language of the section, to be exercised by such board "in the manner provided in this chapter." This section is a part of chapter 1, tit. 6, of the Revised Statutes, which title and chapter provides for the construction of county ditches. Section 4483, which is a section of the same chapter, provides when and how a municipal corporation may invoke the action of the board of commissioners in the matter of the construction of a ditch "whenever the improvement will be conducive to the public health, convenience or welfare, of the whole or any portion of the inhabitants of the corporation." The section is as follows: "Sec. 4483. The council of a municipal corporation may, by resolution, authorize the mayor to present a petition, signed by him officially, and a bond, to the county commissioners, to locate and construct a ditch described in the resolution, or such council may authorize the mayor to sign officially a petition and bond for a ditch, to be presented by parties interested whose lands are without the limits of the corporation, whenever the improvement will be conducive to the public health, convenience, or welfare, of the whole or any portion of the inhabitants of the corporation; in such case the commissioners shall count the municipal corporation as an individual petitioner, and may direct the surveyor or engineer to locate the improvement in accordance with the petition, whether wholly within or wholly without, or partly within and partly without, the limits of the corporation; and the surveyor or engineer, in making his schedule of lots and lands benefited, may enumerate such lots and lands within or without the corporate limits as are specially benefited, and also the municipal corporation for benefits to the health and welfare of its inhabitants." Section 4485 of the same chapter and title provides that: "If the proposed improvement passes through or into a municipal corporation the mayor of which has not signed the petition therefor as provided in the preceding section, the mayor shall be notified of the pendency of the petition in the same manner and at the same time that the commissioners are required by section forty-four hundred and fifty-two

to be notified; the mayor shall notify the council of the pendency of the petition, at its next regular meeting, or, if necessary, call a special meeting of the council for that purpose; and thereupon the council shall appoint a committee of its members, or the engineer of the corporation, or both, to meet the commissioners, at the time and place of their meeting and view, and confer with them in regard to the improvement."

This section, by its terms, can have application only to the construction of a ditch or improvement having its source without the corporate limits of a municipality, but which, when constructed and completed, will pass into or through the corporation; and this section does not confer upon the board of county commissioners jurisdiction or authority to locate and construct in a city or village a ditch the source and course of which lie wholly or substantially within the municipal limits of such city or village, and the sole purpose of which is the drainage of lots or lands lying within the municipality. The right of municipalities to provide for and control the matter of drainage within their municipal limits is recognized and has been amply provided for by the Legislature. By section 2403, Rev. St., power and authority is vested in the council of any city or village to provide for the construction of ditches for necessary drainage within the corporation. And by section 1692 power is expressly conferred upon cities and villages within this state "to open, construct and keep in repair sewers, drains, and ditches" within the municipality; and section 2232, Rev. St., authorizes them, for such purpose, "to appropriate, enter upon, and take private property outside of the corporate limits." From a consideration and comparison of these several statutory provisions, giving to each full force and effect, we are led to conclude that the manner in which drainage shall be accomplished within a municipal corporation is a matter primarily and peculiarly within the discretion and control of the municipality itself, by and through its legally constituted authorities (*Dayton v. Taylor's Adm'r*, 62 Ohio St. 11, 56 N. E. 480), and we do not believe that it was the purpose or policy of the Legislature to confer upon boards of county commissioners jurisdiction and authority to locate and construct a ditch or drain within a municipal corporation, except where such municipality shall petition for the same, as provided in section 4483, or when the ditch or improvement being constructed by the commissioners necessarily passes into or through the municipality, as provided in section 4485. In the case at bar it appears from the findings of fact as made by the probate court that the ditch petitioned for by Mary E. Faulkner and which the board of commissioners ordered established "has its source near the center of the corporate limits of the said village of Pleasant Hill,

Ohio, and is for the sole purpose of draining the lots and lands lying within the said municipality, and that said ditch flows for a long distance within said village, and passes out of said village for a short distance for the purpose of an outlet only. The court further finds that said ditch was not petitioned for by said village nor its council, nor was the petition therefor filed by the mayor of said village, but by the owner of a lot lying and located within said village. The court also finds said ditch does not pass through or into said village in such manner as to deprive the council of said village of the jurisdiction over said drainage ditch. The court also finds that said ditch was petitioned for and granted and ordered by the board of county commissioners against the protest and objection of the council of said village and its properly elected and qualified and acting mayor." We are unanimously of the opinion that upon the facts so found the board of commissioners of Miami county were without authority or jurisdiction to establish and construct the ditch in controversy, and the probate court and the court of common pleas properly so found and adjudged.

The judgment of the circuit court is reversed, and the judgment of the court of common pleas affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, and PRICE, JJ., concur. SUMMERS, J., not sitting.

(71 Ohio St. 169)

BOARD OF EDUCATION OF CANTON v. WALKER.

(Supreme Court of Ohio. Dec. 6, 1904.)

BOARD OF EDUCATION—EMPLOYMENT OF TEACHER—DURATION—SEVERAL DEFENSES—DEMURRER TO EACH—ERROR IN OVERRULING DEMURRER TO ONE DEFENSE ONLY—AFFIRMANCE—PLEADINGS.

1. Under section 4017, Rev. St., a board of education cannot lawfully employ a teacher for a term which would expire after the term of office of every member of the board employing him had expired by law.

2. Where several defenses, each complete in itself, have been pleaded to an action, and demurrer to each of them has been overruled by the trial court, and judgment rendered thereon for defendant, and on petition in error the circuit court finds that there was error in overruling the demurrer as to one defense, but that the demurrer was properly overruled as to the other defenses, the circuit court should affirm the judgment of the court below.

(Syllabus by the Court.)

Error to Circuit Court, Stark County.

Action by one Walker against the board of education of Canton. Judgment of court of common pleas, dismissing complaint of plaintiff, was reversed in the circuit court, and defendant brings error. Reversed.

The defendant in error began his action in the court of common pleas of Stark county against the plaintiff in error, the board of

education of the city of Canton, to recover damages in the sum of \$900, alleged to have been sustained by reason of his dismissal from the position of principal of one of the schools of said city. An answer was filed which contained five defenses. A demurrer was filed to the first, third, fourth, and fifth defenses, and was overruled by the court of common pleas as to the first, third, and fifth defenses, and sustained as to the fourth defense. The first defense was, substantially, that the plaintiff was hired subject to the condition that the service of plaintiff might be terminated or dispensed with at any time upon recommendation of the superintendent of instruction and a majority vote of the defendant, and that he was discharged pursuant to such condition, and with full knowledge thereof upon the part of the plaintiff. The third defense was that the contract set forth in the plaintiff's petition was one which could not be performed within the period of one year from the making thereof, and that neither the said contract nor any memorandum or note thereof is in writing, signed by the party to be charged therewith, or by any other person authorized thereunto by him. The fifth defense sets forth that the board was organized and had its existence under and by virtue of a special act of the legislature of Ohio, passed March 1, 1893, and recorded in 90 Loc. Laws Ohio, p. 450; that by the terms of said law each member of the defendant board shall serve two years, the board to consist of six members, three to be chosen each year for a term of two years; that the defendant board, by the terms of said law, is compelled to reorganize each year, and becomes a new board each year by reason of the fact that three members are required to be elected each year; that the said board, as organized and constituted at the time of the making of the said contract, to wit, June 28, 1899, had no power, by virtue of any law of the state, to enter into a contract with the plaintiff for a period of two years thereafter, and that the said attempted hiring for the period of two years, as set forth in the petition, was illegal and void, and against public policy. The plaintiff below, after the overruling of his demurrer to the first, third, and fifth defenses in the court of common pleas, declined to plead further, and judgment was entered against him for costs, and his petition dismissed. On proceedings in error the circuit court reversed the judgment of the court of common pleas upon the ground that it erred in overruling the demurrer to the said fifth defense, but the circuit court expressly found that the court of common pleas did not err in overruling the demurrer filed by the plaintiff in error to the first and third defenses in the answer. This proceeding is prosecuted to reverse the judgment of

the circuit court and to affirm the judgment of the court of common pleas.

Denver C. Hughes, City Sol., for plaintiff in error. Welty & Albaugh and J. W. Burris, for defendant in error.

PER CURIAM. By the statute (90 Ohio Laws [Local] p. 450) the board of education of the city of Canton was made to consist of six members, of whom three were required to be chosen each year for a term of two years. Thus in two years from the time of its organization on the third Monday of April the term of office of every member of the board would have expired. The board which made this contract was organized on the third Monday of April, 1899. The contract was made June 28, 1899, as alleged by plaintiff, to commence July 1, 1899, and to run two years from that date. But the term of office of every member of the board which made the contract expired before the contract would expire, namely, on the third Monday of April, 1901. Section 4017, Rev. St., relating to the employment of teachers, etc., provides that "no person shall be appointed for a longer time than that for which a member of the board is elected." The time "for which a member is elected" is, in this instance, two years from the third Monday of April. That is the limit of the teacher's employment. It may be less. It must not be more. The apparent purpose of the General Assembly is to prevent a board of education from continuing a teacher's appointment for any time after the people may have completely changed the organization and personnel of the board. We are therefore of the opinion that the board of education was without power to employ a teacher for the term which would expire after the term of office of every member of the board employing him had expired by law. The circuit court therefore erred in sustaining the demurrer to the fifth defense. But the judgment of the court of common pleas should have been affirmed on another ground. That court not only overruled the demurrer to the fifth defense, but to the first and third defenses also. The plaintiff declined to plead further, and suffered final judgment to go against him. The circuit court found that the court of common pleas did not err in this, and in that, we think, that the judgments of both courts below are correct. For that reason the judgment of the court of common pleas should have been affirmed.

The judgment of the circuit court is reversed, and that of the court of common pleas is affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, CREW, and SUMMERS, JJ., concur.

(71 Ohio St. 181)

GENTSCH et al. v. STATE ex rel. McGORRAY et al.

(Supreme Court of Ohio. Dec. 6, 1904.)

CONSTITUTIONAL LAW—OBJECTS OF GENERAL LAW—SPECIAL CLASSIFICATION UNCONSTITUTIONAL—ELECTIONS—OPENING AND CLOSING POLLS.

1. Classification is often proper and sometimes necessary in legislation, in order to define the objects on which a general law is to take effect, and in order to definitely apply and effectuate the purposes of the legislation; but when classification is unnecessary, arbitrary, fictitious, or otherwise faultily made, and is used to evade the constitutional limitations under the form of general legislation, such legislation in relation to a class may be both special and unconstitutional.

2. Within the legitimate purposes of general legislation, not relating to the organization of cities and villages, a bona fide classification on the basis of real and substantial differences in population, and of the conditions growing out therefrom, may be valid.

3. Section 2926o, Rev. St. (97 Ohio Laws, p. 208), is a law of a general nature, and operates uniformly throughout the state.

4. When the said section is construed with other legislation in pari materia, it does not appear that it denies or abridges the right of citizens to vote. The said section is intended to, and does, facilitate rather than impede the exercise of the right of suffrage, and it is reasonable, uniform, and impartial.

(Syllabus by the Court.)

Error to Circuit Court, Cuyahoga County.

Action by the state, on the relation of Joseph V. McGorray and others, for a writ of mandamus to Frank F. Gentsch and others. From an order of the circuit court affirming a judgment of the common pleas in favor of relators, defendants bring error. Reversed.

The defendants in error filed a petition in the court of common pleas of Cuyahoga county praying for a writ of mandamus commanding the plaintiffs in error to cause all voting places in the city of Cleveland to be opened at the hour of 5:30 a. m. on the 8th day of November, 1904, and to keep them open and to receive all votes offered by the qualified electors up to the hour of 5:30 p. m. of said day. The relators allege that they are electors and candidates for office duly nominated in said city; that the defendants are the chief deputy and board of deputy state supervisors and inspectors of elections, as well as judges of election in Precinct A, Ward 14, in Cleveland. They aver that in the act of the General Assembly passed April 23, 1904 (97 Ohio Laws, p. 208), there is included a certain section, to wit, section 2926o, Rev. St., which provides that on the day of the November election in every year the polls in each and every precinct in cities in which registration is required shall be opened by the judges of election appointed and organized as is provided in said act, by proclamation made by the chairman, at the hour of 5:30 o'clock in the morning, standard time, and

shall be closed by proclamation at the hour of 4 o'clock, standard time, in the afternoon, in cities which now have or may hereafter have a population of 300,000 or more, as ascertained in the manner provided in section 2926a, and at the hour of 5:30 o'clock in the afternoon in all other cities in which registration is required. And the relators further allege that said section is unconstitutional and void, and that the defendants nevertheless threaten and declare their intention of opening said polls at 5:30 o'clock a. m., standard time, on November 8, 1904, and of closing the same at 4 o'clock in the afternoon of the same day, in the city of Cleveland, which is a city having a population of 300,000 or more. The relators further say that the population of Cleveland is about 450,000, and that there are more than 90,000 qualified electors in said city who have the right to vote at said election, and, as electors, will at said election be required to choose and vote upon more than 300 persons as candidates for national, state, county, municipal, and township offices, 80 persons as candidates for school-district offices, and three questions submitted to popular vote, two of them involving the annexation of territory to the said city, and one involving the issuance of a large amount of bonds for municipal purposes; that there are in the said city about 239 precincts, and at past elections at many of these precincts more than 450 electors have cast their ballots; and that heretofore the time from half past 5 in the morning until half-past 5 in the afternoon in the large precincts has not sufficed to enable all the electors entitled to cast their ballots to vote, and, if the provisions of said section be enforced, many electors throughout said city will be unable to vote, by reason of the physical impossibility of all the voters residing in such precincts, and entitled to vote, casting their ballots within the time allowed by said unconstitutional section of the statutes of Ohio. The relators say that the defendants have been urged and demanded by these relators to disregard the provisions of said section, which they have refused to do; but, on the other hand, threaten to, and will, unless otherwise directed by the court, close the said polling places at the hour of 4 p. m. on said day. A demurrer was filed to the petition on the ground that it did not state facts sufficient to constitute a cause of action for the relief prayed for, which demurrer was sustained by the court of common pleas, and, the defendants not desiring to plead further, judgment was rendered thereon. The defendants in error, as plaintiffs in error, filed a petition in error in the circuit court of said county, seeking the reversal of said judgment, and the circuit court affirmed the judgment of the court of common pleas, and proceedings are prosecuted in this court for the purpose of obtaining a reversal of the judgment of the circuit court and the court of common pleas.

Wade H. Ellis, Atty. Gen. (Roscoe J. Mauck, of counsel), for plaintiffs in error. Foran & McTigue and Arnold Green, for defendants in error.

DAVIS, J. (after stating the facts). The contention is made here that section 29260, Rev. St., violates section 1, art. 5, of the Constitution, and also section 28, art. 2, of the Constitution.

It has not been made to appear to us, by argument or otherwise, that the strict enforcement of this statute would necessarily deprive any elector of his vote, or that any elector ever has been deprived of his vote thereby. In one of the cities of the class defined in this section, this law has been in force for 18 years, and no complaint has yet been made that it has operated to the exclusion of a single lawful vote. When we consider its operation in connection with the sections of the statute making the election day from 5:30 o'clock a. m. to 9 o'clock a. m. a legal part holiday for election purposes only, and requiring the deputy state supervisors to "provide a sufficient number of voting shelves" (97 Ohio Laws, p. 288, § 6, and *Id.* p. 284, § 19), it does not appear probable that any voter would be deprived of his vote by reason of the shortness of the time allowed. The first ground of the contention is therefore not well taken.

The section is general in its nature. Its subject-matter is the conduct of elections, as is the subject-matter of the whole statute of which it is a part—a matter which directly concerns every elector in the commonwealth. It operates throughout the state, because its operation is not limited to any locality, and is limited only by the boundaries of the state. The provisions of this section, however, do apply only to cities having a population of 300,000 or more, wherever they may be situated within the state. It happens that there are only two cities in the state which are included in the class defined in the statute, and it also happens that these cities are situated at opposite extremities of the state. Hence it is argued that although the act is, in form and subject-matter, of a general nature, and operates throughout the state, yet it does not uniformly operate throughout the state, and is, in intention and effect, a special enactment, conferring a special privilege upon the two cities in regard to a matter which concerns alike all the electors of the state; and it is maintained that it is based on an unconstitutional classification in order to give the section the form and appearance of a law of uniform operation. If the classification which is made in this statute can be sustained, then the statute strictly complies with section 28 of article 2 of the Constitution. If such classification is not allowable under the Constitution, then this section of the statute is unconstitutional, for the reason that it is special legislation upon

a subject-matter of a general nature, and does not operate uniformly throughout the state.

In *Platt v. Craig et al.*, 66 Ohio St. 75, 79, 68 N. E. 594, it was said in the opinion that "laws of a general nature are required by the Constitution (article 2, § 28) to have a uniform operation throughout the state. Not only must such laws operate throughout the state, but they must operate uniformly; that is, there must be no exemption as to individuals of the same class. A general law must, therefore, in its operation, be coextensive with the state, and coextensive with every class brought within the purview of the statute; but the section does not imply that a law of a general nature must necessarily affect every individual in the state, or every small division of territory within the state." In *State ex rel. v. Spellmire et al.*, 67 Ohio St. 77, 65 N. E. 619, at page 86, 67 Ohio St., and page 622, 65 N. E., Burket, C. J., says: "With us, 'uniform operation throughout the state' means universal operation as to territory. It takes in the whole state. And as to persons and things, it means universal operation as to all persons and things in the same condition or category. When a law is available in every part of the state as to all persons and things in the same condition or category, it is of uniform operation throughout the state."

It is apparent from these recent utterances of this court that the court has never meant to be understood as denying the general doctrine, held everywhere, and often approved here, that a statute in relation to a class, if its operation is not territorially restricted, is a general law. Classification is often proper, and sometimes necessary, in legislation, in order to define the objects on which the law is to take effect, and in order to definitely apply and effectuate the purposes of the legislation. For example, married women and widows are recognized as two distinct classes, for the purposes of legislation peculiar to each class, as are also corporations classed as railroad companies, street railroad companies, electric interurban railroad companies, telegraph companies, telephone companies, express and insurance companies, etc. Many other illustrations may be found in the statutes of our state. In short, there could be very little general legislation without classification. But when the classification is unnecessary, arbitrary, fictitious, or otherwise faultily made, and is used to evade the constitutional limitations under the form of general legislation, such legislation in relation to a class may be special and unconstitutional. The reported decisions of this court abound with cases of false classification in acts obviously drawn with the purpose of enacting special laws under the guise of general laws. These are chiefly acts relating to municipal corporations. In *State ex rel. Knisely et al. v. Jones et al.*, 68 Ohio St. 453, 64 N. E. 424, 90 Am. St. Rep. 592,

it was clearly shown that classification and subclassification of cities and villages for the purposes of the organization thereof, and for the purposes of legislation relating to the organization thereof, to the extent that every considerable city stood in a class by itself, and all others could be readily identified, and might as well have been mentioned by name, was not a classification on the basis of any real or permanent relation among its objects, but was a fictitious classification, resulting in specialization and an evasion of constitutional limitations, and that legislation founded thereon was special legislation. But that is not inconsistent with the well-established doctrine that within the legitimate purposes of general legislation, not relating to the organization of cities and villages, a bona fide classification on the basis of real and substantial differences in population, and of the conditions growing out therefrom, would be valid. The present case is an illustration of the application of this principle. The General Assembly was legislating upon the subject of the conduct of elections throughout the state. That body was admonished in advance by a decision of this court that "the Legislature have no power, directly or indirectly, to deny or abridge the constitutional right of citizens to vote, or unnecessarily to impede its exercise; and laws passed professedly to regulate its exercise or prevent its abuse must be reasonable, uniform, and impartial." *Monroe et al. v. Collins*, 17 Ohio St. 665. But experience has shown that, under the social conditions which prevail in some quarters of very large cities, fraud, intimidation, and even violence, were more likely to occur in the twilight and darkness than in broad daylight—"They love darkness because their deeds are evil"—and more likely to occur there than in smaller aggregations of population. The Legislature therefore provided that the polls should be closed at 4 o'clock, standard time, in the afternoon, "in cities which have now or may hereafter have a population of three hundred thousand or more." The minimum of population thus fixed is tens of thousands below the population of either of the cities now included within the class, and is not beyond the range of possibility to other cities, if the rate of growth in urban populations in recent years should continue for a quarter or a half of a century. Thus the Legislature clearly evinced an intention that the section which is now challenged should not apply to Cincinnati and Cleveland only, but should apply generally throughout the state, and that it should be a permanent regulation regarding the conduct of elections throughout the state. There may well be differences of opinion as to whether this provision should not apply to cities of less population than the prescribed number, but the lawmaking power has exercised its judgment on that matter. The limit of population upon which the classification should be based is entirely with-

in the discretion of the General Assembly, having regard to all the conditions and circumstances; and, so long as it is not unreasonable in its operation, or subversive of the rights of electors, we cannot interfere with it. This section was evidently designed to protect the voter in casting a free, untrammelled ballot, and to enable him to have it honestly counted. It seems to have been conceived on proper lines; and, when construed with other enactments in pari materia, it is liberal and reasonable towards the voter.

The case of *State ex rel. v. Buckley*, 60 Ohio St. 273, 54 N. E. 272, cited in behalf of the relators, does not apply to this case. In that case there was an express exemption of territory as to which the statute should not be operative. That is not true of the statute which we are now considering.

Our conclusion is, therefore, that section 29260, Rev. St., is a law of a general nature, and that it operates uniformly throughout the state; that, when considered in connection with other legislation related to it, and on the same subject, it does not deny or abridge the right of citizens to vote; that it is intended to, and does, facilitate, rather than impede, the exercise of the right of suffrage; and that it is reasonable, uniform, and impartial.

The judgment of the circuit court and the judgment of the court of common pleas are therefore reversed, and the original petition dismissed.

CREW and SUMMERS, JJ., concur.
SPEAR, C. J., and PRICE, J., not sitting.
SHAUCK, J., concurs in the third and fourth propositions of the syllabus and in the judgment.

(212 Ill. 584)

PEOPLE ex rel. FREEMAN v. MURPHY.
(Supreme Court of Illinois. Dec. 7, 1904.)

HABEAS CORPUS—SUPREME COURT—JURISDICTION—STATUTE—CONSTRUCTION.

1. Under Hurd's Rev. St. 1899, c. 38, par. 438, providing that any person committed on a criminal charge, not admitted to bail, and not tried at some term of the court having jurisdiction within four months of the date of commitment, shall be set at liberty unless the delay shall happen on the application of the prisoner, or unless the court is satisfied that due exertion has been made to procure the evidence on the part of the people, and that there is reasonable ground to believe that such evidence may be procured at the next term, in which case the court may continue the case to the next term, the Supreme Court has no jurisdiction on habeas corpus to determine a prisoner's right to release for a violation of the statute after trial and conviction in a court of competent jurisdiction.

2. The fact that a petition for writ of habeas corpus was presented to a circuit judge, and denied, in a case where the relator had been convicted of crime by a criminal court of concurrent jurisdiction with the circuit court, does not give the Supreme Court jurisdiction to hear the petition on its merits as to a point which was reviewable only on error or appeal from a ruling of the trial court.

Motion by the people, on the relation of George Freeman, for leave to file a petition for a writ of habeas corpus against E. J. Murphy, warden. Motion denied.

A. B. Dunning, for relator.

RICKS, C. J. A motion for leave to file a petition for habeas corpus is made by the relator, Freeman, and the particular ground for relief set forth in the petition is that the petitioner, who was indicted for murder, was not given a trial within four months after the time of his commitment to jail. The relator was committed to jail in Cook county November 21, 1903, on a coroner's warrant, charged with the murder of Cornelius Van Zandwick, following an inquest. He was indicted at the December term, 1903, of the criminal court, entered his plea of not guilty on December 22, 1903, and demanded a trial at the February term, 1904, on the last day of the month and term. He obtained a continuance of the cause at the March term, 1904, on the 28th day of March, and on the 29th day of the same month the order of continuance was, on his motion, set aside. He then moved to be discharged for want of prosecution within the fourth term of the court. The motion was denied and the trial entered upon, and the examination of jurors begun and continued until a jury was fully impaneled and sworn on March 30th, and the trial was proceeded with to April 6th, when a verdict of guilty of manslaughter was returned. A motion for a new trial was made, and at the June term, 1904, overruled, and the relator sentenced.

The criminal court of Cook county has a term commencing the first Monday of each month, and all pending and undisposed of causes are continued from one term to another by operation of law, unless otherwise continued. Hurd's Rev. St. 1899, c. 37, par. 56. Relator was tried, or his trial entered upon, at a term of court commencing within four months from his commitment, but the trial was not concluded until the April term, which commenced more than four months after his commitment. He was tried by a jury impaneled at the March term, and did not, during the trial, move for or demand his discharge, and no order was asked of or entered by the criminal court touching his discharge after the trial began.

The statute relied on is as follows: "Any person committed for a criminal or supposed criminal offense, and not admitted to bail, and not tried at some term of the court having jurisdiction of the offense commencing within four months of the date of commitment, or if there is no term commencing within that time, then at or before the first term commencing after said four months, shall be set at liberty by the court, unless the delay shall happen on the application of the prisoner, or unless the court is satisfied that due exertion has been made to procure the

evidence on the part of the people, and that there is reasonable grounds to believe that such evidence may be procured at the next term, in which case the court may continue the case to the next term." Hurd's Rev. St. 1899, c. 38, par. 438.

It is contended by the relator that because his trial was not completed during the March term of the court, but extended over into the April term, the court lost jurisdiction of his person under the provisions of the above statute, and that he is therefore entitled to his discharge under the writ of habeas corpus. It is not denied that, at the term the jury was impaneled and his trial entered upon, the court had jurisdiction of both the subject-matter and the person of the relator, and there can be no question but that the court retained jurisdiction, unless the jurisdiction of the person of the relator was lost by the court entering some order that it should not have entered, or failing to enter some order that should have been entered.

The above statute authorizes the court to continue a cause to a term commencing after four months from the time of commitment, if the delay has happened upon the application of the prisoner, or if the court is satisfied that due exertion has been made to procure the evidence on the part of the people, and if the court is also satisfied that there is reasonable grounds to believe that such evidence may be procured at the term to which said cause is continued. When the court is moved to discharge a prisoner, or when his release is sought under the provisions of the above statute, a number of questions arise upon such application, which, we think, must be determined in the court in which the prisoner is held for trial. Some of these questions are of such a nature that it could well be said that they rest within the sound legal discretion of the trial court. In view of the provisions of the statute and the authority reposed in the court under it, we are clearly of the opinion that no court but the trial court in which the proceeding is pending has jurisdiction to primarily determine this question, and that no court except a court of review has jurisdiction to determine whether or not the trial court properly disposed of such an application. We are unable and unwilling to give our assent to the contention that any court but a court of review has jurisdiction to determine that the trial court was not satisfied, or was not justified in being satisfied, that due exertion had been made to procure the evidence for the people, and satisfied that there was reasonable grounds to believe that the evidence for the people might be procured at the next term of the court. If the prisoner would invoke this statute he should demand his release in the trial court, and preserve in the record, by bill of exceptions, the proceedings had upon such application. If the application be denied, it is the right of the prisoner to have the action of the court reviewed as a part of the record,

and if error is committed in the proceedings (and it is merely error if it is anything), and that error is made to appear in the record which is brought before this court on writ of error, this court will review the action of the trial court in that behalf, as was done in *Marzen v. People*, 190 Ill. 81, 60 N. E. 102, and *Guthmann v. People*, 203 Ill. 260, 67 N. E. 821.

The statute under consideration cannot be held, in view of its provisions, to be an unqualified mandate that the prisoner shall be released by the mere lapse of time, or the mere fact that he is not given a trial at a term of court commencing within four months of the time of his commitment. Not only must the time elapse, but the circumstances must be such that it is error for the court to longer detain him, and, as to these circumstances and to his right of discharge, he must obtain the judgment or ruling of the court having jurisdiction of the cause. If an indictment is found, then, thereafter, the benefit of this statute must be sought in the court having jurisdiction of the cause; that is, the court in which the indictment is pending. If the prisoner does not apply to that court and obtain from it an order discharging him, or refusing to do so, he is in no position to complain, as he should not be allowed to complain, on writ of error or otherwise, that he has not received an order he has not asked for. Before the action or refusal to act of the trial court can be assigned for error, the court must at least be called upon to act. Error cannot be assigned upon a mere failure of the court to discharge a prisoner under the provisions of this statute, who has not asked or moved the court to do so. It is not the intent or purpose of the law that mere errors committed or arising out of matters wherein a court is exercising a discretion, as in this case, during the pendency of the trial, and reviewable upon error, shall be reviewed by courts of concurrent jurisdiction, or any court for that matter, under a writ of habeas corpus. The writ of habeas corpus is not for the purpose of reviewing errors, and is only authorized in those cases where the court has acted without jurisdiction. *People ex rel. v. Allen*, 160 Ill. 400, 43 N. E. 332; *People ex rel. v. Foster*, 104 Ill. 156; *Ex parte Thompson*, 93 Ill. 89; *Ex parte Smith*, 117 Ill. 63, 7 N. E. 683; *People v. Murphy*, 202 Ill. 493, 67 N. E. 226; 15 Am. & Eng. Ency. of Law (2d Ed.) 172.

In the case of *People ex rel. v. Allen*, supra, it is said: "The court had jurisdiction of the person and subject-matter. There may be some question in regard to whether the judgment entered in the case was erroneous or not. However that may be, the judgment is not void, and for that reason there is no ground for writ of habeas corpus. If there was any error committed by the court in the trial of the cause or in the sentence of the petitioner, that is a question

which may be reviewed by writ of error, but the party has no right to a writ of habeas corpus." So in the case at bar, as the jury was impaneled at the March term—a term commencing within four months of the time of the arrest and commitment of the relator—and an indictment followed the arrest at the December term, the court then had jurisdiction of the subject-matter and of the person of the relator, and whether it lost that jurisdiction depended only upon whether it correctly or wrongfully determined the rights of the relator to discharge upon application made for that purpose, and, if it was incorrectly held by the court that the relator was not entitled to his discharge, that question, if properly preserved, was one for review upon writ of error.

It is suggested in the petition that this court should take jurisdiction of this cause, and consider it upon its merits, because the petition was presented to a circuit judge of Cook county and the writ denied. The circuit court, and the criminal court in which the trial was had, are courts of concurrent jurisdiction. The contention or view that the circuit court of Cook county is vested with jurisdiction to sit in review of the proceedings of the criminal court cannot for a moment be entertained. If the circuit court had assumed jurisdiction and granted the writ, predicated its action upon this statute, it would have been a nullity for lack of jurisdiction in the court, and could avail the relator nothing. The order of the circuit court would neither warrant the discharge of the relator nor protect him against rearrest. It is as essential that a court have jurisdiction in a proceeding for writ of habeas corpus as any other cause that may come before it. In original application for habeas corpus the jurisdiction of this court is not greater, or based on different grounds, than that of the circuit and superior courts. The views we have above expressed preclude us from the consideration of the case upon its merits, and leave to file the petition is denied.

Motion denied.

(213 Ill. 637)

DUNBAR et al. v. AMERICAN TELEPHONE & TELEGRAPH CO. et al.

(Supreme Court of Illinois. Dec. 13, 1904.)

ERROR—JURISDICTION—APPEAL PENDING.

1. Where parties injuriously affected by a decree have perfected an appeal therefrom to the Appellate Court, they are not entitled, so long as the appeal is pending, to prosecute error in the Supreme Court to review the same decree, though in doubt as to their remedy.

Error to Circuit Court, Cook County.

Controversy between Francis W. Dunbar and others and the American Telephone & Telegraph Company and others. Decree ad-

¶ 1. See Appeal and Error, vol. 2, Cent. Dig. § 47.

verse to Dunbar and others, and they bring error. Dismissed.

Henry S. Robbins, Pliny B. Smith, and John S. Miller, for plaintiffs in error. A. N. Waterman, Holt, Wheeler & Sidley, and Tenney, Coffeen & Hardin, for defendants in error.

SCOTT, J. This is a motion made by the defendants in error to dismiss the writ. The plaintiffs in error seek to have reviewed a decree of the circuit court of Cook county. At the time that decree was entered, plaintiffs in error prayed for and obtained an appeal to the Appellate Court for the First District. They filed a bond, and are engaged in prosecuting that appeal. This motion was made on the ground that the cause cannot properly be pending in this court and in the Appellate Court at the same time.

It is said, in response to that, that counsel for plaintiffs in error are in doubt as to which of the courts has appellate jurisdiction of this case. We deem that an insufficient answer. They prosecuted an appeal to the Appellate Court, and so long as that is pending they will not be permitted to invoke the jurisdiction of this court. Accordingly the writ will be dismissed.

Writ dismissed.

(212 Ill. 549)

PEOPLE ex rel. HOELDTKE v. MURPHY,

(Supreme Court of Illinois. Dec. 7, 1904.)

HABEAS CORPUS—LEGALITY OF DETENTION—GRANT OF STAY ORDERS.

1. Where sentence was entered immediately upon overruling a motion for new trial, which had been pending but a few days, and defendant was at all times kept in custody, the grant of stay orders on defendant's motion was not such an irregularity as to render defendant's detention after the execution of the sentence and his commitment to the penitentiary illegal, so as to entitle him to relief on habeas corpus.

Motion by the people, on relation of Henry Hoeldtke, for leave to file petition for a writ of habeas corpus against E. J. Murphy. Motion denied.

E. C. Rockwell and W. H. Martz, for relator.

RICKS, C. J. This is a motion for leave to file a petition for habeas corpus. The petitioner is confined in the penitentiary under a conviction for manslaughter. The indictment against him was found in February, 1902. He was tried and convicted in December, 1902. Motion for a new trial was made in January, and was overruled, and sentence entered. On the same day the petitioner moved the court for an allowance of 60 days in which to prepare and file a bill of exceptions, and also for a stay of the execution of the sentence for 40 days. Both of these motions were allowed. On April 8, 1903, a motion was made by petitioner for a

further stay of the execution of sentence, and that motion was allowed; and in like manner a number of motions for stays of the execution of the sentence were made by petitioner and allowed, the last of which motions was on November 10th, and a stay was then granted of two weeks. At the expiration of this last extension of two weeks the sentence was executed, and the petitioner was delivered to the warden of the penitentiary, in compliance with the judgment and sentence of the trial court. The petitioner now seeks to be released on habeas corpus on the ground that all these stays of execution of sentence by the trial court, granted on his own application, were without authority of law, and void, and that during all that time and ever since then he was imprisoned unlawfully, and should now be released from custody.

The case mainly relied upon is that of *People ex rel. Boenert v. Barrett*, 202 Ill. 287, 67 N. E. 23, 95 Am. St. Rep. 280, 63 L. R. A. 82. As the court view it, the Boenert Case is wholly different from the one at bar. Boenert was convicted of embezzlement by the verdict of the jury. Motion was made for a new trial, and pending the consideration of that motion the defendant was released on bail, and was permitted to go at large for 27 months without any order of court in the case. The court in that case did not dispose of the motion for new trial, nor enter any sentence, and 27 months after the trial and conviction, when the defendant got into some other trouble, he was brought into court, the motion for new trial was then overruled, and he was sentenced on the verdict. Upon an application to this court for a writ of habeas corpus the court held that the trial court had so far disregarded the law and its duty in the premises that it had lost jurisdiction to enter sentence, and Boenert was released from custody.

In the case now before us sentence was entered immediately upon overruling the motion for a new trial, which was not pending more than a few days. The defendant was all the time kept in custody. Whether or not the orders granting these stays were lawful or unlawful; whether or not, as a matter of strict law, a court, after having passed sentence, can, upon its own motion or upon the motion of anybody, stay the execution of sentence for a given time—does not seem to us to be material or controlling in this case. The petitioner was all the time kept in legal custody, and the orders entered by the court were presumably in furtherance of justice. The extension by a trial court to a convicted defendant of an opportunity to make up his record for the presentation of his case to a court of review cannot be regarded as such an unwarranted exercise of power as to annul the sentence of the law legally passed before the alleged unwarranted orders of stay were made. The petitioner did not, at the time, complain of his imprisonment pending

these orders, nor did he complain until after he had been in the penitentiary a number of months. He is now where the sentence of the law directed that he should be placed, and the court is not of the opinion that there is any such error or irregularity in the granting of these stay orders after sentence, at his own request, as should entitle him to any relief under this petition. The motion for leave to file the petition will be denied.

Motion denied.

(213 Ill. 530)

PEOPLE ex rel. WILSON v. MATTINGER
et al.

(Supreme Court of Illinois. Dec. 7, 1904.)

MANDAMUS—ELECTION CANVASSING BOARD—
ALTERATION OF CERTIFICATE—DISSOLUTION
OF BOARD—RESTORATION OF CERTIFICATE.

1. Where a county clerk and two justices selected by him, acting as a canvassing board, permitted the changing of a certificate of the return of votes from a district on the ground that an error had been made in the canvass of that district, mandamus would not lie to compel the board to reassemble and restore the certificate, the board not having been a permanent one, and it having in fact acted in canvassing the returns.

Mandamus by the people, on the relation of Alonzo E. Wilson, to compel Alfred E. Mattinger and others, constituting a canvassing board, to reassemble and restore a certificate from a certain district to its original condition. Motion for leave to file petition denied.

E. C. Akin, for petitioner.

RICKS, C. J. This is a motion for leave to file a petition for mandamus directed to the county clerk of Will county and to two justices of the peace, who, it seems, served with said clerk as canvassers of certain election returns. The petitioner was a candidate in the district composed of Du Page and Will counties, and it is alleged in the petition that in one of the districts in Will county the returns as brought to the county clerk showed some 240 votes for the petitioner, Wilson, and that after the said returns had been brought to the clerk's office, and when the canvassing board had been called together to make the canvass, some of the judges or clerks, or at least some person present in the room, suggested that there had been an error made in the canvass of the votes of that district by the judges and clerks to the number of 50 or 51 votes, and that the certificate of the judges to that extent was wrong. It is further alleged that such judges and clerks or persons were then and there allowed, in the presence of the canvassing board, to correct their certificate of the return of the votes. The effect of that was to change the result with reference to the petitioner and defeat his election. With those 51 votes he would have been elected, and without them he is defeated. He now petitions this court to direct, by mandamus, the county clerk and the said two justices who acted with him as the

board to reassemble and restore the certificate to its original condition.

It may be said, with reference to this motion and petition, that this canvassing board which we are asked to control by mandamus is not one of any permanent duration, but is a board created at the will of the county clerk, he himself composing one of its membership, and calling two justices, such as he may see fit, to constitute the other two members. When the board has performed its duties, whether well or otherwise, its official existence as a canvassing board is gone. The members of it have resumed their ordinary stations in life as individuals. They cannot any longer be said to be a canvassing board after the time that their duties have been performed. It is well recognized that a writ of mandamus will not issue against individuals as such, but must be against some person or persons clothed with authority to do the act sought to be compelled. These persons are no longer in authority, and on this phase of the petition the court has very great doubt of its power to issue an order to these individuals to reassemble and reorganize, and then do some act differently from what they have already done. Where some officer or some body of persons having authority refuses to do an act which it is his or its legal duty to do, mandamus may be resorted to to require such officer or body to act. If this canvassing board were now in existence and in session, and were refusing to do its duty—refusing to act—the court might be asked to require it to act. But it has in fact acted. The petitioner says it has acted improperly. If that be true, it is not a ground for a writ of mandamus to make it now act properly. If the petitioner was legally elected, as he contends he was, he has still his right to contest that question before the body of which he claims to have been legally elected a member. That is guaranteed to him and provided for by statute. We perceive no sufficient ground upon which we could assume jurisdiction in the case, and the motion will be denied.

Motion denied.

(213 Ill. 302)

KINSLOE et al. v. POGUE et al.

(Supreme Court of Illinois. Dec. 22, 1904.)

CERTIORARI—ACTS OF COUNTY COURT—CALLING
OF COUNTY SEAT ELECTION—PETITION
—WITHDRAWAL OF SIGNATURES.

1. Under the statute making the decision of the county court in calling a county seat removal election final, certiorari will lie to review its action in calling such an election when it has no jurisdiction.

2. Under Hurd's Rev. St. 1903, p. 553, c. 34, requiring petitions for the calling of a county seat removal election to be signed by two-fifths of the voters of the county, signers of such a petition may withdraw their names before the county court has taken final action on the petition.

¶ 2. See Counties, vol. 12, Cent. Dig. § 34.

Error to Appellate Court, Second District.

Petition by James B. Pogue and others for writ of certiorari to review the action of the county court of De Kalb county, Albert S. Kinsloe, and others, in calling a county seat removal election. From a judgment of the Appellate Court affirming a judgment granting the writ and quashing the proceedings of the county court, respondents bring error. Affirmed.

This is a petition for a writ of certiorari, filed in the circuit court of De Kalb county by certain citizens and legal voters of said county, to require the county court of said county to send up its record wherein said county court had ordered an election to be held in said county for the purpose of voting upon the proposition to remove the county seat of that county from Sycamore to De Kalb. The petition was in the usual form, and alleged said county court was without jurisdiction to make the said order, and that there was no method provided by law whereby the order of said county court could be reviewed by appeal or otherwise, as the statute provided the judgment of the county court, in ordering an election for the removal of a county seat, should be final. The writ was ordered to issue, and, having been served upon the county judge and the clerk of the county court of said county, the clerk of the county court filed as a return to said writ the record of the county court in the matter of calling said election. A hearing was had upon the petition and return, and a judgment was entered quashing the proceedings in the county court calling said election, which judgment has been affirmed by the Appellate Court for the Second District, and the record has been brought to this court for further review upon writ of error.

A. G. Kennedy, Co. Atty., and H. W. Prentice (L. C. Whitman and H. W. McEwen, of counsel), for plaintiffs in error. Hopkins, Dolph, Peffers & Hopkins (H. A. Jones and D. J. Carnes, of counsel), for defendants in error.

HAND, J. (after stating the facts). It is first contended the circuit court was without jurisdiction to issue the writ. The law is too well settled in this jurisdiction to now be questioned that the circuit courts of this state may award the common-law writ of certiorari to all inferior tribunals and jurisdictions within the state where it appears that they have exceeded the limits of their jurisdiction, or where they have proceeded illegally, and no appeal is allowed, or other mode provided by law for reviewing their proceedings. *People v. Wilkinson*, 13 Ill. 660; *Whitmer v. Commissioners of Highways*, 96 Ill. 289; *Commissioners of Mason & Tazewell Special Drainage District v. Griffin*, 134 Ill. 330, 25 N. E. 995; *Commissioners of Highways v. Quinn*, 136 Ill. 604, 27 N. E. 187; *Glennon v. Britton*, 155 Ill. 232, 40 N. E. 594; *Commissioners of Highways v.*

Barnes, 195 Ill. 43, 62 N. E. 775. In *People v. Wilkinson*, supra, the writ was issued by the circuit court to the county court, and in *Commissioners of Mason & Tazewell Special Drainage District v. Griffin*, supra, it was held that the writ lies, when issued by the circuit court, to all inferior tribunals and officers exercising judicial and quasi judicial functions. As has heretofore been said by this court: "It is unnecessary to multiply cases upon the authority of the court to issue this writ. It is a common-law power, and is vested in our circuit courts, which in this state are the highest courts of original jurisdiction." *People v. Wilkinson*, supra; *Glennon v. Britton*, supra. And in the *Griffin* Case it was said (page 340, 134 Ill., page 997, 25 N. E.): "The general rule seems to be that this writ lies only to inferior tribunals and officers exercising judicial functions, and the act to be reviewed must be judicial in its nature, and not ministerial or legislative. *Locke v. Lexington*, 122 Mass. 290; *State v. Mayor*, 84 Minn. 250, 25 N. W. 449; *In re Wilson*, 32 Minn. 145, 19 N. W. 723; *Robinson v. Supervisors*, 16 Cal. 208; *Ex parte Fay*, 15 Pick. 243; *Stone v. Mayor*, 25 Wend. 157; *Esmeralda v. District Court*, 18 Nev. 438, 5 Pac. 64; *Thompson v. Multnomah County*, 2 Or. 84. But it is not essential that the proceedings should be strictly and technically 'judicial,' in the sense in which that word is used when applied to courts of justice. It is sufficient if they are what is sometimes termed 'quasi judicial.' The body or officers acting need not constitute a court of justice, in the ordinary sense. If they are invested by the Legislature with the power to decide on the property rights of others, they act judicially in making their decision, whatever may be their public character. *Robinson v. Supervisors*, supra."

The statute authorizing the county court to call a county seat removal election provides that the decision of the county court in calling said election shall be final, which is an equivalent to failing to provide for the review of the action of the court in that regard by appeal or otherwise. We think it clear, therefore, the circuit court did not err in issuing the writ.

The next question to be considered is, was the writ properly issued in this case? The statute providing for the removal of county seats (*Hurd's Rev. St. 1903*, p. 553, c. 34) provides the petition for removal must be signed by a number of legal voters of the county equal to two-fifths of the votes cast in said county at the last preceding presidential election. The court found that at the presidential election preceding the filing of the petition 8,169 votes were cast in De Kalb county, and that two-fifths thereof was 3,268. The petition, when filed, contained 3,987 signatures, which were reduced to 3,910 by striking therefrom certain names which were contested. On the convening of the county court at its September term, 1903—that be-

ing the term at which the petition properly came up for hearing—1,252 persons who had signed the petition for removal presented their petitions in the county court, asking that they be permitted to withdraw their names from the removal petition. This the court declined to permit them to do. Had those names been permitted to be withdrawn from the removal petition, that petition, which was jurisdictional, would not have contained, by at least 500, the requisite number of signatures to give the county court jurisdiction to order the election, and the petition, for want of a sufficient number of signatures, must have failed, and the court should have dismissed the same. The question whether the writ was properly issued in this case is therefore narrowed to the question whether those persons who sought to withdraw their names from the removal petition should have been permitted to withdraw them by the county court.

The petitions of withdrawal were presented to the court before the court had finally acted upon the petition and determined to call an election, and we are of the opinion they were presented in time, and that the persons signing them should have been permitted by the court to withdraw their names from the petition for removal. The right of a petitioner to withdraw his name from a petition before the tribunal authorized to act upon the petition has taken final action has recently been considered by this court in two cases (*Littell v. Board of Supervisors of Vermilion County*, 198 Ill. 205, 65 N. E. 78, and *Theurer v. People*, 211 Ill. 296, 71 N. E. 997), wherein the authorities were reviewed, and the conclusion was reached that a petitioner has the right to withdraw his name from the petition at any time before the tribunal created by law to determine the matter submitted by the petition has finally acted. We see no difference in principle between the case at bar and those cases, and think the doctrine there announced should control in this case.

As the names of the petitioners who signed the petitions of withdrawal should have been eliminated from the petition for removal, it is apparent the county court, after said petitions of withdrawal were filed, exceeded its jurisdiction in ordering said election, and that the circuit court did not err in quashing the proceedings and the order of the county court in calling said election. The judgment of the Appellate Court will therefore be affirmed.

Judgment affirmed.

(213 Ill. 291)

WESTON et al. v. TEUFEL et al.

(Supreme Court of Illinois. Dec. 22, 1904.)

WILL CONTEST—UNDUE INFLUENCE—EVIDENCE—INSTRUCTIONS—HARMLESS ERROR.

1. On the trial of a will contest, the admission in evidence of a memorandum, indorsed on the will by the probate judge, showing that it had

been proved and admitted to probate, was reversible error.

2. Error in admitting in evidence, on the trial of a will contest, a memorandum, indorsed on the will by the probate judge, showing it had been proved and admitted to probate, was not cured by a necessary averment in the bill that the will had been admitted to probate.

3. Such error was not cured by an instruction that the order of the probate court admitting the will to probate should not be considered by the jury in arriving at their verdict.

4. The general rule that on the whole case the burden of proving undue influence is on the contestants of a will applies as well to undue influence resulting from an abuse of a fiduciary relation between the testator and a beneficiary as to undue influence arising from other causes.

5. Separate instructions in a will contest, each of which isolates a fact and tells the jury that such fact is not sufficient to overthrow the will, are erroneous, as inducing the jury to find for proponents, when a consideration of all the circumstances together might lead them to find in favor of contestants.

6. In a will contest, the jury were instructed that, to vitiate a will on account of undue influence, it must appear that there was something wrongfully done, amounting to a specimen of fraud, compulsion, "or other conduct improper under the instructions herein." Held erroneous, as the instructions disclosed no language to which the words quoted could apply, but many circumstances were proven and relied on to show undue influence not specifically referred to in the instructions, and the jury might conclude that they were excluded from their consideration.

7. The jury were instructed that, if they disbelieved a witness as to any material fact, they were entitled to disregard his entire testimony, except so far as it was corroborated by other competent testimony, or by facts and circumstances in evidence. Held that, the jury not being the judges of the competency of evidence, the instruction was erroneous, in that it used the word "competent," instead of "credible," or other word of like import, and thereby required the jury to give weight to the testimony of an impeached witness in so far as he was corroborated by competent evidence, even though they did not regard such evidence as credible.

Error to Superior Court, Cook County; Axel Chytraus, Judge.

Bill by Walter B. Weston and others against Charles Teufel and others. There was a decree in favor of defendants, and plaintiffs bring error. Reversed.

C. J. Michelet and Samuel B. King, for plaintiffs in error. Walker & Payne, for defendants in error Teufel, McElhern, and Gould. Harvey B. Hurd, for defendants in error Bailey, Mann, and Crockett. George P. Merrick, for defendants in error Tubman.

SCOTT, J. Plaintiffs in error filed their bill in the superior court of Cook county to set aside the will and codicil of Nancy Bailey, deceased, which had been admitted to probate in the proper court of that county on the 9th day of December, 1896, upon the grounds that she was of unsound mind at the time of execution thereof, and that the execution of said will and codicil was procured by the exercise of undue influence on the part of Charles Teufel. After verdict, there was a decree for proponents, which is brought here for review.

Nancy Bailey died on August 19, 1896, at the age of 64 years, possessed of property worth approximately \$150,000. Her heirs at law were John McAllister and James McAllister, brothers, Jane Hart, a sister, and Walter and Charles Weston, children of a deceased sister. The will and codicil were executed on the same day and at the same time, the purpose of the codicil being to add a provision, and both will be hereinafter referred to as "the will." Testatrix, after providing for the payment of debts and funeral expenses, in addition to making several small bequests, gave to Charles, Walter, and Milton Weston, \$500 each; to James McAllister and Jane Hart, "Bailey's Opera House, Evanston, in fee simple"; to Charles Hart, a son of Jane Hart, "the premises 815 Davis street, Evanston"; to Charles Teufel, "my residence, known as 'The Oaks,' No. 2907 Sheridan Road, Evanston." The residue was given to James McAllister, Jane Hart, and Charles Hart. Charles Teufel was nominated executor. By one clause of the will she excluded John McAllister from sharing in her estate. The proof tends to show that the real estate devised to Teufel was in value about one-third of her property. He is the principal devisee.

For many years the testatrix had been an inebriate, habitually addicted to the use of intoxicating liquor in excessive quantities. Charles Teufel, at the time of the execution of the will, was a bachelor 44 years of age. The bill avers, and the evidence tends to prove, that for several years prior to the execution of the will he had been her man of business, and had sustained very close confidential relations with her; that she was in a debilitated physical and mental condition, consequent upon intoxication, habitual and long continued; that she reposed great confidence in him; that he had acquired such dominion and control over her that her will readily yielded to his persuasions; and that by reason thereof a fiduciary relation existed between them, by the abuse of which he secured the execution of the will in question. The will was drawn on July 22, 1896. On that day Charles Teufel went with her to the office of Charles S. Cutting, an attorney in the city of Chicago, with whom she had no previous acquaintance, for the purpose of having her will drawn. She informed the lawyer of the purpose of her visit, and he began to make memoranda in regard to the disposition of her property, when he was called away. He suggested that Charles Teufel, who was still present, should complete the memoranda in his absence. When he returned Teufel had acted on the suggestion. The attorney then read the items aloud, and the testatrix assented to them. Teufel withdrew, and Mrs. Bailey remained a half or three-quarters of an hour, discussing her business affairs and stating the reasons that impelled her in making the disposition of her property that she was making,

and then took her departure. On the next day, in accordance with an arrangement made with her, Mr. Cutting took the will to Evanston, the place of her residence, where it was executed in the office of her physician, Charles Teufel being present at the time of the execution; and it appears that he had accompanied her to that office on that occasion. Later on the same day she departed from Evanston on a journey to Ireland, where she arrived on August 5th, and where her death occurred on August 19th of the same year.

It is first urged that the verdict is against the manifest weight of the evidence. A previous trial had taken place, in which a verdict had been returned for the contestants. That verdict was set aside by the nisi prius court, because, as it is said, the jury was not properly instructed. A large amount of testimony was taken in the second trial. It covers 272 pages of the printed abstract. It is sharply conflicting and irreconcilable, and we do not think the decree should be disturbed on the ground above suggested. A large number of witnesses testified on behalf of proponents, and a somewhat lesser number for the contestants. We have carefully considered this testimony, and, as the case must be tried again, we refrain from any discussion of the evidence, except to say that we consider the case a close one on the proof, more especially so upon one of the two questions presented by the pleadings.

In making their case in chief, the proponents introduced the certificate of the oath of the witnesses taken at the time of the first probate, and were also permitted to introduce, over the objection of the contestants, an indorsement on the will, made by the judge of the probate court, which was in the words and figures following: "Will proved and admitted to probate in open court, this 9th day of September, 1896. Christian C. Kohlsaat, Probate Judge." The admission of this indorsement is assigned as error. We have heretofore held that a certified copy of the order of the court admitting a will to probate was not properly admitted in evidence on the trial of a will contest, and, in a case where the evidence is conflicting, that its admission is prejudicial to the contestants. *Craig v. Southard*, 148 Ill. 37, 35 N. E. 361.

It is first sought to obviate this error by showing that the bill averred that the will had been admitted to probate in the probate court of Cook county. If this averment cures the error, it is manifest that the error is one that could not be availed of in any case, because, without an averment in the bill that the will had been admitted, no reason would appear for invoking the power of a court of equity to set it aside. Under the statute, the sole question to be determined by the jury is "whether the writing produced be the will of the testator or testatrix or not." *Hurd's Rev. St. 1903, c. 148, § 7*. It is clear the in-

dorsement in question could throw no light on that issue.

In *Graybeal v. Gardner*, 146 Ill. 337, 34 N. E. 528, the will had been admitted to probate in the circuit court upon an appeal from the probate court, and a bill in chancery thereafter filed to contest the validity of the instrument. In the trial of the issue made on the bill, the court permitted the proponents to read to the jury the order of the circuit court admitting the will to probate, and this was held to be error, but not of a reversible character, for the reason that it merely recited the testimony of the subscribing witnesses and expressly stated that the will was admitted to probate on the evidence of those witnesses alone, and that, as a certificate of the evidence of those witnesses would have been prima facie proof of the validity of the will, the order simply amounted to proving the legal effect of the evidence of those witnesses, and was therefore harmless. The same thing cannot be said of this memorandum, as it does not show upon what evidence it was based. The conclusion that the jury would probably reach would be that the probate judge had made an investigation and ascertained that the will was valid. Whether that determination had been reached by that officer upon the testimony of the subscribing witnesses, or upon that of many other persons, the jury would not know.

It is also suggested that the jury were instructed that the order of the probate court admitting the will to probate should not be considered in arriving at their verdict. We do not think this cures the error. In the first place, the objectionable evidence was, not the order admitting the will to probate, but a memorandum indorsed on the will by the probate judge. In the second place, the evidence was harmful, for the reason that it gave to the cause of the proponents the support of the finding of the probate court. When the jury had once been acquainted with the fact that such a finding had been made by Judge Kohlsaat, the wrong had been done, and the instruction, if they had understood it to apply to this memorandum, could not have removed from their minds the impression that a verdict for contestants would be adverse to the views of the probate judge. The admission of the memorandum in this case was reversible error.

The court instructed the jury that it was incumbent upon the contestants to establish one or the other of the grounds upon which the bill was based by a preponderance of the evidence, and this is said to be error so far as the question of undue influence is concerned. Where a fiduciary relation exists between the testator and a devisee who receives a substantial benefit from the will, and where the testator is the dependent and the devisee the dominant party, and the testator therefore reposes trust and confidence in the devisee, as in the ordinary relation of attorney and client, and where the will is written,

or its preparation procured, by that beneficiary, proof of these facts establishes prima facie the charge that the execution of the will was the result of undue influence exercised by that beneficiary, and this proof, standing alone and undisputed by other proof, entitles contestants to a verdict. 1 *Woerner on American Law of Administration* (2d Ed.) § 32; *Richmond's Appeal*, 69 Conn. 226, 22 Atl. 82, 21 Am. St. Rep. 85; *Marx v. McGlynn*, 88 N. Y. 357; *Garvin's Adm'r v. Williams*, 44 Mo. 465, 100 Am. Dec. 314; *Coghill v. Kennedy*, 119 Ala. 641, 24 South. 459; *Thomas v. Whitney*, 186 Ill. 225, 57 N. E. 808. This results from the distinction, pointed out in the authorities cited, between undue influence arising from coercion or active fraud and undue influence resulting from the abuse of a fiduciary relation existing between the parties. Proof of the relationship, and of the fact that the beneficiary, in whom trust and confidence were reposed by the testator, prepared or procured the preparation of the will by which he profits, may or may not be a preponderance of all the evidence on that subject. When that proof is made, the presumption arises therefrom that undue influence induced the execution of the document. That proof casts upon proponent, if he is to sustain the will, the necessity of showing that the execution of the will was the result of free deliberation on the part of the testator and of the deliberate exercise of his judgment, and not of imposition or wrong practiced by the trusted beneficiary. This, however, does not change the general rule, which is that upon the whole case the burden of proof is upon the contestants to establish the undue influence. No instruction presenting the doctrine pertaining to fiduciary relations, above recited, was offered by plaintiffs in error, nor was any instruction given inconsistent therewith.

There are five of the proponents' instructions, however, which are erroneous. The thirteenth, fourteenth, fifteenth, and sixteenth instructions each in substance tells the jury that, if Nancy Bailey executed the instrument in question of her own free will at a time when she possessed the requisite mental capacity, then that instrument is her will; the thirteenth and fourteenth, in differing language, direct the jury that this is true, even though, prior to the execution of this instrument, she had made another and different will, and had made statements that she might change this will upon her return from Ireland; the fifteenth instructs them that the will would not be invalidated by the fact that Nancy Bailey acted upon the suggestions and advice or persuasion of Charles Teufel; the sixteenth advises that the fact that the beneficiaries are those by whom the testatrix was surrounded and with whom she stood in confidential relations, or that Charles Teufel had for years been in control of her estate, are not grounds for inferring undue influence. Instructions of this character are misleading

and calculated to confuse the jury. West Chicago Street Railroad Co. v. Petters, 196 Ill. 298, 63 N. E. 662; Drainage Com'rs v. Illinois Central Railroad Co., 158 Ill. 353, 41 N. E. 1073. The objection is that each isolates a fact, and tells the jury that such fact is not sufficient to overthrow the will. If this course was pursued with reference to each fact which contestants established, the proponents could have the jury instructed, by a separate instruction, that each one of many circumstances relied upon by contestants was not sufficient to warrant the jury in returning a verdict finding that the paper offered was not the will of the testatrix. This course would probably induce the jury to find for the proponents, when a consideration of all the circumstances together, free from the influence of such instructions, might lead the jury to the conclusion that the evidence preponderated in favor of the contestants.

The fifteenth instruction is also erroneous in another respect. It contains this language: "To vitiate a will on account of undue influence, it must appear, from the evidence, that there was something wrongfully done, amounting to a specimen of fraud, compulsion, or other conduct improper under the instructions herein." An examination of the entire series of instructions discloses no language to which the words italicized above could apply. In fact, many circumstances were proven and relied upon by contestants to establish undue influence which are not specifically referred to in the instructions in any manner, and the jury might well conclude that such circumstances were by this instruction excluded from their consideration.

The instruction given by the court at the instance of proponents in reference to the credibility of witnesses is inaccurate. By it the jury were instructed that, if they believed from the evidence that any witness had knowingly testified falsely as to any material fact, then they were entitled to disregard entirely the testimony of that witness, except in so far as that testimony was corroborated by other competent testimony, or by facts and circumstances in evidence in the case. The jury are not the judges of whether evidence is or is not competent. The instruction erroneously uses the word "competent," instead of the word "credible," or other word of like import. Evidence introduced may be competent, and not credible, and the jury would, under this instruction, be required to give weight to the testimony of an impeached witness, in so far as that witness was corroborated by competent evidence, even though they did not regard the corroborating evidence as credible.

A number of other errors are assigned, a careful consideration of which has led to the conclusion that they are each without merit. To discuss them would unnecessarily extend this opinion. The decree will be reversed, and the cause will be remanded to the superior court of Cook county for further pro-

ceedings consistent with the views expressed in this opinion.

Reversed and remanded.

(180 N. Y. 83)

CULLINAN, Commissioner of Excise, v. BOWKER et al.

(Court of Appeals of New York. Dec. 30, 1904.)

PRINCIPAL AND AGENT—DELEGATION OF AUTHORITY—EXECUTION OF BOND.

1. Where a surety company appointed an agent to execute and attach the seal of the company to bonds filed under the liquor tax law, the bonds to be signed by such agent, the agent cannot delegate his powers to a clerk in his office; and where a county treasurer, in the absence of the agent, and with knowledge of his authority, accepts a bond issued by his clerk, who stated that the agent would sign it on his return, and the certificate for which the bond had been issued had been forfeited for a violation of the liquor tax law, the company was not liable, though the agent on his return, in ignorance of the forfeiture, affixed his signature to the bond.

Vann, Bartlett, and Martin, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, Third Department.

Action by Patrick W. Cullinan, Commissioner of Excise, against Harry J. Bowker and the Aetna Indemnity Company. From an order of the Appellate Division (84 N. Y. Supp. 696) reversing a judgment (82 N. Y. Supp. 707) in favor of plaintiff and granting a new trial, plaintiff appeals. Affirmed.

This action was brought by the plaintiff, as State Commissioner of Excise of the state of New York, against the principal and surety upon a bond, which had been given to the people of the state upon an application for a liquor tax certificate to recover the penalty of the bond by reason of a violation of its provisions. The plaintiff had judgment against the defendant, but upon appeal to the Appellate Division in the Third Department, the judgment was reversed, and a new trial of the action was ordered. From that determination the plaintiff has appealed to this court.

The bond was executed by the applicant, the defendant Bowker, as principal, and by the Aetna Indemnity Company of Hartford, a corporation of the state of Connecticut, as surety. The Aetna Company was authorized to execute bonds in such cases, and had appointed, under an instrument filed with the county treasurer, one Channell as "its resident assistant secretary to execute and deliver and attach the seal of said company to any and all bonds to be filed in any city or county of the State of New York, under the provisions of the Liquor Tax Law of the State of New York, * * * all said bonds shall be also duly signed in all cases by the president or vice-president." The bond in the present instance, when delivered to the county treasurer upon the application for the liquor tax certificate, bore the signature of the president of the company, but it had not been

signed by Channell. The bond recited its penal obligation to the people, and the proposed application by Bowker, the principal, for a liquor tax certificate. Its condition, briefly stated, was that the principal in the bond, while the business for which the liquor tax certificate was given shall be carried on, would not violate its provisions, or any of those of the liquor tax law. It concluded in this language: "In witness whereof, the said principal hereto has duly signed these presents and the surety hereto has caused its corporate seal to be hereunto affixed, and these presents to be signed by F. T. Maxwell, its president. This bond shall bind said surety company only when signed by F. S. Channell, its lawful resident assistant secretary at Malone, N. Y., county of Franklin, N. Y., whose certificate of authority is duly filed with the officer authorized to issue liquor tax certificates for the county in which the traffic in liquors is to be carried on by said principal." At the time of the application to the county treasurer for the liquor tax certificate, Channell was absent, and a clerk in his office undertook to deliver the bond, without Channell's signature. Prior to Channell's departure, his clerk had asked him the question whether, in his absence, it would be "all right if I issue a bond to any one who makes application, and that you will sign it when you get home"; to which Channell answered, "Yes, if it is agreeable to Mr. Adams." Adams was the county treasurer, and, before this bond was delivered to him, Channell's clerk had telephoned to him that Bowker had made application for a bond. He testifies that he "said Mr. Channell is not here, but I will issue the bond and give it to him, and Mr. Channell will sign it when he comes home, and I said, 'How will it be with you?' He said, 'All right,' or words to that effect." Thereupon the bond was given and filed, and Bowker obtained his liquor tax certificate. Subsequently, and prior to the expiration of the period for which the certificate ran, he was tried and convicted, and his certificate was declared forfeited, upon a charge of having violated the liquor tax law in the sale of liquor to Indians. Channell, the agent of the Aetna Company, upon his return, but without any knowledge on his part, or on the part of his clerk, that Bowker had already been convicted, affixed his signature to the bond. It also appears that the company was not informed that Channell's signature was lacking to the bond when accepted by the county treasurer.

S. B. Mead and Albert O. Briggs, for appellant. John P. Badger, for respondent.

GRAY, J. (after stating the facts). The salient facts in this case are that the bond which the county treasurer accepted was an incomplete instrument, for the want of the signature of the company's representative at Malone; that the company's representative

had never passed upon Bowker's application for the company to become surety for him; that the county treasurer was aware of these facts at the time the bond was offered; and that the company never had knowledge of the delivery of its obligation in an incomplete form, and without the exercise of its agent's judgment upon the application.

The appellant's claim is that the powers of Channell, the company's resident agent, were unlimited, and that he could "waive the provision in the bond which required his name to be signed thereto." Undoubtedly Channell possessed a wide and general authority to bind the company by issuing its bonds to secure the grant of liquor tax certificates to applicants, but I know of no principle of the law of agency, and I am not aware of any authority in the reports, which will sustain the doctrine now contended for by the appellant, in all its length and breadth. In order to do so, we should have to hold that, though Channell was appointed the company's agent for a particular class of business, wherein the assumption of an obligation was to be through his own act and evidenced by his own signature, he might nevertheless waive the exercise of his judgment and delegate to another the performance of the duty confided to him.

The powers of a general agent extend to the doing of all acts connected with the business of his principal, and his authority will be deemed to include all usual means for the effective performance of his duties, in the employment of clerks, or of subordinate agencies, for the performance of acts where an exercise of the agent's judgment, or discretion, is not demanded nor presumed. Reference is made by the appellant to decisions in cases arising upon contracts of insurance, and they furnish many illustrations of the extreme lengths to which the courts have gone in enforcing the liability of insurance companies upon obligations created for them by their agents with an apparent disregard of the conditions imposed upon the exercise of their powers. However far those decisions have gone, in this court, certainly, I think I am safe in observing that there has steadily been an observance of this qualification: that, if the limitations upon the agent's authority to act are known to the person with whom he is dealing, or if the transaction is such as to charge him with the duty of inquiring into the extent of the agent's authority to do the particular act, the principal will be protected, if the act be unauthorized or in clear excess of the agent's powers, and if the principal be an innocent actor in the transaction. The general rule with respect to the powers of a general agent was stated by the Supreme Court of the United States in *Insurance Company v. Wilkinson*, 13 Wall. 222, 20 L. Ed. 617, in this language: That "they are, *prima facie*, coextensive with the business intrusted to his care, and will not be narrowed by limitations not communi-

cated to the person with whom he deals." This statement of the rule has received the indorsement of this court in *Pechner v. Phoenix Ins. Co.*, 65 N. Y. 195, 209, *Marvin v. Universal L. Ins. Co.*, 85 N. Y. 278, 283, 39 Am. Rep. 657, and *Walsh v. Hartford F. Ins. Co.*, 73 N. Y. 5. In the latter case it was said that "if a person dealing with an agent knows that he is acting under a circumscribed and limited authority, and that his act is in excess of or an abuse of the authority actually conferred, then, manifestly, the principal is not bound, and it is immaterial whether the agent is a general or a special one. The principal has the unqualified right, as between himself and the agent, to define and limit the agent's authority." *Quinlan v. Providence W. Ins. Co.*, 138 N. Y. 356, 31 N. E. 31, 28 Am. St. Rep. 645, more recently reasserted the same doctrine. In that case it may be noted, it was held, where a policy of insurance prescribed that the company should not be bound unless the execution of the agent's power was indorsed in writing upon the policy, that "the condition is of the essence of the authority, and the consent or act of the agent, not so indorsed, is void." Broad as may be the authority of corporate agents to waive conditions which enter into the validity of a contract of insurance at its inception, however appearing in the policy when delivered (*Berry v. American C. Ins. Co.*, 132 N. Y. 49, 58, 30 N. E. 254, 28 Am. St. Rep. 548), I think that the present case is not within the operation of any such rule. It is a case where the extent of the agent's authority to bind the principal at all was made known to the party with whom he was dealing, and where the principal had the right to rely upon the fact for its protection. The instrument by which the *Ætna* Company constituted Channell its agent authorized him "to execute and deliver and attach the seal of the company to any and all bonds to be filed * * * under the provisions of the Liquor Tax Law of the State," etc., and this implies plainly that he was intrusted with a duty which necessarily involved the exercise, on his part, of judgment before executing and delivering the bonds of the company which were deposited with him for the purpose. The bonds themselves were explicit in declaring that they "shall bind said surety company only when signed by F. S. Channell, its lawful resident assistant secretary at Malone, N. Y., county of Franklin, N. Y., whose certificate of authority is duly filed with the officer authorized to issue liquor tax certificates," etc. The county treasurer, who was that officer, and who, as such, was to approve of the bond accompanying the application for a certificate, had full knowledge upon the subject of the agent's powers. Indeed, when notified of Channell's absence by his clerk, he was willing to accept the bond upon the representation of the clerk that Channell would sign it when he returned. Therefore he took the risk that

the obligation might never become binding upon the surety company.

Whatever we might assume with respect to the general powers of Channell to bind his principal, he was not authorized to delegate to another the exercise of the power to decide upon an application and upon the character of the applicant in such cases. He might authorize his clerk to do a great many things in the ordinary course of the business of the agency which, possibly, by reason of its magnitude, he might be incapacitated from doing personally, or which were more or less mechanical, or mere matters of detail; but the purpose for which his agency was constituted was that his judgment or discretion should be exercised in issuing the bonds. To that extent the authority was personal. He could not delegate to his clerk the power to pass upon the application for the company to become a surety, any more than, in the case of *Commercial Bank v. Norton*, 1 Hill, 501, to which the appellant refers, the general agent was deemed capable of delegating to a clerk the power, generally, to bind the partnership by an acceptance of commercial paper. In that case the agent had passed upon the question of accepting the bill, and he merely directed the bookkeeper of the firm to write the acceptance. That was a mechanical act. In the present case, what Channell did prior to his departure was to authorize his clerk to "issue a bond to any one who makes application," and to say that he would sign it upon his return. That was obviously the delegation of a particular power, with the exercise of which the agent was personally intrusted. He never passed upon the application in question, and the company could not be deprived of the benefit of the exercise of his judgment in the matter, for which it had stipulated.

For these reasons, I advise that the order appealed from should be affirmed, and that judgment absolute should be rendered against the plaintiff, pursuant to the stipulation.

VANN, J. (dissenting). The plaintiff is the State Commissioner of Excise, and the defendant is a foreign corporation authorized to execute bonds required from holders of liquor tax certificates pursuant to the provisions of the liquor tax law. One Channell was the resident assistant secretary and general agent of the defendant, residing at Malone, N. Y., and as such had received blank bonds, executed by one of its officers, which provided that they should become binding only when signed by him. On the 18th of December, 1901, the defendant Bowker applied to the county treasurer of Franklin county for a liquor tax certificate, under subdivision 1 of section 11 of the Liquor Tax Law, Laws 1897, p. 210, c. 312. At the same time Bowker paid the tax and filed a bond executed by himself, as principal, and by the defendant through its

president, as surety, but it had not been signed by Channell, because he was away from home. Before going away for the winter on account of his health, Channell had instructed his clerk, who had charge of his insurance business during his absence, that if it was agreeable to the county treasurer he might issue and deliver liquor tax bonds to any one who made application therefor, and said that he would sign them on his return. Said bond was issued by the clerk under this authority, the premium was paid to him, and, in behalf of Channell, he made the usual monthly report to the defendant, and paid over the premium, with others, in the usual way. The bond was approved and accepted by the county treasurer on the 18th of December, 1901, upon the assurance of the clerk that it would be signed by Mr. Channell on his return, and, in reliance thereon, a liquor tax certificate was issued to the applicant on the same day. On March 27, 1902, Bowker was found guilty upon an indictment which accused him of selling liquor to an Indian in violation of subdivision 4 of section 30 of the liquor tax law. A fine was imposed, which he paid, and his liquor tax certificate was canceled. Channell did not return until about the 13th of May, when he signed said bond without knowing that Bowker had violated the law and had been convicted therefor. The defendant retained the premium, and, so far as appears, never offered to return the same. This action, which was brought to recover the penalty of the bond, was tried before the court without a jury, and the trial judge found in favor of the plaintiff, but upon appeal the Appellate Division reversed his judgment, and ordered a new trial on questions of law only, the facts being allowed to stand undisturbed.

The delegation of authority to transact any business includes authority to transact it in the usual way. *Ellis v. Albany City Fire Ins. Co.*, 50 N. Y. 402, 406, 10 Am. Rep. 495; *Bodine v. Exchange Fire Ins. Co.*, 51 N. Y. 117, 123, 10 Am. Rep. 566. In the latter case the court said: "We know, according to the ordinary course of business, that insurance agents frequently have clerks to assist them, and that they could not transact their business if obliged to attend to all the details in person, and these clerks can bind their principals in any of the business which they are authorized to transact. An insurance agent can authorize his clerk to contract for risks, to deliver policies, to collect premiums and take payment of premiums in cash or securities, and to give credit for premiums or to demand cash; and the act of the clerk in all such cases is the act of the agent, and binds the company just as effectually as if it were done by the agent in person. The maxim of *delegatus non potest delegare* does not apply in such a case." Judge Story, referring to this maxim, says in his work on Agency (section

14): "In general, therefore, when it is intended that an agent shall have a power to delegate his authority, it should be given to him by express terms of substitution. But there are cases in which the authority may be implied, as where it is indispensable by the laws, in order to accomplish the end, or it is the ordinary custom of trade, or it is understood by the parties to be the mode in which the particular business would or might be done." In reliance on this principle, it was held in *Clark v. Glens Falls Ins. Co.*, 21 N. Y. Wkly. Dig. 197, affirming the judgment of the Special Term upon the opinion of Martin, J., that an insurance agent can authorize his clerk to countersign policies, and the act of the clerk in such case is the act of the agent, and binds the company as effectually as if it were done by the agent in person, even though the policy requires that it shall be countersigned by the authorized and commissioned agent. So Mr. May, in his work on Insurance, says: "Generally, agents of insurance companies authorized to contract for risks, receive and collect premiums, and deliver policies, may confer upon a clerk, or subordinate, authority to exercise the same powers. The service is not of such a personal character as to come under the maxim *delegatus non potest delegare*. * * * It is not to be expected that a general agent should personally attend to all the affairs under his control. He may employ all necessary clerks, subagents, and surveyors to enable him to transact the business with accuracy, intelligence, and promptness, and may authorize his clerks to contract for risks, so that they may bind the company by parol contract." 1 May on Ins. §§ 154, 154a. As was said in *Arff v. Star Fire Ins. Co.*, 125 N. Y. 57, 65, 25 N. E. 1073, 1075, 10 L. R. A. 609, 21 Am. St. Rep. 721: "An agent of an insurance company has the right to, and, indeed, it is the expectation of the company that he will, employ such clerks and other assistants as may be necessary and proper in order that he may do the business for which he has been appointed agent. * * * Upon the question of the character of the service, we think it is sufficient that the person is engaged by the agent to do for him some portion of the ordinary, usual, and well-known duties pertaining to the position of the agent, and what he does in the course of that employment and within its general scope is done by the agent. * * * Nor does the provision in the policy that no one not holding the commission of the company shall be considered as its agent prevent the agent's employment of the usual and indeed necessary clerical and other assistants, in order to enable them to properly perform their duties as commissioned agents of the company. And, when thus employed, the ordinary rules of law are applicable to their acts and positions. We think that if Streck-

er were exclusively employed by the agents, and that his duties could only be honestly discharged while the agreement between them lasted by giving his entire service in that line to the agents of the defendant, and if he were thus employed at the time that he procured this application and received this notice, the defendant is bound by such notice the same as if it had been given in person to their agents." See, also, *Kuney v. Amazon Ins. Co.*, 36 Hun, 66; *Cooke v. Aetna Ins. Co.*, 7 Daly, 555; *Eclectic Life Ins. Co. v. Fahrenkrug*, 68 Ill. 463; *Manufacturers' & Merchants' Ins. Co. v. Armstrong*, 45 Ill. App. 217, 219; *Myers v. Keystone Ins. Co.*, 27 Pa. 268, 270, 67 Am. Dec. 462; *Hibernia Ins. Co. v. O'Connor*, 29 Mich. 241; 21 Am. & Eng. Encyc. Law, 856; 2 Wood on Ins. § 433.

By a formal power of attorney Mr. Channell was authorized by the defendant "to execute and deliver and attach the seal of said company to any and all bonds to be filed in any city or county of the state of New York, under the provisions of the Liquor Tax Law of the State of New York." There was no limitation whatever upon this broad power. Such an instrument must be read in the light of what the parties, according to its terms, must have had in contemplation. A general agent whose territory embraced the entire state, could not reasonably be expected to personally transact all the business which might come to him. Of necessity he would have to employ clerks and subagents, giving them proper instructions, and holding them responsible to himself for compliance therewith, as he was responsible to the company for all he did through them. He could not, or at least might not be able to, do the business of the defendant in any other way, and hence this was an implied part of his power. The implication springs both from the words of the instrument and from the custom of doing insurance business, which is of such long standing and so universal that it was recognized over 30 years ago in the *Bodine Case*, and nearly 20 years later in the *Case of Arff*. All insurance agents who conduct business on a large scale necessarily act through their clerks, and in many cases issue policies and make contracts through them without personal knowledge of the facts affecting the risk. The insurance business could not be carried on in most offices in any other way. The agent does the business through his clerk, not by delegating his powers, but by exercising them himself through the assistance of his clerk. If the agent goes away for health or pleasure, all business cannot be suspended during his absence, and it would not be to the interest of the company that it should be, for renewal certificates must be issued, new policies written, premiums collected, consents to assignments and transfers given, the same as if he were at home, and, indeed, in most cases, he would

have as much knowledge of what was done in the one instance as in the other. The clerks and subagents have no direct relation to the company, but, acting under the instructions of its general agent, they transact any business that he can transact in person, and through him bind the company. This is part of his implied power, arising from the usages of the business and the absence of any limitation upon his power as a general agent. The bond in question was issued, under the direction of Mr. Channell, by his clerk in charge of his insurance business, and the former, as the general agent of the defendant, had power to and did waive in advance the affixing of his own signature until his return home. When he came back he ratified what his clerk had done by signing the bond, and, if it had not taken effect already, it then took effect by relation as of the date when it was first delivered to the county treasurer, and bound the defendant for all intervening violations. It was immaterial whether he knew that Bowker had violated the law and had made the company liable, for it was his duty to sign the bond. Acting as the general agent of the defendant, he had agreed to sign it. The company had the insurance premium in its treasury, and the plaintiff at any time had the equitable right to compel it to perfect the bond. If, before Bowker sold the liquor in violation of law, the plaintiff, by a bill in equity, could have compelled the defendant to deliver the bond properly signed, which cannot be denied, he could have done so after the violation, because he had done all that the law required of him, and was not responsible for the change in the situation. He had paid or caused to be paid the premium which the company kept, and it would be a fraud on its part to refuse to cause the policy to be signed even after the condition had been violated by the principal. That was one of the chances the defendant took, and one of the contingencies against which the plaintiff needed protection. The premium was paid for that purpose, and nothing further was required from the plaintiff, who had fully performed on his part. Action was then required by the defendant, and if the bond was not perfected, through its fault, the law will not permit it to take advantage of that fact. It could not take the money and refuse to perform. The premium was paid for a bond, and the law exacts a bond in return. The company cannot keep what was paid for insurance and claim there was no contract to insure.

In an early case a general agent with authority to issue policies in a certain district, which did not include the city of Utica, in good faith accepted \$30 from the plaintiff as a premium for a policy on his buildings in Utica. The money was paid and a receipt given late in the evening of March 30th, when the agent said he was busy, but would deliver a policy at a future day. Three or

four hours later the buildings burned, and the company refused to pay because the policy had not been delivered. The agent made out the policy, but at first refused to deliver it, and the company notified the plaintiff that the agent's authority would be at once revoked. After this the agent, without knowledge of the attempt to revoke his powers, as the letter of revocation had not reached him, voluntarily delivered the policy to the plaintiff, without any solicitation from him. A recovery on the policy was sustained. *Lightbody v. North American Ins. Co.*, 23 Wend. 18. Judge Bronson, speaking for the court, said: "If the policy was well delivered, it took effect by relation from the day of its date, which was the day on which the premium was paid and the contract concluded. *Jackson v. Ramsay*, 3 Cow. 75, 15 Am. Dec. 242, and cases cited. It was the manifest intent of the parties that the contract should operate from the day of its date, so as to give the plaintiff the same legal remedy which he would have had if the policy had in fact been delivered on that day; and the law will give effect to that intention. * * * The delivery was well made, and bound the defendants, unless there was something in the circumstances of the case which should have precluded the plaintiff from receiving the policy when it was offered to him. * * * He had a perfect equitable right to the delivery of the usual policy, which he might have enforced in the proper forum. *Perkins v. Washington Ins. Co.*, 4 Cow. 645. Having this equitable right to the policy, he was clearly at liberty to receive it, when voluntarily tendered to him by one who had authority to deliver it. It would be a refinement in law, if not in ethics, to hold a man precluded from accepting that which was rightfully his due, because he happened to know that the debtor did not intend to discharge his obligation. * * * The plaintiff accepted that which was voluntarily tendered, and was his rightful due, with the knowledge that his debtor did not intend he should have it. That cannot be a good impeachment of his title."

When Mr. Channell's health required him to go south for the winter, he placed his clerk in charge of his business. He exercised his discretion and judgment as an agent when he relied on the discretion and judgment of his clerk and told him to issue a bond "to any one who makes application." Whether this was just to the company or not is a question between him and the company which selected him, not between the plaintiff and the defendant. As the general agent of the company he could authorize his clerk to sign his name to a bond, and could waive the condition requiring his own signature, until it was practicable for him to sign in person. *Berry v. American Central Ins. Co.*, 132 N. Y. 49, 58, 30 N. E. 254, 28 Am. St. Rep. 548; *Wood v. American Fire Ins. Co.*, 149 N. Y. 382, 44 N. E. 80, 52 Am. St. Rep. 733. There was

no restriction in the letter of attorney or in the bond upon the power of Channell to waive any condition, but he had general powers, and could do what the company itself could do in this regard. If he had accepted the premium and had personally delivered the bond unsigned by himself, the liability of the defendant in equity would not be open to question. He had the right to authorize his clerk to deliver the bond without his signature, and he thereby waived his signature until his return. What he did the company did, for he was a general agent, and could bind and loose as if he were the company itself. The bond was binding in equity on the company from the date of its delivery until his return, when he signed it, and thenceforward it was binding in law, because every condition had been performed. There was a waiver or estoppel until performance became practicable, and then actual performance.

As I find no error of law committed by the trial judge which authorized the action of the Appellate Division, I dissent from the judgment about to be pronounced by the court.

CULLEN, C. J., and O'BRIEN and HAIGHT, JJ., concur with GRAY, J. BARTLETT and MARTIN, JJ., concur with VANN, J.

Order affirmed, etc.

(180 N. Y. 116)

ROSSEAU v. ROUSS.

(Court of Appeals of New York. Dec. 30, 1904.)

EXECUTORS — CONTRACT OF DECEDENT — EVIDENCE TO ESTABLISH — COMPETENCY OF WITNESS.

1. In an action to recover on an oral contract entered into with a decedent prior to his death, whereby he promised the mother of his putative child that, if she would support and maintain the child for a certain time, he would settle upon it at the expiration of such time \$100,000, must be established by clear testimony, and cannot be established by parol evidence of an interested witness.

2. In an action by a child to enforce a contract of deceased, alleged to be his father, to settle upon him \$100,000 on his arriving at a certain age, it appeared that the promise of the mother to support the child was the only consideration of the promise of the alleged father. *Held*, that she was disqualified, under Code Civ. Proc. § 829, from testifying to the alleged agreement, under the provision in the statute that one from whom a party derives his interest cannot testify to a personal transaction with the decedent in an action to enforce such interest.

Gray, Bartlett, and Martin, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Charles Rosseau, by J. Arthur Fischer, his guardian ad litem, against Peter W. Rouss, executor of Charles Broadway Rouss. From a judgment of the Appellate Division (86 N. Y. Supp. 497) affirming a

judgment for plaintiff, defendant appeals. Reversed.

Austen G. Fox, W. J. Townsend, and John J. Rooney, for appellant. Charles A. Decker and James J. Allen, for respondent.

VANN, J. Mainly upon the testimony of his mother, the plaintiff, a lad not yet in his teens, has recovered more than \$100,000 from the estate of his putative father by the judgment now before us for review. The recovery was founded upon an alleged oral agreement made between the father and mother on the 8th of June, 1901, whereby, as it is alleged in the complaint, in consideration of her promise "to care for and provide for the support and maintenance" of the son until the 4th of June, 1902, the father "promised and agreed to pay to and settle upon the" son "the sum of one hundred thousand dollars on the" day last named for his "benefit, support, and maintenance." The story of Mrs. Eva Rosseau, the mother, as told by her at the trial, is in substance as follows: Her real name is Eva Figgett, but she assumed the name of Rosseau on the 29th of September, 1891, for some purpose that she did not disclose. Meretricious relations sprang up between herself and Mr. Rouss, the decedent, in December, 1890, and continued until May, 1901. The plaintiff was born on the 5th of June, 1892, and the decedent in many ways and on various occasions acknowledged that he was his father. Commencing in 1896, he made an allowance of \$70 a week for the support of the mother and child, and this continued until he died, on March 3, 1902. He was engaged in the mercantile business in the city of New York, and, while it does not appear how much he was worth, he repeatedly stated that he was a millionaire. He was deeply attached to the plaintiff, and openly associated with him, and to some extent with his mother, although until 1898 he had a wife, and was living with her in the same city where he kept Mrs. Rosseau as his mistress. He had legitimate children, but whether more than two—a son and a daughter of full age, who were mentioned in the evidence—did not appear. In the spring of 1901 there was a quarrel between the father and mother about another woman, and she told him that she intended to leave the city, and take the plaintiff with her, in order to rear the child amidst better surroundings. He strenuously objected, and said that she might go, but he did not want her to take the boy with her; that, while he preferred she should not go, if she did, he wanted the boy to remain in the city. He then continued, according to the statement of Mrs. Rosseau: "Remember, that if you do so, I will settle upon Charley, when he is ten, the sum of \$100,000. It is nothing. I am a rich man, my children will have plenty. Plenty. I don't mind that little amount of money. I will give it to Char-

ley for his support, but he must be reared as my son. He must have the best that the money that I now give provides. I want him to have the best raising. I want him to be raised a Christian gentleman." She said: "I don't want to stay here. I am tired of it. I am tired; but if it is best for my boy, and if you will give him \$100,000, as you say, I submit to your view; but I don't want to, yet I will, for his sake." Shortly afterward, as he handed Mrs. Rosseau \$200 to enable her and the boy to visit the exposition at Buffalo, he said: "I won't give you any more money than this. Remember my contract—that you bring the boy back. Let me have the pleasure of his society. My life is a hard one—sad. I am an old man, I am lonely. I am blind. The music of his voice is the sweetest I hear. I want him. I miss him. I need him. Don't deprive me of this one favor. Bring him back. Do as I tell you. Keep him in the city, and when he is ten I will give the money that I promised him—\$100,000." In September, 1901, the following conversation is said to have occurred: "I said that Charles had been ill. That he had had an abscess. Blood poison had formed. He had been taken to the hospital. Dr. Gibb had operated on him. That the bills were very large. The school was expensive. He was growing; and that I wanted more money. He said: 'My love, I think \$10 a day is enough, don't you?' I said, 'Hardly, under the circumstances; that I should like to have an increase of money just at that time.' But he objected. He says: 'Pay your bills out of the money I give you regularly—yours and the boy's. The time now is very short. Charles is nine. He will soon be ten. Be satisfied with the amount that you now have, because in a few months, when he is ten, he will have \$100,000 that I will give him.'" On her cross-examination she testified that her relations with Mr. Rouss continued to be cordial and pleasant up to the time of his death, although she admitted that in May, 1900, by the aid of a policeman, she was put out of his house on Fifth avenue, where she had called to object to his attentions to another woman. She also recalled an occasion when Rouss was riding with some woman, and she "tried to get in and did get in" the carriage. He did not repulse her, but left the carriage with his companion, leaving Mrs. Rosseau the sole occupant. Referring to the interview of May, she stated the promise of Mr. Rouss as follows: "I own an establishment down on Broadway. I have a little money, and my boy shall have the benefit of it. He is, when he is ten years of age, provided you do as I tell you, to have \$100,000 on his tenth birthday—the 5th of June. * * * He said, 'When Charles is ten, he is to go down into the store, and be a partner in the store with his brother.'" She did not frequently have disputes with him in regard to the amount of

money he allowed her, or make frequent demands for more than the \$10 a day, "not after this contract was made by him." After the death of Mr. Rouss she made a claim against his estate for dower, on the ground of an alleged common-law marriage with him after the death of Mrs. Rouss. In March, 1902, she was paid \$23,000 in settlement of that claim, but she did not say anything then or previously about the claim of her son for \$100,000, which was not presented to the executor until July, 1902. At first she said she did not have it in mind, but later admitted that she thought of it, although she said nothing about it. She had been told by her counsel that the claim of her son would not be affected by the release of her claim for dower. She did not consult her counsel in relation to the claim of the boy, or tell him that the boy had a claim, but "he told me; he suggested it." She further testified that she kept and supported the boy in the city as Mr. Rouss directed, but it did not appear that she had any means of supporting either herself or the child, except the allowance of \$10 a day. She did not testify that she had any property of her own, or that she expended any money of her own in supporting the plaintiff, or in keeping him in the city of New York, as the decedent requested, and as she had done for nine years. So far as appeared, her compliance with that request for less than a year was the only consideration to support the contract. Mrs. Rosseau was the only witness who was present when the alleged agreement was made, but her story was corroborated, to some extent, by three witnesses, who testified to admissions said to have been made by the decedent to the effect that he had made a contract resembling the one sworn to by her.

Thus the evidence relied upon to establish the contract is, first, the testimony of the mother, who tried to swear \$100,000 into the pocket of her own child; and, second, the testimony of witnesses who swear to the admissions of a dead man. The former is dangerous, the latter is weak, and neither should be acted upon without great caution. We have repeatedly held that such a contract must not only be certain and definite, and founded upon an adequate consideration, but also that it must be established by the clearest and most convincing evidence. We have been emphatic in condemning these agreements, because they "have become so frequent in recent years as to cause alarm." We have been rigid and exacting as to the sufficiency of the evidence to establish them, and have condemned the proof thereof "through parol evidence given by interested witnesses." As "such contracts are easily fabricated, and hard to disprove, because the sole contracting party on one side is always dead when the question arises," we have declared that they "should be in writing, and the writing should be produced, or,

if ever based upon parol evidence, it should be given or corroborated in all substantial particulars by disinterested witnesses." *Hamlin v. Stevens*, 177 N. Y. 39, 69 N. E. 118; *Mahaney v. Carr*, 175 N. Y. 454, 67 N. E. 903; *Ide v. Brown*, 178 N. Y. 26, 70 N. E. 101; *Edson v. Parsons*, 155 N. Y. 555, 50 N. E. 285; *Shakespeare v. Markham*, 72 N. Y. 400.

We do not deem it necessary to pass upon the sufficiency of the evidence by which it is claimed that the contract was established, or the sufficiency of the consideration alleged, as we think that the judgment should be reversed because Mrs. Rosseau, the principal witness for the plaintiff, was incompetent to testify under section 829 of the Code of Civil Procedure. Her competency is challenged on three grounds: First, because she made the contract and furnished the sole consideration therefor, and the plaintiff derived his interest therein from her; second, because she employed attorneys to prosecute this action, and is bound to pay them for their services; third, because she deposited the sum of \$250 as security for the costs of the defendant if he should succeed, although a bond to secure such costs was filed, but whether before or after the deposit does not appear. The first ground is the only one that we shall consider. Mrs. Rosseau made the contract with Mr. Rouss, and no one else had anything to do with it. While we do not hold that there was any legal consideration, so far as there was any she furnished it. Either there was no consideration, or the plaintiff's interest is derived from his mother. Unless she had an interest in the performance of the contract, there was no consideration therefor, as a promise for the benefit of a third person must not only be supported by a sufficient consideration, but the one furnishing it must have a legal interest in the performance of the promise. *Embler v. Hartford Steam Boiler Ins. Co.*, 158 N. Y. 431, 436, 53 N. E. 212, 44 L. R. A. 512; *Durnherr v. Rau*, 135 N. Y. 219, 222, 32 N. E. 49; *Vrooman v. Turner*, 69 N. Y. 280, 284, 25 Am. Rep. 195. The one who furnished the consideration in this case is under a legal obligation to support the plaintiff until he becomes of age or self-supporting. 2 Kent's Com. (13th Ed.) 215. If he should die intestate and without issue, she would inherit from him. Real Property Law, § 289. If he succeeds in collecting the large sum involved, it will be, according to the complaint and the contract, for his support and maintenance, and she can apply to the court for an allowance therefrom for that purpose, which would relieve her wholly or in part from her legal liability. Even if such an allowance cannot ordinarily be demanded as a matter of right, the fact that such applications are usually granted is not without significance. The right to make the application cannot be denied, nor can it be asserted, in view of the practice of the courts and of the expression of purpose by the father in

making the contract, that the result of such an application would be uncertain. While Mrs. Rosseau is not a party to the action, she made the contract which is the sole foundation for the action. She created the cause of action, and she alone furnished such consideration as there was for the contract on which it is founded. There is a distinction between a contract by a putative father to pay a third person for the mere support of his natural child, which was the case in *Todd v. Weber*, 95 N. Y. 181, 47 Am. Rep. 20, and an agreement with the mother to settle a fortune upon her child, which requires something more than a moral obligation to sustain it. While it was the duty of Mrs. Rosseau to support her own child, she was entitled to his custody, and it is her promise in relation to his custody by agreeing to keep him for a very short time in a particular place that constitutes the consideration, if there is any. The plaintiff derives his title from her, because upon her promise to the decedent the latter promised to pay the plaintiff the legal equivalent of the consideration furnished by her, and she had the right to have the promise run to him instead of to herself. The plaintiff made no contract with his father, and if the promise to pay him \$100,000 is not supported by a sufficient consideration it cannot be enforced. What, if anything, vitalized the contract, is the consideration furnished by the mother for the promise of the father to pay the plaintiff, whose interest thus comes through her. From what other source did he get it? He did not create it himself, nor furnish the consideration for it himself. His mother created all his rights by her promise to his father, made in consideration of his promise to her for the benefit of the plaintiff. If there was no consideration, there was no contract; but, if there was a consideration, however slender it may be, it was furnished by the mother.

The argument may be summarized as follows: As the plaintiff did not make the contract himself, he must have derived his interest therein from some one. He did not derive it from his father, because his father could not make a promise to himself nor contract with himself for the plaintiff's benefit. The father made no promise to the plaintiff, but he promised the mother to pay the plaintiff the sum named. That, however, was not enough, for such a promise is not binding without a consideration. The plaintiff furnished no consideration for the promise, and would have had no interest in the contract unless a consideration had been furnished by some one. His mother furnished the sole consideration, and the promise was made by the father to the mother to pay the son, who thus derived his interest from her. The statute forbids a party or a person interested in the event of an action, or one from whom a party derives his interest, from testifying to a personal transaction with a dead man. It is a wholesome statute, designed to quiet the

voice of the living party to a contract when the other party is dead and cannot speak.

The respondent relies upon *Connelly v. O'Connor*, 117 N. Y. 91, 22 N. E. 753, and *Bouton v. Welch*, 170 N. Y. 554, 63 N. E. 539, but we do not regard either as controlling, because in both the promise was made to or in the presence of the party to be benefited, who furnished a consideration therefor. In *Connelly v. O'Connor* the promise was made by the father of a filius nullius directly to the plaintiff, who was not the mother, and was under no obligation to support the child, to pay her for supporting him, and the action was brought to recover for care and maintenance already furnished on the strength of that promise. In *Bouton v. Welch* the promise was made to the husband in the presence of the wife in consideration of a deed from both husband and wife. The release of her inchoate right of dower was a sufficient consideration flowing directly from her to the one who made the promise. As no further consideration was needed to support it, her interest was direct, and not derivative, and that is the only ground upon which that decision can stand. Here the promise was not made to the plaintiff, and the consideration did not come from him. The promise was made to his mother for his benefit. She furnished the consideration for his benefit, and she had an interest that the promise should be performed, because it would result in the creation of a special fund for his "benefit, support, and maintenance"; otherwise there was no contract.

We think that Mrs. Rosseau was an incompetent witness for her son against his father's estate, and that the objections and exceptions taken to the admission of her testimony require us to reverse the judgment and order a new trial; costs to abide event.

CULLEN, C. J. I concur in the opinion of Judge VANN that Eva Rosseau, the mother of the plaintiff, was the party under whom the plaintiff claimed, and therefore, under section 829 of the Code of Civil Procedure, not a competent witness to personal transactions between herself and the defendant's testator. I think, however, that no sound distinction can be drawn between this case and our decision in *Bouton v. Welch*, 170 N. Y. 554, 63 N. E. 539. It is true that in that case the defendant released her dower by joining in the execution of the deed of her husband. But the trial court found that the agreement out of which the defense arose was made by the plaintiff's testator, not with her, but with her husband. No matter what ground, however, the case might have been decided upon, as a matter of fact it was actually decided on the proposition that where a third person sues on a contract made for her benefit she does not derive her interest from the party who furnishes the consideration for said contract. We are now about to hold the exactly contrary doctrine, and I

think it but fair to the profession that under such circumstances we should expressly retract the Bouton Case, not seek to distinguish it, or leave it as a false light to deceive the unwary.

CULLEN, C. J. (In memorandum), and O'BRIEN and HAIGHT, JJ., concur. GRAY, BARTLETT, and MARTIN, JJ., dissent on opinion of PATTERSON, J., below.

Judgment reversed, etc.

(180 N. Y. 76)

BRIGHTSON v. H. B. CLAFLIN CO.

(Court of Appeals of New York. Dec. 30, 1904.)

MASTER AND SERVANT—ACTION FOR SERVICES—EVIDENCE—PLEADING AND PROOF.

1. The complaint in an action for services alleged that a written agreement for five years was continued for a further term of five years on the same conditions. There was evidence for plaintiff that he held over and continued in the service of the defendant, with its consent, until he was discharged. Defendant denied the making of the second contract, and interposed the defense of the statute of frauds. *Held* not to support a judgment for plaintiff; the evidence showing an agreement from year to year, and the pleading alleging a continuance under a written agreement.

2. The manager of a department in a department store was to receive a commission on the net annual profits of the sales of his department for his services, to be paid annually, in addition to a certain monthly salary. He was discharged four months before the expiration of the term for which he claimed to have been hired. In an action after the expiration of the alleged contract, he attempted to establish the amount of his commissions by the result in his department for the two years preceding the year in which he was discharged. There were no profits during the first six months of such year, but a loss. *Held* insufficient to establish such commissions.

3. In an action to recover commissions as manager of a department in a department store, in order to show the profits on which to base a recovery, plaintiff should have produced the inventories and books of the department, or required them to be produced.

Appeal from Supreme Court, Appellate Division, Second Department.

Action by George E. Brightson against the H. B. Clafin Company. From a judgment of the Appellate Division (82 N. Y. Supp. 667) affirming a judgment for plaintiff, defendant appeals. Reversed.

John L. Wilkie, William B. Goodwin, and Moses Ely, for appellant. Sidney H. Stuart, for respondent.

O'BRIEN, J. The plaintiff brought this action to recover \$50,000 damages for breach of a contract of hiring, by which contract the relation of master and servant was established between the parties. The defendant is a business corporation, with its principal place of business in the city of New York. Its business was conducted on so large a scale that it was divided into a great

many departments, with a person at the head of each, having general charge and supervision of it. It is alleged that the plaintiff was employed at the head of what was known as the "Notion Department," which had its own staff of bookkeepers, entry clerks, and general employes, numbering in all about 200.

It is averred in the complaint that on the 30th of November, 1892, the plaintiff entered into a written contract with the defendant, wherein and whereby it employed and hired the plaintiff to work for it as a manager of this department for the term of five years, beginning on the 1st of January, 1893, and the defendant agreed to pay him therefor 12½ per cent. of the net annual profits of the sales of said department, in equal, yearly payments, with a guaranteed drawing account of \$500 per month, and that the plaintiff agreed to work for that time, and for this compensation. It is alleged that the plaintiff entered upon the performance of this agreement on his part, and performed the same fully until the 1st of January, 1898; that on or about that date it was agreed by and between the plaintiff and the defendant that said written agreement should be, and it was, continued for a further term of five years from the 1st of January, 1898, upon the same terms and conditions as the agreement of 1892, above stated; that the plaintiff entered upon the performance of this last agreement on his part, and performed the same fully and entirely until the 21st of August, 1900, when the plaintiff, while engaged in carrying out the agreement, was, without any fault on his part, wrongfully discharged by the defendant from its employ, and it refused to permit him to carry out the agreement.

It is quite important at the outset to get a clear idea of the plaintiff's cause of action as stated in the complaint. It is alleged that the written agreement for five years' services which had just expired was continued for a further term of five years upon the same terms and conditions as were embraced in the first written contract. An agreement to employ the plaintiff for five years, in order to be valid, should be in writing; and, since it is alleged that the first written agreement for five years was continued for another five years, the legal effect of the allegation is that the second agreement was evidenced by some writing signed by the party to be charged thereby. The proper construction of the pleading, therefore, is that the plaintiff seeks to recover damages for the breach of a written contract of hiring, commenced on the 1st day of January, 1898, and to terminate in five years thereafter.

On the trial the plaintiff sought to establish a cause of action only by proof that, after the termination of the first written agreement, the plaintiff held over and continued in the service of the defendant, with the defendant's consent, to the time of his

discharge. In other words, the plaintiff sought to recover for breach of an agreement from year to year, to be implied by law from the fact that the plaintiff continued to hold over in the service after the expiration of each year. The evidence of the plaintiff in that regard was received under the defendant's objection and exception. The objection was to the effect that the proof was a departure from the cause of action stated in the complaint. No amendment of the complaint was asked or allowed, and the question is not in respect to the power of the court to grant an amendment in such case, but as to the right of the plaintiff to recover for the breach of a contract for one year, based entirely upon an inference or implication of law. Where there is a hiring for one year, and the servant continues in the employment after the expiration of the year with the consent of the master, this effects a hiring for another year. *Adams v. Fitzpatrick*, 125 N. Y. 124, 26 N. E. 143. But this is not the cause of action stated in the complaint. The plaintiff pleaded a written contract for five years, and he recovered for breach of a contract implied by law for one year. We think that the plaintiff did not recover *secundum allegata et probata*, and that this rule was violated at the trial, since the evidence was received under the defendant's objection. *Southwick v. First Nat. Bank of Memphis*, 84 N. Y. 420; *Romeyn v. Sickles*, 108 N. Y. 650, 15 N. E. 698; *Day v. Town of New Lots*, 107 N. Y. 148, 13 N. E. 915. In these cases it was held that it is a fundamental rule that a judgment shall be *secundum allegata et probata*, and that any departure from that rule is certain to produce surprise, confusion, and injustice. It was said with much force that pleadings and a distinct issue are essential in every system of jurisprudence, and there can be no orderly administration of justice without them. If a party can allege one cause of action, and then recover upon another, his complaint will serve no useful purpose, but rather to ensnare and mislead his adversary. The defendant by its answer made a distinct issue with respect to the contract stated in the complaint. It denied the making of any such contract, and, among other defenses, interposed the statute of frauds; expressly alleging that there was no note or memorandum in writing of the five-year contract. Under the authorities cited above, the defendant's objection to the proof at the trial should have been sustained, and the exceptions were well taken.

The defendant's answer also put in issue the allegation of the complaint that the plaintiff was wrongfully discharged, and this issue raised a serious question for the plaintiff. There is no dispute about the fact that in December, 1899, the year before the plaintiff was discharged, he presented an inventory or statement to the defendant's ex-

ecutive officers purporting to show the sales and profits of his department during the year; and there is no dispute about the fact that the statement was untrue, in that over \$40,000 of goods were reported as sold which were in fact on hand. This statement enlarged the basis for the plaintiff's commissions to that extent, and he was actually paid \$5,000 in the form of commissions which he was not in fact entitled to. Whether this falsification of the inventory was the result of fraud, negligence, or honest mistake, may be another question; but the fact that the statement was untrue, and that the plaintiff received the benefit of it, seems to be undisputed, and there was no attempt on the part of the plaintiff to explain the discrepancy, or any offer to restore what he had received on the faith of it. This condition of the plaintiff's account in his department was not brought to the attention of the defendant's officers until about a month before his discharge, and they then sought to obtain some explanation consistent with his honesty and fidelity, but failed in that respect. The relations between the plaintiff and the defendant's officers became somewhat strained in consequence of this incident, and in about a month after the discovery the plaintiff brought an action against the defendant to procure an injunction restraining the defendant from interfering with the management of his particular department. This move, of course, added fuel to the flame, and the defendant's president, the day after the papers were served upon him in the injunction suit, discharged him. The learned trial judge submitted to the jury the question arising upon these facts. The jury were instructed that, if the falsification of the inventory was the result of fraud or negligence, then the defendant had the right to discharge the plaintiff; but if it was an honest mistake, without fraud or negligence, that the plaintiff might be excused, and that if he commenced the injunction suit in good faith, intending only to assert his legal rights, and not for the purpose of annoyance, then he might be excused for that act as well. There does not seem to be any exception in the record to the submission of this question to the jury, nor to the charge in that respect; and, since the judgment was unanimously affirmed below, we do not think that this court can properly deal with the question concerning the defendant's right to discharge the plaintiff.

The breach of contract for which the plaintiff recovered \$5,000 in this case consisted in discharging the plaintiff about the 21st of August, 1900; that is, about eight months from the commencement of the year, and about four months before, according to the plaintiff's own theory of the case, his term would expire. This included the monthly guaranty of \$500 a month for four months, and the loss of commissions for the whole

year, which were to be estimated at the rate of 12½ per cent. upon the net profits of the department; and these net profits were to be ascertained according to certain rules described in the first written agreement, but which are not now very important. It is by no means clear that the plaintiff, under the circumstances of this case, was entitled to recover anything for commissions which were not yet earned and did not accrue, or could be ascertained only by the results at the end of the year. *Sedgwick on Damages*, vol. 2 (8th Ed.) § 671. There are some cases in this state which appear to hold that such commissions or profits may be recovered as damages, but only when the plaintiff has made it appear that such profits are reasonably certain to be made, and that, if he fails in such proof, he will not be entitled to recover on that basis. *Lavens v. Lieb*, 12 App. Div. 487, 42 N. Y. Supp. 901. Whatever the rule may be in this respect, we think that the evidence which the plaintiff produced upon the trial of this case in order to establish his claim to commissions or profits was incompetent. The only proof offered was the result in the plaintiff's department for the two years preceding the year in which he was discharged. This evidence was received under the defendant's objection and exception as to its competency. It appears to be an undisputed fact in the case that for the first six months of the year in question there were no net profits in the department, but, on the contrary, a loss of between sixteen and twenty thousand dollars. The question was whether at the end of the four months during which the plaintiff's contract was to be in force the situation was changed, the loss wiped out, and a net profit secured, upon which to base a recovery of commissions amounting, according to the verdict, to \$3,000. The books and inventories of the department were kept under the plaintiff's supervision, and he could have produced these books or papers in court, or required them to be produced, and thus the result of the business at the end of the year could be accurately known and clearly established. The results of the business in the department for the two previous years did not prove, or tend to prove, what the result was in fact at the end of the year in question. The business was constantly changing, and the expense of the department increasing. Moreover, the statement of the net profits for the previous year, as claimed by the plaintiff, was discredited to the extent of \$40,000, and could be no safe guide in ascertaining the net profits at the end of the following year. There is no difficulty or hardship in requiring the plaintiff to prove the net profits at the end of the year in question by the inventories and books of the department made up to the close of the year. The contract, at most, had only four months to run, and this action was commenced long after that period had expired. If the contract covered a long series

of years, instead of four months, possibly a different rule might be applied. But since it appears that up to the time of the plaintiff's discharge no profits had accrued, but a very considerable loss was suffered, we think it was not competent for the plaintiff to resort to vague statements as to the profits of the two previous years, when the exact figures at the end of the year were available to him, and could have been produced before the jury.

The judgment must be reversed, and a new trial granted, with costs to abide the event.

CULLEN, C. J., and GRAY and VANN, JJ., concur. BARTLETT and HAIGHT, JJ., concur in the result, and MARTIN, J., concurs on ground last discussed in opinion.

Judgment reversed, etc.

(180 N. Y. 107)

REICH v. DYER et al.

(Court of Appeals of New York. Dec. 30, 1904.)

COURT OF APPEALS—JURISDICTION—REVIEW—QUESTIONS FOR JURY—DEED—WHEN A MORTGAGE—EVIDENCE.

1. An order of the Appellate Division reversing a judgment on the law and facts and ordering a new trial cannot be reviewed by the Court of Appeals on the ground that the Appellate Division had no power to reverse on the facts, because plaintiff was entitled, as a matter of law, to a verdict in her favor, where plaintiff failed to ask for the direction of a verdict, and there is any question of fact or credibility of witnesses for the jury.

2. A deed absolute in form, and containing full covenants, in the usual form, for a price expressed therein, part of which price the grantee advanced to the grantor under an agreement that the grantee might within a year from the date of the deed retain the title to the premises by paying the balance of the price—the money to be treated as a loan if the grantee concluded not to purchase—cannot be held, as a matter of law, a mortgage, in an action to recover the balance of the price, where there was evidence that the parties intended the instrument to be a deed, and that the possession of the premises was surrendered to the grantee.

Martin, O'Brien, and Vann, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Elizabeth Reich against Edith La Bau Dyer and others. From an order of the Appellate Division (86 N. Y. Supp. 544) reversing a judgment for plaintiff, she appeals. Dismissed.

See 86 N. Y. Supp. 1145.

Alton B. Parker and Charles Strauss, for appellant. John M. Bowers and G. Morgan Browne, for respondents.

HAIGHT, J. This action was brought to recover a balance due upon the purchase price of a farm consisting of 100 acres of land, situated at Brentwood, Long Island. The facts established by the verdict of the

jury are substantially as follows: The plaintiff was the owner and resided upon the farm in question. She applied to the defendants' testatrix in her lifetime for a loan of \$3,133, and offered to give her a mortgage upon the farm to secure its repayment. Thereupon negotiations took place between the plaintiff, her husband, and Mrs. La Bau with reference to the purchase of the farm by Mrs. La Bau, resulting in an agreement fixing the purchase price at \$40,000, the advancing by Mrs. La Bau to the plaintiff of \$3,133, and the giving by the plaintiff to Mrs. La Bau of a full covenant deed of the premises, under an oral agreement that at any time within a year Mrs. La Bau may elect to pay the balance of the purchase price, at a time to be named by her, and thereby retain the title to the premises. Mrs. La Bau, in answer to the plaintiff's offer to give her a mortgage, stated that "she preferred to have a deed, so that, when she made up her mind that she would keep the property, that there is no further loss of time, and she will then state the time of payment." Subsequently Mrs. La Bau advertised for a tenant, arranging with the plaintiff's husband to show the property to persons desiring to rent, and soon thereafter she leased the premises to one Horace I. Moyer; the lease bearing date the 28th day of March, 1895, running for a period of five years from the 1st day of April thereafter, and containing a provision to the effect that the lessee is granted an option to purchase the premises for the sum of \$45,000 on the 1st day of April, 1897. Thereupon she wrote the plaintiff to the effect that she had leased the farm, and that the tenant was desirous of leasing the personal property on the farm, and that she thereby gave notice that she would keep the property conveyed to her, thus exercising her option, and that she would pay therefor on or before March 1, 1897. She also requested the plaintiff to release the property, and give her a list of the horses, cows, furniture, and other chattels upon the place, with the prices therefor. To this the plaintiff replied under date of March 30, 1895, in which she inclosed duplicate lists of the personal property upon the premises, giving the prices therefor, amounting in the aggregate to \$2,772, which amount, deducted from the \$3,133, would leave a balance of \$361 to be credited upon the purchase price of the farm, reducing the same to \$39,639, which, under the letter of Mrs. La Bau, was to be paid on the 1st day of March, 1897. Upon the receipt of the letter, Mrs. La Bau announced to the attorney of the plaintiff that it was "entirely satisfactory." Thereafter, and on the 1st day of April, the plaintiff surrendered the possession of the farm and of the personal property thereon to the tenant. The jury found in favor of the plaintiff for the sum of \$54,523.45; being the balance due upon the purchase price, with interest thereon to the date of the verdict. From the judgment entered thereon an ap-

peal was taken to the Appellate Division, which court, as we have seen, has reversed upon the law and the facts, and granted a new trial.

The first question that arises has reference to our jurisdiction to review the action of the Appellate Division in granting a new trial upon the facts. This court has repeatedly refused to entertain jurisdiction of orders of the Appellate Division reversing judgments and granting new trials where the judgments have been entered upon verdicts, and motions for new trials have been made and denied, unless the court, in its orders, in effect, certified that these reversals were upon the law only, and that it had examined the facts, and found no reason for interfering with the verdict upon the ground that it was against the weight of evidence. *Harris v. Burdett*, 73 N. Y. 136; *Chapman v. Comstock*, 184 N. Y. 509, 512, 31 N. E. 876; *Mickee v. Wood Mowing & R. M. Co.*, 144 N. Y. 613, 39 N. E. 650; *Canavan v. Stuyvesant*, 154 N. Y. 84, 47 N. E. 967; *Henavie v. N. Y. C. & H. R. R. Co.*, 154 N. Y. 278, 48 N. E. 525; *Schoen v. Wagner*, 156 N. Y. 697, 50 N. E. 1122; *Judson v. Central Vt. R. Co.*, 158 N. Y. 597, 53 N. E. 514; *Livingston v. City of Albany*, 161 N. Y. 602, 56 N. E. 148; *Schryer v. Fenton*, 162 N. Y. 444, 56 N. E. 997; *Albring v. N. Y. C. & H. R. R. Co.*, 166 N. Y. 287, 59 N. E. 990; *Id.*, 174 N. Y. 179, 68 N. E. 665. It consequently follows that we have no power to review the order in question, unless the plaintiff, upon the evidence in the case, was entitled, as a matter of law, to a direction of a verdict in her favor. *Otten v. Manhattan Ry. Co.*, 150 N. Y. 395, 400, 44 N. E. 1033; *Hirschfeld v. Fitzgerald*, 157 N. Y. 166, 51 N. E. 997, 46 L. R. A. 839; *Griggs v. Day*, 158 N. Y. 1, 9, 52 N. E. 692; *Westerfield v. Rogers*, 174 N. Y. 230, 239, 66 N. E. 813. It is now contended on behalf of the appellant that the Appellate Division had no power to reverse upon the facts, for the reason that the plaintiff was entitled, as a matter of law, to a direction of a verdict in her favor. We have examined the record for the purpose of determining whether this contention can be sustained. It must be conceded that there is but little, if any, controversy with reference to the facts testified to by plaintiff's witnesses. It may be that an inference may be drawn from the testimony of one or two of the defendants' witnesses that would be, to some extent, in conflict with the claim of the plaintiff, but it is contended that these inferences would not amount to more than a scintilla of evidence. But some of the essential facts upon which the plaintiff's claim is based have to be established by the oral testimony of witnesses so nearly connected with the plaintiff in relationship and in business as to involve their credibility. Mrs. La Bau died before this action was brought, and consequently could not be heard in defense of her estate; and, under the circumstances,

we are of the opinion that the question became one of fact for the jury, and not for the trial court to dispose of. This disposition of the case was acquiesced in by the plaintiff upon the trial, for she did not ask for a direction of a verdict, or take any exception to the submission of the case to the jury. We therefore conclude that we have no jurisdiction to review the order appealed from, so far as this branch of the case is concerned, and therefore that the appeal must be dismissed.

Inasmuch as the plaintiff has been granted a new trial, we have thought it wise to consider the question as to whether the deed given by the plaintiff to Mrs. La Bau was a mortgage. We think it was a question of fact for the jury. The deed was absolute upon its face, containing full covenants in the usual form. Mrs. La Bau contemplated the purchase of the farm. The purchase price was fixed and agreed upon, and she made an advance to the plaintiff of \$3,133, to be applied upon the purchase price unless she should elect not to purchase the farm within one year from the date of the deed. The money so advanced was only to be treated as a loan in case she concluded not to purchase. The plaintiff had applied for a loan and had offered to give a mortgage, but this Mrs. La Bau declined to take; stating, as we have seen, that she preferred to have a deed, so that, in the event of her concluding to keep the property, no further conveyance would be necessary. A deed can be changed into a mortgage only when it is apparent that the parties intended that such should be its effect. In this case the jury might have found that the intention of the parties was that it was a deed, was accepted as such, and that the possession of the premises was surrendered to Mrs. La Bau or her tenant thereunder. We think, therefore, that the authorities relied upon by the learned Appellate Division, to the effect that an instrument once becoming a mortgage always remains a mortgage, have no application, and that its determination with reference to the deed in question cannot be sustained.

The appeal should be dismissed, with costs.

MARTIN, J. (dissenting). Whatever may be the law elsewhere, it is a general rule in equity, established by the decisions of the courts of this state, that a deed absolute in form will be treated as a mortgage when executed as security for a loan or a debt. *Despard v. Walbridge*, 15 N. Y. 374; *Horn v. Keteltas*, 46 N. Y. 605; *Fullerton v. McCurdy*, 55 N. Y. 637; *Ensign v. Ensign*, 120 N. Y. 655, 656, 24 N. E. 942. But it is equally well settled that the burden of establishing an oral defeasance to such a deed rests upon the one who alleges it, and its precise terms must be established by clear and conclusive evidence, to overcome the presumption that the deed expresses the entire contract between the parties. There is a di-

versity of opinion as to the principle upon which this doctrine is founded. In this state, however, it seems to have been based upon the intention of the parties, and upon the doctrine that courts of equity will always look through the form of a transaction, and give effect to it, so as to carry out the substantial intent of the parties. The law presumes that a deed is an absolute conveyance, and the party who claims it to be a mortgage must sustain his claim by proof sufficient to overcome this presumption of law; and it was held by this court in *Ensign v. Ensign*, 120 N. Y. 655, 24 N. E. 942, that an oral defeasance must be established beyond a reasonable doubt. A conditional sale is not opposed to public policy, nor in any sense illegal, and the courts of this state will give it effect as such when that is the real intention of the parties. *Randall v. Sanders*, 87 N. Y. 578. It seems perfectly obvious from the evidence in this case that the conveyance by the plaintiff to Mrs. La Bau was not intended as a mortgage, or in the first instance for the purpose of securing the money advanced to her by the defendants' testatrix. The plaintiff sought to make a loan of the defendants' testatrix, and to secure its payment by a mortgage on the premises subsequently conveyed. That the defendants' testatrix refused to do, but insisted upon the plaintiff's fixing a price which she would accept in full payment for the premises, and that a full covenant deed should be given, which was to continue as such, and remain absolute, unless Mrs. La Bau should, within a year, elect to hold the deed as a mere security for the money advanced. That she did not do, but, on the contrary, gave notice that she would retain title to the property so conveyed, and pay the plaintiff the balance of the consideration. Thus it becomes manifest that the defendants' testatrix not only declined to exercise her option by transforming the deed into a mortgage, but she actually elected to confirm the deed as an absolute conveyance, and thereby the option was spent, and afterwards was of no force or effect. From this brief history of the transaction, it seems certain that the deed was never at any time intended to be, or regarded by the parties as, a mortgage, but was always a deed absolute. That under these circumstances the defendants' testatrix obtained an absolute title to the premises, which, after the expiration of the year, and in view of the election of the testatrix, was free from any condition or possibility by which it could be regarded or treated as a mortgage, there can be no doubt.

In its origin, the instrument under consideration was a full covenant deed; and such has been its character from the day it was given until the present time, notwithstanding the fact that during the period of one year there was a possibility that, by the action of the defendants' testatrix, it might

have been changed into an instrument in the nature of a mortgage, and held as such for the security of the money advanced by her as a part of the purchase price, if she so elected, during that time. Moreover, she agreed to pay the remainder of the purchase price at a time named, as was agreed by the parties. It is also to be observed that the plaintiff had no option in the matter. So far as she was concerned, the instrument under consideration was a deed, and nothing she could do would interfere with its validity as such, or with the testatrix's title, or in any way change the character of this instrument. That there was never a time—not even for a moment—when the parties intended that the deed in question should be regarded as a mortgage, is perfectly obvious, and consequently the principle that once a mortgage always a mortgage, upon which the learned Appellate Division relied, was utterly inapplicable under the facts in this case. Although the order of the Appellate Division asserts that the judgment of the Trial Term was reversed upon the “law and facts,” still it is difficult to discover any facts necessary to sustain the judgment of the trial court as to which there was any conflict in the evidence that justified the Appellate Division in reversing the judgment upon that ground.

Hence I favor the reversal of the judgment appealed from, and the affirmance of the judgment entered by the trial court.

CULLEN, C. J., and GRAY and BARTLETT, JJ., concur with HAIGHT, J. O'BRIEN and VANN, JJ., concur with MARTIN, J.

Appeal dismissed.

(180 N. Y. 85)

CUDLIP v. NEW YORK EVENING JOURNAL PUB. CO.

(Court of Appeals of New York. Dec. 30, 1904.)

DEPOSITIONS—CROSS-EXAMINATION — REFUSAL TO READ—OBJECTIONS TO EVIDENCE.

1. Where a deposition has been read, the opposing party may decline to read the testimony taken on his cross-examination, and, if read by the adverse party, he may, under Code Civ. Proc. § 911, authorizing objections without noting them on the deposition, object to any question as incompetent or irrelevant, though it was a part of his own cross-examination.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Ellen B. Cudlip against the New York Evening Journal Publishing Company. From a judgment of the Appellate Division (84 N. Y. Supp. 1122), affirming a judgment for plaintiff, defendant appeals. Affirmed.

David B. Hill and Clarence J. Shearn, for appellant. Thomas P. Wickes and Charles D. Ingersoll, for respondent.

GRAY, J. The plaintiff brought this action to recover of the defendant damages for a libelous publication in its newspaper. The defendant did not plead in justification, but alleged various facts in mitigation of damages. The plaintiff recovered a verdict upon the trial, and her judgment has been affirmed unanimously by the Appellate Division in the First Department. There is but one question of sufficient importance now for us to consider, and that arises upon an exception to the exclusion of portions of a deposition offered to be read by the defendant. It appears that the testimony of a former husband of the plaintiff had been taken under a commission issued at the instance of the defendant. The witness' direct examination was read by the defendant without objection thereto, in which, in response to a question as to the general reputation of the plaintiff in the city of Washington during certain years, he testified that he had “no personal knowledge, but from all accounts it had not been the best.” When the reading of the direct examination was concluded, the plaintiff's counsel stated that he would not read the cross-examination of the witness, whereupon the defendant's counsel announced that he would read it, or parts of it. In doing so, objections were made by the plaintiff to the reading of certain questions and answers relating to a divorce which the witness had procured from the plaintiff for the willful desertion of her husband and infant child, upon the ground that such testimony was incompetent. The objections were sustained, and exceptions were taken by defendant to the court's ruling.

Whether the ruling was correct turns upon the construction which section 911 of the Code of Civil Procedure should receive. That section provides that a deposition taken and returned may “be read in evidence by either party. It has the same effect, and no other, as the oral testimony of the witness would have; and an objection to the competency * * * of the witness, or to the relevancy, or substantial competency, of a question put to him, or of an answer given by him, may be made, as if the witness was then personally examined, and without being noted upon the deposition.” The appellant insists that the plaintiff's counsel could not be heard to object that his own questions were not relevant or competent. Doubtless the situation was singular in that respect; but, nevertheless, the extremely broad language of the Code section seems to justify the ruling below. It enlarges the scope of the objections to testimony elicited upon a deposition very greatly, and frees a party from any restrictions upon his right to object, which would not exist were the witness present and being personally examined. It materially changed the former rule of procedure, under which objections to interrogatories proposed upon a commission to take testimony were noted, and when, therefore, such

a question as this could not arise upon the reading of the return to the commission. Considering the situation in the light of the present Code provision, when, upon the plaintiff refusing to read her cross-examination of the witness, the defendant offered to read it, it made the deposition its own, and a part of its direct evidence. It was then as though the defendant was offering to show, in mitigation of damages, specific acts or instances of plaintiff's misconduct in order to prove the allegation that her reputation was bad. This was, of course, inadmissible evidence under the settled rule. *Root v. King*, 7 Cow. 613; *Corning v. Corning*, 6 N. Y. 97, 104; *Holmes v. Jones*, 147 N. Y. 59, 68, 41 N. E. 409; 49 Am. St. Rep. 646. Lately the Appellate Division in the First Department has had the same question under consideration in *Kramer v. Kramer*, 80 App. Div. 20, 80 N. Y. Supp. 184, when construing section 883 of the Code, whose provisions with reference to the taking of depositions within the state are similar to those of section 911. That court has taken the same view of the operation of the statute upon evidence offered upon a trial in depositions, and has expressly held, upon a very similar situation, that examining counsel could not be estopped from objecting to incompetent testimony. The courts of other states have taken the same view of the question in cases to which we are referred. *Hatch v. Brown*, 63 Me. 410; *In re Smith*, 34 Minn. 436, 26 N. W. 234; *Brandon v. Mullenix*, 58 Tenn. 446; *Bloomington v. Osterle*, 139 Ill. 120, 28 N. E. 1068.

The judgment should be affirmed, with costs.

CULLEN, C. J., and O'BRIEN, BARTLETT, HAIGHT, MARTIN, and VANN, JJ., concur.

Judgment affirmed.

(180 N. Y. 88)

KURZ v. DOERR.

(Court of Appeals of New York. Dec. 30, 1904.)

ACTION FOR ASSAULT—INSTRUCTIONS—APPEAL—CERTIFICATE FROM APPELLATE DIVISION.

1. In a civil action to recover for injuries from an assault, an instruction that defendant is presumed innocent until he is proven guilty is properly denied.

2. Under Code Civ. Proc. § 191, subd. 2, a certificate of the Appellate Division that, in its opinion, a question of law is involved, which should be reviewed by the Court of Appeals, is sufficient, without specifying the question for review, as it is only under Code Civ. Proc. § 180, subd. 2, that such questions are required to be certified.

Appeal from Supreme Court, Appellate Division, Second Department.

Action by George Kurz against Anton Doerr. From a judgment of the Appellate Division (83 N. Y. Supp. 736) affirming a

judgment in favor of plaintiff, defendant appeals. Affirmed.

Leander B. Faber, for appellant. Stephen H. Voris, for respondent.

BARTLETT, J. This action was to recover damages for an assault committed by the defendant upon the plaintiff, by willfully and maliciously leveling a loaded firearm at him, and discharging the same. The jury rendered a verdict for \$250.

This appeal presents a single question, based on an exception to the charge of the trial judge. The following is an extract from the record: "Defendant's Counsel: I ask your honor to charge that the burden is upon the plaintiff to prove by a preponderance of evidence that the defendant is guilty of an assault. The Court: Yes; I charge that. Defendant's Counsel: Also that the defendant is presumed innocent until he is proven guilty. The Court: That presumption does not prevail here. It is a question of which one has presented to you a preponderance of the evidence; that is, does the evidence in favor of the story told by the plaintiff outweigh the testimony which makes against that claim? What I mean by 'the weight of the evidence' is the convincing force of the evidence as it appeals to your minds." We are of opinion that the trial judge committed no error in refusing to charge that the defendant is presumed innocent until he is proven guilty. The opinion of the learned Appellate Division to this effect, in which Mr. Justice HIRSCHBERG carefully reviews the conflicting authorities in this state, meets with our approval, and we adopt the same. We would add nothing to this opinion were it not deemed advisable that this court should, by positive statement, set at rest the question that has been much discussed by the bar and in judicial opinions. *Woodbeck v. Keller*, 6 Cow. 118; *Clark v. Dibble*, 16 Wend. 601; *Hopkins v. Smith*, 8 Barb. 599; *Johnson v. Agricultural Ins. Co.*, 25 Hun, 251; *Wilcox v. Wilcox*, 46 Hun, 32; *Grant v. Riley*, 15 App. Div. 190, 44 N. Y. Supp. 238; *Seybolt v. N. Y., L. E. & W. R. Co.*, 95 N. Y. 562, 47 Am. Rep. 75; *People v. Briggs*, 114 N. Y. 56, 20 N. E. 820; *N. Y. & Brooklyn Ferry Co. v. Moore*, 18 Abb. N. C. 106, 102 N. Y. 667, 6 N. E. 293.

In *Seybolt v. N. Y., L. E. & W. R. Co.*, supra, the action was for negligence resulting in the death of plaintiff's intestate. At the close of the case the defendant requested an instruction to the jury that: "The burden of proof is on the plaintiff to establish the negligence of the defendant. If there is a reasonable doubt, on the whole evidence, as to the negligence of the defendant, the verdict should be for the defendant." Chief Judge Ruger said (page 569, 95 N. Y., 47 Am. Rep. 75): "We are not aware of any rule applicable to the trial of issues of fact in civil actions which requires a party upon whom the burden of proof rests to establish

a case free from reasonable doubt. In criminal cases the law, out of tender regard for the rights of accused persons, and the presumption of innocence which always attaches to persons in that situation, gives to the defendant the benefit of any reasonable doubt existing as to his guilt; but in civil actions, unless the issue involves the commission of a crime by some of the parties thereto, the application of such a rule is, we think, unauthorized by the law of evidence. It was held in the case of *Johnson v. Agricultural Insurance Co.*, 25 Hun, 251, where the defendant had, in answer to an action upon a policy of insurance to recover damages for a loss occasioned by fire, alleged that the plaintiff had himself fired the insured buildings, that it was sufficient if the defense was supported by a preponderance of evidence, and that it was error to require the defense to be proved beyond a reasonable doubt. The question decided in that case has been the subject of considerable controversy among authors upon evidence, and we do not intend to express any opinion thereon."

In *New York & Brooklyn Ferry Co. v. Moore*, supra, the plaintiff sought to recover of the defendant, its ticket agent in the ferry house, moneys which it was alleged he had received in a fiduciary capacity and embezzled. Judge Earl, writing for this court, said (18 Abb. N. C. 119, 6 N. E. 296): "In this case it is not for us to determine how satisfactory plaintiff's evidence was, but whether there was any evidence to sustain the judgment. * * * There is no rule of law which requires a plaintiff in a civil action, when a judgment against the defendant may establish his guilt of a crime, to prove his case with the same certainty which is required in criminal prosecutions. Nothing more is required in such cases than a just preponderance of evidence, always giving the defendant the benefit of the presumption of innocence." The words last quoted, "always giving the defendant the benefit of the presumption of innocence," have led to some confusion in the lower courts. The presumption of innocence is not indulged in a civil action, as the plaintiff rests only under the burden of proving his case by a preponderance of evidence.

People v. Briggs, supra, was an action brought by the Dairy Commissioner, in the name of the people, to recover the penalty imposed by the act of 1885 "to prevent deception in the sale of dairy products." Chapter 183, p. 338, Laws 1885. The Legislature provided in this act that certain violations of it should subject the defendant to various penalties, and other violations were declared to be misdemeanors. The court was requested and declined to charge the jury that they must be satisfied beyond a reasonable doubt of the violation by the defendants, before they could find against them, and charged that they might so find upon a preponderance

of evidence, and exceptions were taken. Judge Bradley, after reviewing the authorities, said: "We have examined the numerous reported cases of the several states and England and the text-books cited by counsel, and some other cases, upon this question, and think that in civil actions the rule that the preponderance of evidence is sufficient to warrant the finding of the fact in which is involved the charge of such character has the support of the better reason."

We deem it very important that the strict rule of evidence applicable to the burden of proof in criminal cases should not be extended to civil actions for the recovery of damages, where the defendant is charged, incidentally, with arson, embezzlement, or any other crime. When life or liberty is involved, the proof must exclude reasonable doubt; but in a civil action, where a recovery of damages is sought against the wrongdoer, the plaintiff is only required to sustain his case by a preponderance of evidence.

The learned Appellate Division, in its order granting leave to appeal to this court, has submitted for our answer the following question: "Did the trial court err in refusing to charge the jury that the defendant is presumed innocent until proven guilty?" This appeal is taken under section 191 of the Code of Civil Procedure, subd. 2, which provides, in part, that no appeal shall be taken to this court from a judgment of affirmance rendered in an action to recover damages for a personal injury, when the decision of the Appellate Division of the Supreme Court is unanimous, unless such Appellate Division shall certify that, in its opinion, a question of law is involved, which ought to be reviewed by the Court of Appeals. The Appellate Division has in this case issued its certificate to that effect, and it is sufficient, without specifying a question for review. It is only in appeals taken under section 190 of the Code, subd. 2, that questions are required to be certified. *Young v. Fox*, 155 N. Y. 615, 50 N. E. 279.

The judgment and order appealed from should be affirmed, with costs.

CULLEN, C. J., and GRAY, O'BRIEN, HAIGHT, MARTIN, and VANN, JJ., concur.

Judgment affirmed.

(180 N. Y. 138)

AUGSBURY v. SHURTLIFF.

(Court of Appeals of New York. Dec. 30, 1904.)

SAVINGS BANKS—INDIVIDUAL DEPOSIT—MERGER—ORDER FOR PAYMENT TO SURVIVOR—DELIVERY—REVOCATION—EVIDENCE.

1. A husband and wife, having separate accounts in a savings bank, addressed the bank in writing, requesting that their accounts be merged so as to run to either or the survivor of them. Held to constitute an order for the change of the accounts so as to make each the joint owner

of the entirety, so that on the death of one the survivor would become the owner of the whole, but which was revocable by either party at any time before the order had been presented to the bank and complied with.

2. Where a husband and wife wrote an order to a savings bank in which each had a deposit to merge the same, so that on the death of either the survivor would become the owner of the whole, the husband, with whom the instrument was left after execution, was the agent of the wife, and, where he failed to deliver such order to the bank before the death of the wife, it was revoked thereby.

3. Where husband and wife, having individual accounts at a savings bank, execute an order on the bank to merge the same, in an action on the death of the wife to recover possession of the bankbook it is reversible error to nonsuit the plaintiff without submitting the question as to whether such order was delivered by the husband to the bank during the life of the wife.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by David D. Augsbury, administrator, against Lore F. Shurtliff. From a judgment of the Appellate Division (86 N. Y. Supp. 1128), affirming a judgment for defendant, plaintiff appeals. Reversed.

EL. C. EMERSON, for appellant. JOHN N. CARLISLE, for respondent.

HAIGHT, J. This action was brought to recover a savings bank passbook issued to Sarah Ann Roof in her lifetime by the Jefferson County Savings Bank. The defendant was the administrator with the will annexed of John C. Roof, and claims the right to hold the passbook as the property of his testator.

John C. Roof and Sarah Ann Roof were husband and wife. They had both been married before, but neither had any children. They both had made deposits in the Jefferson County Savings Bank, and a passbook had been issued to each of them. Sarah Ann Roof had a balance upon her book of \$911.26, and John C. Roof had a balance upon his book of \$900.88. They were about 80 years of age, and had each made and executed a will, in which each gave the use of his or her property to the other during life, and upon the death of the survivor each had bequeathed his or her property to collateral relatives. After the execution of these wills, and on the 8th day of January, 1896, they signed a paper, of which the following is a copy: "Theresa, N. Y., Jan. 8, 1896. To Jefferson County Savings Bank—Gentlemen: We, the undersigned, owners of bank books No. 23,861 and No. 25,472 issued by your bank, desire to have the accounts therein merged into an account running to John C. Roof or Sarah Ann Roof or the survivor of them; our object being that, in case of the death of either, the other may draw the whole amount. John C. Roof. Sarah Ann Roof. Witnesses: Mary E. Countryman. Lizzie Countryman." Two days after the making of the foregoing instrument Sarah Ann Roof had a stroke of paralysis, and was confined to her bed until her death, which occurred 10 days later. Some days after the

making of the paper John C. Roof took the paper to the savings bank, together with the bankbook of his wife, and the teller pasted the paper in the bankbook containing signatures, and wrote upon the passbook, after the name of Sarah Ann Roof, the words "and John C. Roof," so that the account read "Jefferson County Savings Bank in account with Sarah Ann Roof and John C. Roof." He also made the same change upon the ledger account. It is claimed on behalf of the plaintiff that the paper was taken to the bank and the changes made in the books after the death of Mrs. Roof, and that prior to her death and after her paralytic stroke she spoke to her husband in monosyllables at repeated intervals, indicating that she wanted her own, and that he replied to her that he knew what she wanted, and that he would get the paper and destroy it, and that the conversation had reference to the above-described paper.

The first question which we deem it important to consider is the meaning and effect intended to be given by the parties to the paper. As we have seen, it is addressed "to the Jefferson County Savings Bank." The respective owners of the bankbooks which were described in the paper expressed their desire to have their accounts merged so as to run to John C. Roof or Sarah Ann Roof, or the survivor of them. They then concluded by stating their object to be "that, in the case of the death of either, the other may draw the whole amount." There are no words here indicating any present gift from one to the other of any portion of the funds on deposit in the bank. On the contrary, it is apparent that each in his or her lifetime intended to retain the fund, so that either could draw upon their deposits as their necessities might require; but it is apparent that they intended that, upon the death of either, the other should be permitted to draw the whole amount. The purpose for which the survivor might draw the whole amount is not specified. In the absence of evidence upon the subject, the inference might be permissible that it was their intention to give the survivor the right to draw the whole amount so as to make it his or her own property. Assuming this to be so, the effect of the paper was therefore a written order addressed to the bank requesting it to change their respective deposits so as to make each the joint owner of the entirety, analogous to a joint tenancy or tenant by the entirety in real estate, so that upon the death of one the survivor became the owner of the whole. *Bertles v. Nunan*, 82 N. Y. 152, 44 Am. Rep. 361. As we have seen, the paper was an order merely, and was executory until it was presented to the bank and the deposits were changed in accordance therewith. It is conceded that it was subsequently taken to the bank by John C. Roof and the changes made so far as the deposit of Mrs. Roof was concerned; but was this

change made during her lifetime? Upon this subject considerable evidence was taken, and, if the fact is material, it doubtless became a question for the jury to determine.

This brings us to a consideration of the question as to whether the order is deemed to be revoked by the death of Mrs. Roof before it was delivered to the bank and the change in the deposits made. The order was executory until its delivery to the bank and the changes in the deposits were made. It, consequently, could be revoked by either party at any time before the order had been complied with. It is contended that Mrs. Roof did revoke by her statements in monosyllables, but these declarations were too vague and uncertain to warrant a finding of fact to that effect. If it was revoked, it was by reason of her death before it was delivered to the bank. The paper, as we have seen, was a mere executory order, which did not constitute an executed gift, or make either of the parties thereto a creditor of the other. Mrs. Roof only intended to give to her husband the same right to draw upon their joint account that she had until her death, and then, if he survived her, the right to draw the whole; but before her order had been executed she died, and her estate at once became vested in her heirs at law, or, upon proof of her will, in her collateral relatives specified, subject to the life use of her husband. If her husband had become her creditor, he could prove his claim as against her estate; but he was not a creditor. If the execution of the paper was a gift in present, then, of course, the money on deposit became his; but it was not such a gift, nor so intended, for she retained the right to draw every dollar of the fund and use it for her own purposes. It was not a gift *inter vivos*, for the reason that, as we have shown, the order was executory and not executed. It was not a gift *causa mortis*, for the reason that the parties, at the time of executing the paper, were not suffering from any disease or apprehensive of death from any impending perils. The paper, as we have seen, was left in the possession of John C. Roof. He is deemed, therefore, to have become the agent of his wife to take the paper to the bank; but, if he failed to do this within her lifetime, his agency, by the happening of that event, is deemed to have been revoked. Schouler on Personal Property (volume 2, § 86) correctly states the rule as we understand it: "An agency is revoked by the principal's death; therefore the agent of one who intends a gift *inter vivos* must have performed what was incumbent upon him to make the transfer complete during the donor's lifetime, otherwise the gift fails as though the donor himself had failed to make a seasonable delivery. Nor can a gift *inter vivos* be sustained which contemplates a postponement of delivery by the agent or trustee until the donor's decease, for a gift of personalty made after this fashion must

stand, if at all, as a gift *causa mortis*, or else on the footing of a testamentary disposition, with all the formalities of a will. Delivery, then, in all cases of ordinary gift, must have been made during the donor's lifetime. But if the gift has been once completed, so as to fully transfer the beneficial interest from donor to donee, in accordance with their mutual intent, and so as to make any third party holding the custody the trustee for carrying out the original purposes of the donation, or the donee's agent, the subsequent death of the donor, sooner or later, will leave the gift unimpaired." Story on Agency, § 488; *Farmers' L. & T. Co. v. Wilson*, 189 N. Y. 284, 289, 34 N. E. 784, 86 Am. St. Rep. 696.

We conclude that the question as to whether the order was delivered to the savings bank during the lifetime of Mrs. Roof is material, and under the evidence the question as to whether it was so delivered was for the jury, and that the exception taken by the appellant to the nonsuit raises an error of law which requires a reversal of the judgment.

The judgment should be reversed and a new trial granted, with costs to abide the event.

VANN, J. (concurring). This action was brought by the personal representative of Sarah Ann Roof against the personal representative of John C. Roof, her husband, to recover possession of a savings bank passbook as evidence and a muniment of title to the deposit represented thereby, which, according to the rules of the bank, could be drawn only upon the production thereof. The defendant by his answer claimed that, as such personal representative, he was entitled to possession of the passbook and to the amount of the deposit. Upon the trial before a jury a nonsuit was granted, and, the judgment entered thereon having been affirmed by the Appellate Division, the plaintiff came here.

John C. Roof and Sarah Ann Roof, his wife, were aged people, without children, and each had a small amount of property. On the 2d of September, 1890, when she was 75 years of age, Mrs. Roof made her will, whereby she gave to her husband the use of all her property during his life. On the 18th of July, 1895, when he was 77 years old, Mr. Roof made his will, whereby he gave to his wife the use of all his property during her life. On the 8th of January, 1896, each had a passbook from the Jefferson County Savings Bank, representing deposits made by them respectively at various times. The balance on that day due her, according to her passbook, was the sum of \$911.26, and the balance due him, according to his passbook, was the sum of \$900.88. On the day last named Mr. and Mrs. Roof executed an instrument, of which the following is a copy: "Theresa, N. Y., Jan'y 8, 1896. To Jefferson Co. Savings Bank—Gentlemen: We, the un-

dersigned, owners of bank books No. 23,661 and No. 25,472, issued by your bank, desire to have the accounts therein merged into an account running to John C. Roof or Sarah Ann Roof, or to the survivor of them, our object being that in case of the death of either the other may draw the whole amount. John C. Roof. Sarah Ann Roof. Witnesses: Mary E. Countryman. Lizzie Countryman." Mrs. Roof had a stroke of paralysis on the 10th of January, 1896, and died 10 days later, while Mr. Roof survived until the 8th of August, 1899. At some time he took her passbook and said paper to the bank, when the entry was changed by the paying teller, who added the name of John C. Roof as one of the depositors, so that it read: "Jefferson County Savings Bank, in account with Sarah Ann Roof and John C. Roof." Both accounts were changed on the ledger of the bank so as to read in the same way, but no change was made in the passbook of Mr. Roof, which was not produced for the purpose. Whether said changes were made before or after the death of Mrs. Roof was a question upon which there was a conflict in the evidence. When the plaintiff rested the defendant moved for a nonsuit, which was granted, although counsel asked to go to the jury "on the question as to whether there was an intent upon the part of Sarah Ann Roof to transfer her interest in this fund to her husband," and also "upon all the questions of fact in the case." Each request was denied separately, and a separate exception was taken to each ruling.

The instrument of January 8, 1896, was a letter of instructions to the bank, directing that the two accounts should be merged into one, running to the two depositors severally, or to the survivor. The object of the merger, as expressly stated in the paper, was to enable the survivor to draw the whole amount upon the death of the other. The question at once arises, why did these two old people desire to confer authority upon the longest liver of them to draw the entire sum on deposit to the credit of each separately? They were husband and wife, so that the object may have been a gift. They had made mutual wills, so that the object may have been convenience both of administration and enjoyment under the wills, which gave a life use.

The letter of instructions was not literally complied with by the bank, which changed the account in question so as to make it joint in form, whereas the direction was to make it several. The two names should have been separated by the word "or," but, instead, they were united by the word "and." What the bank did, however, is not very important, but what Mr. and Mrs. Roof wrote is of the highest importance. As the account was to be several in form, either could draw during the lifetime of both, which would tend to show that a gift *inter vivos* was not intended. *Gannon v. McGuire*, 160 N. Y. 476, 481,

55 N. E. 7, 73 Am. St. Rep. 694; *Beaver v. Beaver*, 117 N. Y. 421, 428, 22 N. E. 940, 6 L. R. A. 403, 15 Am. St. Rep. 531. The fact that neither of the parties was at the time laboring under the apprehension of death from some disease then existing would tend to show that a gift *causa mortis* was not intended. *Ridden v. Thrall*, 125 N. Y. 572, 579, 26 N. E. 627, 11 L. R. A. 684, 21 Am. St. Rep. 758; *Williams v. Guile*, 117 N. Y. 343, 349, 32 N. E. 1071, 6 L. R. A. 368.

When a donor receives as much as he gives, a consideration is suggested, and a consideration suggests a contract. Each of these parties had the same chance of benefit as the other, and the question is presented whether there was an agreement underlying the letter of instructions, of which the letter, as the means of carrying it into effect, was some evidence.

Considering that the relation of husband and wife existed between these persons, that they had no near relatives, that they had made mutual wills, that they had both reached extreme old age, and that their bank accounts were substantially equal in amount, and reading the letter of instructions in the light of these facts, I think that the question of fact arose whether each had transferred to the survivor his or her bank account, or what should be left of it upon the death of the shortest liver. While the letter of instructions was not a transfer, it was evidence from which, in connection with the other facts, a jury might infer, not necessarily, but in the exercise of their sound judgment, that such a transfer as would fit the letter had been made. Since the letter is adapted to carrying a particular form of transfer into effect, it is some evidence that a transfer of that kind had been made. It may have been drawn for some other purpose, such as mere convenience, but it was for the jury to say, under all the circumstances. While Mr. Roof was named as the executor of his wife's will, she was not named as the executrix of his will, so that convenience of administration would not necessarily have been promoted by the letter.

A contract by which each of two owners of a fund, as tenants in common, transfers his interest therein to the other if he survives him, is supported by a good consideration, and I see no reason why the intention of the parties should not be enforced by the courts. While such an agreement cannot be performed until after the death of one of the parties, it is complete and irrevocable, for neither can withdraw therefrom without the consent of the other. It is not testamentary in character, because it is founded on a valuable consideration, and is not subject to revocation. It is as absolute as a deed, "which is to take effect so as to pass the title at" the death of the grantor. *Worth v. Case*, 42 N. Y. 362, 366; *Carnwright v. Gray*, 127 N. Y. 92, 27 N. E. 835, 12 L. R. A. 845, 24 Am. St. Rep. 424. When a husband takes

securities payable to himself or his wife, they become hers if she survives him, and the delivery thereof to her by him is not necessary to perfect the gift. *Sanford v. Sanford*, 45 N. Y. 723; *Fowler v. Butterly*, 78 N. Y. 68, 72, 84 Am. Rep. 507. This is upon the theory of a gift where there is no consideration, but where there is a contract between husband and wife, resting upon a mutual and equal consideration, providing that the security created by both and standing in their names severally shall belong to the survivor, effect must be given to it, or the law of contracts is violated.

Without prolonging the discussion, I am of the opinion that there was a question of fact, other than that discussed in the prevailing opinion, which should have been sent to the jury, and I therefore concur in the result.

CULLEN, C. J., and GRAY and O'BRIEN, JJ., agree with HAIGHT, J. BARTLETT, J., agrees with VANN, J. WERNER, J., absent.

Judgment reversed, etc.

(180 N. Y. 525)

PEOPLE ex rel. PROVIDENT SAV. LIFE ASSUR. SOC. v. MILLER, Comptroller.

(Court of Appeals of New York. Dec. 30, 1904.)

Motion for reargument. Denied.

For former opinion, see 71 N. E. 930. For opinion below, see 85 N. Y. Supp. 468.

O'BRIEN, J. There is nothing in the opinion in this case to justify the assumption in the motion for reargument that the tax was supposed to be, and treated by the court as, a property tax. On the contrary, it is plainly stated in the opinion that it is a franchise tax, and nothing else. But a franchise tax, like a transfer tax, must ultimately rest upon and affect property of some kind or description. It cannot be paid out of the franchise, but in this case from the assets or business of the corporation. We may properly call the tax a franchise tax, but, whatever name is given to it, the burden is to be borne by the assets or business of the corporation. What business? Is it the business transacted or growing out of contracts made years ago, before any such tax was thought of, or only such business and contracts as originate on or after the date when the law takes effect? It may be true that the Legislature has the power to measure the tax in either way, but, if it intended that the burden should rest on past contracts or transactions, as well as future contracts or transactions, that intention should be expressed in words so clear as to leave no room for construction. In this case we have construed the words of the statute as applicable

only to future business arising from future contracts. That is all we decided. Every tax, by whatever name it is called, must rest upon and become a burden on some kind of property. When the burden rests upon the income or receipts of corporate business, as in this case, in the absence of clear language to the contrary, the statute should be construed as applying to future business, and not to past transactions. If there is any ambiguity in the statute, it should be resolved in favor of the taxpayer, and not in favor of the state.

The motion should be denied, with \$10 costs.

GRAY, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur.

Motion denied.

(180 N. Y. 125)

PEOPLE v. SMITH.

(Court of Appeals of New York. Dec. 30, 1904.)

MURDER—EVIDENCE—REMARKS OF PROSECUTING ATTORNEY—INSTRUCTIONS.

1. Evidence on trial for murder held to warrant a verdict convicting defendant of murder in the first degree.

2. An exception to remarks of prosecuting attorney during a dispute with defendant's counsel is not ground for reversal, where the jury is directed to disregard the discussion as immaterial.

3. On trial for murder, an instruction, where the evidence was circumstantial, that if, from "the established facts," the jury is satisfied as to defendant's guilt, its judgment rests on a foundation as secure and reliable as though it rested on the testimony of eyewitnesses, is not ground for reversal.

4. Where, on a trial for murder, the charge deals only with the facts in evidence, the narration of the facts in defendant's own language is not erroneous because his story seems unreasonable or incredible.

Bartlett and Vann, JJ., dissenting.

Appeal from Supreme Court, Trial Term, Monroe County.

George A. Smith was convicted of murder in the first degree, and appeals. Affirmed.

Louis E. Fuller, for appellant. Stephen J. Warren, Dist. Atty. (Willis A. Matson, of counsel), for respondent.

O'BRIEN, J. The defendant has been convicted of the crime of murder in the first degree upon an indictment which charged him with the killing of his wife about 3 o'clock on the morning of September 9, 1897. The woman died about five days thereafter. That her death was caused by a pistol shot wound in the head, inflicted feloniously while she was in bed, either by the defendant or some other person, is not disputed. The evidence in support of the indictment against the defendant was mainly circumstantial, and consisted largely of the defendant's acts, conduct, and statements concerning the tragedy. The case comes before this court

for the second time. On a former appeal we reversed the judgment of conviction for certain erroneous rulings at the trial in the admission of evidence which was held to be incompetent. *People v. Smith*, 172 N. Y. 210, 64 N. E. 814. The new trial then granted has resulted in another conviction, and the present record is free from the objections found in the former one.

The facts and circumstances of the case are so fully stated in the report of the case on the first appeal that it is quite unnecessary to repeat them here at any great length, and they will be referred to as there stated, but only in a very general way. There is very little difference in the facts as they now appear and as they were disclosed by the former record. The defendant professed to know, and doubtless does know, in what manner and under what circumstances his wife was killed. A few hours after the tragedy occurred he stated with considerable detail all the facts, as he claimed, in regard to the homicide; and these statements, which the proof at the trial tended to show were utterly false, constitute a large part of the groundwork of the case against him, and which has resulted in producing two convictions. The homicide was committed in the house where the defendant and his wife lived, and the only other occupants were an invalid nephew of the wife and a young woman who attended him as a nurse. The nephew and the nurse occupied a bedroom and hall directly over the room where the defendant and his wife slept, but they heard no shot, although the nurse was giving medicine on the hour, and between hours passed up and down stairs. The defendant and his wife occupied the same bed, having retired about 10 o'clock on the previous night. Shortly before 3 o'clock in the morning a physician, who was a near neighbor, heard the report of a pistol in the direction of the defendant's house, but, so far as appears, it was heard by no one else. At about 3 o'clock the nurse was aroused, but what awakened her she was unable to state. Upon awakening she heard groaning, went to her patient, found him sleeping, and then concluded that it was below, and that it was the defendant. She did not go to the room where he was until about 4 o'clock, and in the meantime the groaning continued; but she heard no other sound except some time after 3 o'clock she heard the shutting of a door which she was not able to locate. When finally she went below she found the defendant in the dining room, fastened with cords or small ropes to the leg of the oak dining table, with his legs bound, his hands tied behind him, and a gag in his mouth. She asked him if he was sick, and he replied, "They bound me; let me loose." She at once summoned the neighbors. Upon her return she went to the bedroom occupied by the defendant and his wife, saw blood on the decedent's face and on the sheets, and ask-

ed her what had happened. She did not reply, but inquired for the defendant. The neighbors soon reached the house. One of them cut the cords with which the defendant was bound, and raised him from the floor, when he at once stated that two masked burglars had entered the room occupied by himself and wife, dragged him from the bed, compelled him to disclose where his money was hidden, which they took, and then bound, gagged, and left him in the condition in which he was found. He was partly dressed, having on trousers, a night shirt, a pair of socks, and suspenders over his shoulders. The table to which he was fastened was an ordinary dining table, upon which were the dishes ordinarily used for meals. He described the burglars as one being tall, the other short, as wearing white masks and moccasins, and as carrying shining revolvers. He also stated that they kicked, pounded, and sandbagged him; that he heard the discharge of a gun in the room then occupied by his wife, who cried "murder!" and that was why they shot her; that after the gun went off the burglars said it went off accidentally. This is substantially the defendant's version of the tragedy which resulted in the death of his wife.

The premises where the homicide occurred were searched by officers, who found pieces of rope or cord which were proved to be similar to those with which the defendant was bound. A revolver frame without a cylinder, and also the center pin, were found in a building upon the premises, and in the same building were found several cartridges, the bullets in which were proved to be similar to that extracted from the decedent's head. The cylinder belonging to the revolver frame was never discovered, although a most thorough search was made of the entire locality. The defendant groaned and complained so loudly of pain resulting from his injuries that he was asked to keep quiet both by the physician and nurse in attendance. Subsequently the physicians removed his shirt, examined his chest, abdomen, and hip where he claimed to have been injured, but no indications of external bruises or injuries were found. Proof was given that there was dust on the window sill that appeared to be undisturbed, which tended to show that no one passed through the window by which the defendant claimed that at least one of the burglars had escaped. There was also proof that where he said the box containing his money was hidden there was dust, but that it was undisturbed, thus indicating that his statements in that respect were also untrue. The testimony at the trial tended to show that these statements of the defendant were false. There was some evidence tending to show that the relations between the defendant and his wife had at times been unpleasant, although there was other evidence that their relations were most friendly. There were two life insurance

policies of \$1,000 each upon the life of the decedent, which had been assigned to the defendant.

The jury have evidently found that the defendant's statements in regard to the homicide were false, and, if they were false, as declared by the verdict, that is a circumstance of far-reaching importance, since it is quite inconceivable that such a series of falsehoods would be constructed by the defendant except for the purpose of warding off suspicion from himself. Such a series of falsehoods could not have originated in the defendant's mind unless through a consciousness of his own guilt. So that, the truth or falsity of these statements was a matter of importance at the trial; and when the jury found that they were false the conclusion that the defendant himself was the author of his wife's death was almost inevitable.

This case comes before us again, as it did on the former appeal, without any claim on the part of the defendant's counsel that the case should have been taken from the jury, and manifestly there can be no ground for such a claim. The question of the defendant's guilt or innocence under the circumstances was for the jury, and we cannot see how any other verdict than the one rendered was reasonably possible under the circumstances of the case. What was said by the court in disposing of the former appeal is just as applicable to the case now as it was then, and hence we may now assume many things that were the subject of discussion before. There was a mass of expert evidence produced to show that the revolver found in the building without a cylinder was the weapon from which the fatal shot was fired, and that the bullets found with this revolver frame corresponded with the bullet taken from the head of the deceased woman. It is quite unnecessary to go into these matters again. It would only be repeating what has been said before.

The learned counsel for the defendant seeks to reverse this judgment upon certain exceptions which were taken at the trial to the admission or exclusion of evidence, to the conduct of the trial generally, and to certain parts of the charge. These exceptions are very numerous, and they have been discussed at the bar and in the briefs of counsel at very great length. It would serve no useful purpose to discuss or refer to them in detail, and it would extend the scope of this opinion beyond all reasonable limits. It is enough to say that we have carefully examined them all, and we think that none of them present any question that would justify this court in interfering with the verdict.

There are two or three exceptions in the case that have been presented at length, and with great earnestness. If these exceptions present no error, it is safe enough to say that the rest are very much weaker, and

even less harmful. After a witness called by the people had been examined by both sides, and his examination completed, a juror interrogated the witness with respect to whether any one asked the deceased any question when they were probing the wounds. The witness answered, "Yes." The juror then asked what they asked her. When the last question was propounded by the juror as to what they asked, defendant's counsel interrupted the answer by remarking that he did not object to it, "except the Court of Appeals had ruled it should not be presented in this case." The district attorney then said, "There is no objection, unless there is an objection made coming from the defendant," whereupon the court remarked, "It is hardly proper to ask those questions." Counsel for the defendant then took up the discussion, and, among other things, stated that he considered it an exceedingly improper thing, when he had made an objection for the purpose of having the case tried as the Court of Appeals had indicated with respect to this evidence, "that an attempt should be made by counsel to prejudice the defendant by flinging it at me that the door had been opened and this truck that went in the last time should be admitted in the case, for the reason that the only effect of that thing can be to give to this jury an inference of something from which they may draw an inference that something was said by Mrs. Smith to some of these people from the time she was found there until she died, charging this defendant with having some connection with that crime. Now, I consider that an exceedingly improper thing to do here at this trial, for the reason that my friend himself knows that not a word was uttered by that woman charging this defendant with the commission of that crime, or any connection with it, and it seems to me flinging out an innuendo of that kind on the part of the counsel is wrong, and prejudicial to the defendant, and it should be stopped." The district attorney then said: "The counsel has made the declaration that he intended to make when he started in, and that declaration is to the effect that I know that Mrs. Smith said nothing in regard to this defendant having any connection with the commission of the crime that night. I say in return that I do not know that to be the fact, and, if that is the position the counsel is to take in this case, I say let all the conversation that was had with Mrs. Smith on that night come into this case. So I say, if there is no objection on the part of the counsel for the defendant, let this testimony come in. The inquiry has been made as to what was said there, and I have not any objection to it. Let everything come in. I say let it all come in, all she said from the time of the shooting until she died." The court then said in the presence of the jury: "Gentlemen, you will disregard and not consider the remarks just made by counsel upon either side." Defend.

ant's counsel excepted to the remarks made by the district attorney, and the latter stated they were only made in reply to what defendant's counsel had said. The discussion was then dropped.

It will be seen that the matter quoted above from the record presents no question of law, or even of fact. So far as there was any expression of opinion of the court, it was in favor of the defendant, and not against him. It frequently happens in a long and tedious trial, such as this was, that counsel are tempted to indulge in verbal disputes in which each acts a part intended to make an impression on the jury. It is very seldom, if ever, that this kind of verbal warfare produces the result intended or has any effect whatever except to ruffle the temper of the combatants. The persons selected as jurors in a capital case ought to be credited with such a measure of sturdy good sense and judgment that no danger of injustice to the accused need be seriously entertained by reason of such incidents at the trial. If it were otherwise, and it could be supposed that a jury selected to try a case involving the question of life or death could be influenced by such unbecoming displays of professional zeal, it would go far to discredit the whole jury system. This court cannot reverse a judgment, even in a capital case, by reason of a dialogue between counsel which originated with the defendant's counsel himself, and in which he had, if not the last, possibly the strongest, word, especially when the court put the matter at rest by a ruling in the presence of the jury to the effect that the discussion had nothing to do with the case.

The court charged the jury that "no greater degree of certainty is required where the evidence is circumstantial than where it is direct, for in either case the jury must be convinced of the prisoner's guilt beyond a reasonable doubt. You are bound by your oath to render a verdict upon all of the evidence, and the laws make no distinction between direct evidence of a fact and evidence of circumstances from which the existence of a fact may be inferred. In drawing conclusions and inferences from the established facts in this case, if you reach the conclusion that the accused was guilty of the crime charged against him, your judgment rests upon a foundation fully as secure and reliable as though it rested upon the testimony of eyewitnesses." This part of the charge was excepted to, and it is claimed that prejudicial error is to be found in the language quoted and the use of the words "established facts" because they are the positive assertion of the sufficiency of the people's case, and the instruction eliminated the question of reasonable doubt. The use of the words "established facts" doubtless had reference to certain facts in the case which were not disputed, but it is apparent from the whole charge that there was no intention to take from the jury any question of fact

as established beyond their power to determine what the real truth was with respect to the whole case. The central idea which the trial court was evidently attempting to impress upon the minds of the jurors was that the evidence of eyewitnesses of the killing was not necessary, but that their verdict might rest upon circumstantial evidence, provided they were satisfied of the prisoner's guilt beyond a reasonable doubt. In this there was no error.

There is another paragraph of the charge that is earnestly assailed by the defendant's counsel, and the exception covering it is perhaps the most important one in the case. The charge was as follows: "If you believe from the evidence that masked burglars entered the bedroom occupied by the defendant and his wife, dragged him from his bed into the dining room, and allowed him to put on his trousers and socks because he was cold, sandbagged and pounded him, and he made no outcry, compelled him, by holding shining revolvers to his head, to disclose where his money was hidden, which they took from under the bureau without disturbing the dust which covered the floor where this cigar box was located, and then bound and gagged him and tied him to the leg of the dining table, upon which there were dishes apparently undisturbed, and then, because his wife made an outcry, they shot her, and then the burglars left the house, one or both of them going through the window, upon which there was mosquito netting, without tearing the netting from the window or disturbing the dust on the window sill or the grass under the window, then, gentlemen, it is your duty to acquit him. But if you reach the conclusion that burglars did not enter the house that night and shoot his wife, and that his statements were false, then you may determine from all the facts and circumstances whether the defendant of his own accord put his trousers and socks on, and the purpose of putting them on at that hour of the night." An exception was taken to this part of the charge, and it is insisted in behalf of the defendant that, taken as a whole, it was neither an exposition of the law nor a fair summary of the evidence. A careful perusal of the evidence of the witnesses on the subjects reviewed by the learned trial court in this portion of his charge discloses that all the facts collated were testified to repeatedly in the course of the trial, and were substantially undisputed so far as they constituted the theory of the defense. It was the story of the crime as narrated by the defendant to the witnesses who first discovered him tied to the leg of the dining room table. Several witnesses also testified to the location of the table, the window, the contents of the table, the condition of the window sill, the netting at the window where he had stated the burglars left the room and the other facts referred to in the charge. This part of the

charge is an epitome of the defendant's own version of the transactions that resulted in the death of his wife. It contains no element that was not to be found in the evidence at the trial. It is said that the learned trial judge so arranged and marshaled the facts disclosed by the testimony that a vein of sarcasm runs through the whole passage, which was not only out of place, but unseemly and erroneous in the discussion of such grave questions as the case presented. We do not think that this criticism is well founded. If the narrative of the facts in substantially the defendant's own language made a story that seemed unreasonable or incredible, it was not on that account error for the trial court to bring them to the attention of the jury. Whatever the impression that the narrative, as it appears in the charge, is calculated to make on the mind, is due to the character of the facts themselves as stated by the defendant, rather than to any coloring or rhetorical art on the part of the learned trial court. It would be quite difficult to so arrange the facts in the defendant's narrative of the events that resulted in his wife's death without giving the impression of which the learned counsel for the defendant now complains. It is the defendant's own version of the transactions that impresses the mind, and not the manner in which it is stated. The charge, on the whole, was a fair one, and, if there were expressions in it that indicated that the judge had an opinion upon the questions of fact, he was careful to guard the jury from any possible influence from that source. The following passage from the charge will show how completely the jury was left to determine the case for themselves: "Now, gentlemen," said the court, "if you have gleaned any information as to my views of the merits of this case by any of my rulings or remarks made to counsel during the trial, you will discard it at once. * * * But whether the defendant killed his wife is a question of fact which you must determine from all the evidence in the case, and that must be established beyond a reasonable doubt. * * * If you are satisfied from the evidence that the defendant committed the crime of killing his wife * * *. These are questions for you to consider and answer. I do not say he did the things, or what inference may be drawn from the facts proved. I simply allude to these important points in order that you may give them your careful consideration. If burglars did not commit the act, then it is for you to say, from all the facts and circumstances, whether the defendant committed the crime or not." We do not think that any fair reason can be given for disturbing the judgment in this case based upon the charge or upon any ruling disclosed by the record. It should be observed that no trace of any burglars was ever found in the neighborhood, and the theory of the people was that the defendant

committed the homicide himself, and then invented the story that it was the act of burglars in order to protect himself from suspicion. The proof also tended to show that the binding and gagging was done in such a way that he could easily have accomplished it himself. It is now over seven years since the offense was committed of which the defendant has been convicted. There have been substantially three trials of the case. The first trial resulted in the discharge of the jury without a verdict in consequence of the serious illness of one of its members. The second trial resulted, as already stated, in a verdict of guilty. The judgment upon that verdict was reversed in this court for the reason stated. On the new trial thus ordered the defendant has been convicted again, and, after a careful review of the whole case, we have been unable to find anything in the record of the trial that would justify this court in interfering with the judgment, and so it must be affirmed.

CULLEN, O. J., and GRAY, HAIGHT, and WERNER, JJ., concur. BARTLETT and VANN, JJ., dissent.

Judgment of conviction affirmed.

(187 Mass. 141)

CRAPO et al. v. PEIRCE.

(Supreme Judicial Court of Massachusetts.
Bristol. Jan. 3, 1905.)

WILLS—CONSTRUCTION—MEANING OF TERM
"CHILDREN."

1. In the construction of a will not only the intention of the testator must control, but it is to be gathered from the instrument itself, read in the light of the circumstances existing at the time it was made.

2. Testatrix gave a fund to trustees, the income to be paid to a certain person; after his decease to his wife for life, and after her decease the principal to be distributed among the children of said person and wife. At the time the will was executed, both beneficiaries of the trust were in the service of testatrix, and had been for many years, both before and after their marriage. *Held*, that children of the husband by a former marriage were not entitled to share in the distribution of the fund on the death of both beneficiaries.

Appeal from Supreme Judicial Court, Bristol County.

Petition by William W. Crapo and others, as trustees, for instructions as to the distribution of the trust fund. From the decree Mary Peirce, a claimant of the fund, appeals. Affirmed.

Perry, Jenny & Potter, for appellant Mary L. Peirce. O. Prescott, Jr., for petitioners. J. E. N. Shaw, for appellees A. R. and F. R. Brownell.

BRALEY, J. By the fifth clause of her will Silvia Ann Howland gave a fund to trustees, whose successors are the petitioners, upon the trust "to pay to Frederick

¶ 1. See Wills, vol. 49, Cent. Dig. §§ 955-961.

Brownell, who now works for me, the income and net profits arising therefrom during his life, and after the decease of said Frederick to pay the said income to his present wife, if she shall survive him, during her life, and after the decease of said Frederick and wife to pay, distribute and divide the said principal fund however the same may be then invested to and among the children of said Frederick and wife, and the issue of any deceased child by right of representation." As the beneficiaries for life are dead, the principal fund is now to be distributed. The question is whether Mary L. Peirce, the appellant, a child of said Frederick by his first marriage, is entitled to share in the distribution with Abbie R. Brownell and Frederick A. Brownell, children by his second marriage. It is well-settled law that in the construction of a will not only the intention of the testator must control, but is to be gathered from the instrument itself, read in the light of the circumstances existing at the time it was made. *Dana v. Dana*, 185 Mass. 156, 70 N. E. 49; *Thissell v. Schilling*, 186 Mass. 180, 71 N. E. 300. These familiar rules are to be applied for the purpose of ascertaining the intention of the testatrix. At the date of the execution of the will Frederick Brownell and his wife, Anna B. Brownell, were in the employment of the testatrix. They had been for many years in her service, both before and after their marriage, and the existing relation created not only a friendly interest in their welfare, but led her to recognize their long and faithful service by making pecuniary provision for their benefit. With these conditions in mind, she provides for Frederick absolutely during his life, and at his death the income is given to "his present wife." This specific bequest, while designed to show her regard for Anna, also prevented the possible intervention of another legatee for life before distribution among the children if Anna died and Frederick again married. Even if all his children were living, yet in her contemplation of the family was a unit, composed of Frederick, his wife, and the two children born of the second marriage; for she immediately goes on to provide for a final distribution after the decease of their father and mother. If she had said the children of "said Frederick," and gone no further, those born of both marriages would have been included. *Andrews v. Andrews*, L. R. 15 Ir. 199. But the qualifying words "and wife" are used, and constitute a limitation which cannot be rejected, and narrow the gift. The whole phrase, then, should be read collectively, as she used it, and not distributively, to mean the children of Frederick and the children of Anna. *Luce v. Harris*, 79 Pa. 432; *Gelston v. Shields*, 78 N. Y. 275. By this interpretation they plainly identify "children" to be the issue of Frederick by "his present wife," and do not include the appellant.

Decree of probate court affirmed.

(187 Mass. 174)

MOWRY v. REED.

(Supreme Judicial Court of Massachusetts.
Franklin. Jan. 4, 1905.)

BANKRUPTCY — FRAUDULENT TRANSFER — JURY QUESTION — TROVER AND CONVERSION — CROSS-EXAMINATION.

1. In trover by a trustee in bankruptcy against the bankrupt's wife, who was alleged to have converted funds of the bankrupt to her own use, it was proper to show on cross-examination of defendant that she received a check for the fund in question, and kept it nearly three months; that she then drew the money on it in the place of her residence, and on the same day carried it to a city some 30 miles away, and there deposited it in two banks; that, her husband having been under examination in bankruptcy, and having refused to tell where the money was, she went to the banks where it was deposited the following day and drew it out; and that thereafter, on being examined in the bankruptcy proceedings, she, by advice of her counsel, refused to tell where the money was, and also whether she used the money a long time afterwards.

2. In trover by a trustee in bankruptcy against the wife of the bankrupt, who was alleged to have converted funds of the bankrupt to her own use, evidence examined, and whether the transfer in question was made by the bankrupt with an actual intent to defraud future creditors held a question for the jury.

Exceptions from Superior Court, Franklin County; Elisha B. Maynard, Judge.

Action by Miles L. Mowry, trustee in bankruptcy of the estate of Frank E. Reed, against Abbie N. Reed. From a judgment for plaintiff, defendant brings exceptions. Overruled.

Fredk. L. Greene and Wm. A. Davenport, for plaintiff. Dana Malone and Chas. N. Stoddard, for defendant.

BARKER, J. The main facts concerning the occasion for this suit are these: The defendant's husband for about 14 years up to the spring of 1897 had kept a hotel, and during that time she had worked constantly and efficiently helping in that undertaking. Upon parting with his interest in the real estate of the hotel at that time, he caused the title to a house and lot which he was to have in exchange to be conveyed to his wife; saying that it was her share of the property, and that she had worked hard and earned it. The title so placed in her remained until November 23, 1897, when, upon the occasion of her husband's purchase of the lease, furniture, and stock of another hotel, the title was conveyed by her to the person with whom her husband's bargain was made. In the deal that person received a deed of the title and certain shares of stock, and the defendant's husband received a lease of the hotel authority to sell liquors under a license, indemnity against claims of a prior lessee, and a bill of sale of the furniture and fixtures of the hotel. The defendant's husband ran this hotel until January 30, 1901, when the stock, furniture, and fixtures were sold for cash, of which \$3,500 was paid by the purchaser to the defendant in a bank

check or draft. On April 2, 1901, the defendant's husband became a voluntary bankrupt, and this action is brought by his trustee in bankruptcy to recover the \$3,500 on the ground that it was property of the bankrupt transferred to her in fraud of his creditors. On June 30, 1898, a bill of sale of the furniture and fixtures was made by the bankrupt to his brother, and another bill of sale of the same property given by the brother to the defendant. Upon the sale of January 30, 1901, the defendant gave a bill of sale of the same property to the purchaser. The whole price then paid by him was \$5,260, of which the sum of \$3,500 was taken by the defendant, and the balance by her husband. After a jury trial resulting in a verdict for the plaintiff, the case is here upon the exceptions of the defendant to certain questions which the plaintiff was allowed to ask her upon her cross-examination as a witness, and upon an exception to a refusal to rule that upon all the evidence the plaintiff could not maintain his action.

1. The questions excepted to upon the defendant's cross-examination had reference to what she did with the \$3,500, and, from her answers, it appeared that, having received the check or draft on January 30, 1901, she kept it until April 27, 1901, when she drew the money upon it at a bank in the place of her residence, and on the same day carried it to a city some 30 miles away, and there deposited it in two banks; that her husband having been under examination in bankruptcy on May 8, 1901, and having refused to tell where the money was, on May 9, 1901, she went to the banks in which she had deposited the money and drew it out, and that thereafter, upon being examined in the bankruptcy proceedings, she, by advice of her counsel, refused to tell where the money was. The last of the questions excepted to was whether it was not a long time afterwards when she used the money. We think all the questions excepted to were admissible upon the issue whether, as alleged in the declaration and denied in the answer, the defendant had converted the \$3,500 to her own use.

2. In deciding whether the case should have been submitted to the jury, we assume, in favor of the defendant, that the conveyance to her in the spring of 1897 of the house and lot by direction of her husband, and as her share of the property earned by her work, gave her a good title, which could not be avoided by future creditors. When, however, she conveyed that title in November, 1897, it was a fair inference from the evidence that she allowed her husband to take as his own the property, the title to which was transferred to him in the transaction of which her deed was a part. From that time until June 30, 1898, the legal title to the whole property was in the husband; and it could be found from the evidence that, before either the husband or the defendant took any steps to have the title to the furni-

ture transferred to the latter, the husband had begun to find his business unprofitable, and had reason to know that, unless things changed for the better, he would become insolvent. In the transaction of November, 1897, he had himself furnished a considerable proportion of the consideration for which the bill of sale of November 23, 1897, was made to him; and it could be found that the other party to that transaction knew of no intention that the defendant, or any one except her husband, with whom alone the bargain was made, should have any interest in the property. The jury could find that the bills of sale of June 30, 1898, were not a mere means of correcting an error by which the bill of sale of November, 1897, had been made to the husband, but were an actual transfer of the husband's property to the wife, and without a valuable consideration. We assume that the husband was not then insolvent, and that the debts which he then owed were afterwards paid in full. If, however, the husband made the transfer with an actual intent to put the property so that it could not be come at by creditors for debts which at the time he intended to contract, and which he had reasonable ground to believe that he might not be able to pay, even if he did not then have that intention as to any particular debt or debts, the transfer was fraudulent and void, and could be found to be so, if the evidence went far enough, notwithstanding the fact that all debts which the husband owed when the transfer was made had been paid. *Winchester v. Charter*, 12 Allen, 606, 610, 611. But such a finding would not be warranted by proof simply that the transfer was made with a design to settle the property on the defendant, so that it should not be exposed to the hazards of his future business, or liable for any future debts which he might contract. *Jaquith v. Mass. Baptist Convention*, 172 Mass. 439, 446, 52 N. E. 544; *Jaquith v. Rogers*, 179 Mass. 192, 60 N. E. 486. In the present case the evidence tended to show that while the husband on June 30, 1898, was not insolvent, he then had no considerable amount of property, and none except the stock, fixtures, and furniture of the hotel, and a savings bank deposit of \$1,200, pledged to another bank for a loan of \$1,000; that he then had no license for the sale of liquors, and that his business was, and for some little time had been, a losing one, and that the amount of his property, aside from that which was transferred to his wife on June 30, 1898, was but little in excess of the amount which he then owed in current debts; that he was in the habit of borrowing money from, and of lending his credit to, the brother through whom the transfer was made; that there was no change of possession of the property transferred, and no change in the manner of conducting the business, and that the insurance on the property transferred was still carried in the husband's name; and

finally that after having carried on the business at a loss until January, 1901, he sold it out by a transaction entered into in his own name alone, and caused much the greatest part of the proceeds of the sale to be paid to the defendant, when he was owing more than \$7,000, largely to concerns with whom he was dealing on June 30, 1898, and to whom he was then in debt for current bills, and from whom it might be found he then intended to buy in the future upon credit, he then having reasonable ground to believe that he might not be able to pay. While not conclusive, we think this evidence fairly justified the inference that the husband made the transfer with an actual intent to defraud future creditors.

Exceptions overruled.

(187 Mass. 128)

DE MONTAGUE v. BACHARACH et al.
(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 3, 1905.)

CONTRACTS—INVALIDITY UNDER STATUTE OF FRAUDS—RECOVERY OF PAYMENTS MADE IN PARTIAL PERFORMANCE—AVOIDANCE OF CONTRACT—EVIDENCE—PLEADINGS IN FORMER SUIT—ACCOUNTING—IMPLIED CONTRACTS.

1. In an action to recover the consideration paid to defendants in part performance of a contract which defendants had broken, and which was unenforceable under the statute of frauds, it was held on appeal that plaintiff could not recover, the contract being enforceable until the statute of frauds had been pleaded as a defense, which had not been done. Plaintiff then sued for breach of the contract, and defendants by demurrer set up the statute, but nothing further was done in the case. *Held*, that on retrial of the first action, evidence that the statute had been pleaded in the second action was admissible without any allegation to that effect in the pleadings.

2. In an action to recover payments made under a contract which defendants had, in another action for breach thereof, avoided by pleading the statute of frauds, the pleadings in such other action were competent evidence to prove that the statute had been set up therein.

3. Where a contract unenforceable under the statute of frauds is repudiated by one party after it has been partially performed by the other, the latter cannot maintain an action at law for damages.

4. Defendants, who operated a saloon in a building leased by them, contracted with plaintiff to allow him to conduct a restaurant in a part of the building; plaintiff to make certain fixed payments, and to turn over to defendants one-tenth of his gross receipts. Defendants were to pay plaintiff one-tenth of the receipts for liquor served in the restaurant from the bar. After plaintiff had been in occupation for some time, and made numerous payments, defendants refused to allow him to proceed with the contract, and in an action thereon set up the statute of frauds. *Held*, that plaintiff was entitled to recover the amounts paid by him, less the value of any benefit received from his use of the premises; the defendants, after having avoided the contract by pleading the statute, not being entitled to set it up as a bar to such an accounting.

5. Evidence that the privilege of conducting the restaurant was worthless unless defendants paid the percentage on liquor sold, was admissible to show the value of defendants' partial performance.

6. If defendants derived more advantage from the sales of liquor in the restaurant than plaintiff did, and he, at their request, hired additional help, not needed in the restaurant, and solely to facilitate the sale and service of liquor, and defendants afterwards promised to pay for such extra help, the question of defendants' liability to pay for such help was for the jury.

7. One cannot recover for labor voluntarily performed for another under no express or implied promise to pay.

Exceptions from Superior Court, Suffolk County; John H. Heken, Judge.

Action by Albert F. De Montague against Solomon Bacharach and others. Judgment for defendants, and plaintiff brings exceptions. Exceptions sustained.

Jas. J. McCarthy, for plaintiff. Henry H. Baker and H. M. Williams, for defendants.

BRALEY, J. At the time of the verbal contract between the parties the defendants were in occupation of a furnished restaurant and liquor saloon in which they were doing business as common victualers. It was then mutually agreed that the plaintiff, during the remaining two years of the written lease under which they held the premises, should have the privilege of conducting the restaurant expressly for his own profit, while they retained control of the portion used for the sale of liquors. They also were to pay him one-tenth of all receipts for liquor sold and served at his tables until he began his payments to them, when this amount was to be increased to one-fifth. The plaintiff engaged to furnish all materials and labor required in his business, and also to pay one-half the salary of a porter in their employment, and all bills for gas used on the leased premises. But he was not to pay rent or other compensation until his undertaking had become sufficiently profitable to permit it, when the defendants were to receive one-tenth of his gross receipts. The exceptions recite that "about the last of June, 1899, * * * and after the plaintiff had run the restaurant about ten months, * * * he was compelled to stop by the defendants; that the agreement made between him and the defendants was broken and repudiated by the defendants without fault on his part, and that full performance of the contract was prevented by the defendants," and "no payments of any kind have ever been made by the defendants to the plaintiff, and nothing of value other than the use and enjoyment of the premises and utensils have ever been received by the plaintiff from the defendants." It further appears that during this time he made the payments called for by the contract. In the litigation that followed to recover the money paid it was held that the plaintiff could not prevail, for the reason that he could not rescind the contract, as it was impossible for him to return the benefit received. Nor could the action be maintained to recover what he had paid; for, if the

¶ 7. See Work and Labor, vol. 50, Cent. Dig. § 1.

contract was oral, and within the statute of frauds, and it had been broken by the defendants, yet the statute had not been pleaded, and, until this defense had been interposed, the contract could be enforced, and an action would not lie to recover the consideration. *De Montague v. Bacharach et al.*, 181 Mass. 256, 258, 63 N. E. 435. Following this decision, the plaintiff then brought a second action to recover damages for breach of the contract, to which the defendants, by demurrer, set up the defense that it was within the prohibition of the statute of frauds. But no further steps were taken, and the plaintiff then proceeded to try again the first suit, which is the case now before us.

The pleadings, so far as they are material, consist of a count on an account annexed of 47 items, to which the answer is a general denial, and it is admitted by the plaintiff that of these all but 11 are for payments made by him under the contract. In the bill of exceptions no reasons are stated on which the ruling that the plaintiff could not recover was given. The inference, however, is that the evidence offered was excluded, and a verdict finally ordered on the plaintiff's evidence, because it was open to the defendants under their answer to assert that he had failed to prove that any of these items constituted a cause of action, as they were covered by an express contract. *Rodman v. Gullford*, 112 Mass. 405; *Macdonald v. Sargent*, 171 Mass. 492, 51 N. E. 17. Up to this point of the trial, whenever reached, there was no occasion for the plaintiff to prove that the defendants had resorted to the statute; but when it appeared that this part of the declaration was covered by the contract then he was obliged either to amend by declaring on the contract itself, if it was still in force, or submit to a verdict to this extent in their favor. Instead of amending, he sought to prove that they had avoided the contract by setting up this defense in the suit on the agreement. *Mullaly v. Austin*, 97 Mass. 30, 33; *De Montague v. Bacharach*, *ubi supra*. For this purpose the plaintiff offered in evidence the writ and pleadings in that case, which were excluded on the objection of the defendants, who now insist that it was not open to the plaintiff to show a resort by them to the statute, unless pleaded in the suit on trial. They further claim that this evidence was incompetent as proof that they had availed themselves of such a defense in the second suit.

It has been held that the statute cannot be relied on unless pleaded (*Middlesex Company v. Osgood*, 4 Gray, 447; *Graffam v. Pierce*, 143 Mass. 386, 9 N. E. 819; *Brown v. Magorty*, 156 Mass. 209, 30 N. E. 1021), and the better practice is undoubtedly to declare at the same time not only on the contract, but also upon the appropriate common count, if this defense is anticipated. Yet a general denial, where the latter alone

is used, placed the burden of proof on the plaintiff, who could, under an account annexed, introduce the contract that had been repudiated to prove payments made by him under its terms; and, although it was not in issue on the face of the pleadings, he could not prove his case without its appearing in evidence. *Basford v. Pearson*, 9 Allen, 387, 391, 85 Am. Dec. 764; *Mullaly v. Austin*, *ubi supra*; *Fitzgerald v. Allen*, 128 Mass. 232, 234. After the former decision the declaration might have been amended by adding a count covering the issue raised by the second suit, but the plaintiff, at least in the absence of a plea in abatement, could pursue the defendants by separate suits founded upon different legal conceptions of his cause of action. If the first suit had been for damages for breach of the contract, instead of for money paid, and upon the statute being interposed judgment had been entered for the defendants, and a second suit had then followed to recover the consideration, the last action would not have been defeated because it did not appear by the pleadings therein that the defendants relied upon such a defense. In this case the order of trials was reversed, and the plaintiff cannot recover without proving that the defendants repudiated the contract by a reliance on the statute. But they could not prevent his recovery by simply omitting to set up the statute in their answer, as pleading such a defense here would be clearly inappropriate and mere surplusage. After the former decision, which gave them the power of choice either to abide by the contract or to avoid it, an election to avoid, regularly and properly pleaded by way of demurrer in the second suit, in which this issue alone arose, was sufficient. When a suit at law is brought and prosecuted in the usual manner, the appearance of counsel for the defendant and the preparation and filing of proper pleadings are presumed to be regular, and strictly within the scope of the attorney's employment. Such acts, so far as they definitely fix the legal grounds of his client's defense, must be held to bind his principal, at least until it is shown that he acted without authority. *Loomis v. New York, New Haven & Hartford Railroad Co.*, 159 Mass. 35, 44, 34 N. E. 82; *Currier v. Sillo-way*, 1 Allen, 19; *Gordon v. Parmelee*, 2 Allen, 212; *Jones v. Howard*, 3 Allen, 223, 224. Until formally extended, the papers offered in evidence were the only record of the case, and showed that the defendants had pleaded the statute. Nor does it appear that after this had been done there was any denial of the apparent authority of their counsel, or refusal by them to be bound by the action taken. *Bogle v. Chase*, 117 Mass. 273, 275. The cases of *Dennie v. Williams*, 135 Mass. 28, and *Farr v. Rouillard*, 172 Mass. 303, 52 N. E. 443, on which the defendants rely as authorities for the exclusion of the evidence, were suits against a constable

and the sureties on his bond to enforce the payment of a judgment recovered against him. To prove that he had acted by virtue of his office, the plaintiff offered in evidence the answer in the original action in which such an allegation had been made. It was held that the answer was not evidence against the constable, as it did not appear that his attorney had been particularly instructed to make such defense. But in neither case was any general rule formulated that pleadings signed by an attorney in another suit were to be held inadmissible for any purpose in subsequent litigation between the parties. In the case at bar the record was not offered to prove the truth of allegations of fact stated in a pleading, but to show the fact that the defense of the statute had been set up in the other action. When once taken, the plaintiff had a right to regard this defense as expressing an unconditional act that barred the maintenance of that suit, and authorized him to treat the agreement as unenforceable. *Williams v. Bemis*, 108 Mass. 91, 93, 11 Am. Rep. 318. See *Freeman v. Foss*, 145 Mass. 361, 14 N. E. 141, 1 Am. St. Rep. 467. In the opinion of a majority of the court it was therefore competent for him to prove by the record of the subsequent case that the defendants had pleaded the benefit of the statute, and the exclusion of this evidence was wrong.

If it had been admitted, the plaintiff would have shown with the accompanying proof that the defendants had received payments of money to a large amount from him under an oral contract which they had refused fully to perform, and that could not be enforced by reason of the statute of frauds. Pub. St. 1882, c. 78, § 1, cl. 5. They had thus rendered further performance by him impossible, and there is left for discussion to what extent he can recover the payments made. Although the contract had been repudiated while in the course of performance, and there was only a partial failure of consideration, it was not taken out of the statute, and he could not maintain an action at law for damages. *Kidder v. Hunt*, 1 Pick. 328, 11 Am. Dec. 183; *Thompson v. Gould*, 20 Pick. 134, 138; *Hill v. Hooper*, 1 Gray, 131, 133; *Marcy v. Marcy*, 9 Allen, 8, 12. See *Bassett v. Percival*, 5 Allen, 345, 347. As the benefit of the statute is not waived, and the contract, though partly executed, thus becomes unenforceable, so the extent to which it has been performed affects only the measure of recovery. The defendants were at liberty to fully perform, but by choosing to stop with a partial performance, and then resorting to the statute, they cannot retain the entire consideration which was paid to them on the basis of a full performance, unless it appears that the plaintiff has received an equivalent for the benefit conferred upon them. *Dix v. Marcy*, 116 Mass. 416, 417, and cases cited; *Miller v. Roberts*, 169 Mass. 134, 47 N. E. 585. See, also, in this connection,

Riley v. Williams, 123 Mass. 506; *Kelley v. Thompson*, 181 Mass. 122, 124, 63 N. E. 332. If the plaintiff, though not in default, cannot enforce the contract itself, but must declare on one of the common counts, or on an account annexed, in order to recover the money paid, he may not be able to recover the entire amount. A jury might find that he derived some benefit, at least, from the privilege which he was allowed to enjoy for nearly a year. While the defendants must compensate him for any benefit they have received, yet this is ascertained after deducting the value of what he has already obtained, and may result in their favor, if it is found to be sufficient to offset what he had paid. Or they may be required to return the whole, or a part, of the money paid to them. He is entitled, therefore, to maintain his action as to the items that include this sum for the purpose of determining this question, and the defendants cannot rely upon a contract which they have avoided as a bar to such an accounting. *Williams v. Bemis*, *ubi supra*; *White v. Wieland*, 109 Mass. 291; *Dix v. Marcy*, *ubi supra*; *Dowling v. McKenney*, 124 Mass. 478, 481; *Fitzgerald v. Allen*, *ubi supra*; *Freeman v. Foss*, *ubi supra*; *Kelley v. Thompson*, *ubi supra*.

It is also plain that the evidence offered by the plaintiff, and excluded, that the privilege of carrying on the restaurant was worthless unless the defendants paid the percentage on liquor sold, which they had not done, became relevant and admissible, as it tended to prove the value of their partial performance of the agreement. *Dix v. Marcy*, *ubi supra*; *Dowling v. McKenney*, *ubi supra*.

This leaves for consideration the remainder of the declaration, which, with the exception of item 45, is composed of items 36 to 47, inclusive, and of these all but two are for money paid by the plaintiff on account of electric lighting and repairs of electrical apparatus and fixtures. But, as he was content to leave them with no evidence to support his contention that the defendants were liable to repay him, a verdict on these items in their favor was rightly ordered.

In item 46 he seeks to recover disbursements for additional domestic service, and in item 47 for the value of labor either furnished or performed by him in superintendence, under requests made at different times by the defendants, and upon their complaint that customers who desired liquor were not served promptly. From the plaintiff's uncontradicted evidence it could have been found that the sale of liquors in connection with the business of the restaurant, though of benefit in retaining a class of customers that otherwise might not have patronized him, was of greater profit to the defendants. If an examination of the whole case makes it obvious that both parties from the beginning contemplated that the business of each should be managed with a proper regard for the success of the other, yet in conducting the res-

restaurant the retention and increase of this patronage may have been of greater importance to the defendants than to him. Under such conditions, if no increase of help in his branch of the enterprise was required, but at the request of the defendants, and to facilitate and increase their traffic, he employed and paid an additional servant, who worked at the bar, preparing liquor to be served and drank in the restaurant, when such service should have been rendered by them, and in response to a demand made for payment they did not deny liability, but promised an adjustment of his claim, a contract to pay for the service shown by this item could fairly be found. At least, the question whether such a contract had been proved should have been submitted to the jury. The labor performed and furnished under item 47 was voluntary, and no express or implied promise to pay therefor appears, and the verdict on this item must stand. *Gassett v. Glazier*, 165 Mass. 478, 480, 43 N. E. 193, and cases cited. See *Devine v. Murphy*, 168 Mass. 249, 251, 46 N. E. 1066.

The exceptions must be sustained, and a new trial ordered on all the items covered by the contract, and also on item 46, and they are overruled as to the other items.

So ordered.

(187 Mass. 197)

MERRILL v. PRESTON et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 5, 1905.)

DEEDS — CONSTRUCTION — TECHNICAL WORDS — HEIRS AT LAW.

1. The widow and only child of a decedent created a trust for the benefit of the decedent's brothers and sisters. The deed provided that the income of certain shares of the fund should go to each of deceased's brothers and to two of his sisters for their lives, and at the death of any beneficiary one-half of his or her share should be divided among his or her issue "then living," and in default of issue should revert to the donors or their heirs at law. The remaining ninth of the fund was devoted to the benefit of a remaining sister of deceased for life, and at her death a part thereof was to be conveyed to a certain person "if then living, but, if then deceased, to his heirs at law." *Held*, that the words "heirs at law" in the clause last quoted, referred to those who were such at the time of the death of the ancestor there mentioned, and not to those surviving at the period of distribution.

Case Reserved from Probate Court, Suffolk County; Henry K. Braley, Judge.

Petition by one Merrill, trustee, against one Preston and others, for the distribution of a portion of a trust fund. In the Supreme Court, on appeal from a decree of the probate court, the case was reserved by a single justice for the determination of the full court. *Affirmed*.

Moses P. White and Howard K. Brown, for Geo. D. Edmonds. Edwin G. McInnes, for Alonzo E. Preston and Eliza L. Kendall. Frank B. Newton, for Sarah A. Harris.

HAMMOND, J. The part of the trust deed now presented for interpretation directs the trustee to pay the net income of one-ninth of the trust fund to Frances Maria Preston, and at her decease to convey this ninth "one-third thereof to said Sarah S. Preston if then living, but if then deceased to her heirs at law, and the other two-thirds thereof to the said Horatio W. Preston, if then living, but if then deceased to his heirs at law." The precise question is whether the words "heirs at law," as applicable to the estate of Horatio, are to be determined as of the time of his death or of the death of the life beneficiary. It already has been decided by this court that the term "heirs at law" in this deed, so far as applicable to the estate of Horatio, designates those persons who would inherit his land by the general rules of descent, and that under those rules, as well by the law of Maryland, where, at the time of his death, he was domiciled, as by the law of Massachusetts, his mother, Sarah S. Preston, who survived him, was his sole heir at law; and that John A. Preston, one of the beneficiaries for life, having died, she, as such heir, was entitled to receive the part of the trust fund then payable to the heirs of Horatio. *Merrill v. Preston*, 135 Mass. 451. It is to be observed that at the time of that decision the mother, who was sole heir at law of Horatio at the time of his death, was still living, and hence the question now before us was not involved in the decision. The clause in question cannot be taken out of its setting, but must be construed in the light of the general purposes and language of the whole deed. The donees were the widow and only child of Joshua P. Preston, deceased. They each had received from his estate considerable property, and they had "formed the design to make provisions for the benefit of" two of his brothers and three of his sisters; and accordingly this deed was made. Briefly summarized, the deed created a trust fund, to which the widow contributed one-third and the son two-thirds, the net income of two-ninths of which was to go to each of the deceased's brothers and to each of his two sisters Sarah and Eliza, and the income of the remaining one-ninth to his sister Frances, during their respective lives. As to the two-ninths set apart for the benefit of each brother, it was provided that upon the death of the life beneficiary one-half, and, if he left no issue surviving, then the whole, of it was to go to the heirs at law of the donors, in the same proportion as that in which they contributed; but, in case there were such issue surviving, then one half should go to such issue and the other half only to the grantors. A similar provision was made as to the two-ninths set apart for each of the two sisters Sarah and Eliza. As to the one-ninth set apart for Frances, the whole was to go at her decease to the donors or their heirs. It is a fair inference from the deed that this change was made in ref-

erence to this one-ninth because she was unmarried, and from age or otherwise not likely to have issue, even if she should marry. In this way the donors set aside a certain portion of their property for the support of these brothers and sisters of Joshua P. Preston, intending that at least a part, and possibly the whole, of it at the respective deaths of the life beneficiaries should revert to them, the donors, if then living, and, if not, then to their heirs. Moreover, so far as respected the life beneficiaries, the trust was what is commonly called a "spendthrift trust." Neither the interest nor the principal could be reached by their creditors. In a word, a part of the estate of each donor was to be separated from the rest, and devoted to this trust, and when the object of the diversion should be accomplished it was to be returned to their heirs at law. The central idea of the scheme had reference, not to a classification of the property of the donors, nor of their heirs, but to the pecuniary benefit of certain relations of the deceased husband and father.

Coming now to the special language of the deed, we find that the deed is well drawn, and it is evident that the minds of the donors were directed many times to the question whether at the various times of the distribution of parts of the principal of the fund the distribution shall be made to a whole class or only to the survivors of the class. For instance, as to the two-ninths set apart for the benefit of each of the two brothers, the deed provides that at the decease of either brother the trustee shall divide one-half of said two-ninths, being one-ninth, "into as many equal shares as there shall be children of him then living, or deceased leaving issue then living," and shall "apportion and convey one of said shares to each of said children then living, and one to the child or children then living of each deceased child aforesaid, equally to be divided between them if more than one." So far the minds of the donors have been fixed upon the one-ninth which shall go to the issue of the beneficiary, and the conclusion reached is that the principal of that one-ninth shall go, not as a vested interest to the whole issue of the life beneficiary, but as a contingent interest only to those who may be living at the time of his death. And all this is expressed clearly in apt language. With this thought fresh in their minds, the donors proceed to the directions for the other one-ninth. As to this (and as to the first one-ninth if the life beneficiary leaves no issue surviving him) the trustee is to convey one-third part to the donor, Sarah, if then living, but, if then deceased, to her heirs at law, and two-thirds to Horatio, if then living, but, if then deceased, to his heirs at law. The same question which had arisen as to the issue of the life beneficiary, namely, as to whether the distribution of the one-ninth should be confined to those living at the

time of the distribution, arose, in substance, when the donors came to designate what heirs of Horatio should take in case he should not be living at the time of the distribution. In the case of the issue, they only were to take who were living at the time of the distribution. In the case of the heirs at law of the respective donors, no such limitation is expressed. The sharp contrast between the two clauses in this respect is significant, and is entitled to much weight. It seems to us highly improbable that, if the intention was that the term "heirs at law" should mean only those surviving at the time of the distribution, the donors, whose minds had just been sharply drawn to the expression of a similar intention with reference to the issue of a life beneficiary, and had clearly expressed it, should have failed to express the intention in language equally clear, especially when it is considered that the general rule is that the term "heirs at law" designates those who are such at the time of the death of the ancestor. The same remarks are applicable to similar language used in that part of the deed which makes provision for the two sisters Sarah and Eliza. The language with reference to the one-ninth set apart for Frances is different, it is true, in that it contains no provision for distribution among her issue, but, as before remarked, it is fair to infer that this difference in language was due to the expectation that she would leave no issue. And, in any event, it is not reasonable to suppose that the term "heirs at law" was used in any different sense in this part of the deed than in the part relating to her brothers and sisters.

In view of the predominant central purpose of the donors in creating this fund as expressed in the deed, the sharp contrast between the language designating the issue of a beneficiary who are to take at a time of distribution and that designating the heirs of the donors who are to take at such a time, and of the general principle of interpretation that, in the absence of anything to the contrary, the term "heirs at law" designates those who are such at the time of the death of the ancestor, and of the absence of anything expressly leading to a contrary interpretation, a majority of the court are of opinion that in the clause relating to the distribution of the one-ninth set apart for Frances, which is the only clause now before us, the heirs at law of Horatio are to be determined as of the time of his death. The case is clearly distinguishable from *Wason v. Ranney*, 167 Mass. 159, 45 N. E. 85, upon which the respondents rely. For cases in our own Reports bearing upon the general rule as to the meaning of the term "heirs at law," see *Childs v. Russell*, 11 Metc. 16; *Abbott v. Bradstreet*, 3 Allen, 587, and cases therein cited; *Heard v. Read*, 169 Mass. 216, 47 N. E. 778, and cases therein cited. The result is that the

petitioner, Edmands, the sole surviving executor of the will of Sarah S. Preston, who was the sole heir at law of her son, Horatio, at the time of his decease, is entitled to receive as such executor the part payable to the heirs of Horatio. The decree of the probate court was correct.

Decree affirmed.

(187 Mass. 150)

CITY OF HAVERHILL v. CITY OF MARLBOROUGH.

(Supreme Judicial Court of Massachusetts.
Essex. Jan. 4, 1905.)

HEALTH—CONTAGIOUS DISEASES—CARE OF PAUPERS—LIABILITY OF TOWN OF SETTLEMENT—STATUTES—CONSTRUCTION—PROSPECTIVE OPERATION—APPEAL—PROCEDURE.

1. Under Rev. Laws, c. 173, §§ 105-110, authorizing exceptions by any party aggrieved by any ruling or judgment of the court, exceptions may be taken to rulings of law made upon the trial of a cause upon an agreed statement of facts; but since neither the court of the first instance nor the Supreme Judicial Court can draw inferences of fact when the agreed statement does not give that power, and the final decision to be rendered on the agreed facts follows as a matter of law, and as material questions of law are open upon appeal, and immaterial errors are no ground for a reversal, the proper practice is not to take exceptions, but to appeal.

2. Rev. Laws, c. 8, § 5, cl. 23, provides that in construing statutes the word "town" includes "city." Chapter 75, § 42, provides that, if a disease dangerous to the public health, breaks out in a town, the board of health may cause any sick or infected person to be removed to a hospital, or may leave him in the house where he is. Section 56 provides that, in cases of smallpox, patients shall not be removed from their homes, except in cases in which, in the opinion of the board of health and the attending physician, the cases cannot be properly isolated in the houses where the patients reside. Section 40 provides that each city shall establish one or more isolation hospitals for the reception of persons having smallpox, and subjects towns refusing to comply to a penalty. Section 54 provides that expenses incurred by a town for the preservation of the public health may be recovered in an action of contract. Section 57 provides that reasonable expenses incurred by the board of health in providing for persons infected with smallpox shall be paid by such person, his parents or master, if able; otherwise by the town in which he has a legal settlement. *Held*, that the failure of a city to establish an isolation hospital, or its failure to remove persons infected with smallpox to a hospital, does not preclude it from recovering expenses incurred on behalf of such persons from the city where they have their legal residence.

3. Under Rev. Laws, c. 75, § 57, providing that reasonable expenses incurred by the board of health in caring for persons infected with smallpox shall be paid by such person, his parents or master, if able, otherwise by the town in which he has a legal settlement, a sum paid to a physician as wages for services during the time that he was actually in attendance on a smallpox patient, and for two weeks' quarantine thereafter, is to be regarded as an expense incurred in providing medical attendance for the patient, and is recoverable.

4. But expenses for services of policemen stationed to enforce the quarantine of the houses,

and for supplies for other persons not ill, furnished because they were quarantined in the same building with smallpox patients, are incurred in the preservation of the public health, and are not recoverable.

5. It is to be presumed, unless the contrary appears, that the operation of a statute is to be prospective, and that it is not to affect transactions already passed.

6. Rev. Laws, c. 75, § 54, provides that expenses incurred by a town for the preservation of the public health, which are recoverable of a private person or corporation, may be recovered in an action of contract. Section 57 provides that reasonable expenses incurred by the board of health in making provision for a person infected with a disease dangerous to the public health shall be paid by such person, his parents or master, if able; otherwise by the town in which he has a legal settlement. Other provisions relative to hospitals and dangerous diseases are to be found in sections 35-58, inclusive, of the same chapter. St. 1902, p. 150, c. 206, provides that cities and towns having isolation hospitals may receive persons from adjoining towns, and amends sections 46 of chapter 75, relative to the issuance of warrants to remove persons infected with contagious diseases, etc. St. 1902, p. 156, c. 213, § 1, contains practically the same provisions as section 57, supra, but adds to such section provisions relative to the approval of bills for expenses incurred in aiding paupers by the city or town in which such persons have a legal settlement. Section 3, p. 157, repeals, without any saving clause, said section 57. *Held*, that chapter 213, p. 156, is prospective in operation, and has no effect on the mode of procedure in case of an obligation, existing at the time of its passage, in favor of one town against another, for the care by the former of patients having a settlement in the latter.

Exceptions from Superior Court, Essex County; Lemuel Le B. Holmes, Judge.

Action of contract by the city of Haverhill against the city of Marlborough. There was a finding for plaintiff, and defendant excepts. Exceptions overruled.

Essex S. Abbott, City Sol., for plaintiff.
Jas. W. McDonald, for defendant.

BARKER, J. The expenses for which repayment is sought were incurred by the city of Haverhill in consequence of the falling ill with smallpox within its limit of two persons whose settlement was in Marlborough. The expenses were incurred between February 27, 1902, and the 5th day of the following April.

In the lower court the case was tried without a jury upon the pleadings and an agreed statement of facts, and a finding was made for the plaintiff in respect of a part only of the items declared for. Both parties appealed to this court, and the defendant filed also a bill of exceptions. The agreed statement of facts gave the court no power to draw inferences of fact. For this reason the plaintiff contends that the defendant had no right of exception. But rulings of law made upon the trial of a cause upon an agreed statement of facts are rulings by which either party to the cause may be aggrieved, and the right to allege and prosecute such exceptions is conferred by statute. Rev. Laws, c. 173, §§ 105-110,

But in cases like the present it is wholly useless, and therefore bad practice, to prosecute exceptions, for the reason that no relief can be given to the excepting party upon his bill of exceptions which would not be open to him upon an appeal merely. Neither the court of first instance nor this court can draw inferences of fact when the agreed statement has no clause giving that power. The final decision in such a case is that required as a matter of law by the application of correct principles of law to the facts agreed. All questions of law material to the decision are therefore open upon the appeal, and, if the court below has made an erroneous ruling upon a question of law not material to the decision, the error furnishes no ground for a reversal of the judgment, and it is useless to ask us to revise it upon exceptions. See *Rand v. Hanson*, 154 Mass. 87, 91, 28 N. E. 6, 12 L. R. A. 574, 26 Am. St. Rep. 210; *Norton v. Brookline*, 181 Mass. 380, 384, 63 N. E. 930.

When the expenditures of the plaintiff began, on February 27, 1902, its power and duty to incur them, and its right to recover on account of them, were regulated by the provisions concerning hospitals and dangerous diseases contained in Rev. Laws, c. 75, §§ 35-57; the duty of repayment being imposed by section 57, and the right of action being conferred upon the municipality by section 54. Before the expenditures had been completed, on April 5, 1902, the Legislature had enacted St. 1902, p. 156, c. 213, which took effect on March 26, 1902.

The defendant contends that the plaintiff can take nothing by its suit, because it had not established an isolation hospital, in accordance with the provisions of Rev. Laws, c. 75, § 40, and also because the persons ill with smallpox were not removed to a hospital, but were kept in the dwelling where they fell ill. We think these contentions unsound. In the first place, section 40, which provides that "each city shall establish and be constantly provided, within its limits, with one or more isolation hospitals for the reception of persons having smallpox or any other disease dangerous to the public health," provides its own penalty, which is a forfeiture of not more than \$500 for each refusal or neglect to comply with the provisions of the section upon request of the State Board of Health, and does not enact that all persons ill with smallpox, or any such persons, shall be treated in such hospitals and not elsewhere. In the next place, under the provisions of section 42, which, under Rev. Laws, c. 8, § 5, cl. 23, we construe to apply to cities, it was within the power of the proper officers of the plaintiff either to remove the persons who had fallen ill to a hospital, or to care for them in the house where they resided; nor could the persons lawfully be removed to any hospital unless, in the opinion of the plaintiff's board of health and of the attending physician,

the case could not be isolated properly in the house where the patients resided. Rev. Laws, c. 75, § 56.

The expenses for which the plaintiff seeks to recover are of several classes, one only of which was allowed for in the finding for the plaintiff in the court below. The expenses so allowed were for the services of a physician, medicines, household supplies, and rent of the house. The only question raised by the defendant as to the expenses of this class, if the plaintiff is held to be entitled to recover at all, is as to the services of the physician. He was employed on February 27, 1902, to go to the house and remain there to attend and care for all persons in the building who then were or might be ill of smallpox, and he remained in the house under that employment until April 5, 1902. No other persons in the house fell ill with smallpox, except the two who had settlements in Marlborough. His agreed compensation for the service was to be a certain sum per week for such time as his services should be required at the house, and for two weeks' quarantine thereafter, and the charge for his services in the plaintiff's bill of particulars includes the agreed compensation for the two weeks after he left the house. It is agreed that the prices charged in the bill are reasonable for the services rendered, and from this it follows, as a conclusion of law, that the amount paid the physician was a reasonable one. But the defendant contends that the stipend for the two weeks after the physician had been allowed to leave the house, and during which he rendered no services to the persons who had been ill there, were not expenses incurred in making any provision for the persons infected with smallpox, but were merely expenses incurred for the protection of the public from contagion. We think this too fine a distinction to be followed, and that the whole sum paid to the physician was an expense incurred in providing medical attendance for the two persons who were ill.

The other classes of expenses were for services of policemen stationed to enforce the quarantine of the house, and for supplies for other persons not ill, furnished because they also were quarantined in the same building. All these expenses were disallowed by the lower court, and we think rightly. They were none of them expenses incurred for the persons infected with smallpox, but were incurred for the preservation of the public health.

The remaining contention of the defendant is that the plaintiff can recover nothing because the bill of the plaintiff's expenses has not been approved by the board of health of the city of Marlborough, as provided for by St. 1902, p. 156, c. 213, § 1. The court below ruled that if St. 1902, p. 156, c. 213, requires the approval of the board of health of the defendant to the

plaintiff's bill, as a prerequisite to recovery, still that statute is to be construed to act prospectively, and not to affect cases where relief proceedings were undertaken before it went into effect. The presumption that the operation of a statute is to be prospective, and not to affect transactions already passed, is always to be made, unless the contrary appears. *Bridgewater Bank v. Copeland*, 7 Allen, 139, 140, and cases cited; *Com. v. Sudbury*, 106 Mass. 268; *Murray v. Gibson*, 15 How. 423, 14 L. Ed. 755.

The only circumstance which can be urged in support of the theory that the Legislature intended that the new provisions of St. 1902, p. 156, c. 213, § 1, should apply to instances in which the duty to make provision for persons ill with a disease dangerous to the public health had already arisen, and either had been met or was already in course of performance, is the express repeal, without a saving clause, of Rev. Laws, c. 75, § 57, by St. 1902, p. 157, c. 213, § 3. But it is to be noted that section 57 did not in terms confer the right of action. As the statutory scheme stood up to March 26, 1902, the office of section 57 was to impose the duty of reimbursement upon the person infected, his parent or master, the town of his settlement, or the commonwealth, and, if by the latter, to direct how the bills should be approved, and impliedly to authorize the making of payments in such cases by municipalities or by the commonwealth. If payment were not made in accordance with the duty, the right of action was given by Rev. Laws, c. 75, § 54, and this section was not repealed or changed by St. 1902, p. 156, c. 213. Looking at the provisions of that statute, we find that its first section imposes the obligation to make repayment in the same language, except that the master of the infected person is not mentioned, and that all the new provisions of the section are concerned with notices to be given of the state of things requiring the expenses to be incurred, the approval of certain boards of the bills, and the determination of settlement, and that the statute nowhere says, in terms, that its provisions are intended to affect past transactions. We think its fair construction is as if it had said that as to cases of infection arising after March 26, 1902, the master of the infected person shall not be bound to make payment, and in the same class of cases the notices to be given, the determination of the settlement, and the approval of the bills shall be regulated as provided in the new statute. We cannot think that it was the intention of the Legislature that the provisions of its first section, so far as they were inconsistent with or in addition to those of Rev. Laws, c. 75, § 57, should apply, except in instances where the action of the municipality to which the payment is to be made was wholly subsequent to the time when the statute took effect. When the repeal was made,

the obligation of the defendant was already in existence. Reading the new statute in connection with the many provisions upon the same general subject contained in Rev. Laws, c. 75, §§ 35-58, and in St. 1902, p. 150, c. 206, approved on March 19, 1902, to take effect in the following month, it is impossible to think that the Legislature intended by the repeal to destroy existing obligations.

Some of the provisions of St. 1902, p. 156, c. 213, § 1, are novel, and the whole section is not easy of construction. It is not necessary in the present case to decide whether the approval of the bill by the board of health is a prerequisite to an action to recover, and we express no opinion on that point.

Defendant's exceptions overruled. Judgment for plaintiff affirmed.

(187 Mass. 217)

ROGERS v. BOSTON & M. R. R.

(Supreme Judicial Court of Massachusetts.
Essex. Jan. 5, 1905.)

RAILROADS—CROSSING ACCIDENT—NEGLIGENCE —EVIDENCE—JURY—CONTRIBUTORY NEGLIGENCE.

1. In an action against a railroad for injuries received in attempting to cross defendant's track at a private way, evidence held insufficient to justify the submission of the question of defendant's negligence to the jury.

2. Where plaintiff, in an action against a railroad for injuries received in attempting to cross defendant's track at a private way, was shown to have been in a cart, the noise of which he knew would prevent his hearing an approaching train, and his view of which was obstructed, he was guilty of contributory negligence in failing to stop and listen before driving on the track.

Exceptions from Superior Court, Essex County; Chas. De Courcy, Judge.

Action by Randolph A. Rogers against the Boston & Maine Railroad. Verdict directed for defendant, and plaintiff brings exceptions. Exceptions overruled.

Peters & Cole, for plaintiff. Henry F. Hurlburt and Damon E. Hall, for defendant.

LATHROP, J. This is an action for running down and injuring the plaintiff while crossing the defendant's tracks. At the trial in the superior court, at the close of the plaintiff's evidence, the judge directed a verdict for the defendant, and the case is before us on the plaintiff's exceptions.

Taking the evidence most favorably for the plaintiff, the following facts appear:

The defendant had three tracks at the place of the accident. One of them was its main track, and on each side of this was a spur track put in for the benefit of a coal and lumber company, which occupied the land on each side of the tracks. The spaces between the tracks were planked in accordance with an agreement made by the predecessor in title of the defendant, and the planking was

maintained for the benefit of the coal and lumber company. The tracks ran in an easterly and westerly direction. On the north of the land of the company was the Merrimack river. The way in question crossed the tracks at nearly a right angle, and was used by the company to obtain access to its coal sheds.

The plaintiff was 29 years old, and had been in the employ of the coal and lumber company for three months. He was familiar with the surroundings. He knew that passenger trains and freight trains passed on the main track, and that a train might come along at any moment. He knew, also, that there was no gate or flagman at the crossing, and testified that it was a dangerous crossing, and he knew that he was taking some chances in using it.

To one approaching the tracks from the south, as the plaintiff was doing just before the accident, the view towards the west was obstructed by a lumber shed and by a car on the southerly spur track near the crossing. The plaintiff was on an empty tipcart drawn by two horses, and was on his way to the coal sheds on the northerly side of the tracks to get a load of coal. He testified that as he approached the crossing his horses were walking at a pretty good gait, but as he got nearer he pulled up his horses a little, so that they were walking about a mile an hour, and when his horses' heads were about at the southerly corner of the lumber sheds he pulled up his cap, which had been drawn over his ears, listened and looked, but heard and saw nothing; that he kept looking, but could not see anything until he got upon the track where he was struck. He also testified that unless there was some noise in the yard to drown the sound of trains one could hear them; that on that morning the ground was frozen, and his empty cart made considerable noise as he went along; and that there was noise also in the yard.

The only evidence as to the speed of the train came from a witness for the plaintiff who, on direct examination, testified that the train, which consisted of a flat car loaded with lumber, pushed by a locomotive engine, was going at the rate of 30 miles an hour, but who on cross-examination testified that he "was entirely wrong when he estimated the speed of the train at 30 miles an hour"; that the train was going three or four times as fast as the plaintiff, and at its usual rate at that place. The accident occurred about a quarter to 10 o'clock in the morning of a pleasant day in January, 1902.

On this evidence we are of opinion that the ruling was right. This was not a highway, townway, or traveled place, where a railway corporation is required to cause a bell to be rung or a whistle to be sounded, under Rev. Laws, c. 111, §§ 188-192. It was a private way, restricted to the use of the coal and lumber company, its agents and servants, and its customers.

In the next place we are of opinion that the plaintiff was not in the exercise of due care. The general rule in this commonwealth is that, as a railroad crossing is a dangerous place, a traveler on the highway is bound to make a reasonable use of his sense of sight as well as of hearing, in order to ascertain whether he will expose himself to danger; that if he fails to use his senses without reasonable excuse he fails to use reasonable care; and that the burden is on the plaintiff to show such care, even though the defendant is in fault. *Chase v. Maine Central Railroad*, 167 Mass. 383, 387, 45 N. E. 911, and cases cited. So, also, it is the general rule that if there is anything to obstruct the view of a traveler on the highway at a crossing at grade it is his duty to stop until he can ascertain whether he can cross with safety. *Chase v. Maine Central Railroad*, 167 Mass. 383, 388, 45 N. E. 911; *Fletcher v. Fitchburg Railroad*, 149 Mass. 127, 133, 21 N. E. 302, 3 L. R. A. 743; *Donnelly v. Boston & Maine Railroad*, 151 Mass. 210, 24 N. E. 38; *Debbins v. Old Colony Railroad*, 154 Mass. 402, 28 N. E. 274.

We see nothing in the case before us to take it out of the general rule. The plaintiff certainly had no greater rights than a traveler on the highway. While there is evidence that he looked and listened, neither was of any avail. His view was obstructed, and the noise of his cart prevented his hearing the approaching train, and this he knew. It was his duty then to stop and listen. If he had done this, there can be no doubt that he would have heard the approaching train. He took his chances, and must abide the consequences.

Exceptions overruled.

(187 Mass. 220)

UPHAM v. CITY OF BOSTON.

(Supreme Judicial Court of Massachusetts, Suffolk. Jan. 5, 1905.)

MUNICIPAL CORPORATION—DEFECTIVE SIDEWALKS—QUESTIONS OF LAW—APPEAL.

1. The Supreme Court may hold, on exceptions, that a certain condition of things in a way is not, as matter of law, a defect.
2. A circular hole from 2 to 2½ inches in diameter, in which the toe or heel of a traveler might be caught, cannot be held, as a matter of law, not to be a defect in the sidewalk in which it exists.

Exceptions from Superior Court, Suffolk County; Chas. U. Bell, Judge.

Tort for personal injuries by one Upham against the city of Boston. There was a verdict for plaintiff for \$800, and defendant excepted. Exceptions overruled.

Chas. W. Bartlett and Elbridge R. Anderson, for plaintiff. Arthur L. Spring, Asst. Corp. Counsel, for defendant.

BARKER, J. The plaintiff, while walking with a crutch on the sidewalk of Union Park street, in Boston, was thrown down and hurt

because the end of her crutch went down into a circular opening in the surface of the sidewalk caused by the absence of a glass disk in a Hyatt light. The hole was from 2 to 2½ inches in diameter. The crutch went down into the hole about 2 feet. Several of these glass disks were out at the time of the accident. The court left to the jury the question whether the hole was a defect. The defendant excepted to a refusal to rule that the evidence did not disclose any defect.

The only question raised by the defendant in this court is whether we shall decide, as matter of law, that such a circular opening in the surface of a sidewalk is not a defect. We have no doubt of our power to hold that a certain condition of things in a way is not, as matter of law, a defect. See *Burke v. Haverhill* (Mass.) 72 N. E. 256. Nor do we express any opinion upon the question whether a hole so small that it could endanger no travelers except those using crutches might be a defect. We think it plain that the toe or the heel of many travelers without crutches might be caught in a circular opening 2½ inches in diameter, and cause injury.

Exceptions overruled.

(187 Mass. 213)

COLE v. KILLAM.

(Supreme Judicial Court of Massachusetts.
Essex. Jan. 5, 1905.)

VENDOR AND PURCHASER—SPECIFIC PERFORMANCE—NECESSITY OF TENDER—DEMAND OF SURVEY.

1. Where the vendor merely stipulates to sell land at a certain price, and there is no provision as to whether the payment of the money or the conveyance is to be made first, the covenants are to be deemed mutual and dependent, and are to be performed simultaneously, and it is sufficient that when the time comes for the transaction the purchaser is able and prepared to pay, and demands the deed.

2. The fact that a purchaser demanded a survey of the land when he demanded a deed does not affect his right to specific performance, when such a survey was necessary to determine the price to be paid, and the vendee did not put his refusal to pay on the ground that the survey was requested.

Report from Superior Court, Essex County; Lemuel Le B. Holmes, Judge.

Bill by Morris L. Cole against Henry Killam for the specific performance of a contract for the sale of real estate. There was a decree overruling a demurrer to the bill, and the case was reported, at the request of defendant, to the Supreme Judicial Court. Decree for plaintiff.

At the hearing of the case it appeared that the defendant leased to the plaintiff certain real estate for the term of five years; that in said lease was contained the following agreement: "And I, the said Henry M. Killam, agree to sell all of said land except the following described parcels to the said Cole for the sum of fifty dollars per acre at any time prior to the expiration of this lease." The plaintiff testified: That about a month

before the expiration of the lease he had a conversation with the defendant about the purchase of the land, which conversation did not result in anything definite. That about a week before the expiration of the lease he had another conversation with the defendant, in which the defendant said that he guessed he would not sell any of the land. That he thought the lease was not good, because the plaintiff had not met his payments when they became due. That thereupon the plaintiff saw counsel. That counsel wrote a receipt on the back of the lease for the defendant to sign. That the receipt written on the back of said lease was as follows: "Whereas Morris L. Cole within named has elected to purchase the premises within mentioned and has this day offered to pay for the same. Now, I hereby acknowledge that I have this day received from him the sum of one hundred dollars on account of the purchase price of said premises and I agree to convey said premises to him and to have said premises surveyed and a proper deed prepared and tendered to him on or before April 20, 1902. Witness my hand and seal this 9th day of April 1902. [S.J.]" That on the evening of the 9th day of April, 1902, the night before the expiration of the lease, the plaintiff with his lease and the above receipt written thereon went to the house of the defendant in company with one Benson. That the plaintiff had with him \$175 in money. That the plaintiff asked the defendant to accept \$100 on account of that land and sign the receipt on the back of the lease. That the defendant declined to sign it. That the plaintiff then demanded of the defendant a deed of the land, and told him that when the land was surveyed and the deed was ready the money was ready. That the defendant refused to give a deed of the property to the plaintiff.

Peters & Cole, for plaintiff. J. Frank Batchelder, for defendant.

HAMMOND, J. The defense is that the plaintiff made no tender of the purchase price. It is true that no formal tender was made, but it was unnecessary. In a case like this, where the stipulations are that the one shall pay the money and the other shall execute a conveyance, and there is no provision that either is to be done first, the covenants are mutual and dependent. The one is not bound to pay without receiving his deed, nor the other to part with his land without receiving his money. The performance must be simultaneous. It is not necessary on the part of the purchaser to make a strict tender. It is sufficient that when the time comes for the transaction he is able and prepared to pay, and demands the deed. That is sufficient tender of performance. *Irvin v. Gregory*, 13 Gray, 215.

The court has found that before the expiration of the lease the plaintiff notified the defendant that "he would take the land, and

pay the price, and was ready and able and offered to do so." The plaintiff's evidence tended to show also that the defendant refused to give the deed, and the court found that "he did not intend to convey or keep his agreement." The evidence fully justifies these findings.

As to the contention of the defendant that the plaintiff asked him to have a survey made of the land, it is enough to say that the court has found that such a survey was necessary to determine the price to be paid, and that the defendant did not put his refusal to convey on the ground that the survey was requested, nor did he rely upon it as a ground for refusal at the time the plaintiff offered to pay. The evidence at the trial showed a case for the plaintiff.

The defendant demurred to the bill upon the ground that it did not appear therein "that the plaintiff ever tendered, before the expiration of the term of the lease, to the defendant, the purchase price." For the reasons above given, the demurrer was rightly overruled.

In accordance with the terms of the report, there must be a decree for the plaintiff.

(187 Mass. 165)

JOSLIN v. GODDARD et al.

(Supreme Judicial Court of Massachusetts. Worcester. Jan. 5, 1905.)

FINDING OF FACT BY MASTER—CONCLUSIVE-NESS—DELIVERY OF DEED.

1. The finding of facts by the master, who saw and heard the witnesses, confirmed by order of the court to which he made his report, will not be reversed, though the evidence is such that a contrary finding would be allowed to stand.

2. Where deeds were delivered to and held by one of the grantees, who was the grantor's man of business, subject to the grantor's control, revocation, or alteration while she lived, and the other grantee knew nothing of their existence until after the death of the grantor, there was no delivery of the deeds.

Appeal from Superior Court, Worcester County; F. A. Gaskill, Judge.

Action by one Joslin against Emory Goddard and another to cancel two quitclaim deeds. From a decree for plaintiff on report of the master, defendants appeal. Affirmed.

Chas. Haggerty and J. R. Kane, for appellants. John S. Gould, for appellee.

BARKER, J. The plaintiff and the two defendants are the only children and heirs of Mary A. Goddard, who died intestate on December 19, 1899, at the age of nearly 83 years; having been a widow for many years. In the present position of the action, the turning point is as to the validity of two deeds executed by her on June 6, 1896. One of these deeds purported to quitclaim to the defendants all the grantor's right, title, and

interest, after her death, in certain land, in trust to pay over the net income to the plaintiff during her life, and upon her death to turn over the land to themselves, free of trust. The other deed quitclaimed to the defendants certain other lands, reserving and excepting to the grantor during her natural life the use, occupation, income, enjoyment, and control of the lands quitclaimed. The lands described in the two deeds constituted all of the grantor's real estate. The bill asks to have them declared void, and for an accounting of the rents and profits of the lands for the time which has elapsed since the grantor's death, upon the ground that the plaintiff and the defendants are tenants in common, as the heirs at law of the grantor. Certain allegations as to personality alleged to have been owned by Mrs. Goddard at the time of her decease have in the course of the proceedings become immaterial to our decision. After issue joined, the cause was sent by the superior court to a master to find the facts and state the account, and make report thereof, together with so much of the evidence as either party might request. Upon the coming in of the master's report, it was recommitted and a supplementary report was made, to which the defendants filed exceptions, which were overruled, and a final decree was entered for the plaintiff. The cause is here upon the defendants' appeal from the order overruling their exceptions to the supplementary report of the master and from the final decree, and it has been considered upon the briefs submitted by the parties. The defendants' brief raises no questions except those as to the validity of the deeds of June 6, 1896, and we treat all others as waived.

The decree declares that the two deeds are void because there was no delivery of the same in the lifetime of the grantor, and for other reasons, which, in the view we hold, are now immaterial. As all the evidence is before us upon the master's report, we have examined it with care, to see whether the declaration that the deeds are void for want of delivery shall stand.

At the time of their execution, Mrs. Goddard was living in the same house with the two defendants, and this house was in the same yard with their business office. One of the defendants had a wife and children, and occupied the upper tenement, while Mrs. Goddard and the other defendant, who was unmarried, occupied the lower tenement of the house. Since her husband's death the married son had been her confidential man of business, and had the custody of her papers. The two deeds were drafted by an attorney in pursuance of oral instructions given to him by Mrs. Goddard at her home. They were executed by her there, when she and the attorney were alone together. They were then taken by the attorney and carried to the defendants' office, where they were

¶ 2. See Deeds, vol. 16, Cant. Dig. §§ 119, 134.

handed to Emory Goddard, the son, who acted as the grantor's man of business, and who had the custody of her papers; the attorney saying to Emory that his mother told him to give them to him. The attorney was examined as a witness, and testified: "I asked her what I should do with it. She told me to give it to Emory Goddard—he would know what to do with it"—and upon cross-examination: "She told me what to do with them after they were executed. She told me to give them to Emory." Standing by itself, this evidence would justify a finding that there was a delivery of the deeds, and, if the master had so found upon all the evidence, we have no doubt that his finding would have been allowed to stand. But the master has found that the deeds were held by Emory subject to Mrs. Goddard's control, revocation, and alteration while she lived, and that he was merely the custodian thereof for his mother, and that he so understood it; and the defendant's exception to the finding has been overruled by the superior court, and a decree entered declaring that there was no delivery. The finding of the master, who saw and heard the witnesses, confirmed by the order of the court to which he made his report, will not be reversed here unless our examination of the reported evidence shows us that the finding is clearly wrong. *Holt v. Silver*, 169 Mass. 435, 48 N. E. 837. In support of the master's finding, besides the fact that Emory was Mrs. Goddard's man of business, having the custody for her of all her papers, the evidence shows that neither deed was recorded until some time after Mrs. Goddard's death; that the other grantee had no knowledge of either deed until after the grantor's death; that after their execution Mrs. Goddard spoke on more than one occasion in a way which would justify the inference that she supposed that in making the deeds she had made her will, and that she could change it; and that Emory himself told her that the deeds were in his safe, and that, if she should ever conclude to change her mind, they were not on record, and she could fix them as she pleased. Upon this state of the evidence, we are not inclined to set aside the master's finding on that part of the final decree which declares the deeds void for want of delivery. We do not consider whether they are void for other reasons also.

Decree affirmed.

(187 Mass. 202)

RADOVSKY v. SPERLING et al.

(Supreme Judicial Court of Massachusetts.
Bristol. Jan. 5, 1905.)

EXECUTION—ARREST OF DEFENDANT—POOR DEBTORS' OATH—FRAUD.

1. Although an affidavit for the arrest of a judgment debtor, charging fraud in accordance with Rev. Laws, c. 168, § 17, providing for such arrest in cases of a fraudulent conveyance of

property by the debtor, is in general terms, and is such that the debtor might be entitled to have specifications filed, if seasonably requested, yet where no request is made for such specifications, or where the charge can be made specific by a reference to the action or otherwise, the debtor can be called upon to plead to the charge.

2. Rev. Laws, c. 168, § 17, cl. 2, provides for the arrest of a judgment debtor where the debtor has fraudulently disposed of his property since the debt was contracted or the cause of action accrued. Section 52 provides that, where the debtor is charged with fraud, the charges shall be considered in the nature of an action at law to which the debtor may plead. Section 55 provides that, if the debtor voluntarily makes default at a time appointed for the hearing, or is found guilty, he shall have no benefit of the proceedings for the relief of poor debtors. *Held*, that where an affidavit of the creditor for the arrest of the debtor charged fraud under section 17, supra, and the debtor defaulted at the time appointed for the hearing, and the poor debtor's oath was refused, another court, to which the debtor subsequently applied to be permitted to take the oath, was without jurisdiction to grant the relief sought.

Exceptions from Superior Court, Bristol County; Aiken, Judge.

Action by Joseph Radovsky against Abraham Sperling and others. There was a finding for defendants, and plaintiff excepted. Exceptions sustained.

D. R. Radovsky and T. E. Higgins, for plaintiff. Frank Wasserman, for defendants.

HAMMOND, J. This is an action on a poor debtor's recognizance. From the record of the Second District court of Bristol it appears that charges under the first and second clauses of Rev. Laws, c. 168, § 17, were filed by a judgment creditor against the defendant Sperling, the judgment debtor; that after a hearing thereon a certificate for his arrest upon the execution was issued; that on November 12, 1903, Sperling was arrested and brought before the court, and that on the same day he, with one Ziman, the other defendant in this case, as his surety, entered into the recognizance; that on November 27th, Sperling filed in the same court an application for leave to take the oath for the relief of poor debtors, and on the same day notice thereof was issued to the judgment creditor to appear at that court on December 1st and examine the debtor. The record continues as follows: "On this December 1, 1903, the debtor appeared, and, after being duly sworn, was partially examined. The hearing was then continued to December 1, 1903, at two o'clock p. m., at the courtrooms of the Second District court. Then the hearing was adjourned until December 2, 1903, at nine o'clock a. m., at the courtrooms of the Second District court. Then the judgment debtor, Sperling, was defaulted, and the oath for the relief of poor debtors was refused." The evidence offered by the defendants tended to show that on December 5th, Sperling applied to the Third District court of Bristol to take the oath for the relief of poor debtors, and that on December 15th, the creditor, although duly notified, not being present, the

oath was administered by a justice of said court to Sperling, and he was discharged from arrest, the judge making the proper certificate thereof. It is contended by the defendants that after Sperling had been defaulted in the first court to which he applied that court had no jurisdiction to proceed further in the matter, and that the order refusing the oath was *coram non iudice*, and therefore that the provision in Rev. Laws, c. 168, § 35, that, if the oath has been refused, another application to take it "shall not be made within seven days from the hour of such refusal," is not applicable. We have not found it necessary, however, to consider this question, because we are of opinion that, even if this contention be correct, still the plaintiff is entitled to recover upon a ground to which this is in no sense material. It is to be borne in mind that the affidavit of the creditor contained two charges, the second being one of fraud in accordance with the second clause of Rev. Laws, c. 168, § 17. While this charge is very general, and, before pleading, the debtor might be entitled to have specifications filed, if he seasonably requested (*Stockwell v. Silloway*, 100 Mass. 287; *Frost's Case*, 127 Mass. 550, 554), yet, in the absence of such a request, or where the charge can be made specific by its reference to the action or otherwise, the debtor can be called upon to plead. *Noyes v. Manning*, 162 Mass. 14, 37 N. E. 768. The record of the first court to which the debtor applied does not recite that he had pleaded formally to this charge of fraud, but the hearing was upon both charges, the second as well as the first, and the debtor defaulted at a time appointed for the hearing. The case is therefore within Rev. Laws, c. 168, § 55, which, when read in connection with sections 17 and 52 of the same chapter, provides, in substance, that when such a charge is made or filed on affidavit for arrest or pending the examination of the debtor, "if the debtor voluntarily makes default at a time appointed for the hearing, * * * he shall have no benefit from the proceedings under the provisions of this chapter," except as stated in another part of the same section, which is not material to this case. It follows that the second court to which the debtor applied had no jurisdiction, and there was a breach of the recognition, and the first ruling requested by the plaintiff should have been given.

Exceptions sustained.

(187 Mass. 248)

SALTMAN v. BOSTON ELEVATED RY. CO.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 6, 1905.)

STREET RAILROAD — CROSSING ACCIDENT — CONTRIBUTORY NEGLIGENCE — DIRECTING VERDICT.

1. Where plaintiff in an action against a street railroad for injuries resulting from a collision between an electric car and the wagon

which the plaintiff was driving was shown to have driven on the second of defendant's tracks when it was impossible, because of a car passing on the first track, for him to use his sight for protection, and when he could not depend on his sense of hearing because of his inability to distinguish between the noise made by the car which was passing and that of the approaching car, which collided with his wagon, he was guilty of contributory negligence, warranting the direction of a verdict for defendant.

Exceptions from Superior Court, Suffolk County; Lorumus E. Hitchcock, Judge.

Action by Louis Saltman against the Boston Elevated Railway Company. Verdict directed for defendant, and plaintiff brings exceptions. Overruled.

Ellisha Greenwood and Josiah Bon, for plaintiff. Russell A. Sears and Hugh Bancroft, for defendant.

LATHROP, J. This is an action of tort for injuries sustained by the plaintiff resulting from a collision between an electric car of the defendant coming up Brattle street into Harvard Square, in the city of Cambridge, and a wagon which the plaintiff was driving. The collision took place about 2 o'clock in the afternoon on October 25, 1900. At the trial in the superior court the judge declined to rule that there was no evidence of negligence on the part of the defendant, but instructed the jury, as matter of law, that the plaintiff was not in the exercise of due care, and that his lack of care contributed to the injury, and directed a verdict for the defendant. The only question before us is raised by the plaintiff's exception to the latter ruling.

The plaintiff was driving, in an express wagon loaded with junk, from North Cambridge, intending to cross Brattle street, which runs from the west side of Harvard Square into Boylston street, which runs from the south side of the square. The plaintiff's horse and wagon together were about 22 feet long. There are numerous tracks of the defendant in Harvard Square, and two tracks in the middle of Brattle street, occupying a space of 14 feet and 9 inches. The plaintiff was familiar with the locality, as he passed through there about every day. He also knew that "there were a good many cars going through there all the time." Brattle street is straight in the direction from Harvard Square towards Brattle Square for a distance variously estimated at from 100 to 300 feet, but which appeared by an atlas of the city of Cambridge to be 262 feet, where the street curves towards Brattle Square. The plaintiff testified that the distance of the straight part of the street was from 100 to 150 feet. The plaintiff also testified that as he approached the tracks on Brattle street he was obliged to slow up to allow a car to pass him going from Harvard Square to Brattle Square; that while this car was passing he looked down Brattle street, but saw no car approaching from the other direction; that he could not say that he looked again

¶ 1. See *Street Railroads*, vol. 44, Cent. Dig. § 215.

after that; that as soon as the outward-bound car passed him he drove straight along, looking straight ahead; and that an inward-bound car struck the hind wheel of his wagon, doing the injury complained of. The plaintiff further testified that there was nothing except the passing car to prevent the motorman of the car which struck him from seeing him or from his seeing the car. On this evidence we are of opinion that the ruling of the court below was right. The plaintiff's looking while his view was obstructed by a passing car did him no good. Common experience teaches us that it is unsafe to cross a double line of tracks without looking to see whether a car is approaching on either line; and it also teaches us that, if the view is temporarily obstructed, one should wait until the view is unobstructed. The plaintiff in this case drove upon the second line of tracks when it was impossible for him to use his sight for his protection, and when he could not depend upon his sense of hearing, as it would be impossible for him to distinguish between the noise made by the car which was passing and that of the approaching car. The case seems to us to come fairly within *Kelley v. Wakefield Street Railway*, 175 Mass. 331, 56 N. E. 285; *Hurley v. West End Street Railway*, 180 Mass. 370, 62 N. E. 268, and *Dunn v. Old Colony Street Railway*, 186 Mass. 316, 71 N. E. 557. See, also, *Donovan v. Lynn & Boston Railroad*, 185 Mass. 533, 70 N. E. 1029.

Exceptions overruled.

(187 Mass. 168)

BARRON v. CITY OF BOSTON.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 4, 1903.)

TAXATION—DOMICILE OF TAXPAYER—PROPERTY
TAXABLE IN OTHER PLACE—PRINTING
PRESSES—PUBLICATION OF PAPER.

1. A person owning a house in the city of B., and one in the town of C., occupied with his family the house at C. from May to December, 1900, and in the fall of that year formed an intention to become a resident of C., and gave notice to the assessors of B. that he was a resident of C. In December he moved to his house in B., and was not in C. again until June, though his intention of remaining a resident there continued uninterrupted. In April he went abroad, notifying his family to be in C. by the 1st of May; but, as a fact, they did not arrive there until after the 1st, and he did not notify the assessors of C. of his having become a resident there until June, 1901. *Held*, that he was a resident of C. on May 1, 1901, and hence taxable there, until Rev. Laws, c. 12, § 23, making personal estate assessable in the city or town in which one is an inhabitant on May 1st.

2. Rev. Laws, c. 12, § 23, provides that goods, wares, merchandise, and other stock in trade, and stock employed in manufacturing or the mechanic arts, in cities other than those in which the owners reside, shall be taxed in the cities or towns in which the owners hire or occupy manufactories, stores, or shops. *Held*, that a printing press and other personalty incidental to the business of publishing a bulletin of information to bankers once in five minutes, situated in a city other than that in which

the owner resided, was not taxable there, since if the property constituted goods, etc., it did not appear that the owner occupied a manufactory, store, or shop, and the business could not be termed manufacturing.

Appeal from Superior Court, Suffolk County; Francis A. Gaskill, Judge.

Action by Clarence W. Barron against the city of Boston to recover taxes. Case reported for determination of the Supreme Court. Judgment for plaintiff.

Whipple, Sears & Ogden and Alex. Lincoln, for plaintiff. Arthur L. Spring, for defendant.

KNOWLTON, C. J. This is an action to recover back a tax assessed upon the personal property and poll of the plaintiff on May 1, 1901. The first question is whether he was a resident of Boston at that time. He owned a house in Boston, which he occupied a part of the time. He also owned a large estate in Cohasset, consisting of a dwelling house containing 20 rooms, and a farmhouse, stables, and a cowhouse. This he occupied a considerable part of the time in each year. Early in the year 1900 he was a resident of Boston, but he stayed with his family at the house in Cohasset from May to December in that year. The judge who heard the case found as follows: "That in the fall of 1900 Mr. Barron, having formed the intention of then and there becoming a resident of Cohasset, and while living in his house at Cohasset, and before his return to Boston, gave notice to the assessors of the city of Boston that he was a resident of Cohasset; that Mr. Barron, some time after this notice was given—in December—moved to his Boston house, and was not in Cohasset again until June, but his intention of remaining a resident of Cohasset continued uninterrupted; that he left for abroad in April, and, before leaving, notified his family to be in Cohasset by the 1st of May, but that, as a fact, they were not there until shortly after the 1st of May. I further found as a fact that Mr. Barron did not notify the assessors of the town of Cohasset of his having become a resident there until the summer, in June, 1901, and that Mr. Barron had not carried out his intention of becoming a resident of Cohasset by any sufficient overt act; and on these facts I ruled and found the plaintiff was a resident of the city of Boston on May 1, 1901, and not of Cohasset."

On this finding of facts, the ruling should have been that he was a resident of Cohasset. In *Viles v. Waltham*, 157 Mass. 542, 32 N. E. 901, 34 Am. St. Rep. 311, the law as to domicile is stated as follows: "To acquire a domicile, there must be residence in a place, and an intention to make that place one's home." The only act, apart from the intention of the actor, which is absolutely necessary to the acquisition of a domicile in a city or town, is that at some time the person must go to the place and take up his abode there. If he

is abiding there while his domicile is elsewhere, and if while so abiding he forms an intention immediately to make it his home permanently or for an indefinite period, and continues to abide there in pursuance of that purpose, he thereby acquires a new domicile. There is no requirement of law that he shall give notice to assessors or to anybody else. The act of going from one place to another, or some other act indicating a change of residence, is often referred to as a foundation for the introduction in evidence of the person's declarations as a part of the *res gestæ*. Declarations accompanying such acts are often important evidence of intention, bearing upon the question whether there was a bona fide change of residence. See *Viles v. Waltham*, *ubi supra*. In *McConnell v. Kelly*, 188 Mass. 372, Chief Justice Morton states the rule as follows: "In determining whether there has been such a change from one place to another, the test is to inquire whether he has in fact removed his home to the latter place with the intention of making it his residence permanently or for an indefinite time. If he has, he loses his old domicile, and acquires a new one, with all its rights and incidents." In *Thayer v. Boston*, 124 Mass. 182-145, 28 Am. Rep. 650, Mr. Justice Colt quoted from *Lyman v. Fiske*, 17 Pick. 231-234, 28 Am. Dec. 293, a part of the definition of domicile, as follows: "It is manifest, therefore, that it embraces the fact of residence at a place, with the intent to regard it and make it his home. The act and intent must concur, and the intent may be inferred from declarations and conduct." In *Wilbraham v. Ludlow*, 99 Mass. 587, this is a part of the headnote: "A person legally capable of choosing or changing his domicile, who is residing in a city or town of this commonwealth, with the purpose of there remaining for an indefinite time, and without retaining and keeping up any intention to return to his former home in another city or town of this commonwealth, has his domicile in the place of his actual residence." Under the law laid down in this and other cases, the plaintiff, upon the findings of the judge, as applied to the other admitted facts, acquired a domicile in Cohasset, and a tax upon his poll and his personal estate could not properly be assessed in Boston.

The judge further found that he "had a printing press and other personal property incidental to the publishing of the Boston News Bureau in his Boston office, on Exchange Place, on May 1, 1901, and ruled that said property was subject to assessment in the city of Boston, even though Mr. Barron was a resident of the town of Cohasset on May 1, 1901, and that in that event the plaintiff's only remedy was by petition for abatement, and that this action could not be maintained on that ground also." As we have already seen, this property could not be assessed under the first general provision of Rev. Laws, c. 12, § 23, because the plain-

tiff was not an inhabitant of Boston. If it was taxable in that city at all, it was under the first clause of the exceptions in this section. To be taxable under this clause, property must be "goods, wares, merchandise," or "other stock in trade," or "stock employed in the business of manufacturing or of the mechanic arts," and the owner must hire or occupy a "manufactory, store, shop or wharf" in Boston. If the property used in publishing the Boston News Bureau was goods, wares, or merchandise, within the meaning of the statute, it does not appear that the plaintiff hired or occupied a manufactory, store, shop, or wharf. The business of publishing the Boston News Bureau, according to the undisputed testimony, was the publication of a bulletin of information to bankers once in five minutes. There is nothing to show that the place of business was a store or shop, within the meaning of the statute. The business was not the production of goods, wares, or merchandise to be kept for sale or use. It was rather the communication of information which quickly became a matter of common knowledge, and then ceased to be of value. The printing of words upon the paper used was simply the means adopted for the transmission of this intelligence from time to time. To call such a business manufacturing, or to call the office and rooms in which it was conducted a manufactory, would be giving the words a peculiar and unusual meaning. The finding, therefore, does not bring the case within the statute. *Loud v. Charlestown*, 103 Mass. 278; *Charlestown v. County Commissioners*, 109 Mass. 272; *Hittinger v. Westford*, 135 Mass. 262; *Farwell v. Hathaway*, 151 Mass. 242, 23 N. E. 849; *Ingram v. Cowlea*, 150 Mass. 157, 23 N. E. 48; *Hittinger v. Boston*, 139 Mass. 18, 29 N. E. 214; *Wellington v. Belmont*, 164 Mass. 143, 41 N. E. 62.

Judgment for the plaintiff.

(187 Mass. 285)

HOFFMAN et al. v. NEW ENGLAND TRUST CO. et al.

(Supreme Judicial Court of Massachusetts.
Essex. Jan. 5, 1905.)

WILL—CONSTRUCTION—TRUST—VALIDITY—TERMINATION.

1. Testator, under item 7 of his will, directed that any bonds owned by him should not be collected or sold until they became due. By the first codicil he modified the will in relation to bonds, directing the setting apart of certain of them by his executor to meet legacies in trust; that all others were to be held until the decease of the legatees, the interest thereon to be paid to the executor and distributees pursuant to the will; and that on the death of certain legatees the bonds be sold and distributed, although not then due. By the second codicil, item 7 of the will was changed, as to the persons to whom the estate named in the seventh item should go. *Held*, that the provision of the first codicil, as to the care of the bonds by a trustee, and the time when they should be sold and distributed, was not affected by the second codicil.

2. The provision of a will declaring a trust in testator's property to continue during the life of two legatees in being is valid, and hence is not subject to termination by the beneficiaries, especially where one of four beneficiaries and the trustee appear in opposition.

Appeal from Supreme Judicial Court, Essex County; Joe Lathrop, Judge.

Petition in equity by Francis Otey Hoffman, individually and as administrator of O. Peirce Hoffman, deceased, and another, against the New England Trust Company, trustee and executor of the estate of Nathan Peirce, deceased, and another, to terminate the trust. Bill dismissed, and petitioners appeal. Dismissed.

Daggett, Young & Jefferson, for petitioners. C. H. Tyler, O. D. Young, and B. D. Barker, for New England Trust Co.

HAMMOND, J. In the original will the only provision relating to the bonds was that contained at the end of the seventh item, as follows: "And I direct that any Bonds owned by me shall not be collected or sold until they become due and payable." In the first codicil the only provision as to the bonds is the following: "And I modify my said will in relation to the Bonds that I may own at my decease, as follows—I now hereby direct that the Bonds of the City of Cambridge—the Bonds of the City of Providence—the Bonds of the City of Springfield—and the Six per Cent Bonds of the Boston and Albany Railroad Company, be set apart by my executor, to meet the income of One third of my Personal Estate, held in trust for Mary Louisa Peirce and also for the One fifth income of the remaining two thirds of my personal estate held in trust for Laura O. G. Peirce, so far as may be necessary for that purpose. And all the other Bonds that I may own at my decease are to be held by my Trustee, the New England Trust Company until the decease of my Nieces, Mary L. Peirce and Laura C. G. Peirce, the interest on the same, to be paid to my said Executor, for distribution to the parties entitled to receive the same by said Will. And at the death of both the said Mary Louisa Peirce and Laura C. G. Peirce, the said Bonds may be sold and distributed with all accumulations, although not then due, to the parties entitled by my said Will to the residue of my Personal Estate." In the second codicil there is no mention of the bonds, and it is suggested by the petitioners that, since the only provision in the original will concerning the bonds was at the end of the seventh item, the substituted provision contained in the first codicil must be regarded also as a part of the seventh item as thus modified, and further that, since the second codicil modifies the seventh item, and says nothing about the bonds, the provisions of the first codicil in relation to the bonds are by necessary implication annulled by the second codicil. But we do not so read the

will. The manifest purpose of the second codicil was not to change the provisions of the first codicil as to the bonds, but to change the provisions of the will as to the persons to whom the estate named in the seventh item should go. The provisions of the first codicil as to the care of the bonds by a trustee, and the time when they shall be sold and distributed among the residuary legatees, must be regarded as still standing.

The main question is whether the trust should be terminated. It is to be observed that the petitioners comprise only three of the beneficiaries, the fourth beneficiary and the trustee appearing in opposition; and under such circumstances, to declare the trust terminated would be going further than this court has gone.

But there are other grounds for refusing the petition. Plainly, the testator intended that the trust should continue until the death of both of his nieces, Mary and Laura. And whatever may be the law elsewhere, that provision in this commonwealth is legal. *Claffin v. Claffin*, 149 Mass. 19, 20 N. E. 454, 8 L. R. A. 370, 14 Am. St. Rep. 393. It is also plain that nothing has happened which the testator did not anticipate, and for which he has not made provision. The language used by Field, J., in the case above cited, is applicable here: "It cannot be said that these restrictions upon the plaintiff's possession and control of the property are altogether useless, for there is not the same danger that he will spend the property while it is in the hands of the trustees as there would be if it were his own." For reasons stated in that case, and in *Young v. Snow*, 167 Mass. 287, 45 N. E. 686, with reference to the general doctrine of the termination of such a trust, which it is unnecessary to repeat here, no sufficient reason is shown for the termination of the trust.

Petition dismissed.

(187 Mass. 179)

TOZIER v. HAVERHILL & A. ST. RY. CO.
(two cases.)

(Supreme Judicial Court of Massachusetts.
Essex. Jan. 5, 1905.)

CARRIERS — PASSENGERS—INJURIES—ACTION—INSTRUCTION—INJURIES TO WIFE—ACTION BY HUSBAND—VALIDITY OF MARRIAGE—DIVORCE—REMARriage OF PARTY—STATUTES.

1. In an action for injuries to a passenger in determining whether the motorman of the car acted with reasonable care in a sudden emergency, the fact that he was obliged to act quickly, and without a chance for deliberation, was to be considered.

2. In an action for injuries to a passenger defendant requested an instruction that, if the motorman did not exercise the best judgment which he could have exercised, he being called on to act in an emergency, his error would not be such negligence as would make defendant liable. *Held* properly refused, since the language was applicable to an error which might have been very gross, and inconsistent with proper care.

3. Pub. St. 1882, c. 145, § 4, declares that all marriages contracted while either party has a former spouse living, save as provided in chapter 146, shall be void, and by chapter 146, § 22 (Rev. Laws, c. 152, § 21), the party against whom a divorce is granted shall not marry within two years from entry of the final decree. St. 1895, p. 476, c. 472 (Rev. Laws, c. 151, § 6), makes marriages which were illegal because of one of the parties having another spouse living valid, after the impediment has been removed by the death or divorce of the other party to the former marriage, provided the contract was made by one of the parties in good faith in the belief that the former spouse was dead, or that there had been a divorce, or without knowledge of such former marriage. *Held*, that where a woman was divorced by her husband, and within two years married again, and while chapter 145 was in force, the marriage was invalid, in the absence of any evidence bringing the contract within the statute of 1895.

4. In an action by a husband for injuries to his wife the marriage was to be proved as a fact, and it was error to treat it as collateral, and instruct the jury that they were to consider plaintiff as the de facto husband of the woman.

Exceptions from Superior Court, Essex County; John H. Hardy, Judge.

Action by Holcy M. Tozler against the Haverhill & Amesbury Street Railway Company, and action by Jeanette F. Tozler against the same defendant. Judgments in favor of plaintiffs, and defendant brings exceptions. In the first case sustained, and in the second overruled.

Timo. W. & Danl. H. Coakley and Chas. C. Johnson, for plaintiffs. Chas. W. Bartlett and Elbridge R. Anderson, for defendant.

KNOWLTON, O. J. These are two actions brought by the plaintiffs, respectively—one to recover for injuries to the female plaintiff from the alleged negligence of the defendant in running a car in which she was a passenger; and the other to recover damages suffered by the male plaintiff, as her husband, resulting from her injury. It was conceded that she was in the exercise of due care, and the only exception now relied on in her case is to the refusal of the judge to give the jury this instruction, which the defendant requested: "If the jury find that the motorman did not exercise the best judgment which the case discloses could have been exercised, he being called upon to act in a sudden emergency, his error would not be such negligence as would make the defendant liable." If the request contained nothing but a statement of the familiar principle that, in determining whether one acts with reasonable care in a sudden emergency, the fact that he is obliged to act quickly and without an opportunity for deliberation is to be taken into account, and he is not to be deemed careless merely because he failed to do that which would have been best as shown by subsequent events, it properly might have been given. See *Ingalls v. Bills*, 9 Metc. 1, 43 Am. Dec. 346; *Cody v. New York & New England Railroad Co.*, 151 Mass. 462, 468, 469, 24 N. E. 402, 7 L. R. A. 843;

Gannon v. New York, New Haven & Hartford Railroad Co., 173 Mass. 40, 52 N. E. 1075, 43 L. R. A. 833. But it went further, and included the proposition that the motorman's error in not exercising the best judgment in a sudden emergency, if the jury found such an error, would not be actionable negligence, whatever the error might be in other particulars. The descriptive language in the request was applicable to an error which might have been very gross, and entirely inconsistent with the exercise of due care, as well as to an error which might have been excusable. We are of opinion that the instruction was properly refused, and that the exception in this case should be overruled.

The question in the other case grows out of the fact that at the time of the marriage of the two plaintiffs the female plaintiff had a former husband living, who had obtained from her a divorce for desertion, which had been made absolute less than two years before. It is declared by Pub. St. 1882, c. 145, § 4, which was in force at the time of the marriage, that "all marriages contracted while either of the parties has a former wife or husband living, except as provided in chapter one hundred and forty-six, shall be void." In Pub. St. 1882, c. 146, § 22 (Rev. Laws, c. 152, § 21), there is a provision in reference to divorced persons "that the party against whom the divorce was granted shall not marry within two years from the time of the entry of the final decree of divorce." The record was put in evidence, and from the facts stated we infer that the divorce was granted in Massachusetts, where the parties lived. The ceremony of marriage of the present plaintiffs was performed in Haverhill. It is plain, therefore, that the marriage was invalid. *Googins v. Googins*, 152 Mass. 533, 25 N. E. 833; *Cook v. Cook*, 144 Mass. 163, 10 N. E. 749.

The plaintiff invokes Rev. Laws, c. 151, § 6, first enacted in St. 1895, p. 476, c. 427, which makes certain illegal marriages valid after the impediment to the marriage has been removed by the death or divorce of the other party to the former marriage, provided the marriage contract was entered into by one of the parties in good faith, in the full belief that the former husband or wife was dead, or that the former marriage had been annulled by a divorce, or without knowledge of such former marriage, and provided they continue to live together in good faith on the part of one of them. See *Lufkin v. Lufkin*, 182 Mass. 476, 65 N. E. 840; *Com. v. Josselyn*, 186 Mass. 186, 71 N. E. 313. But there was no evidence at the trial tending to show that either of the parties entered into the marriage contract under such circumstances as to bring the case within this statute. The evidence tended to show the contrary. Much less could it be said as matter of law that the case was covered by this statute.

The question as to the validity of the marriage was treated by the judge as collateral, and the jury were instructed that they were to consider the male plaintiff as de facto and legally the husband of the other plaintiff. We are of opinion that this was erroneous. The right of action depended upon the alleged fact that he was the husband of the female plaintiff, and this fact was to be proved like any other fact in the case.

In the case of Holcy M. Tozier the exceptions are sustained, and in the case of Jeanette F. Tozier the exceptions are overruled.

So ordered.

(187 Mass. 157)

GREENSTEIN v. CHICK.

(Supreme Judicial Court of Massachusetts.
Essex. Jan. 5, 1905.)

MASTER AND SERVANT—INJURIES TO SERVANT
—NOTICE OF INJURY—NEGLIGENCE OF SUPER-
INTENDENT—APPEAL—ERRORS AVAILABLE.

1. Where a case was tried in the lower court on the assumption that the count under which a recovery was finally had stated a cause of action under the employers' liability statute, and no demurrer was interposed, or ruling on the pleadings requested, the sufficiency of the count under the statute cannot be questioned on appeal.

2. A signature to a notice to the master of injuries to a servant, reading "D. per H.," was sufficient, under the statute requiring such a notice to be signed by the injured person or some one in his behalf, where D. testified that he was retained to give the notice, and dictated the same to his stenographer, H., who wrote his name by his authority.

3. Under St. 1887, p. 900, c. 270, § 1, cl. 2, giving a servant an action against his master for injuries caused by the negligence of a superintendent, it is the duty of a superintendent who puts a servant at work in a place which is dangerous if the machinery is started, to look after the servant, and see that the machinery does not start.

Exceptions from Superior Court, Essex County; Chas. A. De Courcy, Judge.

Tort for personal injuries by Morris M. Greenstein against William N. Chick. There was a verdict for plaintiff, and defendant excepted. Exceptions overruled.

J. J. Mahoney, J. J. Sullivan, and David Benshimol, for plaintiff. Wm. S. Knox and Jos. H. Pearl, for defendant.

LATHROP, J. This is an action of tort for personal injuries sustained by the plaintiff while in the employ of the defendant on May 22, 1901. At the trial in the superior court the jury returned a verdict for the plaintiff, and the case is before us on the defendant's exceptions.

1. The defendant first contends that the plaintiff was not entitled to recover on the third count, on which the case went to the jury, on the ground that the count does not set forth a cause of action under St. 1887, p. 900, c. 270, § 1, cl. 2, in that it does not set forth that the injury was caused "by reason of the negligence of any person in the service of the employer, intrusted with and exercising su-

perintendence, whose sole or principal duty is that of superintendence." But the answer to this is that no such question was raised in the court below, either by demurrer or by asking for a ruling upon the pleadings. We have no desire to encourage slovenly pleadings, but it is evident that this case was tried in the court below on the assumption that the third count was a good count under the statute, as the exceptions state that it was admitted that Pratt, the foreman, who was charged in the count with negligence, was a superintendent within the employers' liability act.

2. The next question is as to the notice. No objection is made to the form of it, but only to the signature, which is "David Benshimol, per H. B." Mr. Benshimol testified that he was retained to give the notice; that he dictated the notice to his stenographer, Helen Blair, and that his name was written by her by his authority. We have no doubt that the notice was sufficient. *Dolan v. Alley*, 153 Mass. 380, 382, 26 N. E. 989.

3. The remaining question arises upon the exception of the defendant to the refusal of the presiding judge to give the following rulings: "(1) Upon all the evidence the plaintiff is not entitled to recover. (2) There is not sufficient evidence to authorize the jury to return a verdict for the plaintiff." The evidence in the case was very contradictory, and it was impossible for the judge to give the rulings requested, unless the plaintiff failed to make out a case entitling him to recover. It is clear from the evidence given by the plaintiff and his fellow workman who testified in his behalf that the jury were warranted in finding that the belt which operated the machine at which the plaintiff was working came off the lower pulley and began to wind around the shafting above; that the plaintiff spoke to Pratt, the superintendent, about it; that Pratt, after examining the machine, said he would go to the engine room, and have the power shut off; that the plaintiff was directed by Pratt, when the machine stopped, to go upon a platform and unwind the belt; that within a few minutes the machine stopped; that the plaintiff went upon the platform as directed, and began to unwind the belt, when the machine almost instantly started, the plaintiff's arm was caught, and he sustained the injury complained of. The case is not one of the giving of an order by the superintendent which was disobeyed by the engineer, a fellow servant of the plaintiff, for Pratt denied giving the order, and the engineer denied receiving any order from him, and testified that the engine was not stopped until after the accident. The jury found specially that the machinery was not in motion when the plaintiff took hold of the belt. The accident was of a kind easily preventable by the exercise of due care and superintendence on the part of Pratt. He had put the plaintiff in a dangerous place to

work if the machinery started, and it was his duty to look after him, and see that the machinery did not start. See *Scullane v. Kellogg*, 169 Mass. 544, 549, 48 N. E. 622; *Malcolm v. Fuller*, 152 Mass. 160, 25 N. E. 83; *Davis v. New York, New Haven & Hartford Railroad*, 159 Mass. 532, 84 N. E. 1070; *O'Brien v. West End Street Railway*, 173 Mass. 105, 53 N. E. 149.

Exceptions overruled.

(187 Mass. 296)

HOAGUE v. CUMNER.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 7, 1905.)

BANKRUPTCY—ASSIGNMENT FOR BENEFIT OF CREDITORS—VALIDITY—RIGHTS OF TRUSTEE IN BANKRUPTCY—STATUTES—CONSTRUCTION.

1. Under Bankr. Act July 1, 1898, c. 541, § 67e, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449], declaring conveyances made in fraud of the act within four months prior to the filing of the petition in bankruptcy void, an assignment for the benefit of creditors, valid at common law and under the statute of the state in which it was executed, made by the bankrupt more than four months prior to the filing of the petition, is not avoidable by the trustee in bankruptcy under section 70e, 30 Stat. 566 [U. S. Comp. St. 1901, p. 3452], giving the trustee the right to avoid any transfer that might have been avoided by any creditor.

2. Rev. Laws, c. 147, § 21, declaring the acts of trustees for the benefit of creditors valid under certain circumstances notwithstanding the assignment may be avoided by subsequent proceedings in insolvency, and section 22, providing that section 21 shall not apply to the acts of the trustee unless the trustee deposits with the clerk of the city or town in which the principal business of the debtor is carried on a copy of such assignment, are superseded by the national bankruptcy act, and remain in abeyance so long as the bankruptcy act continues in force; and hence a trustee in bankruptcy under Bankr. Act July 1, 1898, c. 541, 30 Stat. 566 [U. S. Comp. St. 1901, p. 3452] § 70e, giving him the right to avoid any transfer that might have been avoided by any creditor of the bankrupt, cannot avoid an assignment for the benefit of creditors made more than four months prior to the filing of the petition, merely because the trustee failed to deposit a copy of the assignment in the office of the town clerk.

Appeal from Superior Court, Suffolk County.

Action by Theodore Hoague, as trustee in bankruptcy of one Messenger, against Harry W. Cumner, assignee for benefit of creditors of the bankrupt. From a decree for defendant, plaintiff appeals. Affirmed.

Whipple, Sears & Ogden and Alex. Lincoln, for appellant. Brackett & Roberts and Geo. F. Piper, for appellee.

KNOWLTON, C. J. The plaintiff is the trustee in bankruptcy of one Messenger, who, more than four months before the commencement of the proceedings in bankruptcy, made an assignment of his property to the defendant for the benefit of his creditors, which was assented to by a majority of them, both in number and value. This bill is brought to set aside the assignment and

recover the property. It was said by the plaintiff's counsel at the hearing that no question was made in regard to the validity of the assignment, except that a copy of it was not deposited with the clerk of the city or town in which the principal business of the debtor was carried on, as is required by the Rev. Laws, c. 147, § 22. Construing the assignment, first, as valid at common law and under the statutes of this commonwealth (see *Faulkner v. Hyman*, 142 Mass. 53, 6 N. E. 846), and postponing for the moment the consideration of the statute just referred to, the length of time that the assignment had been in force prior to the commencement of the proceedings in bankruptcy rendered its validity free from disturbance by these proceedings. We have been referred to no case which decides or intimates that under the present statute conveyances valid at common law and under local laws can be set aside on account of proceedings begun after the expiration of four months from the time of their execution. Under Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418], conveyances made in fraud of the act within four months prior to the filing of the petition in bankruptcy are void. Section 67e, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449]. The implication is that, if there is no other element of fraud than a fraudulent preference under the statute, or an act of bankruptcy committed more than four months before the commencement of the proceedings, the trustee acquires no right to interfere with the conveyance. Section 70e, 30 Stat. 566 [U. S. Comp. St. 1901, p. 3452], which gives the trustee a right to avoid any transfer that might have been avoided by any creditor, includes all conveyances which are fraudulent against creditors at common law; but it does not include an assignment like the present, which we have assumed to be valid both at common law and under our statutes.

We come now to the plaintiff's second contention, namely, that the conveyance was rendered void by the Rev. Laws, c. 147, §§ 21, 22, because no copy of it was filed in the office of the town clerk. The contention is that any creditor who did not assent to it might set aside the assignment upon an attachment for his debt, and that, therefore, the trustee is entitled to the property under section 70e of the bankruptcy act. This statute has no reference either to the bankruptcy act or to the rights of creditors at common law. It is intended for the protection of trustees acting in good faith under assignments for the benefit of creditors, in cases in which the assignment is set aside because of subsequent proceedings in insolvency. The failure to satisfy the conditions of section 22 does not affect the validity of the assignment. It simply leaves the assignee without the protection given in section 21 when the assignment is set aside on account of subsequent proceedings in insol-

veny. Like other parts of our insolvency law, it is superseded by the bankruptcy act, and remains in abeyance so long as the bankruptcy act continues in force. See *Parmenter Manufacturing Company v. Hamilton*, 172 Mass. 178, 51 N. E. 529, 70 Am. St. Rep. 258. The assignment is valid notwithstanding the proceedings in bankruptcy.

Decree affirmed.

(187 Mass. 183)

CASHMAN et al. v. LONDON GUARANTEE & ACCIDENT INS. CO., Limited.

(Supreme Judicial Court of Massachusetts.
Essex. Jan. 5, 1905.)

EMPLOYERS' LIABILITY INSURANCE—CONTRACT
OF INSURED WITH THIRD PERSON
—EFFECT ON POLICY.

1. In an action on a policy of employers' liability insurance against loss for damages on account of bodily injuries accidentally suffered within the period of the policy by any employé of the insured during continuance of the work described in the schedule, it appeared that the occupation of insured was mentioned in the schedule as that of "stevedores and contractors." A stevedore in the employ of insured accidentally suffered an injury which caused his death, and his representative recovered judgment against insured; the ground of recovery being a defect in a runway owned by a third person, with whom insured had contracted to keep the runway in repair as long as they used it. *Held*, that the contract of the insured to keep the runway in repair was not, as matter of law, so improper or unreasonable as to take the liability of the insured to their employés, on account of it, out of the general provisions of the policy, so as to make the liability not the liability of a stevedore within the policy, but a separate and independent liability.

Appeal from Superior Court, Essex County; William B. Stevens, Judge.

Action by Michael Cashman and others against the London Guarantee & Accident Insurance Company, Limited. From a judgment for plaintiffs, defendant appeals. Affirmed.

Boyd B. & N. N. Jones, for plaintiff. Dickson & Knowles, for defendants.

KNOWLTON, C. J. This case was submitted upon an agreed statement of facts and evidence, in which it was stipulated that if the defendant is entitled, as matter of law, to a judgment in its favor on the facts and evidence, judgment is to be so entered; otherwise judgment is to be entered for the plaintiff in a stated sum. Judgment having been entered for the plaintiff, the defendant appealed, and the question before us is whether there is anything in the facts and evidence to warrant a finding for the plaintiff.

The action is to recover upon a policy of insurance "against loss from common law or statutory liability for damages on account of bodily injuries, fatal or nonfatal, accidentally suffered within the period of this policy by any employee or employees of the assured, while on duty at the places and in the

occupations mentioned in the schedule hereinafter given, and during the continuance of the work described in said schedule." The occupation of the plaintiffs mentioned in the schedule was that of stevedores and contractors. One of their employés, working as a stevedore, accidentally suffered an injury which quickly caused his death after conscious suffering. A suit was brought against the plaintiffs, which was defended by this defendant, and a judgment was recovered, which these plaintiffs were obliged to pay. See *Garant v. Cashman*, 183 Mass. 13, 66 N. E. 599. The evidence in that case is a part of the agreed statement in this, and it shows that there was a liability of the plaintiffs for an accidental injury to one of their employés engaged in the business of a stevedore. On its face, the liability seems plainly to come within the terms of the policy, and to warrant a recovery in this action.

The ground of the liability of these plaintiffs in the former suit was a defect in their ways, works, and machinery provided for the use of their employés, a part of which was a runway, with an apron or platform attached to it by hinges, which when in use was lowered to a level with the runway, and held in place over the vessel that was being loaded, by hinges and chains. Along each side of the apron were posts and a rope, intended for the protection of the persons working upon it. One of these posts was found to be defective, and this defect was the cause of the injury to the plaintiff in the former suit. The present plaintiffs had entered into a contract with the coal company that owned the runway to keep it in repair so long as they conducted the business of unloading coal at that place. Their liability for the accident may have been founded on this contract, made in connection with their business as stevedores; and the defense in this suit is that such a contract, creating such a liability to employés, was so foreign to the business of stevedores as to take the liability out of the provisions of the policy of insurance.

In the first place, on the evidence, it may be doubtful whether, as matter of law, this runway was not a part of the ways, works, and machinery of the present plaintiffs, furnished to employés for their use in the business, such as to create a liability to them for its condition in the absence of such a contract to keep it in repair, and notwithstanding the ownership of the coal company. See *Coffee v. New York, New Haven & Hartford Railroad Co.*, 155 Mass. 21-23, 28 N. E. 1128; *Trask v. Old Colony Railroad Co.*, 156 Mass. 298-303, 31 N. E. 6; *Hayes v. Philadelphia Coal Co.*, 150 Mass. 457, 23 N. E. 225; *Spaulding v. Flynt Granite Co.*, 159 Mass. 587, 34 N. E. 1134. But if there would have been no liability to employés without the contract which made the present plaintiffs primarily responsible for the condition of the runway, there is nothing in the evidence to

show that such a contract might not properly be made in connection with the plaintiffs' business as stevedores. It seems to us incidental to the business in which they were engaged. They were, and had been for a number of years, under a contract to unload the coal coming to the coal company at this wharf. Certainly it cannot be said, as matter of law, that such a contract was so improper or unreasonable as to take their liability to their employes, on account of it, out of the general provisions of the policy. To have that effect, a contract must be such as to make the liability not the liability of a stevedore, within the meaning of the policy, but a separate and independent liability.

Judgment affirmed.

(187 Mass. 229)

SOLARI v. CLARK et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 5, 1905.)

**INJURY TO EMPLOYÉ—FALLING OF STAGING—
NEGLIGENCE OF SUPERINTENDENT.**

1. The injury to an employé by the falling of a staging on which he was carrying material is the result of negligence in the exercise of superintendency; the superintendent not having performed his duty of not allowing the staging to be used till he had used due diligence to see it was properly put together and secured, which would have disclosed that the flooring rested merely on an insecurely nailed stay, with a knot in it.

Exceptions from Superior Court, Suffolk County; Lemuel Le B. Holmes, Judge.

Action by one Solari against one Clark and others. Verdict for plaintiff. Defendants bring exceptions. Exceptions overruled.

Hill, Bangs, Barlow & Homans and A. H. Morse, for plaintiff. Geo. H. Buck, for defendants.

BARKER, J. The defendants employed the plaintiff and others in constructing a large circular tower of brick, which at the time of the accident had been built up some 25 or 30 feet above the surface of the ground. A staging of lumber was used to support the masons, and the brick and mortar which they were to use. The staging was planned by one Moore, who, upon the evidence, could have been found to have been a superintendent, within the meaning of Rev. Laws, c. 106, § 71. As the tower was built higher, it became necessary from time to time to place and support at a higher level the planks which formed the floor of the staging. These planks rested on joists called "putlogs," which at one end were built into the brickwork of the tower, and at the other rested upon boards nailed to the upright posts of the staging. There were two classes of boards so nailed. One class were nailed to the inside of the uprights, and were called "ledger boards," and there was evidence tending to show that they were designed to hold up the putlogs on which the planks which constituted the floor of the staging rested. The other class were

called "stays," and there was evidence tending to show that their only office was to keep the uprights in their perpendicular position, although there was perhaps some evidence that the stays also supported the putlogs. Soon after the floor of the staging had been raised for the third or fourth time, as the plaintiff was upon it in the course of his work the staging broke, and he was thrown to the ground. It is conceded that he was in the exercise of due care, and that due notice was given under the statute. At the trial he elected to rely upon the sixth count of his declaration, and the count directed a verdict for the defendant upon all the other counts, refused to direct such a verdict upon the sixth count, and left that count to the jury, who found upon it for the plaintiff. The case is here upon the defendants' exception to the refusal of the court to order a verdict for them upon the sixth count, and the question for decision is whether there was evidence from which it properly could be found that the fall of the staging was the result of negligence of Moore in exercising superintendency.

It is plain that the staging was not one of those which the masons employed upon a job of brickwork are expected to build for themselves. On the other hand, it also is plain that enough proper materials were furnished and kept on hand by the defendants for the construction of the staging. It fairly could be found from the evidence that work of building the staging originally, and of raising it whenever necessary, was in charge of Moore, the foreman, who also worked with his own hands, but at whose orders the plaintiff, and other ordinary workmen of his class, made excavations, handled lumber, or carried brick or mortar, as Moore told them to do. It also could be found that the most of the manual labor of erecting and of raising the staging was done by Moore, and by a workman named Gardella, described in the defendants' brief as the "handy man" of the gang. The other common laborers, as they were ordered at times, brought boards for the staging to Moore and Gardella; and sometimes, when the planks were to be raised to the next higher level, the masons themselves helped pull them up. The evidence tended to show that the plaintiff was the first common laborer sent to take up bricks after the staging had been raised to the height where it was when the accident occurred, and that it happened as he was upon the staging with his third or fourth load. It also could be found that at the point where the staging gave way the outer end of a putlog, instead of being placed upon the ledger board, had been improperly placed upon a stay, and that the stay had been fastened to the upright with only two nails, instead of a greater number, and that the nails had been so driven as to tend to split the stay, and that there was a knot in the stay. The theory of the accident is that the strain brought to bear upon the stay caused it to

split, letting down the putlog and the floor of the staging. We think the evidence would not justify a finding that the knotty board was selected or nailed in position or the putlog placed upon it by Moore, rather than Gardella. But we also think that it fairly can be found from the evidence that it was a part of the duty of superintendency resting upon Moore not to allow the staging to be used at the height to which it had just been raised until he had used due diligence to see that it was properly assembled and secured, and that the accident resulted from negligence on his part in failing to observe that the putlog did not rest on a ledger board, and did rest on an insecurely nailed stay, in which was a knot.

Exceptions overruled.

(187 Mass. 159)

MASSACHUSETTS NAT. BANK v. SNOW.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 4, 1905.)

NOTES—INDORSER—LIABILITY—STATUTES—CONSTRUCTION.

1. Under the direct provisions of Rev. Laws, c. 73, § 23, subd. 5, a negotiable instrument is payable to bearer when the only indorsement is in blank.

2. Under the direct provisions of Rev. Laws, c. 73, § 207, a bearer is the person in possession of a note which is payable to bearer.

3. Where a note payable to bearer is presented for discount, the presumption is that the bearer is the owner of the note.

4. Under Rev. Laws, c. 73, §§ 69-76, defining holders in due course of negotiable instruments, one who in good faith takes a note payable to bearer, and discounts it without knowledge of any infirmity, thereby becomes a holder in due course.

5. To constitute notice of any infirmity in a note, or defect in the title, the person to whom it is negotiated must have had knowledge of such facts that his action in taking the instrument amounted to bad faith, under the direct provisions of Rev. Laws, c. 73, § 73.

6. Proof that a note on which an indorser was sued was not only complete in form and in execution, but also that it had been delivered to him by the maker as a binding instrument, and had afterwards been indorsed by the defendant, renders inapplicable Rev. Laws, c. 73, § 33, providing that every contract on a negotiable instrument is revocable until delivery of the instrument for the purpose of giving effect thereto.

7. Under Rev. Laws, c. 73, § 33, providing that, where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him, so as to make them liable to him, is conclusively presumed, a note which is complete and payable to bearer, taken from a thief, is valid in the hands of a holder in due course.

8. Where a negotiable note had taken effect, and was subsequently negotiated by the bearer to a holder in due course, the fact that the bearer was also the maker was immaterial, as between the holder and an indorser in blank prior to the negotiation by the maker.

9. Under the direct provisions of Rev. Laws, c. 73, § 141, a holder in due course of a negotiable instrument may enforce payment thereof according to its original tenor when it has been materially altered.

Exceptions from Superior Court, Suffolk County; Robt. O. Harris, Judge.

Action by the Massachusetts National Bank against one Snow. Verdict for defendant, and plaintiff brings exceptions. Exceptions sustained.

Carver & Blodgett, for plaintiff. Whipple, Sears & Ogden, Sherman L. Whipple, and Edwin M. Brooks, for defendant.

KNOWLTON, C. J. This is an action of contract on three promissory notes, signed, "H. G. & H. W. Stevens," payable to the order of the defendant, indorsed by him in blank, and discounted by the plaintiff. They severally bear date December 9, 1897, and the rights of the parties are accordingly governed by St. 1898, p. 492, c. 533, sometimes called the "Negotiable Instruments Act," which is now embodied in Rev. Laws, c. 73, §§ 18-212, inclusive. In referring to different provisions of this statute, it may be convenient to cite the sections of the Revised Laws, rather than the original act.

The maker of the notes, H. W. Stevens, who did business under the name of H. G. & H. W. Stevens, has deceased; and the defendant introduced evidence tending to show that, after the defendant had indorsed the notes, they were taken from his possession by the maker, without his knowledge or consent, and discounted at the plaintiff bank, and that they were altered by the insertion of the words "seven per cent." after the words "with interest." The defense is founded on this evidence. The defendant's counsel stated that he made no contention that the bank had actual knowledge of any infirmity in the instruments, or defect in the title to them, or that it took them in bad faith. Nor was it contended by the defendant that in discounting the notes the bank acted otherwise than in the regular and usual course of business. But upon the defendant's testimony it might be found that the notes were given to him by the maker in payment of indebtedness; that, after he had indorsed them in blank, and put them in his desk for collection or discount, he was called out of his office, leaving the maker, Stevens, there; and that Stevens then took them without right, and three days later carried them to the plaintiff bank, and caused them to be discounted for his own benefit.

The plaintiff made many requests for rulings, which were refused, subject to its exception, among which were the following:

"First. That, on all the evidence, judgment should be for the plaintiff for the full amount declared upon in its declaration, with interest at seven per cent. from December 9, 1899."

"Fourth. If the plaintiff shows it took the notes declared upon in its declaration as a holder in due course, judgment should be entered for the plaintiff for the full amount

of said notes, with interest at the rate stated in the same from December 9, 1899.

"Fifth. That, when an instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him, so as to make them payable to him, is conclusively presumed."

"Eighth. That the notes declared upon by the plaintiff in its declaration are complete and regular, and were taken before they were due and for value.

"Ninth. That a holder of a note is deemed prima facie to be a holder in due course, and that to constitute notice of an infirmity in the instrument, or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith."

"Fifteenth. That there is no evidence in the case to warrant a jury in finding that the plaintiff was possessed of facts which put it upon its guard as to the title of the person delivering the notes declared upon, or which ought to have led the plaintiff to inquire concerning the same."

"Nineteenth. That when an instrument has been materially altered, and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor."

"Twenty-Third. That even if the jury should find that the words 'seven per cent.' were added to the face of said notes after they were indorsed by the plaintiff, and without his authorization or revocation, yet, on all the evidence in the case, the verdict must be for the plaintiff for the full amount of said notes, with interest at six per cent. from December 9, 1899."

The plaintiff also excepted to the following instructions given at the request of the defendant:

"Fourth. That if the jury find that the notes were taken from the defendant wrongfully, and that the same were never delivered by the defendant to Stevens, the plaintiff gained no title to the notes by the negotiation of the same by Stevens, and the plaintiff cannot recover.

"Fifth. The burden is upon the plaintiff to show that the notes were delivered by the defendant to Stevens, or some other person authorized to negotiate them at the plaintiff bank."

"Seventh. Or, in the alternative, if the jury find that the notes in question were altered by the addition of the words 'seven per cent.' thereto after the same were indorsed by the defendant, such an alteration is a material and wrongful one, destroying the validity of the notes, and upon the notes, or any one of them, thus altered, the plaintiff cannot recover."

The notes, being indorsed in blank, were payable to bearer, within the meaning of the

statute. Rev. Laws, c. 73, § 26 (5). When the notes were taken to the plaintiff for discount, Stevens was the bearer. Rev. Laws, c. 73, § 207. The presentation of such notes for discount raised a presumption of fact that the bearer was the owner of them. *Pettee v. Prout*, 3 Gray, 502, 63 Am. Dec. 778. Upon the undisputed evidence, and upon the defendant's admission that the plaintiff took them in good faith, and discounted them without knowledge of any infirmity in them or defect of title in Stevens, the plaintiff became a holder in due course, within the definition of the statute. Rev. Laws, c. 73, §§ 69-76; *Boston Steel & Iron Company v. Steuer*, 183 Mass. 140, 66 N. E. 646, 97 Am. St. Rep. 426. There was not even anything to put the plaintiff upon inquiry, for the rate of interest was the same that Stevens had been paying on his loans from the bank for two years. The uncontradicted evidence, as well as the defendant's admission, makes it plain that the plaintiff had no notice of any infirmity in the instruments, or defect in the title of Stevens, under the rule prescribed by the statute. Rev. Laws, c. 73, § 73. This rule, namely, that, to constitute such notice, the person to whom the note is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith, is the same as prevailed in this commonwealth before the enactment of the statute. *Smith v. Livingston*, 111 Mass. 342; *Lee v. Whitney*, 149 Mass. 447, 21 N. E. 948; *International Trust Co. v. Wilson*, 161 Mass. 80-90, 36 N. E. 589.

The defendant's contention that, after the notes had been delivered to the defendant and indorsed by him, they were stolen by Stevens, brings us to the question whether, under the negotiable instruments act, a holder in due course of a note payable to bearer, that has been stolen, can acquire a good title from the thief. Even before the enactment of the statute, while the decisions were not uniform, the weight of authority was in favor of an affirmative answer to the question. *Wheeler v. Guild*, 20 Pick. 545, 550, 553, 32 Am. Dec. 231; *Worcester, etc., Bank v. Dorchester, etc., Bank*, 10 Cush. 483, 57 Am. Dec. 120; *Wyer v. Same*, 11 Cush. 51, 53, 59 Am. Dec. 187; *Spooner v. Holmes*, 102 Mass. 503, 3 Am. Rep. 491; *London Joint Stock Bank v. Simmons* (1892) App. Cas. 201, and cases cited; *Smith v. Bank*, 1 Q. B. D. 81; *Goodman v. Simonds*, 20 How. 343-365, 15 L. Ed. 934; *Murray v. Lardner*, 2 Wall. 110, 17 L. Ed. 857; *Hotchkiss v. National Shoe & Leather Bank*, 21 Wall. 354, 22 L. Ed. 645; *Kinyon v. Wohlford*, 17 Minn. 239 (Gil. 215), 10 Am. Rep. 165; *Clarke v. Johnson*, 54 Ill. 296; *Seybel v. National Currency Bank*, 54 N. Y. 238, 13 Am. Rep. 583; *Evertson v. National Bank of Newport*, 66 N. Y. 14, 23 Am. Rep. 9; *Kuhns v. Gettysburg National Bank*, 68 Pa. 445.

The following specific language of the statute touching this question, as well as its provisions in other sections, was intended to establish the law in favor of holders in due course: "But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him, so as to make them liable to him, is conclusively presumed." Rev. Laws, c. 73, § 33. This conclusive presumption exists as well when the note is taken from a thief as in any other case. Of course, this rule does not apply to an instrument which is incomplete. But in reference to a complete, negotiable promissory note, payable to bearer, it is a wholesome and salutary provision. See *Greaser v. Sugarman* (Sup.) 76 N. Y. Supp. 922. Upon the defendant's statement and the counsel's theory of the case, the rule is applicable. The note was not only complete in form and in execution, but, upon his testimony, it had been delivered to him by the maker as a binding instrument, and had afterwards been indorsed by him. Therefore the first sentence of Rev. Laws, c. 73, § 33, "Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto," was inapplicable. The instrument had taken effect, and was subsequently negotiated by the bearer to the plaintiff as a holder in due course. That the bearer was also the maker was immaterial after the instrument had been so indorsed as to become payable to bearer. Upon the plaintiff's theory of the facts, there was no theft, but an ordinary accommodation indorsement by the defendant for the benefit of the maker, and none of these questions arise. We are of opinion that the judge erred in giving the fourth and fifth instructions requested by the defendant, and in refusing other instructions requested by the plaintiff, founded upon a different view of the statute.

There was also error in the instructions given as to the alleged alteration of the notes. By Rev. Laws, c. 73, § 141, it is provided that "when an instrument has been materially altered, and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor." This language is directly applicable to the present case. See *Schofield v. Earl of Londesborough* (1894) 2 Q. B. 660, (1895) 1 Q. B. 536, (1896) A. C. 514; *Schwartz v. Wilmer*, 90 Md. 136-143, 44 Atl. 1059.

We understand that the instructions were given independently of any question of pleading, and we therefore do not deem it necessary to determine at this stage of the case whether the plaintiff should amend its declaration by inserting counts upon the notes as they were before the alleged alteration, if it wishes to recover upon them as notes bearing interest at only 6 per cent. See *Mutual Loan Ass'n v. Lesser* (Sup.) 78 N. Y.

Supp. 629. Nor do we consider other questions which are not likely to arise upon a second trial.

Exceptions sustained.

(127 Mass. 298)

OTIS v. MARCH et al.

(Supreme Judicial Court of Massachusetts. Middlesex. Jan. 7, 1905.)

TRUST—WILLS—CONSTRUCTION.

1. Where a trust fund was created by will, giving the beneficiary the income for life, and at his death the principal to be distributed among those persons who would be legally entitled to receive it "were it given to him absolutely and he owing no debts," but without power of appointment, the will of the beneficiary, giving his daughter \$100 and the balance of his estate to his wife, must be disregarded in making distribution of the trust fund, where no express reference was made to the fund in the will of the beneficiary, and it appeared that he left a considerable estate acquired by his own efforts.

Case Reserved from Supreme Judicial Court, Middlesex County; John W. Hammond, Judge.

Bill by one Otis, trustee under the will of Delano March, deceased, against Mildred March and another, for instructions. Instructions given.

H. I. Cummings, for Ella A. March. Wm. H. H. Tuttle, for respondent.

KNOWLTON, C. J. In response to this bill of a trustee for instructions, two respondents appear, Mildred March, the adopted daughter of Frank D. March, and Ella A. March, his widow and residuary legatee. The fund in question is held under the will of Delano March, the father of Frank D., in trust to pay the income to Frank D. March for his life, "and at his death the principal to distribute among those persons who would be legally entitled to receive the same, were it given to him absolutely and he owing no debts." The adopted daughter claims two-thirds of the fund as a distributee, and the widow claims the whole of it as the residuary legatee mentioned in his will.

There is nothing in the will of Delano March that directly suggests any power of appointment in his son, and it is contended by both claimants that there was no power of appointment under it. A general power of appointment, if exercised, makes the appointed property assets of the estate and liable for the debts of the appointor. *Clapp v. Ingraham*, 126 Mass. 200; *O'Donnell v. Barbey*, 129 Mass. 453-455; *Crawford v. Langmaid*, 171 Mass. 309, 50 N. E. 606. It is strongly contended by the widow that there was no power of appointment and no appointment, and that her husband's will is of importance in the controversy only as showing to whom the property would have gone if it had been given to him absolutely, he owing no debts. We are of opinion that

the counsel on both sides are right in their contention that there was no power of appointment.

It does not follow, however, that the son's will shows who would have been entitled to the property if it had been given to him absolutely. So far as we can judge, his will has no reference to this property. It contains but two sentences, the first giving his daughter \$100, and the second giving the balance of his estate to his wife, and appointing her and one Otis executors. The trust fund held under his father's will was not his property, and is not included in the disposition made by his will. If it had been given to him absolutely, it is a matter of conjecture how he would have disposed of it. The report finds that he left a considerable estate upon which his will operates. If he had owned absolutely this trust fund of about \$50,000, and had disposed of it by will, probably he would have made a will very different from this, which disposes only of the estate that he acquired by his own efforts.

There being no attempt to dispose of this fund by the will of Frank D. March, nor any intimation in the will as to how he would have disposed of it if he had owned it absolutely and owned no debts, we are of opinion that his will must be disregarded in making the distribution required by the will of his father. The result is that one-third of the fund is to be paid to Ella A. March, his widow, and two-thirds to Mildred March, his adopted daughter.

So ordered.

(187 Mass. 239)

GREGORY v. AMERICAN THREAD CO.

(Supreme Judicial Court of Massachusetts. Hampden. Jan. 5, 1905.)

INJURY TO EMPLOYÉ—DEFECTIVE MACHINE—
NEGLIGENCE—CONTRIBUTORY NEGLIGENCE
—EVIDENCE—REMOTENESS.

1. Whether an employé operating a winding machine in a thread factory, who was injured by its starting of itself after she had stopped it with the lever, and while she had her hand on the bobbin to ascertain if it was winding properly, was guilty of contributory negligence in not keeping a hand on the lever—it having started up the same way the day before, but she having been informed that morning by the superintendent that he had fixed it—is a question for the jury.

2. A finding that the superintendent, whose duty it was to make necessary repairs of machines in a thread factory, was negligent in not repairing or in improperly repairing a winding machine, is authorized by the fact that, after it had been stopped with the lever, it started of itself, after he said he had repaired it on notice that it was so acting.

3. On the question of negligence, where a winding machine started up of itself, injuring plaintiff, its operator, the day the superintendent said he had repaired it, evidence that 11 weeks before, when it had so started, the superintendent had it taken apart and made an attempt to repair it, which plaintiff contends was ineffectual, may, in the discretion of the court, be excluded for remoteness.

Exception from Superior Court, Hampden County; Elisha B. Maynard, Judge.

Action by Mary Gregory against the American Thread Company. Verdict was directed for defendant, and plaintiff brings exceptions. Exceptions sustained.

Green & Bennett, for plaintiff. Brooks & Hamilton, for defendant.

LATHROP, J. This is an action for personal injuries sustained by the plaintiff while in the employ of the defendant, in October, 1902. There are counts at common law, and under Rev. Laws, c. 106, § 71, cls. 1, 2. At the close of the evidence for the plaintiff, the judge ruled that, upon the pleadings and evidence, the plaintiff could not recover, and directed a verdict for the defendant. The case is before us on the plaintiff's exceptions.

We agree with the contention of the defendant that there was no evidence that the defendant was negligent in the manner of instructing the plaintiff, or in the hiring of any fellow servant of the plaintiff. On the remaining counts we are, however, of opinion that the plaintiff was entitled to go to the jury. The facts in the case, as they appear from the plaintiff's evidence, may be briefly stated thus.

The plaintiff was a young woman, 27 or 29 years old. She had been in the employ of the defendant 8 weeks at the time of the accident, and it was her duty to run two lap-winding machines, which faced each other. The function of such a machine is to take cotton from six rolls, arranged along the upper part of the machine, run it through the machine, thereby stretching it, and wind it in a compact form in a single lap upon a bobbin at one end of the machine. At this end there is a lever with which to stop and start the machine. Along the sides of the machine are handles by which, also, the machine can be stopped and started. Two of these are on the back and two on the front of the machine. The machine also stopped automatically when the bobbin was full. The plaintiff had to stop the machine twice in the morning and twice in the afternoon, for the purpose of cleaning it. The day before the accident, while the plaintiff was cleaning the machine, and when it had been stopped, it started up of itself, and the plaintiff was struck over one of her eyes. She complained to one Greaves, a second hand, about the machine's starting of itself. Greaves said: "I will see to it. I will have it fixed." The next morning the plaintiff noticed that the machine was running a soft lap; that is, that the lap on the receiving bobbin was not tight to the bobbin, as was usual. She took out that lap, but the next was the same. She then complained to Greaves, showed the lap to him, and said it was running soft. He said: "The next one will be all right." The plaintiff then asked Greaves if he had fixed the machine, and he said: "Yes; I have fixed the machine. That machine is all right."

The plaintiff then resumed her work. In the afternoon the lap appeared to be running soft again, and the plaintiff pushed back the lever at the end of the machine, and brought the machine to a full stop. She then put her right hand over the bobbin to ascertain if the lap was soft. While her hand was in this position, the machine started up, and her hand was caught and injured.

The defendant contends that the plaintiff was not in the exercise of due care, and has addressed to us an elaborate argument to show that, instead of putting her right hand over the bobbin, she should have held on to the shipper with her right hand, and put her left hand over the bobbin, or have removed the bobbin. We are of opinion, however, that whether the plaintiff was in the exercise of due care was, on the evidence, a question of fact for the jury, rather than of law for the court. *Donahue v. Drown*, 154 Mass. 21, 27 N. E. 675.

The next question is whether there was evidence of negligence on the part of the defendant. The plaintiff relies upon the negligence of Greaves, and also contends that the starting of the machine is some evidence that it was defective. We are of opinion that both of these contentions are correct, and that the question of the defendant's negligence was for the jury. As to Greaves, it appears that he had charge of the operatives of the lap-winding machines, and it was his duty to make all necessary repairs. He comes clearly within Rev. Laws, c. 106, § 71, cl. 1. That he was negligent in not repairing the machine at all, or in not repairing it properly, is a fair inference from the fact that the machine started of itself. For his negligence the defendant is responsible under the statute above cited. He is also liable at common law. *Donahue v. Drown*, 154 Mass. 21, 27 N. E. 675; *Mooney v. Connecticut River Lumber Co.*, 154 Mass. 407, 28 N. E. 352; *Connors v. Durite Mfg. Co.*, 156 Mass. 163, 30 N. E. 559. The case seems to us more nearly to resemble the cases last cited than *Ross v. Pearson Cordage Co.*, 164 Mass. 257, 41 N. E. 284, 49 Am. St. Rep. 459, and *Kenneson v. West End Street Railway*, 168 Mass. 2, 46 N. E. 114. In *Ross v. Pearson Cordage Co.* the machine was stopped by a fellow servant of the plaintiff, and it was said to be obvious that, if the belt had not been entirely removed from the tight pulley to the loose one, there would be danger of the belt working onto the tight pulley and starting the machine. In the case before us the plaintiff testified that she stopped the machine, and she was sure that it was stopped. In *Kenneson v. West End Street Railway*, 168 Mass. 1, 46 N. E. 114, the motorman of an electric car, after arriving at his destination, and after the trolley had been shifted, took off the motor handles and went to the other end of the car, and was seen to stoop down and to take hold of the fender. The car shortly after started, and he was caught under the

wheels and fatally injured. What caused the car to start was wholly uncertain, and it was held that there was no evidence of negligence on the part of the defendant. The case bears no resemblance to the one before us.

While the plaintiff was bound to introduce evidence from which the jury might properly infer that the accident was caused by the defendant's negligence, she was not required to point out the particular act or omission which caused the accident. *Mooney v. Connecticut River Lumber Co.*, 154 Mass. 407, 409, 28 N. E. 352; *Melvin v. Pennsylvania Steel Co.*, 180 Mass. 196, 202, 62 N. E. 379; *Kleibaz v. Middleton Paper Co.*, 180 Mass. 363, 366, 62 N. E. 371. The starting of the machine was some evidence that it was in a defective condition. *Packer v. Thomson-Houston Electric Co.*, 175 Mass. 496, 499, 56 N. E. 704. This is not a case where, assuming the plaintiff's story to be true, one's mind is left in entire uncertainty as to the cause of the starting of the machine.

There remains a single question of evidence to be considered. The plaintiff offered to show by a witness that about 11 weeks before the accident the witness was working on the machine, and it started of itself, after having been once stopped; that Greaves' attention was called to the matter, and the machine was taken to pieces, and an attempt made to repair it, which the plaintiff contended was not effective. This evidence was excluded. We are of opinion that it was within the discretion of the judge to exclude the evidence on the ground of remoteness. *Powers v. Boston & Maine Railroad*, 175 Mass. 466, 56 N. E. 710; *Tobin v. Brimfield*, 182 Mass. 117, 65 N. E. 28.

Exceptions sustained.

(187 Mass. 221)

COMMONWEALTH v. CROWNINSHIELD.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 5, 1905.)

MUNICIPAL CORPORATIONS—REGULATION BY PARK COMMISSIONERS—SPEED OF AUTOMOBILES—VALIDITY OF REGULATION.

1. St. 1893, p. 934, c. 300, § 1, authorizing the board of park commissioners "to connect any public boulevard or driveway under its control with any part of a city or town within its jurisdiction by selecting and taking a connecting street or part thereof leading to such park," etc., does not limit the power of the commissioners to the taking of a street connecting two parks.

2. St. 1875, p. 778, c. 185, § 3, authorizing the board of park commissioners to make rules for the use and government of parks, confers power to fix the maximum speed at which a person may ride or drive in a park, or in a street leading to such park.

3. A regulation that no person shall ride or drive in a specified avenue in a city at a rate of speed exceeding eight miles an hour is reasonable.

4. St. 1902, p. 235, c. 315, regulating the speed of automobiles throughout the state, refers to automobiles on public highways, and

does not abrogate the regulation of the speed of automobiles in a city park.

5. St. 1903, p. 511, c. 478, § 14, requiring notice of a special regulation of the speed of automobiles to be posted at the points where any road affected thereby joins other roads, applies only to regulations by boards of aldermen of cities and selectmen of towns, and has no application to regulations made by boards of park commissioners.

6. A park regulation that "no person shall ride or drive" at a rate of speed exceeding eight miles an hour is sufficiently definite to support a criminal prosecution for operating an automobile at an excessive speed, as a person may be said to be "driving" an automobile if he is controlling the motive power.

Exceptions from Superior Court, Suffolk County; John A. Aiken, Judge.

One Crowninshield was convicted of violating a rule of the board of park commissioners, and brings exceptions. Exceptions overruled.

M. J. Sughrue, First Asst. Dist. Atty., for the Commonwealth. Hill, Bangs, Barlow & Homans and B. Wendell, Jr., for defendant.

LATHROP, J. The defendant was found guilty of violating a rule of the board of park commissioners of the city of Boston, which provides that "no person shall ride or drive in Commonwealth avenue at a rate of speed exceeding eight miles an hour." At the trial it appeared that the defendant, on November 13, 1903, was running an automobile at a rate of speed exceeding eight miles an hour in Commonwealth avenue between Exeter street and Fairfield street. Many objections were raised in the court below, and come before us on the defendant's exceptions. So much of Commonwealth avenue as lies between Arlington street and the intersection of the avenue with Beacon street was taken for park purposes by the board of park commissioners on June 29, 1894.

1. It is contended that the board of park commissioners never acquired any jurisdiction over the part of Commonwealth avenue where the offense was committed. This depends on the construction to be given to St. 1893, p. 934, c. 300, § 1. This section is as follows: "Any board of park commissioners constituted under the authority of chapter one hundred and fifty-four of the Acts of the year eighteen hundred and eighty-two as amended by chapter two hundred and forty of the Acts of the year eighteen hundred and ninety, or of any special acts, shall have power to connect any public park, boulevard or driveway under its control, with any part of any city or town in this commonwealth wherein it has jurisdiction, by selecting and taking any connecting street or streets, or part thereof, leading to such park, and shall also have power to accept and add to any such park any street or part thereof which adjoins and runs parallel with any boundary line of the same; provided, that the consent of the public authorities having control of any such street or streets so far as selected and

taken, and also the consent in writing of the owners of a majority of the frontage of the lots and lands abutting on such street or streets so far as taken, shall be first obtained." It appears that the public authorities having control of Commonwealth avenue assented to the selection and taking of the portion of the avenue taken, and that the consent in writing of the owners of a majority of the frontage of the lots and lands abutting on the avenue has been obtained. The contention of the defendant is that as the board of park commissioners has no control over the Public Garden, which abuts on Arlington street for the entire length of that street, it could not take the avenue for the purpose of connecting the Public Garden with the Back Bay Fens. But we are of opinion that the language of the statute is broader than this. The board of park commissioners is expressly given the power "to connect any public park, boulevard or driveway under its control [in this case the Back Bay Fens] with any part of any city or town in this commonwealth wherein it has jurisdiction, by selecting and taking any connecting street or streets, or part thereof, leading to such park." The object of the statute was to give a board of park commissioners having jurisdiction of a park in any city or town to take, under the conditions above set forth, any street connecting with that park in the same city or town, and was not limited to the taking of a street connecting two parks. The view which we have adopted is in accordance with that taken by the commissioners on the Revised Laws, and adopted by the Legislature: "Such boards may connect any public park, boulevard or driveway, under its control, with any part of a city or town for which they are appointed by taking any connecting streets or part thereof leading to such park," etc. Report of Commissioners, c. 28, § 3; Rev. Laws, c. 28, § 3.

2. It is next contended that, if the park commissioners had jurisdiction over that part of Commonwealth avenue where the offense was committed, their jurisdiction was limited to acts of maintenance and management, and did not embrace the power to pass the rule in question. But section 3, St. 1893, p. 935, c. 300, reads as follows: "Such boards of park commissioners shall have the same power and control over the streets or parts of streets taken under this act as are or may be by law vested in them concerning the parks, boulevards or driveways under their control." To ascertain the power of the board, we turn to St. 1875, p. 778, c. 185, § 8, which not only gave the board power to take land for parks, and "to lay out, improve, govern and regulate" the same, but also "to make rules for the use and government thereof, and for breaches of such rules to affix penalties not exceeding twenty dollars for one offense." Power is also given to employ a police force. We cannot doubt the power

of the board of park commissioners, under the statutes cited, to regulate the speed at which a person shall "ride or drive" in a park or in a street which is within the jurisdiction of such commissioners. In *Com. v. Abrahams*, 156 Mass. 57, 30 N. E. 79, where a rule made by the park commissioners under St. 1875, p. 778, c. 185, § 3, was held to be valid, it was said in the opinion of the court: "The parks of Boston are designed for the use of the public generally, and whether any park or a part of any park can be temporarily set aside for the use of a portion of the public is for the park commissioners to decide in the exercise of their discretion." The general question which arises where a by-law or ordinance of a city, or a rule of a board of park commissioners is concerned is whether it is authorized by a statute, and whether it is reasonable. See *Com. v. Stodder*, 2 Oush. 562, 570, 48 Am. Dec. 679. The rule in question was authorized by statute, and was reasonable. No question has been raised as to the power of the Legislature to authorize the board of park commissioners to make the rule relied upon, and it is evident that such contention, if made, could not prevail. *Brodline v. Revere*, 182 Mass. 598, 602, 66 N. E. 607.

3. The next contention is that, if the board of park commissioners had power to pass rules, such power was taken away by subsequent legislation. The argument is that, because St. 1902, p. 235, c. 315, regulated the speed of automobiles throughout the state, it abrogated all park regulations. It is clear, however, that this statute was not intended to apply to park regulations. It refers to the speed of automobiles on public highways, streets, and ways. This act was repealed by St. 1903, p. 512, c. 473, § 15, which contains a clause that "nothing herein contained shall be so construed as to affect the rights of boards of park commissioners as authorized by law." The reason for this is that the act contains certain general regulations which apply to all automobiles, but section 8, which applies to speed limit only, applies to a public way or private way laid out under the authority of statute.

4. The next contention is that under section 14, St. 1903, p. 511, c. 473, no regulation of the park commissioners shall be effective unless notice of the same is posted conspicuously at the points where any road affected thereby joins other roads. But a reading of the section shows very clearly that the last sentence of the section applies only to special regulations made by boards of aldermen of cities and selectmen of towns, and has nothing to do with boards of park commissioners. The section reads as follows: "Nothing herein contained shall be so construed as to affect the rights of boards of park commissioners as authorized by law. Boards of aldermen of cities and the selectmen of towns may make special regulations as to the speed of automobiles and motor cycles, and as to

the use of such vehicles upon particular roads or ways, including the right to exclude them altogether therefrom. Such exclusion, however, shall be subject to an appeal to the Massachusetts Highway Commission, whose decision in the case shall be final. No such special regulation shall be effective unless notice of the same is posted conspicuously at the points where any road affected thereby joins other roads."

5. The last contention is that the rule of the board of park commissioners is too indefinite to support criminal proceedings. Fault is found with the words "ride or drive," but we are of opinion that a person may be said to be driving an automobile if he is controlling the motive power. We find nothing else in the case which requires special consideration.

Exceptions overruled.

(187 Mass. 185)

MCQUESTEN v. ATTORNEY GENERAL
et al.

(Supreme Judicial Court of Massachusetts.
Essex. Jan. 5, 1905.)

ATTORNEY GENERAL — POWERS — REPRESENTATION BY PRIVATE COUNSEL — LAND REGISTRATION — APPEALS.

1. Under Rev. Laws, c. 128, § 31, relative to proceedings for the registration of land titles, providing that if the land borders on a river or an arm of the sea, or if it otherwise appears that the commonwealth has a claim adverse to that of the applicant, notice shall be given to the Attorney General, the commonwealth is a proper party in proceedings to register the title to land over which there is claimed to be a public landing place, and, under section 13 of the act, it may appeal to the superior court from an adverse decision.

2. Rev. Laws, c. 7, §§ 1-9, enlarging and defining the duties of the Attorney General, requiring suits and proceedings in which the commonwealth is a party to be conducted by him or under his direction, and giving him power to appoint such assistants as the duties of the office require, and to employ such additional legal assistance as he may deem necessary, do not limit the previously existing power of the Attorney General to give jurisdiction to the courts, and to bind himself as a party representing the public, through an unofficial attorney at law authorized to represent him.

3. An appeal to the superior court, taken under Rev. Laws, c. 128, § 13, from a decision adverse to the commonwealth in proceedings to register the title to land over which a public landing place was claimed by the commonwealth and by a town to exist, is not invalid because the attorneys who represented the Attorney General in taking the appeal were also acting for the town.

Petition for writ of prohibition by George E. McQuesten against the Attorney General and others. Dismissed.

H. H. Buck, for petitioner. Moulton, Casey, Jones & Darling and U. G. Haskell, for respondents.

KNOWLTON, C. J. This is a petition for a writ of prohibition to prevent the trial in the superior court of an appeal from a decree of the court of land registration in fa-

vor of the petitioner upon an application for the registration of his title to certain land in the town of Marblehead. This appeal was taken by the Attorney General, acting by authorized attorneys, who also represented the town of Marblehead. The principal contention of the present petitioner is that such an appeal could be taken only by the Attorney General, or Assistant Attorney General, or district attorney, in person, and that the Attorney General could not authorize other attorneys to take and enter an appeal which would give the superior court jurisdiction.

On the original petition there was a question whether there was a public landing place over the land described, and notice of the application was accordingly given to the Attorney General, under Rev. Laws, c. 128, § 31. The interests of the public were involved, and the commonwealth was a proper party. Under section 13 it had a right to appeal from an adverse decision. The Attorney General entered an appearance personally in the court of land registration, but filed no claim. Afterwards, with the consent of the petitioner, who reserved all legal rights, attorneys representing the town presented the claim of the commonwealth in that court, under authority in writing from the Attorney General. The petitioner objected to the authority of these attorneys to take an appeal for the Attorney General, and moved to dismiss the appeal. The motion having been denied, this petition was brought.

Previously to the enactment of St. 1896, p. 482, c. 490, it had long been the practice of the Attorney General, in certain civil cases to which he or the commonwealth was a party, to be represented by attorneys procured and paid by relators, or other private parties who had a special interest in the maintenance of the public rights in question. *Attorney General v. Metropolitan Railroad Company*, 125 Mass. 515, 28 Am. Rep. 264; *Attorney General v. Consumers' Gas Co.*, 142 Mass. 417, 8 N. E. 138; *Attorney General v. Tarr*, 148 Mass. 309, 19 N. E. 358, 2 L. R. A. 87; *Attorney General v. Revere Copper Company*, 152 Mass. 444, 25 N. E. 605, 9 L. R. A. 510; *Attorney General v. Abbott*, 154 Mass. 323, 28 N. E. 346, 13 L. R. A. 251; *District Attorney v. Lynn & Boston Railroad*, 16 Gray, 242; *Attorney General v. Butler*, 123 Mass. 304; *Attorney General v. Parker*, 126 Mass. 216; *Attorney General v. City of Boston*, 123 Mass. 460. This had been done with the approval of the court. *Parker, Commonwealth's Attorney, v. May*, 5 Cush. 336-338; *Com. v. Boston & Maine Railroad*, 3 Cush. 25-48. The rule as to criminal prosecutions has always been different. *Com. v. Knapp*, 10 Pick. 477-481, 20 Am. Dec. 534; *Com. v. Williams*, 2 Cush. 582-584; *Com. v. Scott*, 123 Mass. 222-234, 25 Am. Rep. 81. But even in civil cases the court has recognized the desirability of having public interests actively represented in

court by a public officer. *Burbank v. Burbank*, 152 Mass. 254-256, 25 N. E. 427, 9 L. R. A. 748, and cases above cited. Emphasis was given to this view in *Attorney General v. Adonal Shomo Corporation*, 167 Mass. 424, 45 N. E. 762, which was an information brought in the name of the Attorney General, but not actively prosecuted by him. A little before the argument of this case in the full court, but after the hearing before the single justice, St. 1896, p. 482, c. 490 (Rev. Laws, c. 7, §§ 1-9), was passed, which enlarged and more particularly defined the duties of the Attorney General. Under this act the Attorney General appears in all the courts of the commonwealth, not only for the commonwealth, but for the Secretary, the Treasurer, and the Auditor, and for all heads of departments, state boards and commissions, in all suits and other civil proceedings, except upon criminal recognizances and bail bonds, in which the commonwealth is a party or interested, or in which the official acts and doings of said officers are called in question. This put an end to the practice, which had previously prevailed to some extent in state boards and commissions, of employing private counsel in public matters at the expense of the commonwealth. The statute also provides that "all such suits and proceedings shall be conducted by him or under his direction." In this way official responsibility for these suits and proceedings, at all stages of their progress, is secured. The statute also gives the Attorney General power to appoint such assistants as the duties of the office require, and, with the approval of the Governor and council, to fix their compensation. He may also, subject to like approval, employ such additional legal assistance as he may deem necessary in the discharge of his duties. In this way a very large and important official responsibility rests upon the Attorney General. All of this business in which the commonwealth is interested must be conducted in court under his direction. Doubtless it was expected that in ordinary cases this direction would be given most effectually while having the business in court done by his regular assistants, or by other attorneys employed and paid under the authority of the statute. But we are of opinion that this statute was not intended to limit his previously existing power to give jurisdiction to the courts, and to bind himself as a party representing the public, in the ordinary way, through an unofficial attorney at law authorized to represent him. It might be inconvenient, and it is unnecessary, to leave the Attorney General with no power in a civil proceeding to act in court otherwise than in person or through a regular assistant, or a person appointed with the approval of the Governor and council. It would require plain provisions of the statute to indicate a legislative purpose so to limit his power. As a party in a civil proceeding in court, or as an officer represent-

ing public interests, he is bound by the action of his authorized attorney as any other party is. In reference to this, if the requirement that the business shall be done under his direction implies that it shall be done by a regular assistant, or by a person appointed with the approval of the Governor and council, the statute is merely directory. Since the enactment of the statute cases have been heard repeatedly in which the Attorney General was a party, and was represented by private counsel without objection. *Attorney General v. Dole*, 168 Mass. 562, 47 N. E. 436; *Attorney General v. McCabe*, 172 Mass. 417, 52 N. E. 717; *Attorney General v. Williams*, 174 Mass. 476, 55 N. E. 77; s. c., 178 Mass. 330, 59 N. E. 812; *Attorney General v. Donahue*, 169 Mass. 18, 47 N. E. 433; *Attorney General v. Drohan*, 169 Mass. 534, 48 N. E. 279, 61 Am. St. Rep. 301; *Attorney General v. Goodell*, 180 Mass. 533, 62 N. E. 962; *Attorney General v. Vineyard Grove Company*, 181 Mass. 507, 64 N. E. 75.

The fact that the attorneys who represented him in taking the appeal were acting also for the town of Marblehead does not affect the validity of their action. There was no inconsistency between the claims of these two parties which should preclude counsel for one from representing the other in taking the appeal. Indeed, it appears that they agreed in their contention in regard to the acquisition of public rights in the landing place.

Our view of this part of the case makes it unnecessary to consider the question whether, if the appeal was wrongly taken, the petitioner has another remedy that would make it unnecessary to issue a writ of prohibition.

Petition dismissed.

(187 Mass. 207)

MOORE et al. v. DICK.

(Supreme Judicial Court of Massachusetts.
Essex. Jan. 5, 1905.)

MORTGAGES—POWER OF SALE—CONSTRUCTION—NOTICE—NEWSPAPER—IDENTITY—EVIDENCE—SUFFICIENCY—EQUITY—REDEMPTION—LACHES AS DEFENSE—TRIAL—REPORT OF EVIDENCE—DUTY OF MASTER—APPEAL.

1. Where a cause is heard before a master under a rule directing him to hear the parties and report his findings of fact and law to the court, the master need not report the evidence, in the absence of a request during the hearing.

2. The request of a losing party for a report of the evidence, made for the first time after the hearing is closed and the draft report is known, is never looked upon with favor.

3. In a suit to redeem land sold under power of sale in mortgages or notice to be inserted in "the Reporter newspaper, printed in the county of Essex," which was a daily paper at the time the mortgage was given, evidence examined, and held sufficient to support a finding that publication of the notice in the *Lynn Daily Bee* or *Lynn Bee*, published in that county, was not the paper mentioned in the power; the *Reporter* at the time of the sale being a weekly paper, and the *Bee* its successor as a daily.

4. Where a power of sale in a mortgage requires publication of notice thereof to be made

in a particular paper, the identity of which is ascertainable, its publication in a different paper renders the sale thereunder invalid.

5. In a suit to redeem land sold under power of sale in mortgages on notice to be inserted in a particular newspaper, where it appears that sale was made in a different paper, laches is no defense when suit is commenced before the expiration of a period equivalent to the statute of limitation sufficient to give title by adverse possession.

Appeal from Superior Court, Essex County; Russell, Judge.

Suit by one Moore and others against one Dick. From a decree for plaintiffs, defendant appeals. Affirmed.

G. L. Mayberry and W. M. Morgan, for appellant. Wm. H. Niles, Frank D. Allen, and Walter L. Van Kleeck, for appellees.

HAMMOND, J. This is a bill to redeem land from two mortgages given by Henry Moore, the father of the plaintiffs. The bill is resisted upon two grounds, the first of which is that the first mortgage has been duly foreclosed by sale under the power therein contained, and the second that, if the foreclosure was imperfect by reason of any defect in the proceedings, the plaintiffs are barred by laches. After the hearing before the master had closed, and the draft report had been shown, the defendant requested the master to annex to the report a copy of the evidence bearing upon several findings. The master refused to comply with such requests, and the defendant duly excepted. Subsequently the defendant moved that the court order the master to report all the material evidence bearing upon his exceptions, alleging that the court could not properly dispose of them without such a report. The motion was overruled, and the defendant appealed.

The rule to the master directed him "to hear the parties and their evidence, and report his findings of fact and law to the court." Under this rule he was not bound to report the evidence. It was open to either party during the hearing before him to move in court that he be required to report the whole testimony, or any part of it, if, in the progress of the hearing, either party considered that such a course was necessary or desirable. This was not done. "For the losing party to come in for the first time after the hearing is closed and the draft report is known, and ask for a report of the evidence, is never looked upon with favor" (*Parker v. Nickerson*, 137 Mass. 487, 493), and we are not satisfied, from an examination of this report, or from anything before us, that justice requires that the exceptions, so far as based upon the refusal of the master to comply with these requests, should be sustained, or that the motion made to the court about the same matter should have been granted. We proceed, therefore, with the examination of the case as presented by the master's report.

The validity of the foreclosure proceed-

ings taken in 1883 by one Fairchild, then the holder of both mortgages, is attacked solely upon the ground that the notice of sale was not inserted in the paper designated in the power. As to this the master finds as follows: "The power of sale in the first mortgage provides that the notice of sale shall be published in 'the Reporter Newspaper, printed in the county of Essex aforesaid.' At the date of this mortgage, October 10, 1873, there was published in Lynn a newspaper which had as its name at the top of the first page, 'Lynn Semiweekly Reporter.' This paper had been published in Lynn since 1854. Its publication was continued till 1880, when it passed into the hands of new owners, who then began the publication from the same office of two newspapers—a daily, whose title was the 'Lynn Daily Bee,' and a weekly, entitled 'The Lynn Reporter.' They continued to publish the latter under the same name till 1889. Neither in 1873 nor in 1883 was there any other newspaper printed in the county of Essex whose name contained the word 'Reporter.' Both the 'Lynn Semiweekly Reporter' and 'The Lynn Reporter,' during the whole of their existence were commonly known in Lynn by the name of 'The Reporter.' In 1873 it was what is ordinarily spoken of as a 'family paper,' and was the leading paper of that kind in Lynn. It had a good circulation, with many regular subscribers. It contained a summary of the news, with stories and other matters of literary interest, and was in common use for advertising legal notices. It was taken regularly and read by the plaintiffs and their father during its whole existence from 1854 to 1889, and was sent to those of the plaintiffs who were away from Lynn. The publication of a daily paper by the same owners after 1880 had the tendency to diminish the circulation of the weekly. This effect was not at once very great, but increased gradually, till in 1889 it was such that the publication was then stopped. I find that 'The Lynn Reporter' was substantially a continuation of the 'Lynn Semiweekly Reporter,' and that they both answered the description of 'The Reporter newspaper printed in the county of Essex.' The 'Lynn Daily Bee,' or the 'Lynn Bee,' as it is called in the Fairchild affidavit, was in no sense 'The Reporter newspaper' mentioned in the power. The newspaper designated in the power of sale I find was 'Lynn Semiweekly Reporter,' commonly known as 'The Reporter.' I find that this was the newspaper the mortgagor and mortgagee had in mind when the mortgage was given. It is probable that if the notice had been published in the Reporter the plaintiffs would have known of the sale. The publication of the notice of sale in the 'Lynn Bee,' was not such a publication as was required by the terms of the power of sale. A publication in the Lynn Reporter would have been so. I find, therefore, that in this respect Fairchild, the assignee of the mortgage, did not comply with the conditions an-

nexed to the power of sale in the mortgage. It did not appear that there was a failure to comply with the terms of the power in any other respect than that above mentioned."

The question is a narrow one, and not free from difficulty, but after a careful consideration of the circumstances, which are somewhat minutely detailed in the report, we are of opinion that they justify the general finding that the newspaper designated in the power of sale was the "Lynn Semiweekly Reporter," commonly known as the "Reporter," and that its identity under a change of name was substantially continued in the "Lynn Reporter," and not in the "Lynn Daily Bee." It is plain that the weekly paper, in its general character, and presumably in the kind of its patronage, much more nearly resembled the one named in the power than the daily did. The finding of the master upon this matter therefore must stand.

It is familiar law that one who sells under a power must follow strictly its terms. If he fails to do so, there is no valid execution of the power, and the sale is wholly void. *Bigler v. Waller*, 14 Wall. (U. S.) 297, 20 L. Ed. 891; *Shillaber v. Robinson*, 97 U. S. 68, 24 L. Ed. 967; *Roarty v. Mitchell*, 7 Gray, 243; *Thornburg v. Jones*, 36 Mo. 514. In *Smith v. Provin*, 4 Allen, 516, where the power required that an affidavit of the proceedings should be made and recorded in the registry of deeds within one year after the sale, the same principle was recognized and applied, and, it appearing that no such affidavit had been made and filed for record until nearly three years had expired, the sale was treated as a nullity. The manner in which the notice of the proposed sale shall be given is one of the important terms of the power, and a strict compliance with it is essential to the valid exercise of the power. It follows that the sale was not valid. The case stands as though there had been no attempt to foreclose, and the right of redemption is still outstanding.

It is strongly urged by the defendant that the plaintiffs are barred by laches. It is said that they knew, or ought to have known, of these foreclosure proceedings, and that they have slept on their rights so long that they have no claim in equity to relief. But this idea is founded upon a misconception of the case. There is here no question of laches. This is not a case where there has been a literal compliance with the power, so that the legal title to the land passed to the purchaser, but for some reason—as, for instance, a failure to act with due fidelity to the trust imposed by the power—there are equitable reasons why the sale should be set aside. In such a case the sale, being in law valid, is voidable only in equity, and the owner of the right to redeem must apply for relief in equity within a reasonable time. In the present case there has been no valid sale in law, and the title to the land subject to the mortgages

has not passed from the plaintiffs. They are still the owners of the fee. They come into court with a legal right to redeem, a right which never has been impaired by foreclosure proceedings either under the power or by a formal entry for possession. This right to redeem may be enforced by a bill in equity, and mere delay, provided it does not extend beyond the statute of limitations, is no bar, and that is so whether or not anything is paid upon the mortgage debt. *Ayres v. Waite*, 10 Cush. 72. A purchaser under a power of sale must see to it at his peril that there has been a compliance with the legal and essential terms of the power. If there has not been, then he is not protected, whether acting in good faith or not. In the present case the record disclosed through the mortgage the name of the newspaper in which the notice was to appear. The right to redeem is not barred until after the mortgagee has held possession adversely for at least 20 years. *Ayres v. Waite*, *ubi supra*. No such adverse possession appears prior to the foreclosure proceedings in 1888, and the bill was filed July 14, 1902. The conclusion to which we have come upon these questions makes it unnecessary to consider further in detail the defendant's exceptions to the report. The plaintiffs have the right to redeem.

We see no reasonable objection to the final decree. It does not appear that the defendant has made any attempt to convey any portion of the property, and, in the absence of any such act on his part, and in view of the description of the land contained in the deed from Pool to him, the decree, so far as respects the form of the conveyances, seems to meet the precise features of the case more effectually than if it provided simply that the defendant should execute a discharge in the ordinary form; and under the facts disclosed we do not see that it places the defendant in any worse position.

Decree affirmed.

(187 Mass. 250)

GALVIN v. BEALS.

SAME v. WINCHENDON SAV. BANK.

(Supreme Judicial Court of Massachusetts. Middlesex. Jan. 6, 1905.)

LANDLORD AND TENANT—DUTIES OF LANDLORD—REPAIR OF PREMISES—PROMISE TO REPAIR—NEGLIGENCE—EVIDENCE.

1. A tenant cannot recover against his landlord for personal injuries occasioned by the defective condition of the demised premises, unless the landlord agrees to repair, makes the repairs, and is negligent in making them.

2. The fact that a landlord makes other repairs is not evidence that he agreed to keep the demised premises in repair.

3. Where there is an agreement to repair, the landlord cannot be held liable for a defect unless reasonable notice thereof is given to him.

4. Where a tenant complained of a defect in the door and in the steps, but said nothing about a defective piazza railing, and the landlord promised to make repairs, and did remedy the defects complained of, he was not negligent

in failing to repair the railing, and the tenant could not recover for injuries sustained by the giving way of the same.

5. A tenant was injured by the giving way of a defective piazza railing. Previous to the injuries she had complained of other specified defects in the premises, and the landlord had promised to repair them, but nothing was said about the piazza railing. *Held*, that evidence that the landlord assured the tenant, after making some repairs, that everything was safe and sound, and that she need not fear to use the piazza, did not show negligence in failing to repair the piazza railing.

Exceptions from Superior Court, Middlesex County; H. N. Sheldon, Judge.

Separate actions of tort for injuries by one Galvin against one Beals and by the same against the Winchendon Savings Bank. A verdict was directed for defendants, and plaintiff excepted. Exceptions overruled.

Jas. J. Irwin, for plaintiff. Gaston, Snow & Saltonstall, for defendants.

LATHROP, J. These are two actions of tort, tried together in the superior court, to recover for personal injuries sustained by the plaintiff in consequence of the giving way of a railing of the piazza of the house in which she was the sole tenant. At the close of the plaintiff's evidence the judge ruled that there was no evidence of misfeasance on the part of the defendant as distinguished from a mere nonfeasance, and that there was no evidence to warrant a verdict for the plaintiff; and on that ground directed a verdict for the defendant. This ruling was excepted to, and is the principal question in the case. There is also an exception to the exclusion of evidence, to which we shall refer hereafter.

The bill of exceptions leaves us in doubt whether there was sufficient evidence to hold either defendant as the landlord of the plaintiff, but we shall assume, for the purposes of the case, that one or the other of the defendants might have been found to be the landlord, and that the ruling was made on another branch of the case.

The plaintiff's evidence tended to show that she hired the house in question in April, 1899, of George C. Beals, son of the defendant in the first case; that Beals let houses for his father, and also for the defendant in the second case, in the same neighborhood where the house he let to the tenant was situated. George C. Beals had made repairs upon the house at several different times prior to September 1, 1899. The plaintiff testified that about September 1st, when George C. Beals came to collect the rent, she told him that she would not stay in the house any longer, and that he said: "Well, Mrs. Galvin, my father wants you to stay here, and I will make repairs right away. Just tell me what you want of them, and I will see that it is done next week." She further testified that she told him that "the front door would not fasten, that there was no lock and knob on it, and that the

front steps were not fit for use"; that Beals then said, "Everything will be fixed up next week sure;" that within a few days Beals brought lumber there, and two days after he put a new board in the floor of the piazza, a new tread in the steps, a door bell on the door, and that she heard him hammering there for quite a while. The plaintiff further testified that two days later she made use of the piazza for the first time; that she stepped out of the front door onto the piazza, and went to the railing on the right as she came out to air a rug, and as she was in the act of doing so, leaning over the railing on the right, the railing as a whole gave way, and she fell to the ground below. On cross-examination the plaintiff testified that she did not remember that in any of her talks with Beals she had said anything about this rail nor that he did. George C. Beals, who was called by the plaintiff as a witness, testified that his father, the defendant in the first case, was the treasurer of the defendant in the second case; that he (the witness) let the house, and that his father had nothing to do with the letting or keeping the premises in repair. The witness also denied the conversation which the plaintiff testified to, but admitted repairing the steps, and testified that about two weeks before the accident he happened to notice the railing which gave way, and found it weak and shaky, but made no repairs upon it. The testimony of George C. Beals is reported at length. The most significant part is that his father told him to take charge of certain houses and collect the rents, and that he felt that in taking charge he could make repairs. For the purpose of showing negligence on the part of the defendants the plaintiff offered to prove that immediately after Beals had finished the work he assured the plaintiff that everything was safe and sound, and that she need not fear to use the piazza. The judge refused to admit the evidence on the question of the negligence of the defendants, but admitted it upon the question of the plaintiff's due care.

The general rule in this commonwealth must be considered as settled that a tenant cannot recover against his landlord for personal injuries occasioned by the defective condition of the premises let, unless the landlord agrees to repair, makes the repairs, and is negligent in making them. *Bowe v. Hunking*, 135 Mass. 380, 46 Am. Rep. 471; *Tuttle v. Gilbert Mfg. Co.*, 145 Mass. 169, 13 N. E. 465; *McKeon v. Cutter*, 156 Mass. 296, 31 N. E. 389; *McLean v. Fiske Wharf & Warehouse Co.*, 158 Mass. 472, 33 N. E. 499; *Marley v. Wheelwright*, 172 Mass. 530, 52 N. E. 1066. The fact that the landlord makes other repairs is not evidence that he agreed to keep the premises in repair. *McKeon v. Cutter*, 156 Mass. 296, 31 N. E. 389; *McLean v. Fiske Wharf & Warehouse Co.*, 158 Mass. 472, 33 N. E. 499. It also has been held that where there is an agreement to

repair, the landlord cannot be held liable for a defect unless reasonable notice of such defect is given to him. *Hutchinson v. Cummings*, 156 Mass. 329, 31 N. E. 127; *Marley v. Wheelwright*, 172 Mass. 530, 52 N. E. 1066. The plaintiff seeks to bring this case within *Gill v. Middleton*, 105 Mass. 477, 7 Am. Rep. 548, where the landlord was held liable for negligence in making repairs which he had promised and undertaken to make. But there is no evidence in the case before us that the alleged agent undertook to do anything about the railing, or that he did anything about it. The plaintiff complained to him of certain defects, and these he remedied. Nothing was said about the railing. The plaintiff has failed to bring her case within the one upon which she relies. The ruling of the court that there was no evidence of a misfeasance was therefore right. The evidence offered was immaterial to the issue. It did not tend to show that the agent had made repairs as to the railing, or had undertaken to do so. It must be shown, in order that the plaintiff may maintain her action, that repairs as to the railing were actually made, and that the work was negligently done. The evidence, if admitted, would not have tended to show either of these essential elements.

Exceptions overruled.

(187 Mass. 173)

BLACK v. BOSTON ELEVATED RY. CO.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 5, 1905.)

STREET RAILROADS—INJURY TO PASSENGER— NEGLIGENCE.

1. The driver of an unlighted vehicle drove along an unlighted street in the nighttime, without seeing a car on an intersecting street until his horse was within 10 or 12 feet of the track, though he might have seen it when the car was 100 feet or less away from the street corner and he was within 500 feet of the corner. The car was not running at an excessive speed, and the motor was reversed as soon as the vehicle emerged from the darkness into the space lighted by the lights of the car. *Held*, that the facts did not show negligence by the car company, entitling a passenger on the car to recover for injuries received in a collision between the car and the vehicle.

Exceptions from Superior Court, Suffolk County; Robt. O. Harris, Judge.

Action for personal injuries by one Black against the Boston Elevated Railway Company. There was a judgment for defendant, and plaintiff brings exceptions. Exceptions overruled.

John J. O'Connor, for plaintiff. Chas. S. French, for defendant.

LORING, J. This is an action by a passenger for injuries suffered by him under the following circumstances: The plaintiff was standing in the forward end of the aisle of one of the defendant's cars—the seats be-

¶ 1. See *Carriers*, vol. 9, Cent. Dig. § 1211.

ing occupied—with his hand on the handle of the door, and looking ahead. The car was going north on Broadway in Everett. The plaintiff testified that as the car came to the intersection of Dexter street he saw a horse on the track, some 20 or 30 feet away, and realized that there would be a collision. To avoid being hurt by it, he stepped out onto the platform, but, being too late, was thrown violently against the forward end of the car. He also testified that the car was running 10 miles an hour, and that until he saw the team the car had not slowed down; that simultaneously with the collision, or a second or so before, the reverse power was applied by the motorman. The only other witness called by the plaintiff was the driver of the wagon. He testified that he was driving west with a load of coke in a furniture wagon at a pretty fairly lively gait, and never saw the car until the horse's head was 10 or 12 feet from the track; that the car was then 200 feet away; that there was no light there, except the light on the car; that he could see down Broadway for a distance of 100 feet when he was on Dexter street anywhere between the corner of Dexter street and Broadway and a point 500 feet east of the corner; that the car struck his right-hand wheel, and swung his cart round parallel with the car, facing in the opposite direction; that he started from the cokerworks at 5 or 6 minutes after 6 o'clock in the afternoon. The accident happened on January 31, 1902. It was agreed that the plaintiff was in the exercise of due care. The presiding judge directed the jury to find a verdict for the defendant, and the case is here on an exception to that ruling.

We are of opinion that the ruling was right. To recover, the burden was on the plaintiff to prove that the collision was caused by the negligence of the defendant. In place of proving that, so far as the proof went, it showed that it was caused by the negligence of the driver of the cart. The case which the plaintiff made out was the case of the driver of an unlighted cart on an unlighted street, in the nighttime, driving along without seeing a car on an intersecting street until his horse's head was within 10 or 12 feet of the track, although, on his own testimony, he might have seen the car when it was 100 feet or less away from the intersection of the two streets, when he was within 500 feet of the corner. The car was not running at an excessive rate of speed, and the motor was reversed a second or so before the collision—apparently as soon as the wagon emerged from the darkness into the space lighted by the lights of the car. See, in this connection, *Hamilton v. West End Street Railway Co.*, 163 Mass. 199, 39 N. E. 1010.

The plaintiff has argued that, on the only testimony as to lights on the street on which the cart was being driven, it might be found by the jury to mean that there was

no light which enabled the driver to see the motorman on the car platform. If that is so, the plaintiff failed to prove that the street was lighted, and the result is the same. It must be assumed not to have been lighted.

Exceptions overruled.

(187 Mass. 248)

SEELE v. BOSTON & N. ST. RY. CO.

PIERCE v. SAME. PIERCE

et al. v. SAME.

(Supreme Judicial Court of Massachusetts.
Middlesex. Jan. 6, 1905.)

STREET RAILROADS—CROSSING ACCIDENT—PERSONAL INJURIES—INJURY TO PROPERTY—CONTRIBUTORY NEGLIGENCE.

1: To drive for three-fourths of a mile in a wagon which enabled the driver to see only in front, the team being within three or four feet of a street railway track on which a car might at any moment come up from behind the team, and then to turn suddenly across the track without looking or listening, and with the team going so slowly that considerable time must be taken in crossing the tracks, is contributory negligence on the part of the driver and his fellow occupant of the wagon, defeating their right, as well as the right of the owner of the property, to recover for injuries resulting from the wagon being struck by a car before it crossed the track.

Exceptions from Superior Court, Middlesex County; Robt. R. Bishop, Judge.

Actions by one Seele, Winfield B. Pierce, and Ansel B. Pierce and others against the Boston & Northern Street Railway Company—three cases. Findings for defendant, and plaintiffs bring exceptions. Exceptions overruled.

Francis E. Hesseltine and Raymond R. Gilman, for plaintiffs. Henry F. Hurlburt and Damon E. Hall, for defendant.

BARKER, J. In the first two actions the plaintiffs sue for damages for personal injuries. The third action is for damages to the horses and wagon with which the plaintiffs in the first two actions were traveling on the highway when the accident happened. They were on Main street, coming from Melrose, on the west side of the road, which was the right-hand side as they were driving, and the center of the road was occupied by double tracks of the said railway. They were in a two-horse undertaker's wagon, preceding a funeral procession which was some considerable distance in the rear. The wagon was without windows, and had a covered top, closed sides and rear, with an inside partition separating the driver's seat from the interior, which was completely filled with flowers. The sides projected forward of the seat, so that the driver could not look back of the wagon without leaning outside of the wagon. Opposite the intersection of Sylvan and Main streets the team was to cross the tracks to the left of the driver, in order to

¶ 1. See *Street Railroads*, vol. 44, Cent. Dig. §§ 213, 215.

of Main street. Some three-fourths of a mile before reaching Sylvan street the travelers had looked back to see the funeral procession, which was then about an eighth of a mile in their rear, and on so looking back they saw no electric car. Just before and as they turned across the car tracks, their horses were upon a walk. For 1,700 feet back of the team Main street was straight, and with no buildings or cross-streets, and with the view unobstructed. The travelers, before turning the team across the track, did not in any way look to see whether a car was approaching from behind, and they had not looked back since they did so when they were three-fourths of a mile from the place where they intended to cross the tracks. When they turned to the left to cross the tracks—the horses walking—the team was struck by a car coming from behind, and which hit the team between the horses and the footboard or under the seat. Before the crash they did not hear the car, and did not know that one was approaching. The evidence shows that there was another team on the street, going in the same direction, and about 200 feet behind the one which was struck, and that, as the car passed the rear team, the gong on the car was sounded. A witness, who stood on the corner of Sylvan street and saw the car and team approaching, testified that the noise of the car "was a good loud noise—such a noise as a car makes going at a good speed." Other witnesses who were in the vicinity testified that they heard no bell rung or gong sounded as the car approached the team, but that they could not say it was not rung or sounded. There was evidence that the car was being run at an excessive rate of speed.

The burden was upon the plaintiffs to show that they were in the exercise of due care. We think the evidence did not justify such a finding. To drive for three-fourths of a mile in a wagon which enabled the driver to see only in front, the team being within three or four feet of a street railway track upon which a car might at any moment come up from behind the team, and then to turn suddenly across the track without looking or listening, and with nothing to give assurance that a car is not near, and with the team going so slowly that considerable time must be taken in crossing the tracks, is to act in disregard of a known danger. We think that in the present instance it was contributory negligence. See *Saltman v. Boston Elevated St. Ry. Co.*, 72 N. E. 950.

Exceptions overruled.

(187 Mass. 256)

WELCH v. AUSTIN et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 6, 1905.)

DEEDS—EQUITABLE RESTRICTIONS—DURATION
—PETITIONS FOR CONSTRUCTION.

1. A restriction in a deed that the house to be built on the premises shall be set back a

front elevation and material used shall correspond with the grantor's adjoining house, will be taken to have been inserted for the benefit of the adjoining land of the grantor, and to constitute agreements enforceable as equitable restrictions, and not mere personal covenants.

2. But the restriction is limited in its duration to the life of the first house erected on the granted premises, and is not a restriction in perpetuity.

3. Whether a perpetual restriction contained in a deed will be enforced in view of a change of circumstances, is a question which cannot be raised on a petition under Rev. Laws, c. 182, § 11, to determine the validity, nature, and extent of the restriction.

Report from Superior Court, Suffolk County; J. B. Richardson, Judge.

Petition by Francis C. Welch, trustee, against Walter Austin and others, under Rev. Laws, c. 182, § 11, to determine the validity, nature, and extent of certain restrictions contained in a deed. In the superior court a decree was entered, and the case was reported to the Supreme Judicial Court. Decree modified.

Petition under the statute to determine the validity of a restriction in a deed of Oliver Brewster to John Foster. The restriction provided that: "The dwelling house to be built on the granted premises shall be set back five feet from the line of Arlington street, and shall not exceed 65 feet in depth from said street so as to correspond in this particular with my adjoining house. The front elevation and the material used in the construction of the front on Arlington street shall correspond with my house adjoining according to the plan of G. J. F. Bryant herewith to be recorded, including a projection of about one foot on the front line as indicated on said plan. Two or three windows may be inserted in the front elevation from the second floor up, and one or two in the basement floor, as may be preferred by the grantee or his representatives. The front on Marlborough street shall be of freestone, and shall correspond as nearly as may be with the front on Arlington street." Foster did not build, but conveyed the premises to one Cory, who built a house conforming to the restrictions. The superior court found that the restrictions created an easement in the granted premises, which became appurtenant to the adjoining house and land, and that the restrictions were intended to apply to all buildings which might at any time be erected on the granted premises, and bound the original grantee and his successors in title. The case was reported to the Supreme Judicial Court.

C. H. Tyler, O. D. Young, and B. D. Barker, for petitioner. Dunbar, Rackemann & Brewster and Harrison M. Davis, for respondents

LORING, J. The only question before the court is the nature and extent of the possible restriction, stipulation, or agreement created by the deed of Oliver Brewster to John Fos-

ter, dated March 11, 1863, recorded with Suffolk Deeds, libro 825, folio 151. We cannot accede to the petitioner's contention that the agreement in question is nothing more than a personal covenant on the part of John Foster. The case of *Clapp v. Wilder*, 176 Mass. 332, 57 N. E. 692, 50 L. R. A. 120, on which the petitioner has largely relied in support of that contention, went on the ground that the thing provided for there was put in the form of a common-law condition; and although a stipulation put in the form of a common-law condition may operate not only as a condition, but as an equitable restriction as well (*Hopkins v. Smith*, 162 Mass. 444, 38 N. E. 1122), there was not enough in that case to show that the common-law condition there in question operated also as an equitable restriction.

The petitioner has relied, also, on the case of *Badger v. Boardman*, 16 Gray, 559. That case must be taken to rest on special circumstances. It was heard on the merits, and it is stated in the report that Downing, the grantor in the deed containing the "restriction" which the plaintiff sought to enforce, "was the owner of all these parcels of land, which were described on a plan thereof dated the 12th of December, 1843, and recorded in the registry of deeds." It must be assumed that that plan was before the court, although it is not set forth or otherwise described in the report. On an examination of it in the registry of deeds it appears that the question then before the court was not the case of an owner of two lots selling one of them, as in the case at bar, but a more complicated situation. The grantor in that case owned seven lots on the westerly corner of Bowdoin and Cambridge streets in the city of Boston. Five of the seven lots faced on Bowdoin street and two on Cambridge street. The lot conveyed to the defendant was lot No. 3. The lot which eventually came to the plaintiff was lot No. 4, next north of No. 3; and it was conveyed by the original grantor after lot 3 was conveyed. The lot on the corner was lot No. 5. All these lots faced on Bowdoin street. Lots 6 and 7, facing on Cambridge street, ran back across the rear end of lots 4 and 3 to the southerly line of lot 3. There was nothing to indicate that the "restriction" in question forbidding any buildings or shed ever being erected westerly of the main building (on lot 3) "of a greater height than those now standing thereon" was for the benefit of lot 4 rather than of lots 6 and 7. In this situation the court seems to have cut the knot by holding that it was a personal covenant.

Skinner v. Shepard, 130 Mass. 180, the other case principally relied on by the petitioner, is a case where an action was brought for breach of a covenant of warranty in a deed from the defendant to the plaintiff. The breach relied on was that in a deed under which both claimed title there was a provision that no building should ever be placed within

25 feet of Green street, on which the premises faced. The only fact in connection with this deed put in evidence by the plaintiff as showing that this provision constituted an equitable restriction, and not a personal covenant, was that the grantor, at the date of the deed in question, owned a parcel of land on the other side of a railroad which bounded the granted premises on the west. The granted premises were a tract containing over 65,000 square feet of land, and the provision in question was coupled with a provision that the occupant of a part of the premises next the railroad, used for a lumber yard, should have six months in which to remove his lumber. The two provisions were not only coupled together, but were part of the same sentence. Under the rule previously laid down in *Episcopal City Mission v. Appleton*, 117 Mass. 326, 329, each part of this provision must receive the same construction. It is plain that the latter part of the provision, requiring the lumber to be removed within six months, was not an equitable restriction. On these facts it was held that the plaintiff had not made out that the provision in question was anything more than a personal covenant. In the case at bar the things provided for are stated to be "restrictions and agreements," subject to which the land was conveyed. From the nature of the provisions, namely, a set-back from the street in front, a limit to the depth of the house on the back, and a specified facade, which was to make the house to be built on the lot conveyed one building with the house already built on the land of the grantor and the two houses next south of it, they are in their nature matters which would benefit the adjoining land of the grantor; and, as if to put beyond a doubt the question of this restriction having been imposed for the benefit of the only lot remaining owned by the grantor, it is stated in the deed that the restrictions are imposed so that the house to be built on the lot conveyed shall correspond with the adjoining house of the grantor. We are of opinion that these provisions must be taken to have been inserted for the benefit of the adjoining land of the grantor, and constituted agreements which will be enforced as equitable restrictions. *Peck v. Conway*, 119 Mass. 546.

But we are of opinion that the petitioner is correct in his contention that the duration of the restriction in the case at bar was limited to the life of the first house erected on the granted premises. This case is governed by *American Unitarian Association v. Minot*, 185 Mass. 589, 71 N. E. 551. Indeed, there is a reason here for holding the restriction to be limited in its duration, which we did not have in that case. That is the provision that: "The front elevation and the material used in the construction of the front on Arlington street shall correspond with my house adjoining according to the plan of G. J. F. Bryant herewith to

one foot on the front line as indicated on said plan. Two or three windows may be inserted in the front elevation from the second floor up, and one or two in the basement floor, as may be preferred by the grantee or his representatives. The front on Marlborough street shall be of freestone, and shall correspond as nearly as may be with the front on Arlington street, or however otherwise said premises may be bounded, measured or described." The plan referred to is a plan of three houses—the house here in question on the corner, Brewster's house, and the house next beyond on the south. The facade shown is a facade of what is, together with the house on the grantor's lot, the house next to it, and the other corner house (which is not drawn out, but is indicated on the drawing), one building. It hardly could have been the intention to restrict in this minute way in perpetuity the buildings to be erected on this lot of land.

The respondents contend that this case is not governed by *American Unitarian Association v. Minot*, because in that case five of the six houses there in question had been torn down, and buildings erected in their place which were not dwelling houses, and that, while the sixth still stood, it had been converted into a hotel. In the case at bar, on the contrary, the house owned by Brewster at the date of the deed to Foster here in question is still used as a dwelling house. Had the decision in *American Unitarian Association v. Minot* gone on the ground that by reason of a change in circumstances within *Jackson v. Stevenson*, 156 Mass. 496, 31 N. E. 691, 32 Am. St. Rep. 476, a perpetual restriction would not be enforced in equity, these facts might make a difference. But not only did that case not go on that ground, but it is expressly stated in the opinion that it was not necessary to express an opinion on the question whether the doctrine of *Jackson v. Stevenson* could be raised in a petition at law under the statute to ascertain the limits of a restriction. It seems plain that no such consideration can be gone into in such a petition. See *Crocker v. Cotting*, 181 Mass. 146, 153, 63 N. E. 402. More than that, where a restriction which is limited in its duration has come to an end, no question of the application of the doctrine of *Jackson v. Stevenson* can arise. That doctrine can cut down, in effect, the duration of an equitable restriction, but it cannot prolong a restriction which in terms is limited in a particular way. The same is true of the respondents' contention here that, so long as their house is used for a dwelling house, the restriction on the petitioner's land is to continue in existence. The parties to the deed in question could have provided that the restrictions should apply to any building erected on the land conveyed so long as the dwelling house then erected on

But they did not. What they did provide was that "the dwelling house to be built on the granted premises" should be built in the way provided, so as to correspond with the grantor's "adjoining house." This might terminate the duration of the restriction, but cannot prolong it. For example, if Brewster had torn down the dwelling house then standing on his lot before a dwelling house was built on the granted premises, the restriction might, perhaps, have been thereby brought to an end. But by the terms of the provision adopted by the parties the duration of the restriction was measured by the life of "the dwelling house to be built on the granted premises." We are of opinion that the restriction created by this deed expires when the dwelling house now on the petitioner's lot is torn down. The decree entered by the superior court must be modified accordingly.

So ordered.

(187 Mass. 262)

HUTCHINSON v. NAY.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 6, 1905.)

GOOD WILL—SALE BY SURVIVING PARTNER—ACCOUNTING.

1. Where, for nearly two years after the death of his partner, defendant carried on the teaming business at the old stand, with customers of the old firm, and then sold the good will of the business, with a covenant to continue in the employ of the purchaser for six months, and to do all in his power to hold the customers for the purchaser, and not to engage in the business for five years within the district covered by the old business, the good will sold was not the good will of the firm, but that of the defendant, and he was not obliged to account to the administratrix of his deceased partner for even a nominal sum because of such sale.

Case Reserved from Supreme Judicial Court, Suffolk County; Henry K. Braley, Judge.

Bill by one Hutchinson, administratrix of the estate of her deceased husband, against Ira A. Nay, for accounting on alleged sale of good will of partnership. Case reserved. Bill dismissed.

Wm. P. Hale and Fred Parker Carr, for plaintiff. Frank N. Nay and Robert E. Buffum, for defendant.

LORING, J. In the previous bill (*Hutchinson v. Nay*, 183 Mass. 355, 67 N. E. 601) the plaintiff sought to charge the defendant with the value of the good will of the former firm of Ira A. Nay & Co., which was dissolved by the death of Hutchinson, on two grounds, namely, that the defendant, the surviving partner, had agreed with the administratrix of Hutchinson's estate, the plaintiff, to buy the good will of the firm; and, secondly, that he had appropriated it to himself, and so was bound to account for its value. The present bill is founded on the fact that while the first bill was pending

the defendant sold the good will for \$5,000. We are inclined to think that the plaintiff is barred by the former suit from raising the question which is the subject of the present bill. See *Foye v. Patch*, 132 Mass. 105. But the effect of the sale of good will which has been made by the defendant has not been, in fact, considered by the court; and as the plaintiff, in the opinion of the court, is not entitled to maintain the present bill, even if the question is still open to her, we have thought it more satisfactory to dispose of the case on the merits of the question.

We are of opinion that on the dissolution of a firm, caused by the death of one of the partners, the good will of the firm's business is a part of the assets of the partnership, and, in the absence of an agreement between the partners dealing with the matter, the administrator of a deceased partner has a right to have it sold as part of the liquidation of the assets of the firm. But we are also of opinion that a sale thus forced upon the surviving partner does not stand on the same footing as a voluntary sale by a sole trader of the good will of his business. The law of good will is of recent growth. One hundred years ago it was the law of England that the good will of a partnership survived for the benefit of the living partner. *Hammond v. Douglas*, 5 Ves. 539. That is not so to-day. To-day, on the contrary, on the death of a partner the executor or administrator of the deceased partner can have the good will sold as one of the assets of the firm. *Johnson v. Helleley*, 2 D. J. & S. 446; *Hall v. Barrows*, 4 D. J. & S. 150; *In re David*, [1889] 1 Ch. 378, 382; *Lindley, Partnership* (6th Ed.) 445. In the growth of the law of good will in England an anomaly has crept in, which has not obtained here; that is, that one who has voluntarily sold the good will of his business can set up a competing business, but cannot otherwise derogate from his grant. It is undoubted law in England to-day. *Trego v. Hunt*, [1896] A. C. 7. It was held in *Labouchere v. Dawson*, L. R. 13 Eq. 322, that the result of working out the conflicting rights of the vendor and the purchaser of the good will of a business was this: The vendor can set up a competing business, but he cannot solicit business from customers of the old firm. In *Ginesi v. Cooper*, 14 Ch. D. 596, *Jessel, M. R.*, felt the anomaly which was involved in a rule which said to the vendor of his good will, "You shall not derogate from your grant, and so are forbidden to solicit business from customers of the old firm, but you may deal with them if they voluntarily come to you;" and in *Leggott v. Barrett*, 15 Ch. D. 306, he enjoined such a vendor from dealing with the customers of the old firm. This gave rise to a variety of opinions (see *Pearson v. Pearson*, 27 Ch. D. 145), which were finally set at rest by the decision of the House of Lords in *Trego v. Hunt*, [1896] A. C. 7; and the line was finally drawn as it was drawn

in *Labouchere v. Dawson*, L. R. 13 Eq. 322. But in delivering his opinion in *Trego v. Hunt*, [1896] A. C. 7, 19, Lord Herschell said (speaking of the result in *Labouchere v. Dawson*): "These circumstances appear to me to afford an indication that the courts recognized that their view of what was meant by 'good will,' and the effect of a sale of it, differed from the popular conception. Where the good will of a business is not sold under circumstances such as I have been discussing, but the sale is the voluntary act of the vendors, I am by no means satisfied that a different effect might not have been given to the sale, and the obligations which it imposed. It might have been held that the vendor was not entitled to derogate from his grant by seeking in any manner to withdraw from the purchaser the customers of the old business, as he would do by setting up a business in such a place or under such circumstances that it would immediately compete for the old customers. It is now, however, too late to make any such distinction. I think it must be treated as settled that, whenever the good will of a business is sold, the vendor does not, by reason only of that sale, come under a restriction not to carry on a competing business." To a similar effect, see Lord Macnaghten in *Trego v. Hunt*, [1896] A. C. 7, 23, 24; and Lord Davey, *Id.* 27, 29. What Lord Herschell there suggests might have been held has been held to be the law in Massachusetts. In Massachusetts the vendor of the good will of his business cannot set up a competing business at all, if by so doing he would derogate from his grant. *Webster v. Webster*, 180 Mass. 310, 62 N. E. 383. But where a sale of partnership assets is forced upon the survivor by the administrator of a deceased partner, the surviving partner is not in the position of a sole trader who has voluntarily parted with the good will of his business. He is not bound to retire from business, as a sole trader impliedly elects to do by voluntarily selling his good will. A sale of good will forced upon the surviving partner is like the sale of the good will of a sole trader by his trustee or assignee in bankruptcy. In that case it has been held in England that the bankrupt cannot only set up a competing business (a thing which may be done in England where a sole trader voluntarily sells the good will of his business, as has been shown), but he may solicit business from his old customers (a thing which in England cannot be done in case of a voluntary sale). *Walker v. Mottram*, 19 Ch. D. 355; *Trego v. Hunt*, [1896] A. C. 7, 19, 23. No injustice is done to the estate of a deceased partner by this rule. If the estate gets all that the creditors of a sole trader can get, full justice is done to it, while to put the surviving partner in the position assumed by a sole trader who has voluntarily elected to sell his good will would be an act of great injustice. The law in England in this connection seems to be

otherwise. In *re David*, [1889] 1 Ch. 518, it was stated by Romer, J., in a case where there was an agreement for the sale of the good will on the death of one partner, that independently of that agreement the personal representative of the deceased partner had a right to have the good will sold, and, if sold, the sale would be conducted on the basis on which the sale is conducted in case of a voluntary sale by a sole trader. And this had been assumed to be the law in the earlier cases of *Johnson v. Helleley*, 2 D. J. & S. 446, and *Hall v. Barrows*, 4 D. J. & S. 150, and has since been assumed to be the law in *Dixon v. Dixon*, [1904] 1 Ch. 161, and in *Curl Bros., Limited, v. Webster*, [1904] 1 Ch. 685. But the practical result of holding the surviving partner to be in the position of a sole trader who has voluntarily conveyed the good will of his business is so different in England from what it is here that the authority of these cases is not of great weight in this commonwealth.

For these reasons, we are of opinion that, if a sale of the firm's good will had been asked for and ordered in the case at bar, it would have been directed to be conducted on the footing that the surviving partner was at liberty to enter on a competing business, and to solicit trade from the customers of the old firm. Where, therefore, the defendant in the case at bar, for a year and eleven months after the death of Hutchinson, carried on business at the old stand, with customers of the old firm, with only slight changes in the personnel of the customers, and then sold the good will of his business, with a covenant to continue in the employ of the purchaser for six months, and to do all in his power to hold the customers for the purchaser, and with another covenant not to engage in the teaming business for five years within the district covered by the old business, the good will sold was not the good will of the old firm, but the good will of the defendant, and there is no obligation to account for even a nominal sum.

The entry must be: Bill dismissed, with costs.

(187 Mass. 254)

FAULKNER v. BOSTON & M. R. R.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 6, 1905.)

CARRIERS—INJURY TO PASSENGER—FALL OF WINDOW—EVIDENCE.

1. Where, in an action for injuries to a passenger caused by the fall of a car window when the train started, the evidence authorized an inference that when the window was put up, and the bolt released to keep it up, the window was not raised high enough for the bolt to be shot clear over its rest, the testimony of a witness that his window was up as high as it would go, and that the window in question appeared to be equally high, did not overcome the inference.

2. In an action for injuries to a passenger caused by the fall of a car window when the train started of its usual motion, it appearing

that the window and attachments were in good order, and that the fall must have been due to it not having been properly fastened, and there being no evidence that defendant's employes raised the window, plaintiff could not recover.

Exceptions from Superior Court, Suffolk County; Wm. Schofield, Judge.

Action by one Faulkner against the Boston & Maine Railroad. Judgment in favor of defendant, and plaintiff brings exceptions. Exceptions overruled.

Gargan, Keating & Brackett, for plaintiff.
Archibald R. Tisdale, for defendant.

LORING, J. We are of opinion that the judge was right in directing a verdict to be rendered for the defendant.

Taking the plaintiff's evidence, all that appears is that the window fell when the train started with its "usual motion." There was no evidence of a defect in the catch or in the window. When put up, the window was kept up by a bolt which rested on a metallic rest on the window jamb; this bolt was attached to the sash, and was drawn back by pressing a spring; when the spring was released, the bolt flew out to its full length onto the rest. The plaintiff has argued that the testimony of Greim, who raised the window to release the plaintiff's fingers, warranted a finding that the window sash was loose in the window jambs, so that it moved from side to side more than it should have; and that this warranted the further finding that this was the reason why the window fell and caused the injuries here complained of. But we do not think that Greim's testimony can bear that construction. The answer to the question put by the defendant's counsel makes it plain (if it was not plain before) that the window jammed vertically, not horizontally, until the plaintiff's fingers were released. The case which the plaintiff proved, therefore, was the falling of a window in good order on the train's starting with the usual motion. The only inference is that, when the window was put up and the bolt released to keep it up, the window was not raised high enough for the bolt to be shot clean over its rest; in other words, that the cause of the accident was negligence in raising the window when it was opened. The testimony of Greim that his window was up as high as it would go, and the window in question appeared to be equally high, does not cover this point. If a window is up so that the bolt holds the window by being more or less in contact with the rest, without lying on it fully, the difference in height would not be apparent between the lower part of the sash of that window and that of a window next it which was entirely up. There was nothing in the evidence introduced by the defendant which helped the plaintiff.

In this case, therefore, there being no evidence that the window was raised by the defendant's employes, and not by a passenger, the case comes within *Kendall v. Boe*

ton, 118 Mass. 234; Wadsworth v. Boston Elevated Railway, 182 Mass. 572, 66 N. E. 421.

Exceptions overruled.

(187 Mass. 288)

COMMONWEALTH v. LOBEL.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 7, 1905.)

CRIMINAL LAW—REVISION OF SENTENCE—TIME TO MOVE.

1. Where exceptions to rulings made in a criminal trial were waived after being entered in the Supreme Judicial Court, and a rescript sent to the superior court, it is not too late for that court to entertain a motion for revision of the sentence.

Exceptions from Superior Court, Suffolk County; Daniel W. Bond, Judge.

One Lobel, having been convicted of a criminal offense, brings exceptions to the refusing of the court to revise his sentence. Exceptions sustained.

M. J. Sughrue, First Asst. Dist. Atty., for the Commonwealth. Cutler & James, for defendant.

KNOWLTON, C. J. The defendant was tried in the superior court and found guilty of a criminal offense, and exceptions were taken to rulings made at the trial. Afterwards he was sentenced, and execution of the sentence was stayed, upon motion by an order of the court, before any part of it had been executed. The exceptions were entered in the Supreme Judicial Court, but were afterwards waived, and thereupon a rescript was sent to the superior court accordingly. The defendant then filed a motion for revision of the sentence, which motion was denied on the ground that the court had no power to grant it. An exception to this ruling presents the only question before us.

The case of Com. v. O'Brien, 175 Mass. 88, 55 N. E. 466, goes far towards a determination of this question. It was held in that case, after the disposition of the exceptions in the Supreme Judicial Court, when the case came before the superior court for an order vacating the original order staying the execution of the sentence, that it was in the power of the court to revise the sentence for the correction of an error of law. The case of Com. v. Hayes, 170 Mass. 16, 48 N. E. 779,

72 N.E.—62

was considered, and limited to the precise point decided in it. It was said that "the power of the court to deal with a sentence, whenever the exceptions are overruled, so far as to vacate the order staying execution, and to direct enforcement of it, impliedly includes the power to correct any illegality or error in a sentence, provided it then remains wholly unexecuted." There is no good ground for a distinction between the power to correct an error of law and the power to correct an error of fact. Under the present practice, which makes it the duty of the court in criminal cases to impose a sentence after a verdict of guilty, notwithstanding exceptions, the imposition of a sentence in a case in which exceptions are pending is not a final decision of the case, as the imposition of a sentence was under the former law, in a case in which there were no exceptions. Formerly a prisoner could not be sentenced so long as exceptions remained undisposed of, and when a case was ripe for a sentence and the sentence was imposed, and the term of the court was ended, the case was finally ended, and could not be revived unless upon a writ of error or some other new proceeding. But when a sentence is stayed under Rev. Laws, c. 220, § 3, to await a decision upon exceptions, the case is not ended, but remains in the court to await further action that shall put the sentence into execution if the exceptions are overruled. When the case comes up for further proceedings there is nothing in the law which prevents the court from correcting errors of law or errors of fact which enter into a sentence no part of which has been executed.

It would not be proper for a court, when called upon to vacate the order staying a sentence, to entertain a motion for a revision of the sentence, unless cogent reasons are given for opening a matter which has been regularly, and, under ordinary circumstances, finally, disposed of. An application for such a revision is like a motion for a new trial, and should not be granted except for manifest errors, like those which will justify an order for a new trial in an ordinary case. But it would be too strict a rule, when the case is before the court to obtain an order for the execution of the sentence, to hold that the court has no power to revise its own order, to correct a manifest error and to prevent injustice.

Exceptions sustained.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 6, 1905.)

**DANGEROUS PREMISES—LIABILITY OF TENANT—
CONSTRUCTION OF LEASE.**

1. Defendants leased premises, agreeing therein to save the lessor harmless from any damages from neglect in not removing snow and ice from the roof of the building and from the sidewalks, etc. Plaintiff was injured on the icy sidewalk, resulting from the discharge of water from a conductor which took the water from the roof of the building. *Held* that, though plaintiff could not sue on the covenant in the lease, the covenant rendered defendants liable for the injury to plaintiff because of the nuisance they allowed to exist.

Exceptions from Superior Court, Suffolk County; J. B. Richardson, Judge.

Action for personal injuries by Amanda Wixon against George E. Bruce and others. There was judgment for plaintiff, and defendants bring exceptions. Exceptions overruled.

Edgar P. Benjamin, for plaintiff. Dickson & Knowles and Frank Paul, for defendants.

LORING, J. These were two actions of tort for injuries suffered by the plaintiff in the first action, who was the wife of the plaintiff in the second action, from falling upon an accumulation of ice on a sidewalk in front of a building owned by the defendant Bruce, caused by the discharge of water from a conductor which took the water from the roof of that building and the building adjoining it. At the time of the accident the ground floor and basement of Bruce's building, with the exception of a hoistway and the stairs to the upper stories, were in the possession of the defendants Crowley & McCarthy as tenants for a term of years, and the upper stories, together with the hoistway and stairs, were in the possession of another tenant for a term of years. Each lease contained this covenant on the part of the lessee, to wit: "That they will * * * save the said lessor and his legal representatives harmless from * * * any claim or damage arising from neglect in not removing snow and ice from the roof of the building, or from the sidewalks bordering on the premises so leased." The lease to Crowley & McCarthy was dated August 1, 1901, and the other lease was dated May 1, 1900. The premises let to these two sets of tenants comprised the entire building.

The case was heard by a judge without a jury, who found that "the plaintiff Amanda Wixon, while traveling on said Blackstone street, and while in the exercise of due care, fell upon the sidewalk in front of the store occupied by the defendants Crowley & McCarthy; and her fall was caused by an accumulation of ice on said sidewalk, due to the collection and freezing of water flowing from said conductor or spout." The defendants Crowley & McCarthy asked the judge to rule that, on all the evidence, they were not

for these two rulings, which were refused as immaterial, to wit: "(7) If the building No. 113 Blackstone street was not occupied by the defendants Crowley & McCarthy alone, but was leased to and occupied by other tenants beside Crowley & McCarthy, then, in respect to a conductor running from the roof of the building to the ground to conduct the water from the roof of the building, the owner of the building, and not the defendants Crowley & McCarthy, was in control of and the occupant of the conductor, as regards the responsibility for its existence and for its condition, and the obligation to keep it in repair. (8) If the building, No. 113 Blackstone street was leased to more than one tenant, so that the defendants Crowley & McCarthy did not occupy the entire building—if Crowley & McCarthy had a lease of and occupied only the lower part of the building and the upper part was occupied by another tenant—then Crowley & McCarthy had no control over, or responsibility for the existence or condition of, the conductor running from the roof of the building to the sidewalk, and they had no duty in regard to it." The court made the following ruling, namely: "That the defendants Crowley & McCarthy should not be held liable in this action by reason merely of any of their covenants contained in the said lease executed by and between them and the defendant Bruce, trustee; that the said lease was evidence on the question of their possession and occupancy and control of the premises therein and thereby demised, and of the appurtenances by law attached thereto, including the sidewalk; and that upon the evidence of their possession and occupancy of the premises described in said lease, and of the appurtenances by law attached thereto, including the sidewalk, and upon the other evidence in the case, they were liable in this action upon the ground that they had negligently suffered a dangerous accumulation of ice to remain on the sidewalk in front of their store." The case is here on exceptions to the refusal of the judge to give these rulings. No exception was taken to the ruling made.

The principal argument of the defendants Crowley & McCarthy has been that, however it may be inter sese, the responsibility to the public of the legal owner of the conductor for the time being cannot be affected by a private agreement between him and a tenant of a portion of the building. But that argument was put forward and denied in *Quinn v. Cummings*, 171 Mass. 255, 50 N. E. 624, 42 L. R. A. 101, 68 Am. St. Rep. 420. That was a case where the plaintiff was injured by the falling of a division wall, and, after stating that the argument now put forward had been made, this court said: "But examples of liability to the public being affected by private arrangements are not unknown. A landlord may shift his

responsibility for snow falling from the roof of his house into the street by giving control to a tenant, and will have the right to rely upon the tenant's managing the premises in such a way as to prevent their becoming a nuisance. The fact that such action, and not merely abstinence from illegal acts, on the part of the tenant, is required to prevent the harm, is not conclusive." Page 256, 171 Mass., page 625, 50 N. E., 42 L. R. A. 101, 68 Am. St. Rep. 420. That is decisive of this case. We assume here that the defendants were not tenants of the conductor or of the sidewalk, and we agree with the defendants' contention that one injured by a defect in premises could not maintain an action against a stranger who had, for a consideration, agreed to insure the owner and occupant against liability for damages through defects. But these defendants were not strangers. They were tenants of a portion of the building, and a covenant by a lessee of part of a building to save harmless the lessor from any claim arising from neglect in not removing snow and ice from the sidewalk is not a contract of insurance, but, in a case like this—at least where the lessor has let the entire building to these defendants and another tenant—is in effect a covenant to see that the conductor carrying off the water from the roof does not create a nuisance by discharging it onto the sidewalk, where it would afterward freeze. That covenant gave these defendants control over the sidewalk, and brings the case within *Dalay v. Savage*, 145 Mass. 38, 12 N. E. 841, 1 Am. St. Rep. 429; *Clifford v. Atlantic Mills*, 146 Mass. 47, 15 N. E. 84, 4 Am. St. Rep. 279; *Lufkin v. Zane*, 157 Mass. 117, 31 N. E. 757, 17 L. R. A. 251, 34 Am. St. Rep. 262; *Quinn v. Cummings*, 171 Mass. 255, 50 N. E. 624, 42 L. R. A. 101, 68 Am. St. Rep. 420. See, also, *Glynn v. Central Railroad*, 175 Mass. 510, 512, 58 N. E. 698, 78 Am. St. Rep. 507.

The ruling made by the judge, in effect, means that the plaintiff could not have sued on the covenant between Bruce and these defendants, but that by reason of that covenant they became liable for the nuisance created by the conductor discharging water onto the sidewalk, which froze there, from which the plaintiff suffered a special damage.

Exceptions overruled.

(187 Mass. 272)

O'CONNELL et al. v. NEW YORK, N. H. & H. R. R. et al.

(Supreme Judicial Court of Massachusetts. Suffolk. Jan. 6, 1905.)

INSURANCE—INDEMNITY CONTRACTS—CONDITIONS PRECEDENT—WAIVER—SPECIFIC PERFORMANCE.

1. The fact that a casualty company undertook the defense of an action arising out of injuries to a servant of one of its policy holders—conceding that it was thereby estopped from denying that the case was covered by the pol-

icy—did not preclude it from relying on a provision of the policy making payment of the judgment by the policy holder a condition precedent to an action on the policy.

2. An understanding among all the parties interested that a casualty company would indemnify its policy holder against a particular loss did not constitute a waiver on the part of the company of a provision of the policy requiring the payment of a judgment by the policy holder as a condition precedent to its liability.

3. A bill in equity to compel one bound on a covenant of indemnity to make payment directly to the creditor cannot be maintained where the person indemnified has not performed a covenant which by the express terms of the contract of indemnity is a condition precedent to any liability on the part of the covenantor.

Appeal from Superior Court, Suffolk County; J. B. Richardson, Judge.

Bill in equity by Joseph P. O'Connell and others against the New York, New Haven & Hartford Railroad and the Union Casualty & Surety Company. From a decree for complainants, defendant surety company appeals. Reversed.

Geo. R. Swasey, Chas. H. Donahoe, and Francis R. Mullin, for complainants. Robert W. Nason, for defendant Union Casualty & Surety Co. F. A. Farnham, for defendant N. Y., N. H. & H. R. R.

LORING, J. This is an appeal from a final decree in equity in favor of the plaintiff. The facts which gave rise to the filing of the bill were as follows: The plaintiff O'Connell was a contractor, and at the time in question was engaged in building a section of Stony Brook conduit for the city of Boston, near the tracks of the defendant railroad company. In carrying on this work it became necessary to set up one of the guys of a derrick across the tracks of the defendant railroad company, and, on application being made to it, a license so to do was given to the plaintiff by it. The guy was set up too low, and in consequence two of the defendant railroad company's brakemen were injured while riding on the top of freight cars. These accidents occurred on December 17, 1897. On the 28th day of that month the plaintiff gave the company a bond, with two sureties, in the penal sum of \$1,000, conditioned to save it harmless from all loss by reason of said injuries, in order to prevent the revocation of the license to maintain the guy. On the 18th day of the following January one of the brakemen (O'Leary) took a writ against the railroad company, with an ad damnum of \$8,000, out of the United States Circuit Court. Some two months later O'Connell discovered that the accident policy which had been issued to him by the defendant surety company covered "bodily injuries" "accidentally suffered by any person or persons not employed" by him, caused by his negligence, as well as those "suffered by any employee or employees." He thereupon notified the surety company of the action brought by O'Leary against the railroad com-

pany, and on April 9th, in spite of the notice not having been given within the time stipulated for in the policy, the surety company wrote to O'Connell's attorney a letter, in which, after referring to the action of O'Leary against the railroad company, "for which it is probable that Mr. O'Connell is responsible," they state: "Mr. O'Connell has since found that he held a liability policy with this Company under which we will take charge of this particular case when we succeed in getting full information as to the status of the case at the present time." The information was furnished, and an attorney retained by the surety company entered an appearance for the railroad company, and tried the action for it in the following June. The trial resulted in a verdict for the plaintiff in the sum of \$3,625. Exceptions were taken by the defendant, which the attorney retained by the surety company desired to take to the Circuit Court of Appeals. To enable him to do this, he asked the railroad company to give a bond. This the railroad company refused to do, unless a bond was given to it, conditioned for the payment of any judgment and costs and expenses incurred by it in the action. The attorney retained by the surety company then asked O'Connell or his attorney to give such a bond to the railroad company, and such a bond in the penal sum of \$5,000 was given by O'Connell and two sureties on October 24, 1898. The plaintiff and his attorney testified that the attorney retained by the surety company and its general manager and the claims attorney promised O'Connell that, if he would give the bond to the railroad company, the surety company would pay the judgment recovered by O'Leary against the railroad company if judgment was ultimately rendered in his favor. The attorney who tried the action brought by O'Leary against the railroad company under the surety company's retainer testified that when O'Connell's attorney asked him if the surety company would stand behind O'Connell on the bond, if he gave the bond asked for, he answered that he did not "know about that," and that O'Connell, his attorney, and the witness then went to the office of the surety company, where they found the general manager and claims attorney; that the plaintiff's attorney then asked them the question previously asked by him of the witness; and that the general manager or the claims attorney answered, "in some form of words," that they "thought that, as the company had undertaken the defense, there was no doubt that the company would pay." This testimony was corroborated by the claims attorney. The plaintiff also introduced evidence that the railroad company agreed to look to the surety company for the performance of the condition of the bond given by him to the railroad company, and not to the principal and sureties who signed it.

This was denied by the railroad company. The bond was given, the exceptions were argued and overruled, and execution issued against the railroad company in May, 1899. On May 25, 1899, the railroad company paid on the execution the sum of \$3,978.07. On the 5th day of the following October the surety company's agent in Massachusetts wrote to O'Connell's attorney that the surety company "takes the position that it is not liable to Mr. O'Connell on his policy with that company." On the following day the railroad company put the \$5,000 bond in suit, and on the 13th day of the following December it put the \$1,000 bond in suit, and brought a common-law action of negligence against O'Connell. The cases being on the short list for trial in the superior court on February 25, 1902, the bill now before the court was filed. This bill counts on the surety company's agreement to pay the judgment recovered by O'Leary against the railroad company, and to look to the surety company for the performance of the condition of the \$5,000 bond. The prayer of the bill is that the railroad company be restrained from further prosecuting the action brought by it against O'Connell and the sureties on the two bonds, and the other action brought by it against O'Connell, and that the surety company be ordered to pay to the railroad company all sums paid by it to O'Leary. A hearing was had on the merits, the evidence was taken by a commissioner, and a final decree was made in favor of the plaintiff, from which the defendant surety company took an appeal.

The following findings were made by the judge who heard the suit: "In addition to other facts not in dispute, I find that from the time the defendant Union Casualty & Surety Company assumed the defense of the action of O'Leary v. The New York, New Haven & Hartford Railroad Company on March 19, 1898, which it did at its own request, and employed Mr. Proctor to defend that action, it was the general understanding between the said Union Casualty & Surety Company, Mr. O'Connell, and said railroad company (parties to the bill), that the accident to O'Leary was one for which, directly or indirectly, O'Connell was liable, and so that it was one for which the said Union Casualty & Surety Company was liable to indemnify O'Connell under its policy to him; and it was the general understanding between them that the said Union Casualty & Surety Company took up the defense of the O'Leary case because of its own supposed ultimate liability to O'Connell. If there should be a verdict and judgment against the New York, New Haven & Hartford Railroad Company in said suit of O'Leary against the said railroad company, and that the said Union Casualty & Surety Company, by virtue of its policy to O'Connell, intended to, and would, protect and hold O'Connell harmless against loss or damage by reason of said

accident to O'Leary; and this general understanding existed down to the letter of October 5, 1899, * * * during which time the conduct of the three parties was consonant with this understanding. The bond of O'Connell for \$5,000 to the railroad was given at the request of the Union Casualty & Surety Company, in order that it might take the case of O'Leary v. The New York, New Haven & Hartford Railroad Company on writ of error to the Circuit Court of Appeals, which the said Union Casualty & Surety Company desired to do or to have done. I do not find that Mr. Proctor, at the time said \$5,000 bond was given, in express terms agreed with or to Mr. Cronan or Mr. O'Connell, if O'Connell would give that bond, that the Union Casualty & Surety Company would save O'Connell harmless, or pay whatever sum he had to pay to the railroad company by reason of it, or would hold him harmless on such bond, with any intention thereby to create any new obligation of the Union Casualty & Surety Company to O'Connell; yet at that time, as before, I think and find that the general understanding among all the parties was, as before stated, that the Union Casualty & Surety Company would indemnify, protect, and save O'Connell harmless against loss or damage in respect to it, and all parties acted upon that understanding down to the letter of October 5, 1899."

We are of opinion that the decree in favor of the plaintiff must be reversed. The judge has found that neither of the two promises counted on in the bill now before us was in fact made, and the plaintiff has not undertaken to overturn that finding of fact. What the plaintiff has contended for here is that the final decree can be justified on the ground that, under the findings made below, the surety company is estopped to set up the defense set up by it. But the policy issued by the surety company to O'Connell is in the same form as that under consideration in Connolly v. Bolster, ante; and, under the decision in that case, payment of the O'Leary judgment by O'Connell is a condition precedent to an action on the policy. If, therefore, we assume, in favor of the plaintiff, without making a decision to that effect, that, after the defendant surety company had taken on itself the defense of the action, it was precluded from afterwards taking the position that the case was not one covered by the policy, still the plaintiff has not made out a case here, because he has not paid the judgment entered in the action defended by the surety company. There is nothing in the finding of the court which amounts to a waiver of this condition precedent to the defendant surety company's liability. To create a waiver, there must be some act inconsistent with the right waived. There is nothing found here, or in the evidence on which that finding was

made, inconsistent with a determination from the beginning on the part of the surety company to insist that, when the time came for payment under the policy, payment should be made in accordance with the terms of the policy, and on no other terms; that is to say, to pay when O'Connell had paid the judgment in the action which the company had tried, and which for that reason it was estopped to say was not an action fixing its obligation under the policy. The difficulty is not avoided by *Wolmerhausen v. Gullick*, [1898] 2 Ch. 514, and the other cases cited by the defendant. The doctrine of those cases is that while one holding a covenant of indemnity, or one who has a right to contribution, cannot sue at law until he has paid, he can maintain a bill in equity to compel the covenantor or person bound to contribute to make payment directly to the creditor. But the doctrine of those cases is that equity will compel specific performance of the obligation due from the defendant. It is a relief given in case of general covenants of indemnity, as Mr. Justice Story states it. *Story, Eq. Jur. § 850*. Such a bill cannot be maintained where the plaintiff has not performed a covenant which, by the express terms of the contract which he asks to have specifically performed, is a condition precedent to any liability on the part of the defendant. In such a case the party to be indemnified is not in a position to ask for specific performance of the contract of indemnity.

Decree reversed. Decree of bill dismissed to be entered.

(187 Mass. 266)

CONNOLLY v. BOLSTER et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 6, 1905.)

EMPLOYER'S LIABILITY INSURANCE—CONSTRUCTION OF POLICY—ACTION BY EMPLOYEE—EQUITY JURISDICTION—TRUSTEE PROCESS—CREDITORS' BILL.

1. An employer's indemnity policy was subject to the agreement that, if any suit be brought for damages, immediate notice should be given the insurer, so that it could defend or settle the same; that insured would not settle, or interfere with negotiations for settlement or in any legal proceeding, without the consent of the insurer; and that "no action shall lie against the insurer for any loss under the policy unless it be brought by the insured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issues." *Held*, that merely obtaining a judgment against the insured for personal injuries does not give the employee a cause of action against the insurer.

2. If an employee has a right to enforce his judgment for personal injuries against the insurer under an employers' indemnity policy, his remedy is to attach the debt due from the insurer to the employer by trustee process, rather than by direct action against the insurer.

3. Rev. Laws, c. 159, § 3, cl. 7, authorizing a plaintiff to reach in equity the property of a

¶ 2. See *Creditors' Suit*, vol. 14, Cent. Dig. § 6.

his debt, refers to the debtor's property which cannot be attached at law.

Appeal from Superior Court, Suffolk County.

Bill by one Connolly against one Bolster and one Bell and another, to reach and apply the proceeds of a liability insurance policy given by defendant insurance company. Defendant Bolster was the attorney of defendant Bell. Plaintiff was an employé of Bell, and, in a personal injury suit, recovered a judgment, which was not paid. Defendant Bell having disappeared, plaintiff brought this action. A demurrer to the bill by the insurance company having been sustained, plaintiff appeals. Affirmed.

Whipple, Sears & Ogden, for appellant.
Dickson & Knowles, for appellee.

LORING, J. The plaintiff claims that he is entitled to maintain this bill to reach and apply the debt due from the insurance company to his employer, Bell, first, on the ground that, on the true construction of the policy, the insurance company is indebted at law to his employer in the amount of the judgment which he has recovered against him; and, secondly, that, if the debt is not due at law, his employer has a right in equity to maintain a bill against him for exoneration, and to compel the company to satisfy the judgment directly. On the first ground the plaintiff relies on the case of *Sanders v. Frankfort Ins. Co.*, 72 N. H. 485, 57 Atl. 655. In that case relief was given under similar circumstances on the ground that, as matter of construction of a policy having the same terms, payment of a judgment by the assured was not a condition precedent to a right of action on the policy where the insurance company had undertaken the defense of the claim. By the policy here under discussion, and construed by the court in *Sanders v. Frankfort Ins. Co.*, the company "agrees to indemnify" the assured "against loss from common-law or statutory liability for damages on account of bodily injuries" to employes, caused by the negligence of the assured, "subject to the following special and general agreements." The second, third, and eighth clauses of the general agreements are the material ones. The second and third and the material part of the eighth clauses are as follows:

"(2) If thereafter, any suit is brought against the Assured to enforce a claim for damages on account of an accident covered by this policy immediate notice thereof shall be given to the Company, and the Company will defend against such proceeding, in the name and on behalf of the Assured, or settle the same at its own cost, unless it shall elect to pay to the Assured the indemnity provided for in clause A of Special Agreements as limited therein.

"(3) The Assured shall not settle any claim, except at his own cost, nor incur any ex-

cessment or settlement of the Company previously given in writing, but he may provide at the time of the accident such immediate surgical relief as is imperative. The Assured when requested by the Company shall aid in securing information and evidence and in effecting settlement, and in case the Company calls for the attendance of any employé or employes as witnesses at inquests and in suits the Assured will secure his or their attendance making no charge for his or their loss of time."

"(8) No action shall lie against the Company as respects any loss under this policy, unless it shall be brought by the Assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue."

The conclusion that payment of the judgment recovered by the employé was not a condition precedent to an action on the policy was reached in *Sanders v. Frankfort Ins. Co.* on these grounds: The word "defend," in the second clause, means to protect and secure against attack—"in short, to successfully defend"—and therefore included an obligation on the part of the company to pay the judgment if the case defended resulted in a judgment against the assured. That the second clause of the general agreements, so construed, was not consistent with the eighth clause of the general agreements, which stipulates, in terms, that "No action shall lie against the Company as respects any loss under this policy, unless it shall be brought by the Assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue." That, if the eighth clause is construed to cover cases of which the insurance company has assumed the defense, it is inconsistent with the second clause, so construed, and consequently the eighth clause must be construed not to cover those cases, but to be confined to cases of which the insurance company has not assumed the defense. We are of opinion, however, in the first place, that the word "defend," in the second clause, is to have its natural import; that it means here what it means when counsel are retained to defend an action; and that it is not to be extended beyond that, and to mean to "successfully defend." In the second place, the second clause is an obligation in addition to the obligation to indemnify the assured against loss, like the suing and laboring clause in a marine policy (as to which see *Kidston v. Empire Ins. Co.*, L. R. 1 C. P. 535, 2 C. P. 357; *Atchison v. Lohre*, 4 App. Cas. 755; *Johnson v. Salvage Association*, 19 Q. B. D. 458), and not a clause qualifying the main obligation of the policy to "indemnify" "against loss" from liability for damages on account of bodily injuries to employes caused by negligence of the assured. The object of this second

clause is plain, when taken in connection with the third. It is plainly inserted as an additional obligation and privilege for the protection of the insurance company, on the assumption that it is for the pecuniary interest of the company to be given the conduct of and to defend the action which is to fix its liability, and the amount to be paid when liable, rather than to leave that matter to be dealt with by the several persons insured, respectively. This does not result in the necessity of writing into clause 2 the qualifying words "until final judgment," as the plaintiff contends, for, when final judgment is rendered, ordinarily all defense is at an end. Nothing remains but a writ of review or a writ of error, and, if such a proceeding were necessary, it might well be held to be covered by the obligation to defend. But when the defense is ended, and, in spite of the defense, judgment is rendered against the insured, there is nothing to do but pay. Making payment of a judgment against the defendant is no part of a covenant to defend the action. Whether the insurance company is bound to pay the judgment depends upon the terms of its agreement to indemnify the assured against loss, and the eighth clause, in terms, provides that no action shall lie for "any loss under this policy," unless brought by the assured "to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue." In the case at bar, Bell has not paid the judgment recovered by the plaintiff, and therefore has no claim against the insurance company. Similar policies have received the same construction in *Frye v. Gas & Electric Co.*, 97 Me. 241, 54 Atl. 395, 59 L. R. A. 444, 94 Am. St. Rep. 500; *Cushman v. Carbondale Fuel Co.*, 122 Iowa, 656, 98 N. W. 509. It was also adopted in the case of *Travelers' Ins. Co. v. Moses*, 63 N. J. Eq. 260, 49 Atl. 720, 92 Am. St. Rep. 663, where it was held that an assignment of the property of the insured in bankruptcy was payment.

We add, only because the plaintiff has argued to the contrary, that the policy here in question is not to be construed in the same way as a policy which insures against the liability of the employer, and does not contain clause 2 of the general agreements. For that reason the following cases are to be distinguished from that now before us: *Stephens v. Pennsylvania Casualty Co.* (Mich. 1903) 97 N. W. 686; *Fritchle v. Miller's Pennsylvania Extract Co.*, 197 Pa. 401, 47 Atl. 351; *Hoven v. Employers' Association*, 93 Wis. 201, 67 N. W. 46, 32 L. R. A. 388; *Anoka Lumber Co. v. Fidelity & Casualty Co.*, 63 Minn. 286, 65 N. W. 353, 30 L. R. A. 689; *American Employers' Liability Ins. Co. v. Fordyce*, 62 Ark. 562, 36 S. W. 1051, 54 Am. St. Rep. 305; *Fenton v. Fidelity & Casualty Co.*, 36 Or. 283, 56 Pac. 1096, 48 L. R. A. 770; *Pickett v. Fidelity & Casualty Co.*, 60 S. C. 477, 88 S. E. 160, 629. For the same reason it is necessary to point out that to pay a

judgment under clause 2 is not "to settle any claim," within clause 3, and so there is no inconsistency between the two clauses.

It is proper to point out that, if the plaintiff is right in his construction of the policy, his remedy would have been to attach the debt due by trustee process in an action at law.

No argument has been made in support of the second contention stated in the plaintiff's brief. It is, however, dealt with in *O'Connell v. New York, New Haven & Hartford Railroad*, 72 N. E. 979. The contention cannot be sustained.

It remains to speak of the plaintiff's prayer to have a receiver appointed to pay the judgment due the plaintiff, and so complete Bell's right against the defendant. The statute authorizing a plaintiff to reach and apply (Rev. Laws, c. 159, § 3, cl. 7) deals with the defendant's property which cannot be attached at law. It is not a statute authorizing the court to complete inchoate rights, so as to create property which could then be the subject of trustee process in an action at law.

Decree affirmed.

(187 Mass. 300)

BREED et al. v. GARDNER et al.

DUQUET v. SAME.

(Supreme Judicial Court of Massachusetts
Suffolk. Jan. 7, 1905.)

MECHANICS' LIENS—BOND FOR DISSOLUTION—
IMPERSONATION OF SURETIES—VALIDITY
—STATUTE—DEED.

1. The mere fact that a conveyance of the equity of redemption of real estate, subject to mortgages, is made to a person with a view to his giving bond to dissolve a mechanic's lien on the property, pursuant to Rev. Laws, c. 197, § 28, authorizing a person having an interest in property on which a mechanic's lien is claimed to give a bond to dissolve the lien on his interest, does not affect his title.

2. Where the sureties, whose names were signed to a bond given to dissolve a mechanic's lien, pursuant to Rev. Laws, c. 197, § 28, authorizing a person having an interest in property on which a mechanic's lien is claimed to give a bond to dissolve the lien on his interest, were impersonated by others appearing before the master in chancery, who gave false answers in regard to their property, the bond, though signed and approved by the master, is not within the statute, and hence did not effect a dissolution of the lien.

Appeal from Superior Court, Suffolk County; Henry N. Shelton, Judge.

Petitions by Stephen A. Breed and others and Asa M. Duquet and others against Horace J. Gardner and others to enforce mechanics' liens (two cases). Finding for plaintiffs, and cases reported to full bench of the Supreme Judicial Court. Orders affirmed.

It appeared that the premises, before being conveyed to one Blanchard, the present owner, and while the liens could be filed, were conveyed to one Bracket, a person of no financial responsibility, for the purpose of

Bracket executed a bond, with the names of the sureties in blank. Subsequently certain persons went before a master in chancery as sureties, and were accepted, and the bond given. Later it appeared that the persons whose names appeared as sureties had not gone before the master, and that their names were forged.

Norman F. Hesseltine, for petitioners Breed and others. Hollis R. Bailey and Chas. B. Sias, for respondents. Arthur H. Russell, for petitioner Asa M. Duquet.

KNOWLTON, C. J. We shall assume, in favor of the defendants, the correctness of the ruling that Bracket had a sufficient title to bring him within Rev. Laws, c. 197, § 28, authorizing a person having an interest in property upon which a mechanic's lien is claimed to give a bond to dissolve the lien upon his interest. He held a conveyance of the equity of redemption, which purported to give him the estate, subject to mortgages. The mere fact that the conveyance was made to him with a view to his giving a bond to dissolve the lien does not affect his title. The owners were in the exercise of their legal right in making the conveyance, and he took the title with the incidents which legally pertained to it. *Curtis v. Galvin*, 1 Allen, 215; *Hayes v. Fessendon*, 106 Mass. 228; *Glendon Company v. Townsend*, 120 Mass. 346; *Landers v. Adams*, 165 Mass. 415, 43 N. E. 119. Of course, upon a question whether the bond was given, and the approval of it obtained and the record of it made fraudulently, such a conveyance might be very important evidence.

The signatures of the two sureties on the bond were forgeries, and the question is whether the instrument has any legal effect. As against the sureties, it is void. It is, in law, like a bond without sureties. Such a bond does not comply with the requirements of the statute which calls for sureties, and has no effect to discharge the lien. It is even more plainly ineffectual to accomplish its intended object than the bonds which were held void, because not signed by the principal, in *Bean v. Parker*, 17 Mass. 591-604, and *Wood v. Washburn*, 2 Pick. 24.

The respondents contend that the signing by the sureties in the presence of the master in chancery, and their false answers in regard to their property, constituted an adoption by them of the names which they appended to the instrument, and that this false

ing upon them as sureties. This is a mistaken view of the contract. Whatever civil remedy might be had against them by a party injured, the bond was given and recorded and accepted as the bond of the persons whose names appeared upon it as principal and sureties. It was an instrument under seal, and the contract embodied in it was a contract in writing, which showed the parties to the instrument, as well as its other provisions. The contract did not grow out of the presence of the two sureties and their oral representations, but out of the instrument itself, which purported to bind the persons whose names appeared upon it as obligors. The signing as a false impersonation was not unlike ordinary forgeries. Their further impersonation of the supposed sureties in the examination as to their property did not make the contract with them, as persons present under assumed names; but it left the instrument to tell the story of the contract, and they pretended that it told the truth. The case differs materially from the cases cited by the respondents. See *Edmunds v. Merchants' Transportation Company*, 135 Mass. 283; *Bassett v. Daniels*, 136 Mass. 547; *Robertson v. Coleman*, 141 Mass. 231, 4 N. E. 619, 55 Am. Rep. 471. See, also, *Bartlett v. Tucker*, 104 Mass. 336, 6 Am. Rep. 240; *Grafton National Bank v. Wing*, 172 Mass. 513, 52 N. E. 1067, 43 L. R. A. 831, 70 Am. St. Rep. 303. The instrument was not within the terms of the statute.

The respondents contend that the approval of the sureties by the master in chancery, under the statute, made the bond good. But his approval was only of the qualifications and fitness of the persons whose names appeared upon the instrument as sureties. It was no part of his duty to pass upon the question whether the signatures were forged or genuine. He was to inquire into the financial ability and the suitability of the persons represented by the names appended to the instrument. His signature gave no validity to the forged bond.

It is not contended by the respondents that a title taken by a bona fide purchaser in reliance upon a forged instrument recorded in the registry of deeds is good, if a valid instrument of that kind is needed to transfer the title from a former holder. In the present case *Blanchard* stands no better than did *Bolster*, from whom he took his deed.

In each case the entry is to be: Order affirmed.

(187 Mass. 279)

TOBIN v. LARKIN et al.

(Supreme Judicial Court of Massachusetts.
Essex. Jan. 7, 1905.)PARTITION — SALE — PENDING LITIGATION —
KNOWLEDGE OF PURCHASER—EFFECT—JUDG-
MENT—COLLATERAL ATTACK—VENDOR AND
PURCHASER—SPECIFIC PERFORMANCE — SUP-
PLEMENTAL BILL—SUFFICIENCY.

1. A decree of the probate court, within its jurisdiction, is not subject to collateral attack.

2. Mere knowledge of a purchaser of real estate, at a sale in partition proceedings, of pending litigation affecting the property, does not invalidate his purchase so long as the decree remains unrevoked.

3. Where the vendee in a contract for the sale of real estate obtained a decree against two of the owners for specific performance of the contract as to eleven-twelfths of the property in a suit against all, but while the litigation was pending one of the two owners affected by the decree died, and the third owner, with knowledge of the litigation, brought partition proceedings and had the land sold, a supplemental bill by the plaintiff in the petition for specific performance against the surviving vendor and the purchaser at the sale, praying to have the decree in the original case carried into execution as between the parties to the original suit, stating that the advertisement of the partition sale was purposely framed and published so as to afford the plaintiff no notice of the proceedings and sale, and with the intent to evade the decree on the original bill, is insufficient, where it does not charge that the purchaser at the partition sale was a party to the wrong or had any knowledge of it.

Appeal from Superior Court, Essex County; Lemuel Le B. Holmes, Judge.

Suit by Patrick Tobin against Maria Larkin and Patrick J. Lynch. From a decree overruling demurrer to supplemental bill, defendants appeal. Reversed.

Knox & Coulson, for appellant Maria Larkin. Mahoney, Crowell & Sullivan, for appellant Patrick J. Lynch. J. P. S. Mahoney and J. P. Sweeney, for appellee.

KNOWLTON, C. J. The plaintiff brought a bill in equity against Maria Larkin, Bridget Larkin, and Martin Larkin, praying for a decree of specific performance of a contract for the sale of real estate. At the hearing it appeared that Martin Larkin owned one-twelfth of the estate, and that his two sisters, the other defendants, owned eleven-twelfths of it. The bill was sustained as to the two female defendants for their share of the property, and dismissed as to the other defendant. Pending an appeal by the female defendants, Bridget Larkin died. The defendant Martin Larkin began proceedings in the probate court for a partition of the property, and, without notice to the plaintiff, obtained an order for a sale of it for the purpose of partition. Pursuant to a warrant from that court, a sale was made to Patrick J. Lynch, who is one of the defendants in this supplemental bill. He took possession, and now has a record title to the land. A rescript was sent from the Supreme Judicial Court on the appeal in the first suit, affirm-

ing the decree for specific performance. See *Tobin v. Larkin*, 183 Mass. 389, 67 N. E. 340.

The plaintiff avers that at about the time of the filing of the original bill a notice of his pendency was filed in the registry of deeds, and further avers that, in addition to this constructive notice, Lynch, as well as the other defendants in the original suit, had actual notice of the litigation. He also says that he had no notice of the proceedings for partition until after the sale, and that the advertisement of sale was purposely framed and published in a manner to afford him no notice, and with the intent to evade the decree on the original bill. The plaintiff prays that he may have the benefit of the original suit, and the proceedings under it, as against the defendant Lynch, and that the order for a decree in the original case "may be carried into execution as between the parties to this suit, as between the parties to the original suit," and for other relief. The defendants filed a demurrer, which was overruled, and a decree was entered for the plaintiff that, upon the payment or tender of a specific sum to the defendants or either of them, or to their attorneys of record or either of them, they should execute and deliver to the plaintiff a quitclaim deed of the premises, free from incumbrances made or suffered by them or either of them, and that the plaintiff shall be allowed his costs. From the decree overruling the demurrer, and from the final decree, the defendants appeal.

If the purpose of this bill is to establish the right of the plaintiff to have his share of the proceeds of the sale upon the payment of the sum due under the contract, it is plain that he is entitled to the relief sought. But we infer from the statement, the language of the prayer, from the decree, and from the arguments before us, that he desires to set aside the sale, and to have his share of the property without regard to the proceedings for partition. In this view the question is whether the bill states facts that entitle him to this relief. Martin Larkin, who is not joined in this supplemental bill, had a right to have a partition which should give him his share in severalty. *O'Brien v. Mahoney*, 179 Mass. 200, 60 N. E. 493, 88 Am. St. Rep. 371. The notice of his pendency and his actual knowledge of the pending litigation did not deprive him of this right. He brought his petition for partition, and, if all the proceedings had been regular, the judgment for partition and for a sale under Rev. Laws, c. 184, § 47, because the land could not be advantageously divided, would have been "conclusive as to the rights of property and possession of parties and privies to the judgment, including all persons who might by law have appeared and answered," with certain exceptions which are immaterial to this case. Rev. Laws, c. 184, § 22. *Foster v. Abbot*, 8 Metc. 593. *Hathaway v. Thayer*, 8 Allen, 421. Section 47 of this chapter, which relates to sales where the land cannot be

conveyance shall be conclusive against all parties to the proceedings for partition and those claiming under them." This plaintiff is therefore bound by the proceedings, unless there is ground for setting them aside. By section 4 of this chapter it is provided that "the petition shall set forth the rights and titles so far as known to the petitioner, of all persons interested who would be bound by the partition, stating whether they have an estate of inheritance for life or for years, whether in possession, remainder or reversion, and whether vested or contingent. If the petitioner holds an estate for life or years, the remainderman or reversioner shall be so interested and shall be entitled to notice." It is a question not free from difficulty whether the petitioner is "one of the persons interested who would be bound by the partition," within the meaning of this section. If the provision in the statute for a statement by the petitioner in regard to the nature of the estate describes in terms every kind of interest that will be bound by the partition and that should be set forth in it, then, plainly, the plaintiff is not a person interested within the meaning of the section. He is an equitable owner of eleven-twelfths of the property, subject to a liability to pay the contract price, and his claim is adverse to the holders of the record title. If such an owner is not a person interested within the meaning of the statute, the decree of the probate court, so far as appears, was obtained regularly. If he is a person interested, it was the duty of the petitioner for partition, who knew of the plaintiff's relation to the property, to set it forth in the petition so that notice should be given to him under the next section. If the failure of the plaintiff to do this was an irregularity in the proceedings in the probate court, can it be taken advantage of in this suit?

A decree of the probate court, within its jurisdiction, is good unless it is set aside, and it cannot be attacked collaterally. *Gale v. Nickerson*, 144 Mass. 415, 11 N. E. 714; *Tucker v. Flisk*, 154 Mass. 574, 28 N. E. 1051; *Harris v. Starkey*, 176 Mass. 445, 57 N. E. 698, 79 Am. St. Rep. 322; *McCooley v. New York, New Haven & Hartford Railroad*, 182 Mass. 205, 65 N. E. 62. The sale under the decree for partition was legal and binding. Mere knowledge by the purchaser of the pending litigation in equity does not invalidate his purchase, so long as the decree for sale remains unrevoked. *Foster v. Abbot*, 8 Metc. 596. If the plaintiff desires to set aside the sale, his remedy, if he has any, is to apply to the probate court to revoke the decree as obtained without notice to him, through the failure of the petitioner to perform the duty imposed upon him by the statute. Whether the facts will entitle him to such a revocation is a question not now before us. If the decree ought to be revoked as against the petitioner Martin Larkin, the

edge of the defendant Lynch charges him with equities so far that his purchase makes no difference with the plaintiff's rights, and that, therefore, revocation will be ordered as if no sale had been made. This will be a question for the probate court, which we cannot here attempt to decide.

The bill states that "the advertisement of said sale was purposely and designedly framed and published in such a manner as to afford the plaintiff no notice of said proceedings and sale in partition, and with the intent to evade the decree on said original bill." But there is no averment that the defendant Lynch was a party to this wrong, or had any knowledge of it. As against him it does not warrant us in treating the sale as void on the ground of fraud. Unless the sale is set aside in connection with the revocation of the decree of the probate court, or in some other way, Lynch will be entitled to retain the benefits of his bargain.

The decree of the superior court should be reversed, and, upon the interpretation given to the bill by the parties, the demurrer should be sustained.

So ordered.

(187 Mass. 306)

KEYES v. BRACKETT et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 7, 1905.)

MECHANICS' LIENS—DISSOLUTION BY GIVING BOND—FRAUD IN EXECUTION OF BOND— EQUITABLE RELIEF.

1. Where the owner of property chargeable with a mechanic's lien fraudulently conveyed to an irresponsible person, and procured him, as principal, and two other irresponsible persons, who falsely justified as sureties, to execute a bond to dissolve the lien, under Rev. Laws, c. 197, § 28, the lienor was entitled to equitable relief by decree canceling the bond, and forbidding the grantee from claiming any rights thereunder, and ordering a release of all rights acquired by its approval and record.

Appeal from Superior Court, Suffolk County; Henry N. Sheldon, Judge.

Bill by William F. Keyes against William C. Brackett and others. From a decree overruling defendants' demurrer, they appeal. Affirmed.

M. J. Creed, J. Porter Crosby, and Walter A. Bule, for plaintiff. Hollis R. Bailey and Chas. B. Sias, for respondents.

KNOWLTON, C. J. This case comes before us on the defendants' demurrer. The bill states that the plaintiff has a claim on which is now due the sum of \$4,080 for labor and materials performed and furnished in the erection of a building on land owned by the defendant McDaniel; that the former owners of the estate, with whom McDaniel made his contract, were adjudged bankrupts, and are financially worthless; and that a petition is now pending in the superior court

to enforce his lien. According to the averments of the bill, the defendant McDaniel conveyed the property to the defendant Brackett simply for the purpose of having him sign a bond to dissolve the plaintiff's lien, as principal—Brackett being of no financial ability—and he now holds the property for the benefit of McDaniel. All the defendants (McDaniel, Brackett, Lo Cascio, and Harmon) then fraudulently conspired together to procure the approval by a master in chancery of a worthless bond to dissolve the plaintiff's lien. Brackett, the holder of the legal title to the property, as principal, and Lo Cascio and Harmon, as sureties, signed a bond in the sum of \$6,000, running to the plaintiff, for the dissolution of the lien. In pursuance of this conspiracy, each of the defendants Lo Cascio and Harmon, at a hearing before a master in chancery upon an application for the approval of the bond, with the knowledge of the defendants Brackett and McDaniel, falsely, willfully, knowingly, and corruptly testified under oath that he owned certain property specifically described by him, of a value greatly in excess of \$6,000, whereas, in truth, neither of them had or now has any property or money or is of any financial ability, but each of them is absolutely worthless and wholly unable to perform the condition of the bond. In this way they procured the approval of the bond, which was afterwards recorded in the registry of deeds. See Rev. Laws, c. 197, § 28. If these averments are true, a gross fraud was perpetrated upon the plaintiff and the magistrate. It is plain that the plaintiff has no complete and adequate remedy at law, and the question is whether he can have relief in equity.

The chief argument against granting relief is that the fraud was perpetrated in connection with a hearing before a magistrate, who was acting judicially, and that it entered into his finding, which is conclusive upon the parties. We appreciate the importance of the rule that a judgment of a court cannot be set aside by another tribunal merely because of false testimony, fraudulently introduced, which was considered and perhaps believed at the trial. Ordinarily a fraud which will warrant a court in setting aside a judgment must be extrinsic to a trial, rather than in the matters presented for consideration as a part of the trial itself. *Greene v. Greene*, 2 Gray, 361, 61 Am. Dec. 454; *Edson v. Edson*, 108 Mass. 590, 11 Am. Rep. 393; *United States v. Throckmorton*, 98 U. S. 61, 25 L. Ed. 93; *Vance v. Burbank*, 101 U. S. 514, 25 L. Ed. 929; *Steel v. Smelting Company*, 106 U. S. 447, 1 Sup. Ct. 389, 27 L. Ed. 226; *Gray v. Barton*, 62 Mich. 186-196, 28 N. W. 813-817; *Folsom v. Folsom*, 55 N. H. 78; *Hass v. Billings*, 42 Minn. 63-67, 43 N. W. 797-799; *Pico v. Cohn*, 91 Cal. 129, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159. The reasons for this rule, in trials of cases upon formal pleadings, where

usually there is either a right of appeal or an opportunity for other revisory proceedings before the case is finished, do not apply with so much force to a hearing before a magistrate upon an application to approve a bond. Such a hearing is not had upon pleadings in which issues are stated, that give an opportunity for preparation. It is commonly had upon short notice, and usually the testimony cannot be anticipated, nor is there an opportunity to meet it. If a certificate of approval is made, the jurisdiction of the magistrate is ended, there is no opportunity to appeal, and neither the magistrate himself, nor any other magistrate or court, has any power to review the proceedings and correct errors. The opportunity for fraud is open, and there is no effectual way of meeting and overcoming it. In view of these conditions, we are of opinion that the present case should not be treated exactly like a case of similar fraud committed in an ordinary trial in a court.

The bill states a case of fraud, which is something more than an intentional introduction of false testimony in an ordinary trial. In the first place, the owner, McDaniel, exercised his legal right to convey the property to an irresponsible person, with a view of making him the principal on a bond that should be worthless. This was a matter with which the master in chancery had nothing to do, and of which, presumably, he had no knowledge. No harm would have come from it if proper sureties had been furnished, or if they had testified truly. With this plan, which fraudulently represented Brackett to be the true owner, and which deprived the bond of strength that it should have had, he coupled the conspiracy to deceive the plaintiff and the magistrate by the perjury of the sureties. The result is an instrument which in every part is false and fraudulent, in reference to the objects for which such instruments are supposed to be made. In view of the consequences that naturally come from such a fraud, and of the fact that there is no way of avoiding these consequences so long as the instrument is permitted to stand, and of the further fact that no rights of innocent parties have intervened, we are of opinion that the plaintiff should have relief in equity. *Currier v. Esty*, 110 Mass. 536; *Billings v. Mann*, 156 Mass. 203, 30 N. E. 1136; *Weeks v. Currier*, 172 Mass. 53, 51 N. E. 416; *Brooks v. Twitchell*, 182 Mass. 443, 444, 65 N. E. 843, 844, 94 Am. St. Rep. 662; *McAveney v. Brush*, 1 App. Div. 97, 34 N. Y. Supp. 101, 37 N. Y. Supp. 105; *Hibbard v. Eastman*, 47 N. H. 507, 93 Am. Dec. 467; *Craft v. Thompson*, 51 N. H. 536-542.

If substantial grounds for granting relief are established, there is no doubt of the power of the court to devise an effectual method of giving to the plaintiff his rights. The bond may be ordered canceled, and the defendants McDaniel and Brackett, and those holding under them, enjoined from claiming

may be ordered to execute a release of all rights acquired under the bond, and a discharge of the benefits which the statute would give them as owners of the real estate by reason of the execution, approval, and recording of the bond, which may be recorded in the registry of deeds. Similar relief has been granted in many cases. *Willcox v. Foster*, 132 Mass. 320; *Bruce v. Bonney*, 12 Gray, 107, 71 Am. Dec. 739; *Short v. Currier*, 150 Mass. 372, 23 N. E. 106; *Cross v. Beddingfield*, 12 Simons, 35; *Hamilton v. Cummings*, 1 Johns. Ch. 517.

We are of opinion that the demurrer was rightly overruled, and that the defendants should answer over. So ordered.

(187 Mass. 323)

SMITH v. WOOD, Mayor, et al.

(Supreme Judicial Court of Massachusetts.
Essex. Jan. 11, 1905.)

MUNICIPAL CORPORATIONS — POLICEMEN — TERM OF OFFICE — REPEAL OF STATUTE.

1. St. 1869, p. 441, c. 61, § 12, as amended by St. 1887, p. 978, c. 357, providing for the appointment of police officers to hold office till they resign or are removed for cause, is repealed by implication by St. 1894, p. 557, c. 480, covering the whole subject-matter of the police force, and providing for appointment of the whole force for terms of four years.

2. St. 1904, p. 266, c. 314, § 1, providing that every person holding office classified under the civil service rules "shall hold such office * * * and shall not be removed therefrom" without his consent, except for cause, does not enlarge the term of police officers, who by provision of page 557, c. 480, § 2, St. 1894, are to be appointed for a term of four years.

Case Reserved from Supreme Judicial Court, Essex County; Henry K. Bradley, Judge.

Mandamus by Smith against Wood, mayor, and others. Case reserved for the full court. Petition denied.

John J. Winn, for petitioner. Essex S. Abbott, for defendants.

LATHROP, J. This is a petition for a writ of mandamus against the mayor of the city of Haverhill, the board of aldermen, and the committee on police of that city, and also one Radcliffe, who was appointed a policeman of that city, in place of the petitioner on October 6, 1904. The relief prayed for is that a writ of mandamus should issue commanding all the respondents except Radcliffe to recognize the petitioner as a member of the police force of the city of Haverhill, to permit him to perform the duties of his office, and to cease to recognize Radcliffe. Relief is also prayed against Radcliffe, commanding him to abstain from acting as a member of the police force and from usurping the office of the petitioner. The case was reserved by a single justice of this court for our consideration upon the pleadings and certain agreed facts.

regular police force in the year 1890, and has continued as such until October 6, 1904, when the respondent, Radcliffe, was appointed in his place. The original appointment of the petitioner was under the provisions of the city charter (St. 1869, p. 441, c. 61, § 12, as amended by St. 1887, p. 978, c. 357). The original act gave to the mayor and aldermen "full and exclusive power to appoint a constable or constables, and a city marshal and assistants, with the powers and duties of constables, and all other police officers, and the same to remove at pleasure." The amendatory act inserted after the word "pleasure" the following: "Provided that all members of the regular police force except the city marshal shall hold their respective offices until they resign therefrom or are removed by the mayor and aldermen for sufficient cause and after a due hearing." St. 1894, p. 557, c. 480, which took effect on July 1, 1895, in section 1 provides: "The police department of the city of Haverhill shall consist of the city marshal and such assistants and regular police officers as the mayor and aldermen shall from time to time determine." Section 2 provides, on July 1, 1895, and in the month of July in each fourth year thereafter, for the appointment of a marshal, subject to confirmation by the board of aldermen, "whose term of office shall commence with the first Monday in July in the year of his appointment, and continue for four years, and until his successor has been confirmed." The section then proceeds as follows: "Said mayor shall also on said first Monday in July in the year eighteen hundred and ninety-five appoint, subject to like confirmation, the whole number of regular police officers authorized to be appointed in said city, and shall divide such number of appointees into four equal divisions, one division to serve for a term of one year, one division for a term of two years, one division for a term of three years and one division for a term of four years from the date of confirmation and until their respective successors are confirmed. And thereafter, as the terms of the regular police officers so appointed expire, the mayor shall appoint, subject to confirmation by said board, their successors for a term of four years." This act, by section 8, was to take effect on July 1, 1895, provided it was accepted by the qualified voters of the city at the annual municipal election in December, 1894. The act was duly accepted. The city of Haverhill voted that the regular police force consist of 28 men, and thereafter, on July 1, 1895, the petitioner was duly appointed and confirmed as a regular police officer under the provisions of said act, and in the years 1896 and 1900 the petitioner was duly appointed and confirmed for terms of four years. The petitioner was also sworn to the faithful performance of his duties as an officer

under these appointments. The last-mentioned term of the petitioner expired on the first Monday of July, 1904, and he was not thereafter reappointed, but he continued to hold over until his successor was appointed on October 6, 1904.

The first contention of the petitioner is that as St. 1869, p. 441, c. 61, § 12, as amended by St. 1887, p. 978, c. 357, was not expressly repealed by St. 1894, p. 557, c. 480, he could not be removed except for sufficient cause, and after a due hearing. But we have no doubt that so much of the earlier statutes as related to the police force was repealed by implication by the Statutes of 1894, which covered the whole subject-matter of the police force. *Bartlet v. King*, 12 Mass. 537, 545, 7 Am. Dec. 99; *In re Ashley*, 4 Pick. 21, 23; *Nichols v. Squire*, 5 Pick. 163; *Commonwealth v. Cooley*, 10 Pick. 87, 39; *Commonwealth v. Kelliher*, 12 Allen, 480, 481.

The petitioner further contends that as St. 1894, p. 553, c. 480, § 7, makes all appointments of regular police officers under the act subject to the provisions of St. 1884, p. 346, c. 320, and the acts in amendment thereof and in addition thereto, he is entitled to his office under St. 1904, p. 286, c. 314. Section 1 of this act reads as follows: "Every person holding office or employment in the public service of the commonwealth or in any county, city or town thereof, classified under the civil service rules of the commonwealth, shall hold such office or employment and shall not be removed therefrom, lowered in rank or compensation, or suspended, or, without his consent, transferred from such office or employment to any other except for just cause and for reasons specifically given in writing." It is agreed that the office or employment of a member of the regular police force of the city of Haverhill is and has been since March 13, 1885, an office or employment in the public service of the city classified under the civil service rules of the commonwealth. But section 1, St. 1904, p. 286, c. 314, does not purport to change the provisions of St. 1894, p. 557, c. 480, § 2, for the appointment of public officers, nor to limit or extend their term of office. We are of opinion that the words, "shall hold such office or employment, and shall not be removed therefrom," refer to the office or employment to which such person has been elected or appointed and to the term of such office or employment, and does not apply to an officer whose term of office has expired. Any other construction would enlarge an appointment for a term of years into a life tenure, provided it was a classified office under the civil service rules.

The agreed fact that the petitioner always considered himself as holding office under his original appointment of July 31, 1890, is wholly immaterial.

Petition denied.

BRADLEY v. PRUDENTIAL INS. CO. OF AMERICA.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 5, 1905.)

LIFE INSURANCE—BENEFICIARY—POLICY—CONSTRUCTION.

1. Under an industrial life insurance policy, the insurer promised to pay the amount insured to the executors, administrators, or assigns of the insured, "unless settlement shall be made under the provisions of article second." Article 2 provided that the insurer might "pay the sum of money insured hereby to any relative by blood or connection by marriage of the insured, or to any other person appearing to" the insurer to be equitably entitled thereto by reason of having incurred expense in any way on behalf of the insured for her burial or for any other purpose, and that the production by the insurer of a receipt signed by any of such persons should be conclusive evidence that the money had been paid to the persons entitled thereto, and that all the claims under the policy had been satisfied. In an action on the policy by the administrator of insured, it appeared that the insured had, after separation from her husband, gone through a form of marriage with another man, and that they lived together as husband and wife until the time of her death. Her putative husband paid some of the premiums on the policy, and at her death paid her funeral expenses; and the insurer, with knowledge of such payments, in good faith paid to him the amount due on the policy, and took his receipt therefor. *Held*, that the receipt of such person, under the circumstances, was a bar to the action by insured's administrator.

Appeal from Superior Court, Suffolk County.

Action by one Bradley, administratrix of Mary Sawyer Murphy, deceased, against the Prudential Insurance Company of America. From a judgment for defendant, plaintiff appeals. Affirmed.

John F. Lynch and Danl. H. Bradley, for appellant. Chas. T. Cottrell, for appellee.

BARKER, J. This suit upon an insurance policy, of the kind commonly known as industrial insurance, after having been decided in favor of the defendant upon a hearing upon a statement of agreed facts, is here upon the plaintiff's appeal.

The policy was on the life of one Mary Sawyer, and was issued upon her own application in the year 1896. She was then the wife of one Henry C. Sawyer, and continued to be his wife until the time of her death, on September 25, 1902. After taking out the policy, she and her husband separated and lived apart. After the separation, she and one Murphy went through the form of marriage, and lived together as husband and wife until the time of her death; she being known as Mary Sawyer Murphy. The weekly premiums on the policy were paid partly by her, and partly by Murphy with money received from her, and partly by Murphy with his own money. The amount of premiums paid by him is unknown. After her death he paid her funeral expenses,

amounting to \$158. He made and delivered to the company the usual proofs of death during the first part of October, 1902, and on or about October 14, 1902, the full amount due on the policy, \$507.50, was paid to him by the company. He had paid the funeral expenses before he received that payment, and that fact was known to the company when it made the payment to him. The proofs of death stated that he was the husband of the deceased. The company claims that the payment to him was made under the clause of the policy entitled "Article Second," and believed that he was the person who best fulfilled the requirements of that article, inasmuch as he had paid a part of the premiums, and had incurred and paid the expenses of the burial of the insured, his alleged wife. It is further agreed that all the acts of the company were in good faith, and that the only question for the consideration of the court is whether or not the payment to Murphy is a defense to this suit. After that payment the rightful husband of the insured demanded payment of the amount of the policy from the company, and, the demand being refused, the plaintiff was appointed administrator of the estate of the insured, and brought this suit. It is agreed that, if the payment to Murphy is a full and complete bar to the plaintiff's claim, judgment is to be entered for the defendant. If that payment is not a legal defense, it is agreed that the plaintiff shall have judgment for \$507.50, and interest from October 12, 1902.

The promise made by the company in its policy is to pay a certain sum to the executors, administrators, or assigns of the insured, "unless settlement shall be made under the provisions of article second herein-after contained." If, then, such settlement has been made, the contract has been performed according to its tenor, and the plaintiff cannot recover, because there has been no breach. The article is as follows: "Second. The Company may pay the sum of money insured hereby to any relative by blood or connection by marriage of the insured, or to any other person appearing to said Company, to be equitably entitled to the same by reason of having incurred expense in any way on behalf of the insured for his or her burial or for any other purpose, and the production by the Company of a receipt signed by any or either of said persons, or of other sufficient proof of such payment to any or either of them shall be

conclusive evidence that such sum has been paid to the person or persons entitled thereto, and that all claims under this Policy have been fully satisfied." A receipt of Murphy for the sum of \$507.50 from the company, reciting that the payment is in full for all claims against the company under the policy, is part of the statement of agreed facts. We think that the claim of Murphy made in the proof of death, and the payment made by the company, claiming to act in so doing under the provisions of the article quoted—it being agreed that all the acts of the company were done in good faith—was a complete performance by it of its contract of insurance. Under the circumstances as they are disclosed in the statement of agreed facts, there is no promise to pay to the plaintiff, and the payment stipulated for has been made in accordance with the terms of the policy. The plaintiff contends that Murphy was not equitably entitled to the payment. But the stipulation is not as to payment to one in fact equitably entitled to payment, but is as to payment to any person appearing to the company to be equitably entitled to the same. Such stipulations are common in industrial policies, the amounts of which always are small; and one purpose of them is to enable the amount of the policy to be paid very speedily after the death of the insured, without the delay or expense of taking out administration, and another purpose is to remove the chance of litigation between claimants. The insurance being taken out by the person whose life is insured, and the person to whom the policy is paid under the provisions of such articles being either a relative or in the position of a creditor, we see no ground for holding such an article void as against public policy. In effect, the article gives the company power, acting in good faith, to discharge its debt and perform its contract by making payment to any person who is a relative by blood or marriage of the insured, or who has incurred expense for the insured. See *Thomas v. Prudential Ins. Co. of America*, 148 Pa. 594, 24 Atl. 82; *Metropolitan Ins. Co. v. Schaffer*, 50 N. J. Law, 72, 11 Atl. 154. In *Shea v. U. S. Industrial Ins. Co.*, 23 App. Div. 53, 48 N. Y. Supp. 548, the company, in making payment under a similar article, acted in bad faith, with the purpose of cheating the person who had paid the premiums, and to whom it had promised to make payment under the article.

Judgment for defendant affirmed.

TOWNSEND v. CITY OF BOSTON.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 7, 1905.)

TRIAL — ADMISSION — EFFECT — CARRIERS — FERRIES — NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY — PROXIMATE CAUSE — INTERVENING NEGLIGENCE OF THIRD PERSON.

1. Inasmuch as, under St. 1869, p. 497, c. 155, the city of Boston may operate the ferry from Boston to East Boston in part for profit, and be subject to the liabilities of a carrier, or use it otherwise, where, in an action against the city for injuries from negligence in the operation of the ferry, it was admitted that the city was a common carrier, in the absence of other evidence the city must, under the admission, be held to the ordinary duties and liabilities of a carrier.

2. In an action against a carrier operating a ferry for injuries owing to a wagon preceding plaintiff's vehicle in leaving the ferry having run back on the inclined drop and collided with plaintiff's vehicle, *held* that, under the evidence, whether there was negligence on the part of defendant's deck hands, in failing to block the wagon, was a question for the jury.

3. Under the evidence, it was a question for the jury whether plaintiff was in the exercise of due care.

4. Under the evidence, *held* a question for the jury whether defendant had made reasonable provision for passage from the boat to the wharf by teams.

5. One is liable for injuries of which his negligence was the proximate cause, though the negligence of a third person contributed to the injury.

Exceptions from Superior Court, Suffolk County; J. Fox, Judge.

Action by Walter C. Townsend against the city of Boston. Verdict for defendant, and plaintiff brings exceptions. Exceptions sustained.

Edwd. S. Townsend, for plaintiff. Samuel M. Child, for defendant.

KNOWLTON, C. J. The plaintiff was a passenger, with his horse and wagon, upon a ferryboat crossing from Boston to East Boston on October 24, 1900. The ferry is owned and operated by the city of Boston, which purchased it of the East Boston Ferry Company under St. 1869, p. 497, c. 155, and with it the franchise of the corporation. The bill of exceptions says: "It was admitted that the city of Boston was a common carrier of passengers and their property for hire across said ferry." It was proved that tolls were charged for carrying passengers. Under this statute the city could maintain and operate a ferry in part for profit, and be subject to all the liabilities of a common carrier, although there is alternative authority to use it otherwise. In the absence of other proof in regard to the use and management of the ferry by the city, we must, under the admission above quoted, hold the city subject to the ordinary duties and liabilities of a common carrier.

A little in front of the plaintiff's horse on

the boat was a large wagon, drawn by two horses, containing a load of five tons of fish. The tide was very low, and when they reached East Boston a drop 115 feet long was let down upon the boat, up which there was a steep ascent to the wharf. This heavy team started up the drop, and, when it had gone about two-thirds or three-quarters of the distance, the horses stopped, and the wagon soon ran back and collided with the plaintiff's horse, which was following. This suit is brought to recover damages for the consequent injury. The judge directed a verdict for the defendant, in part, as we understand, on the ground that the city owed the plaintiff no duty to make provision against the running back of the team in front of him, and in part on the ground that he was not in the exercise of due care.

It was testified that there was a motor, with gearing, in a large headhouse there, that was often used to help heavy teams up the drop, which at low tide was very steep, and that was used to draw up this load of fish after the accident. The superintendent of ferries also testified that it was a custom, and practically the rule, for deck hands to follow the teams and to "chock" them; that is, be ready to "block" them in case they should roll back or get stuck on the drop. He also said that blocks laid on the end of the boat are provided for that purpose. There was testimony that the driver of the fish team called out to Donovan, one of the deck hands, to block him, as he started up the drop, and the jury might have found that there was negligence on the part of the deck hands in failing properly to do this.

We have no doubt that it was the duty of the city, as a common carrier for hire, upon the facts stated in the bill of exceptions, to make reasonable provision for passage from the boat to the wharf by teams, and we are of opinion that it was a question for the jury whether the defendant's agents or servants neglected this duty. If the defendant's negligence was a direct and proximate cause of the accident, the defendant is liable, even if the negligence of a third person contributed to the injury.

We are also of opinion that it was a question for the jury whether the plaintiff was in the exercise of due care. According to the testimony, he did not start his horse until the other team had got two-thirds or three-quarters of the distance up the drop, and he was stopped fully 50 feet behind the fish team when it began to roll back. Other teams were crowding up behind him. As he started to go up, he saw Donovan, who had been asked to block the team, standing there; and Donovan afterwards, according to the testimony, got a small block and attempted to do it when it was too late. We are of opinion that the evidence should have been submitted to the jury.

Exceptions sustained.

¶ 5. See Negligence, vol. 37, Cent. Dig. §§ 74, 75.

(187 Mass. 245)

ROSEN v. CITY OF BOSTON.(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 8, 1905.)**CARRIERS OF PASSENGERS—NEGLIGENCE—SUFFICIENCY OF EVIDENCE.**

1. The undisputed evidence that plaintiff was injured by slipping on a piece of ice frozen to the deck of defendant's ferryboat made out a prima facie case for plaintiff, and entitled her to recover, in the absence of evidence as to the temperature showing that the ice might have frozen during that trip of the boat.

Exceptions from Superior Court, Suffolk County.

Action by one Rosen against the city of Boston for personal injuries. There was judgment for plaintiff, and defendant brings exceptions. Exceptions overruled.

Daggett, Young & Jefferson, for plaintiff.
Philip Nichols, Asst. Corp. Counsel, for defendant.

LORING, J. In this case the plaintiff slipped on a piece of ice on the deck of one of the defendant's ferryboats. She was a passenger at the time from East Boston to Boston, together with her mother and sister-in-law. They had left the ladies' cabin, and were on their way over the open space for foot passengers forward of the house containing the cabin, when she slipped and fell so violently as to throw her baby, which she had in her arms, over onto her back. She described the piece of ice as a thin piece about the size of a cake of soap, about three inches long and an inch and one-half wide. Her mother (who was the only other witness) testified that after the plaintiff fell she went to see "what was the reason she fell there." She described the piece of ice as the plaintiff did, and added that she tried to pick it up, but could not, because it was frozen to the deck; that "it was about as thick as your finger," and "in the middle it was a little higher." The accident happened on or about January 25, 1902. The defendant conceded that it was liable as a common carrier, and put in no evidence in defense except the statement of its examiner of claims that he was told to investigate the case, and had been unable to find out anything about it, but asked for a verdict on the testimony of

the plaintiff and her mother. This was denied, and the jury found for the plaintiff. The case is here on an exception to the refusal of the judge to direct a verdict for the defendant.

We are of opinion that the plaintiff made out a prima facie case. No evidence having been put in as to the temperature, it must be taken to have been ordinary winter weather. In ordinary winter weather, such a piece of ice frozen to the deck so that it could not be picked off would not have frozen while the boat was running from East Boston to Boston, as the defendant contends might have been the case. That takes the case out of *Goddard v. B. & M. R. R.*, 179 Mass. 52, 60 N. E. 486. And we are of opinion that in respect to keeping this part of the deck in a fit condition for passengers going over it, the degree of care due on the part of a common carrier is greater than that due from a town to keep its highways free from defects, both from the fact that this passageway is small, that passengers go over it in a crowd, and that the defendant's liability is conceded, for the purposes of this case, to be that of a carrier of passengers. That would distinguish this case from *Stanton v. Salem*, 145 Mass. 476, 14 N. E. 519, the other case in this commonwealth principally relied on by the defendant, if that case were not distinguishable on the ground that the statutory liability of a town for a defect in a way is limited to cases where the town might have had notice of the defect complained of by the exercise of proper care.

The only other argument made in defense is the injustice of allowing this plaintiff to recover when she and her other witness testified that they did not know the name of the ferryboat on which the accident happened. The testimony of both witnesses given in the bill of exceptions shows that they were not only illiterate, but ignorant. Without knowing the name of the boat, it must be conceded that the defendant could not practically prepare a part of its defense. But it was for the jury to say whether this proceeded from the ignorance of the plaintiff and her mother or was evidence that the whole claim was a fraud.

Exceptions overruled.

(Court of Appeals of New York. Dec. 30, 1904.)

MURDER—DELIBERATION—PREMEDITATION—INSTRUCTION.

1. Evidence held sufficient to justify a finding of deliberation and premeditation supporting a verdict of murder in the first degree.

2. On a trial for murder, an instruction that there is no space of time necessary within which premeditation and deliberation must occur does not constitute reversible error where it is apparent that the instruction meant that no particular length of time was necessary, and the jury was also instructed that there must be a deliberate design to effect death, which must precede the homicide, and that the question as to whether there was such deliberation was one exclusively for the jury.

Appeal from Court of General Sessions, New York County.

Adolph Koenig was convicted of murder, and appeals. Affirmed.

Andrew C. Morgan, Frederick A. Ware, and Phill Waldheimer, for appellant. William Travers Jerome, Dist. Atty. (Robert C. Taylor, of counsel), for the People.

CULLEN, C. J. The defendant was convicted of the crime of murder in the first degree in having caused the death of one Mary Kaufmann on the 3d day of May (Tuesday), 1904. At the time of the homicide the defendant and the deceased were living together adulterously, the deceased having abandoned her husband to live with the defendant about four months previously. It is very clear that the deceased at this time was substantially plying the trade of a common prostitute. The parties were living in a flat which consisted of four rooms—in front, on the street, a sitting room; back of that a bedroom; back of this bedroom another bedroom; and, finally, in the rear of the apartment, a kitchen. A door led from each room into the adjoining room. On Sunday, the 1st of May, one Henry W. Haas, who was employed as a bartender at the Army and Navy Club, with his wife, Lillie Haas, went to lodge with the deceased. Haas and his wife occupied the rear bedroom adjoining the kitchen, while the deceased and the defendant occupied the one adjoining the sitting room. That evening the defendant, the deceased, and Mrs. Haas went out to supper together, and on their return to the apartment the defendant and the deceased began to quarrel about the latter returning to her husband. Mrs. Haas testified that on that occasion the defendant picked up a table knife, and, seizing the deceased by the throat, said, "I will fix you yet." On Monday morning Kaufmann, the husband of the deceased, came to the flat, and had a conversation with his wife, in which, as he testified, she promised to return to him. On Monday evening the deceased, the defendant, and Mrs. Haas were in the

between the defendant and the deceased was renewed, she telling him that she had seen her husband, and was going back to live with him, because she had made a mistake in leaving him and her children. The defendant replied, "I will fix you before you go back." Haas returned from his work about 1 o'clock that night, and entered the kitchen. He found the defendant and the deceased still quarrelling. He told them to go to bed; that he wanted a bath. He testified that the defendant "grabbed" the deceased, and said to her, "I will fix you yet," to which she replied, "You will like fun," and with that they left the kitchen, and entered their bedroom, and closed the door. Haas, after having taken his bath, retired to bed, where his wife already was. They heard the deceased and the defendant still quarrelling in the adjoining bedroom, the bed there creaking, and also what Haas described as a "gurgling" noise. Haas started to get up, when his wife told him to mind his own business. The noise ceased, and a few minutes afterwards the defendant passed through their bedroom to the kitchen. Haas heard him searching among the knives kept there, and a few minutes after the defendant returned through the Haas room, and closed the door. Haas and his wife then went to sleep. Early in the morning they were aroused by a call from the adjoining room to go and get an ambulance. They found the woman dead on the bed, lying upon her back. Her face was blue, and there were marks on her throat. She was clad in her chemise, with no covering over her. The defendant also lay in the bed, with a comforter over him. A policeman and an ambulance surgeon were called in. It was found that the defendant had stabbed himself in the abdomen. He was removed to a hospital. An autopsy was held on the body of the deceased, which, according to the testimony of the physicians, showed that she came to her death by strangulation. The medical evidence also showed that pressure on the throat from two to five minutes would be requisite to cause her death. The defendant told the police officers that he had left his wife and three friends in the apartment to go and get some beer, and when he returned he found his wife in bed, apparently dead. The prosecution also proved by the cross-examination of Mrs. Griesman, a witness for the defense, that on the Saturday evening prior to the homicide the defendant and the deceased had a violent quarrel, in which the deceased applied vile epithets to the defendant, and reproached herself for having left her husband to go with him; while the defendant threatened to kill both the witness and the deceased. The story told by the defendant as a witness on his own behalf was substantially this: He denied there had been any quarrels between the deceased and

He said that the deceased had been drinking very hard that night; that after they retired to their bedroom she commenced singing, and wanted to drink more whisky; that he threw away the whisky that was in the room; that deceased then went into the parlor and started to dress, saying she would go out and get some whisky; that he stopped her, saying, "You are not going on the street to-night;" that thereupon she seized a penknife that lay on the table, and cut him on the wrist; that he caught her by the neck, pushed her into the bedroom and threw her on the bed face downwards, saying, "Now, you drunken fool, lay there for a while;" that he took a pillow that was lying there, and threw it on her, and thereupon went through Haas' room; that on his return he spoke to the deceased, and to his "fatal surprise found her dead"; thereupon he went again through Haas' room, got a large knife, and stabbed himself.

The defendant's counsel contends that the evidence was insufficient to authorize a finding of the deliberation and premeditation necessary to constitute murder in the first degree. We think otherwise. That the deceased came to her death at the defendant's hands is not denied. While the testimony of the defendant, if believed, would doubtless reduce the degree of his crime, or possibly even acquit him altogether, there being no eyewitnesses to the occurrence, the circumstances were sufficient to justify the jury in discrediting his story. No blood was seen by the ambulance surgeon upon his wrist, where he states he was cut by the knife in the hands of the deceased. She was found lying on her back on the bed, instead of being on her face. She had nothing on except a sleeveless chemise, instead of being partially dressed to go out on the street. Many other circumstances are inconsistent with his story. In addition to this, we have the repeated threats of the defendant against the deceased, and a motive—his anger at her intended desertion of him and return to her husband. The case in many respects closely resembles that of *People v. Pullerson*, 159 N. Y. 339, 53 N. E. 1119. There, also, the homicide was committed by strangulation, and no one saw the deed done. Yet it was held that, in view of the time required to cause death by strangulation, and the previous threats of the defendant, the question of deliberation was one of fact to be determined by the jury.

The only other questions that it is necessary to discuss on this appeal arise out of the charge of the court as to the time requisite to constitute deliberation. In answer to a request by the prosecution the court charged: "If there be sufficient deliberation to form a design to take life, and to put that design into execution by destroying life, there is sufficient deliberation to constitute murder, no matter whether the design is formed at the

it be contemplated for months. It is enough that the intention precedes the act, although that follows immediately." This request is a literal extract from the opinion of Judge Johnson in *People v. Clark*, 7 N. Y. 385, at page 394. That case arose under the old law (2 Rev. St. p. 656, §§ 4, 5), and before the Legislature had made deliberation as well as premeditation a necessary ingredient of murder in the first degree. Nevertheless this very excerpt is quoted with approval by Ruger, C. J., in *People v. Conroy*, 97 N. Y. 62, at page 76, which arose under our present statute. I think very probably it is also to be found in some other recent cases. Despite this approval, I am frank to say that I would be loath to uphold a charge where the proposition formulated by Judge Johnson constituted the only instruction to the jury on the subject of deliberation. It may be logically correct, but it may also be liable to mislead a jury. Probably the best definitions of murder in the first degree under our present law are to be found in the opinions in *Leighton v. People*, 88 N. Y. 117, and *People v. Majone*, 91 N. Y. 211. In the first case Judge Danforth said: "If the killing is not the instant effect of impulse, if there is hesitation or doubt to overcome, a choice made as the result of thought, however short the struggle between the intention and the act, it is sufficient to characterize the crime as deliberate and premeditated murder." In the second Judge Earl wrote: "Under the statute there must be not only an intention to kill, but there must also be a deliberate and premeditated design to kill. Such design must precede the killing by some appreciable space of time. But the time need not be long. It must be sufficient for some reflection and consideration upon the matter, for choice to kill or not to kill, and for the formation of a definite purpose to kill and when the time is sufficient for this it matters not how brief it is. The human mind acts with celerity which it is sometimes impossible to measure, and whether a deliberate and premeditated design to kill was formed must be determined from all the circumstances of the case." I very much question whether these statements of the law can be substantially improved, and I think it would be far wiser for trial courts to adopt these definitions than to refer to cases which arose under different statutes. But the charge of the learned trial judge in this case must be taken as a whole, and its correctness is not to be determined on isolated extracts. *People v. McCallam*, 103 N. Y. 587, 9 N. E. 502; *People v. Dimick*, 107 N. Y. 13, 14 N. E. 178; *People v. Taylor*, 138 N. Y. 398, 34 N. E. 275. While he charged the excerpt from *People v. Clark*, already given, he also charged the law as laid down by Judges Danforth and Earl in the exact language which we have quoted. He then said to the jury: "You must determine from the

tended to kill Mary Kauffmann. If he did intend to kill her, was it premeditated and deliberated? If it was pursuant to such a design to effect her death that he killed her, he is guilty of murder in the first degree. I repeat to you that there is no space of time necessary within which the premeditation and deliberation must occur. It need not be for months, but it must occur. Whether it occurs or not is a question of fact for you, gentlemen, to determine from the evidence in this case." Exception was taken to that part of the language of the trial court already quoted, "that there is no space of time necessary within which the premeditation and deliberation must occur." The language criticised, however, is only part of a sentence which must be construed as a whole. So construed, the fair interpretation is that no particular length or space of time was necessary for deliberation, not that no time at all was necessary. This is apparent from what occurred subsequently. The counsel for the defendant stated that he desired to except to the charge of the court in stating substantially "there is no space of time necessary for premeditation and deliberation before the commission of the act which effected death." To this the court responded: "I don't think I said quite that. I said there was no fixed duration of time necessary. It is necessary for the jury to find there was premeditation and deliberation, but no measured length of time was necessary for them to find that it existed." If there was any danger of the jury misunderstanding the previous instruction of the court, it was entirely removed by this explicit statement. Again and again throughout the charge the jurors were told that, to convict the defendant of the crime charged in the indictment, there must have been deliberation, and that whether there was deliberation or not was a question of fact exclusively for their determination. Reading the charge as a whole, though there are parts of it that might have been better expressed, and possibly still better omitted, we do not see how the jury could fail to understand that, to constitute murder in the first degree, there must be a deliberate design to effect death, and that such deliberation must precede the act.

The judgment of conviction should be affirmed.

GRAY, O'BRIEN, BARTLETT, HAIGHT, MARTIN, and VANN, JJ., concur.

Judgment of conviction affirmed.

(130 N. Y. 171)

KELLEY v. BUFFALO SAV. BANK.

(Court of Appeals of New York. Dec. 30, 1904.)
SAVINGS BANKS—PAYMENT OF DRAFT—NEGLIGENCE—DEATH OF DEPOSITOR.

1. Where, after the death of a depositor in a savings bank, of which fact the bank was igno-

presented, purporting to bear his signature, which was paid by the bank, it is not liable for any error, if it used ordinary care in making payment.

2. Where a savings bank failed to make a physical comparison of a purported signature to a draft with the signature of the depositor on file in the bank, and in point of fact the signature was a forgery, the bank is liable for such payment, for failure to exercise due care and ordinary caution.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Mary Kelley, administratrix of the estate of Ellen Neville, against the Buffalo Savings Bank. From the judgment of the Appellate Division (84 N. Y. Supp. 642) affirming a judgment for defendant, plaintiff appeals. Reversed.

The action is brought by the administratrix of Ellen Neville, deceased, to recover from defendant bank the amount of certain deposits, which, with interest up to the time of the commencement of the action, were said to have amounted to upwards of \$2,100. The material facts, as found by the trial court, and unanimously affirmed by the Appellate Division, are substantially as follows: On the 30th day of January, 1871, the plaintiff's intestate, Ellen Neville, then about 18 or 19 years of age, opened an account with the defendant bank. A bankbook was issued to her in her name, and she signed her name in the signature book kept by the defendant for purposes of identification. At the time when this account was opened there were in force certain rules adopted by the defendant, which were posted in a conspicuous place in its banking room, and also printed in each passbook issued by it. One of these rules provided that "the secretary will endeavor to prevent frauds, but all payments made to persons producing the deposit books or duplicates thereof, shall be good and valid payments to the depositors respectively." Another rule provided that "on the decease of any depositor the amount standing to the credit of the deceased shall be paid to his or her legal representatives when legally demanded." During the lifetime of Ellen Neville she made 16 deposits to the credit of this account, presented her book to the defendant 15 times for the purpose of having interest credited thereon, and drew two checks upon said account, one dated September 22, 1873, for \$335.98, and the other dated July 7, 1877, for \$23.81. These were presented with her passbook, and she received the money thereon. She died on or about the 1st day of December, 1878, at the age of about 25 or 26 years, and at the time of her death there remained to her credit on said account the sum of \$884.43. This is the amount, with compound interest, which the plaintiff seeks to recover in this action. Ellen Neville left, her surviving, her sister, the plaintiff, another sister, named Kate, and her mother. At the time when this account was

opened they all lived together in the city of Buffalo. Each of Ellen's sisters had a bank account of her own. Nearly 23 years after Ellen's death, and on the 22d of May, 1901, the plaintiff applied for and received letters of administration. About 10 years ago the mother and sister Kate became inmates of St. Francis' Asylum for the Aged and Infirm of Buffalo, where they remained until the time of their deaths, which occurred about 2 or 3 years, respectively, before the trial. When they entered this asylum they paid to it the sum of \$1,000. When Ellen died, on December 1, 1878, her bankbook was in the house where the whole family then lived, and was taken possession of by her mother or her sister Kate or the plaintiff. Subsequent to Ellen's death the bankbook was presented to the defendant by the mother or the sister Kate or the plaintiff for the purpose of having interest credited thereon on 10 different occasions between the 1st of January, 1879, to and including July 1, 1883, and on the 4th day of March, 1882, the pass-book was presented by some person unknown to the defendant (such person so presenting said book being the mother, the sister Kate, or the plaintiff), and a deposit of \$70 was duly made and entered therein. Subsequent to Ellen's death the moneys to the credit of this account were paid out by the defendant on five separate drafts or written orders drawn in the name of Ellen Neville, as follows: December 28, 1878, \$41.43; June 2, 1880, \$50; July 30, 1881, \$70.45; August 14, 1883, \$56.62; September 1, 1883, \$937. No part of these moneys was paid to the legal representative or representatives of Ellen Neville, but the payments referred to were made to her mother or to one of her sisters, and the signatures on these five drafts or orders, purporting to be the signatures of Ellen Neville, were not her signatures, but were made by her mother or one of her said sisters. The findings relating to the conduct of the bank officials in the payments of these drafts are as follows: "That by a critical examination and comparison of the said signatures on each of the aforesaid drafts or orders with the true signature of said Ellen Neville, entered and signed as aforesaid in the book of signatures, it would have been apparent to a competent bank officer that neither of the signatures to said drafts or orders was the genuine signature of said Ellen Neville. That, at the respective times at which such drafts or orders were presented to the defendant for payment, the defendant made no critical examination or physical comparison of the signatures thereon with that of the said Ellen Neville entered and signed in the book of signatures of depositors kept by the defendant aforesaid. That said drafts or orders were paid by defendant on presentation of the same with the pass-book, and the defendant made no effort, by a critical examination or physical compari-

son, to ascertain the genuineness of the signatures of any of said drafts or orders, or to ascertain the identity of the person presenting the same. That there does not exist such a disparity or difference between the signature of said Ellen Neville upon the signature book of the defendant and the several signatures upon said five checks, or any or either of them, as to create doubt or misgiving concerning the genuineness of said five signatures, or any or either of them, in the mind of a competent and reasonably careful bank officer, when presented by a person unknown to him with the bankbook, and therefore the defendant exercised due care and caution, and was not guilty of negligence, in paying the five checks in question, nor in paying any or either of them." These findings of fact were followed by the legal conclusion that the complaint should be dismissed, and the judgment entered thereon has been unanimously affirmed by the Appellate Division.

Harry D. Williams, for appellant. Adolph Rebadow, for respondent.

WERNER, J. (after stating the facts). Upon the foregoing facts the trial court dismissed the complaint. At the Appellate Division the judgment entered upon that decision was unanimously affirmed. This court must therefore assume that every fact found is based upon sufficient evidence (*Marden v. Dorthy*, 160 N. Y. 39, 54 N. E. 723, 46 L. R. A. 694; *Reed v. McCord*, 160 N. Y. 330, 54 N. E. 737; *People ex rel. Manhattan Ry. Co. v. Barker*, 152 N. Y. 417, 46 N. E. 875), and the judgment must be sustained unless the conclusion of law upon which it is predicated is erroneous, or other fatal errors affect the rulings made upon the trial.

The immediate question presented by this appeal is whether, upon the record before us, the plaintiff is entitled to recover; and, as the decision of this question necessarily involves an inquiry into the duties and responsibilities of savings banks toward their depositors, the case is one of more than ordinary professional interest and practical importance. Savings banks are prominent factors in our modern business life. Many of them count their deposits by the millions, and number their depositors by the thousands. Many, if not most, of these depositors are persons in the humbler walks of life, living in widely scattered sections of their respective communities, visiting the banks infrequently, having no personal acquaintance with bank officials or employes, and no convenient or satisfactory means of immediate identification when their identity is questioned. These conditions are in striking contrast with those which prevail in the intercourse between the officers and employes of discount banks and their patrons. The majority of the latter are persons actively engaged in business, making daily or at least

Their signatures are familiar to the officers and employes of the banks, and if, now and then, there is need of identification, it can usually be furnished without much difficulty. These considerations clearly indicate the difference between the two classes of banks, as well as the necessity for the law which permits savings banks to adopt reasonable rules, adapted to the nature of their business, which rules, when properly adopted and promulgated, are binding upon them, their depositors, and those who succeed to their interests. Outside of these special rules, however, there are many questions affecting the interests of savings banks and their depositors which must be determined by broad and comprehensive legal rules of general application. One of these questions arises out of the relations between savings banks and the legal representatives of deceased depositors. What degree of care must a savings bank exercise in paying money out of a depositor's account after his death, upon the production of his passbook, and the presentation of a draft purporting to bear his signature, when the bank has had no actual notice of the depositor's death, and nothing has transpired to charge it with knowledge of that fact? That is the question which underlies all other questions in this case.

In view of what has been said concerning the relations of savings banks and their depositors towards each other, it becomes obvious that any general rule that would require savings banks to act in such circumstances at their peril, without regard to the degree of care exercised, would ultimately cast as great a burden upon depositors and their legal representatives as upon the banks, and would disastrously affect the beneficent work which such institutions are designed to accomplish. If it were the duty of savings banks to establish at all hazards the identity of every person presenting a depositor's passbook and draft, it would be quite as impossible for them to continue business as it would be for some persons to avail themselves of the best-known and most generally approved method of investing and accumulating the fruits of frugal and patient economy. The same would be true of any other rule so onerous in its operation that such institutions could not do business without great inconvenience both to them and their depositors. A single illustration will suffice to demonstrate this. Take the case of a large savings bank, with so many accounts that it is impossible for the paying teller to know each depositor. It would be utterly impracticable to do business if each application for a withdrawal of money had to be delayed until a searching inquiry could be made as to the regularity of the transaction. But even if such a course were possible, so far as the bank were concerned, what would be the effect upon the poor and unknown

remote from the banking house, and who may have no acquaintance with any one who would be of the slightest assistance in identifying him? He would have no way of getting money that rightfully belonged to him, or, at least, might find his efforts in that direction so burdensome as to amount to the same thing. This is not an extreme illustration, but one that is fairly typical of the relations between great savings banks located in large centers of population, with many depositors, whose accounts are small, and whose deposits are made at rare intervals. Upon reflection it becomes obvious, therefore, that the only practicable general rule to which savings banks can be safely held in such dealings is the rule of ordinary care, leaving it to be applied in the light of the special circumstances that characterize each separate case. This is the rule that has been laid down by this court in a variety of similar cases. *Schoenwald v. Metr. Savings Bank*, 57 N. Y. 418; *Appleby v. Erie Co. Savings Bank*, 62 N. Y. 12; *Kummel v. Germania Savings Bank*, 127 N. Y. 488, 28 N. E. 398, 13 L. R. A. 786.

In the case of *Allen v. Williamsburgh Savings Bank*, 69 N. Y. 314, the wife of a depositor had wrongfully secured possession of his passbook, forged his signature to a draft, and obtained payment from the bank. But there the bank had adopted a special by-law requiring it to use its best efforts to prevent fraud, and this was construed to bind the bank to a higher degree of care than that enjoined by the general rule.

It is to be observed that all of the cases above cited present instances of payments to the wrong persons during the lifetime of the depositors, and it is true that, in construing certain rules so generally adopted by savings banks as to have acquired almost the binding force of statutes, it has been held by this court that there is a difference between the relations of a savings bank and a living depositor, on the one hand, and the relations of such a bank and the legal representatives of a deceased depositor, on the other hand. The rules referred to are among the by-laws adopted and promulgated by the defendant bank, and are as follows: "The secretary will endeavor to prevent frauds, but all payments made to persons producing the deposit books, or duplicates thereof, shall be good and valid payments to the depositors respectively." "On the decease of any depositor the amount standing to the credit of the deceased shall be paid to his or her legal representatives when legally demanded." In the recent case of *Mahon v. South Brooklyn Savings Inst.*, 175 N. Y. 60, 67 N. E. 118, 96 Am. St. Rep. 603, we had occasion to discuss the effect of these two rules; and, as bearing upon the defense that the bank had exercised due diligence in paying out money upon the account of a deceased de

positor, we said: "The rule of diligence invoked by the defendant applies only to the case of a living depositor. When, through a depositor's carelessness, his bankbook gets into the hands of a third person, who presents it to the bank, the latter may show its care and diligence in making payment to the person presenting the passbook, and thus protect itself against a second demand for payment by the careless depositor. But the by-law which is designed to protect the bank in such a case must be read in connection with the other by-law, which provides that, after the depositor's death, payment must be made to his or her legal representatives.' This latter by-law is for the protection of the depositor, who can no longer protect himself, and therefore the bank is bound to see that payment was made to the proper person. Payment to any other person is made at the bank's peril." That case is now relied upon by the appellant. As applied to the facts there established, the language just quoted was precise and correct, because the bank had knowledge of the depositor's death, and assumed to pay out the money credited to her account to one who claimed it by virtue of an alleged gift causa mortis, which the trial court found had never been made; and the unanimous affirmance of that finding of fact by the Appellate Division left this court no alternative but to apply the rule there laid down. In that case the finding of fact clearly established the absence of ordinary care, and the decision reached by this court was the only logical sequence of the finding. The language of the opinion is general and comprehensive, but of that it is enough to say that judicial discussion is to be limited to what is actually decided. *People ex rel. Metr. St. Ry. Co. v. State Board of Tax Com'rs*, 174 N. Y. 417, 67 N. E. 69, 63 L. R. A. 884.

In the case at bar the situation is different. While there is no direct finding to the effect that the officers of the respondent bank had no knowledge of Ellen Neville's death, that is the direct and inevitable implication of the other finding; and thus the question that remains to be discussed is whether the findings as to what the officers of the bank actually did, support the legal conclusion that they were not guilty of negligence in making payments to the persons who presented the decedent's passbook and drafts purporting to have been signed by her. The substance of the findings upon that subject is that a critical examination and comparison of the signatures on the several drafts referred to with the true signature of the decedent would have disclosed the fact that the signatures on the drafts were not genuine; that the officers of the bank made no critical examination or physical comparison of the signatures on the drafts with the genuine signature of the de-

cedent, entered and signed in the bank's signature book; and that the officers of the bank made no effort, by a critical examination or physical comparison, to ascertain the genuineness of the signatures on the drafts, or to ascertain the identity of the person presenting the same. The use of the disjunctive "or" in these findings separates that portion of them which relates to a critical examination of the signatures from that which relates to a physical comparison thereof, and, fairly construed, they import that no physical comparison of the signatures was made by the officers of the bank. These two findings are not necessarily inconsistent with each other, but they are so divergent as to entitle the appellant to the benefit of the one most favorable to her. *Redfield v. Redfield*, 110 N. Y. 671, 18 N. E. 373. Whether the failure to make a physical comparison of the signatures in the case at bar was consistent with the exercise of ordinary care on the part of the defendant bank may depend upon peculiar facts which are not found in the record before us. The finding quoted in the foregoing statement of facts, to the effect that there was no such disparity or difference between the signature of said Ellen Neville upon the signature book of the defendant and the several signatures upon five checks as to create doubt or misgiving concerning the genuineness of said five signatures in the mind of a competent and reasonably careful bank officer, when presented by a person unknown to him, with the bankbook, and that therefore the bank exercised due care and caution, and was not guilty of negligence, is really a conclusion of law, and not a finding of fact. It is possible that there may be special cases in which it may not be necessary for bank officers to make a physical comparison between one signature on file with a bank and another upon a draft or check presented to it for payment, but, if so, there must exist some unusual and pertinent excuse, that is not discoverable in the findings now before us, tending to show that the failure to make such a comparison is not at variance with the requirements of ordinary care. We think the finding most favorable to the appellant, to wit, that the defendant made no physical comparison of the signatures upon the five drafts with the signature of Ellen Neville in the defendant's signature book, does not support the conclusion of law to the effect that the complaint should be dismissed, and for that reason the judgment herein should be reversed.

This view of the case renders it unnecessary to pass upon the exceptions to rulings that may not be repeated upon another trial, nor upon the extent of the appellant's rights in case she should recover a judgment, and it should appear that, as one of the surviving sisters of Ellen Neville, she has already received a part of the fund which

she now seeks to get in her representative capacity.

The judgment herein should be reversed, and a new trial granted, with costs to abide the event.

VANN, J. I concur for reversal, but upon a more radical ground. While the defendant could have adopted a rule that would cover a payment made in good faith to a person in possession of the passbook of a deceased depositor, it had not done so when the payments in question were made. As its rules then stood, such a payment bound the depositor while he was alive, but did not bind his estate after he was dead, for they expressly provided that "on the decease of any depositor the amount standing to the credit of the deceased shall be paid to his or her legal representatives when legally demanded." This rule is absolute, and a part of the contract. It is the law of the case made by the parties. The language is that of the bank, and hence, if ambiguous, is to be construed in favor of the depositor, who is not responsible for the ambiguity. If we add to it, in effect, the proviso, "But payment to one presenting the passbook of a deceased depositor shall be good unless the bank has notice of the death," we make a new contract. I repeat, as applicable to the case in hand, what we recently said in another case: "This latter by-law is for the protection of the depositor, who can no longer protect himself, and therefore the bank is bound to see that payment was made to the proper person. Payment to any other person is made at the bank's peril." *Mahon v. South Brooklyn Savings Institution*, 175 N. Y. 69, 72, 87 N. E. 118, 96 Am. St. Rep. 603.

CULLEN, C. J., and O'BRIEN, BARTLETT, HAIGHT, and MARTIN, JJ. (and VANN, J., in result, in memorandum), concur with WERNER, J.

Judgment reversed, etc.

(180 N. Y. 148)

PEOPLE v. ROTHSTEIN.

(Court of Appeals of New York. Dec. 30, 1904.)

GRAND LARCENY—FALSE PRETENSES—WRITTEN STATEMENTS.

1. Where defendant, convicted of grand larceny by false representations, was shown to have falsely stated that he had an order from a well-known mercantile corporation for a large number of garments, and that he desired to purchase goods from which to manufacture them, by which he induced their delivery, it was a false statement of an existing fact, and not a warranty as to his financial standing, and was criminal, though not in writing and signed by the party to be charged thereby, as required by Pen. Code, § 544, providing that false pretenses relating to the purchaser's financial ability must be in writing.

Appeal from Supreme Court, Appellate Division, First Department.

Louis J. Rothstein was convicted of grand larceny, in obtaining money under false pretenses; and, from an order of the Appellate Division (88 N. Y. Supp. 622) affirming the same, he appeals. Affirmed.

Elias B. Goodman and John B. Stanchfield, for appellant. William Travers Jerome, Dist. Atty. (Howard S. Gans, of counsel), for the People.

BARTLETT, J. The defendant was convicted of the crime of grand larceny in the first degree, in obtaining goods by false representations. It is charged in the indictment that the defendant obtained 18 pieces of covert cloth from Forstman & Co. by falsely representing to the managing partner that he had an order from a corporation known as Marshall Field & Co., doing business in the city of New York—a well-known jobbing house, of strong financial standing—for 6,000 cloaks, to be made of covert cloth, and requiring about 24,000 yards. The evidence discloses that the defendant had dealt with Forstman & Co. in a "small way," requiring no such amount of credit as was involved in the sale of material necessary to fill the alleged order of Marshall Field & Co. On the 8th of August, 1902, the above false representation was made in order to induce, and which did induce, the complainants to deliver to the defendant, as a part installment of his purchase, 18 pieces of covert cloth, aggregating 1,000 yards, valued at about \$1,600. It was proved that the complainants manufactured the covert cloth in question at the instance and request of the defendant, that he might be able to fill the alleged order for 6,000 cloaks he falsely represented he had received from Marshall Field & Co. It was proved that the complainants relied on this false representation as to an alleged existing fact, and parted with the possession of their property for that reason. The jury found the defendant guilty, and he now seeks to reverse the judgment of conviction on alleged errors of law appearing in the record.

The defendant insists that the representation relates to his means or ability to pay, and is not criminal, because not in writing, as required by section 544 of the Penal Code, which reads as follows: "A purchase of property by means of a false pretense is not criminal, where the false pretense relates to the purchaser's means or ability to pay, unless the pretense is made in writing and signed by the party to be charged." It was doubtless the intention of the Legislature, in enacting this section, to require direct representations of the defendant's means or ability to pay to be in writing. If he states that he is worth so much in money, has so much on investment, and so much

representations bearing directly on his ability to pay, they must be in writing. There are, however, many cases referring to oral statements that relate to an existing fact, inducing a sale or parting with the possession of personal property, and consequently constituting a false pretense, that will sustain an indictment, and need not be in writing.

In *Higler v. People*, 44 Mich. 299, 6 N. W. 664, 38 Am. Rep. 267, the false pretense was the claim of being a "storekeeper." The learned court pointed out that a storekeeper might be absolutely without financial ability, and consequently the representation that he was engaged in such business did not necessarily relate to his pecuniary means. The court said: "Men are trusted in large amounts every day who have no pecuniary responsibility, and are known to have none. Sometimes the reliance for repayment will be a supposed business ability, sometimes on a business that would be injured by the existence of overdue debts, but most often, perhaps, a reputation for integrity. And if in any case the existence of any particular fact would be likely to beget confidence, there is no reason why a false assertion of its existence should not be a criminal pretense, as much as would be a false assertion of pecuniary responsibility, provided it is equally relied upon, and equally effectual to accomplish the fraud designed. Pecuniary responsibility is no more a necessary attendant upon a commission in the army than upon the keeping of a store, but the false assertion that one holds such a commission has been held a false pretense. *Regina v. Hamilton*, 1 Cox, C. C. 244, on appeal 9 Q. B. 271; *Thomas v. People*, 34 N. Y. 351. So the pretense that one is buying horses as a gentleman's servant may be a criminal false pretense, though the fact of service by itself would not be likely to inspire confidence, except in connection with the further fact, expressed or understood, that the master was to pay the purchase price. *Rex v. Dale*, 7 C. & P. 352."

In *Thomas v. People*, 34 N. Y. 351, the false representations were that the defendant was a chaplain in the army, just returned from military service; that he wanted money to get home with; that he would give plaintiff an order for the repayment of any money that complainant might loan him. These verbal statements, which proved to be false, were held to relate to existing facts, and constituted false pretenses. In *Re Valentine*, 4 City Hall Rec. 33, the false pretenses were where the defendant, a man of genteel appearance, falsely represented himself as a wholesale dealer in Broadway, and that one of his country customers had sent him an order for certain goods. These representations were held sufficient to sustain the indictment.

161, 118, the defendant falsely represented himself as a grocer, and that he resided in a particular place. It was held that this representation, having induced the sale of goods, was sufficient in law.

In *Lesser v. People*, 73 N. Y. 78, the evidence of the complainant was that Lesser and his companion, Melville, came together to her residence, and, after bargaining for the goods, agreeing upon the price, Melville went out, as he said, to get the money to pay for them, leaving the prisoner there; that the prisoner represented Melville as a man of business, having two stores, etc.; that Melville returned with the check, and, at the time of passing it off to the complainant and obtaining the goods, in answer to a remark of complainant's sister that the check was dated the next day, said: "It is too late to go to the bank to-day" (it being then half-past 3 o'clock in the afternoon); that at the same time the prisoner said that the check was good, and also that Steinbach, the maker of the check, "had a business." It appeared that no such person as the drawer of the check kept any account in the bank on which it was drawn, and it was admitted on the trial that the check was worthless. It was held that the circumstances tended to show that the transaction was a device to defraud the complainant of her goods, and that Melville and the prisoner were acting together. They together took the goods away.

In *People v. Blanchard*, 90 N. Y. 314, it was held that an indictment for false pretenses could not be founded upon the false assertion of an existing intention; there must be a false representation as to an existing fact. In this case the representations alleged to be false were stated to be that the defendant was agent for Otto Gulick, and that he wanted to buy 18 cattle for Gulick; that Otto Gulick wanted him to buy for him and send him 18 cattle, and that he had a contract with Gulick for buying cattle for him; and that Gulick had agreed to pay him \$1 a head for buying cattle.

In *Commonwealth v. Meserve*, 154 Mass. 64, 75, 27 N. E. 997, 1000, the learned court stated at the latter page: "In the fifth count, one of the false pretenses set forth, as contemplated in the alleged conspiracy, was that 'Kennedy, so to be represented as George Brown as aforesaid, had recently theretofore sold seven thousand dollars' worth of real estate * * * in said state of New Hampshire, and had invested the proceeds thereof in property in said Boston.' The judge instructed the jury that this was good, if proved as charged. The ground of objection urged by the defendants is that this was a representation or pretense as to Kennedy's means or ability to pay, which must be in writing, under Pub. St. 1882, c. 203, § 59. The judge had already instruct-

ed the jury fully, in reference to the first count, that pretenses that he was rich, that he owned real estate in New Hampshire, that this real estate was valuable, and that he was interested in the manufacture of bricks in New Hampshire, were of such a character that they must be in writing, but that a representation that he was shifting his property from New Hampshire to Massachusetts might have another aspect, and that it might be found to be equivalent to a representation that he was so engaged in such transactions that he had occasion for the goods which he sought to obtain."

In the case at bar we have the false representation that the defendant represented to the managing partner of Forstman & Co. that he had an order from Marshall Field & Co.—a well-known jobbing house, of strong financial standing—for 6,000 cloaks, to be made of covert cloth, and requiring about 24,000 yards. This is not the assertion of an existing intention, but is a false representation as to an alleged existing fact. We are of opinion that this false representation is fully within the principle of the cases cited, and of many others to which reference might be made. It is quite evident that Forstman & Co. found this representation as to the order received from Marshall Field & Co. a most persuasive fact in reaching the conclusion that they were safe in granting the credit for which the defendant asked.

In order to appreciate a further point made by the defendant, it becomes necessary to refer to a representation proved at the trial, but not pleaded in the indictment. When the managing partner of Forstman & Co. was on the stand, he had testified to the representation to which reference has already been made. He was asked this question by the district attorney: "Q. Did he state what he intended to do in regard to bills or invoices against Marshall Field & Co.?" A. Yes. Defendant's Counsel: I object. The Court: Yes; objection overruled. Defend-

ant's Counsel: Exception." The witness answered: "He told me that, as he made shipments to Marshall Field & Co., he would assign the bills to us, and make them payable to Forstman & Co. That is all he said about that. The next time I saw him, I imagine, was the following day. He came in almost every day. Q. Did he have any further conversation with you in regard to the order? A. He said that several times." The defendant's counsel, in his brief in this court, insists that the evidence of this alleged false representation was not admissible, not being pleaded in the indictment. The answer to this position is that the defendant's objection to the admission of this evidence states no ground. A further answer is that the evidence was competent as a circumstance bearing upon the question of intent, involved in the main charge.

The people, while relying on the false representation pleaded in the indictment and already dealt with, have insisted in their brief and on the oral argument that this promise to assign the bills against Marshall Field & Co. and make them payable to Forstman & Co. was, as matter of fact, presenting a valuable security for the payment of the purchase price, and thus making the financial condition of the defendant of no importance whatever in the commercial problem involved. As this representation was purely promissory, and relates merely to what the defendant said he would do in the future, we have concluded, while expressing no opinion as to this representation, to rest the affirmation of the judgment of conviction, and the order affirming the same, upon the representation pleaded in the indictment.

The judgment and order appealed from should therefore be affirmed.

CULLEN, C. J., and GRAY, HAIGHT, MARTIN, and VANN, JJ., concur. O'BRIEN, J., not voting.

Judgment of conviction affirmed.

(180 N. Y. 163)

PEOPLE v. RIMIERI.

(Court of Appeals of New York. Dec. 30, 1904.)

MURDER — EVIDENCE — CROSS-EXAMINATION — EXHIBITS.

1. Evidence held to sustain a verdict convicting defendant of murder in the first degree.

2. On trial for murder, where the widow of the murdered man was asked if she had any children, and she said that she had one, and thereafter brought her child into court, and it was offered and received in evidence, any error in so doing was harmless.

3. On trial for murder, objection by defendant to evidence which he has called for on cross-examination cannot be considered.

4. Attempt of counsel for defendant on trial for murder to cross-examine witness as to whether he testified before the coroner's jury or the grand jury was improper where counsel had a copy of the testimony, from which he could examine the witness if he thought proper.

5. Where the record shows that defendant's counsel consented to certain exhibits introduced on trial for murder going to the jury, he cannot insist on appeal that he objected thereto.

Appeal from Kings County Court.

Frank Rimieri was convicted of murder in the first degree, and appeals. Affirmed.

Martin T. Manton, for appellant. John F. Clarke, Dist. Atty. (Robert H. Elder, of counsel), for the People.

WERNER, J. This is an appeal from a judgment of conviction of the crime of murder in the first degree. The defendant assails the judgment on various grounds, several of which relate to the probative weight and effect of the evidence presented on behalf of the prosecution, so that a brief outline of the facts is necessary.

The substance of the specification in the indictment is that in the borough of Brooklyn, New York, on the 1st day of October, 1903, the defendant shot and killed one Jacko Pinto, with the deliberate and premeditated design to effect his death. The shooting by the defendant, and Pinto's subsequent death in consequence thereof, are facts as to which there is no issue, for they were established by uncontroverted evidence, as well as by the admissions of the defendant. The latter claimed, however, that he acted in self-defense, and upon that branch of the case the evidence was conflicting. The defendant and Pinto were both Italians and junk dealers, living within a few doors of each other on Frost street, in the borough of Brooklyn. Several days before the homicide Pinto and the defendant had an altercation over some old bottles, in the course of which the former struck and wounded the latter. The theory of the prosecution was that the defendant, smarting under the indignity and injury thus inflicted upon him, armed himself, lay in wait for Pinto, and fired the fatal shot when the latter came within range. In support of this theory evidence was adduced tending to show that on the evening of the homicide

Pinto and his wife and child were going from his place of business to his home, which was on the opposite side of the same street. The wife and child were several paces in advance of Pinto when the defendant came out from an area adjoining the house where he lived, drew a revolver, and fired. Pinto sank to the ground and the defendant fled. The latter, after running a short distance, was captured, and placed under arrest. The revolver with which the deed was committed, with one chamber emptied, was found in his possession, together with a knife or dagger. While the eyewitnesses to the affair, sworn for the prosecution, differed as to some of the details, they all testified, in substance, that the defendant was the aggressor, and that Pinto was not armed. The story, as told by the defendant and his witnesses, tended to show that Pinto was armed with an axe, with which he pursued and threatened to attack the defendant, and that the latter did not shoot until he was in danger of bodily injury. The defendant sought to account for his being armed by explaining that after the altercation with Pinto several days before that he was in fear of his life, and procured for his defense the weapons found upon his person when arrested. The issue of fact created by these differing narrations of the homicide was submitted to the jury under a very careful and impartial charge, and the result, as already stated, was a verdict of murder in the first degree. After a searching examination of the record, we are convinced that it is beyond our province to interfere with this verdict, either on the ground that it is not supported by the evidence or that it is against the weight of evidence. There is evidence which warranted the jury in finding that the shooting of Pinto by the defendant was wilful, deliberate, and premeditated, and, as all the other facts of the homicide are beyond dispute, we cannot disturb the judgment pronounced upon the defendant, unless one or more of the alleged errors in rulings assigned by the defendant are of sufficient gravity to justify such action.

When Mrs. Pinto, the widow of the murdered man, was on the witness stand, she was asked by the district attorney if she had any children, and she answered in the affirmative. She was then asked how many, and she answered, "I have one child, and I am now pregnant." The record discloses that there was an "objection, as immaterial," and the court ruled that the evidence should be allowed to stand. Subsequently, and just before the case of the prosecution was rested, the district attorney recalled Mrs. Pinto, who had brought her child into court, and the latter was offered and received in evidence without objection. The defendant now relies upon these incidents of the trial as sufficient grounds for reversal of the judgment. Referring to the testimony of Mrs.

that it was not called for in the question of the district attorney; and while the court might with propriety have stricken it from the record, it was entirely harmless, and could not, by any possibility, have been prejudicial to the defendant. The introduction in evidence of the living child was an unusual and an unnecessary thing, the only justification for which rests in the district attorney's claim that the cross-examination of the witnesses for the prosecution indicated that the defense would deny the presence of the child at the homicide, and, since it was probable that there would be some conflict of testimony as to whether Pinto crossed the street in pursuit of the child, which had escaped from the custody of the mother, or whether Pinto belligerently went in search of the defendant, it was proper to fortify the evidence of the prosecution by showing, not only that there was a child, but that it was of such tender age that its attempt to cross the street would arouse the anxiety of the parents, and cause them to follow it. The contention of the district attorney in this behalf is not without support in the record, but still we do not perceive the necessity for introducing the child in evidence. But, when the whole episode is sifted, the question still remains, how could it possibly have harmed the defendant? To hold that a jury, sitting in judgment in a case involving a human life, could be influenced, by such an incident, to render a verdict not warranted by the evidence, would be an unjust imputation upon a system that, with all its faults, has never been open to the criticism of undue severity.

It appeared from the evidence adduced on behalf of the prosecution that in the altercation between the defendant and Pinto, which occurred several days before the homicide, the latter sustained a scalp wound. Pinto's wife was a witness to the altercation, and saw the wound. Upon the trial she gave her version of the affair, which was competent upon the question of motive, and in that connection she stated that her husband went to Saint Catharine's Hospital to have the wound sewed up. Another witness, named Mazzini, saw the wound during the interval between the altercation and the homicide. A policeman named Snow, who was in charge of the neighboring precinct station on the evening of the altercation, testified that a man who gave his name as Pinto called at the station and exhibited a scalp wound, and that he sent Pinto to the hospital to have the wound attended to. McCauley, another policeman, testified to taking Pinto to the hospital in a patrol wagon. Upon the cross-examination of these witnesses defendant's counsel elicited statements as to what Pinto had said about his wound, and the circumstances under which it was inflicted. While evidence

tent if called for by the district attorney and objected to by the defendant's counsel, it cannot successfully be assigned as error when adduced on behalf of the defendant.

Upon the cross-examination of Mrs. Pinto she stated that she had previously testified at the city hall. Defendant's counsel asked her, "When were you examined?" An objection was interposed by the district attorney, and then a colloquy ensued between counsel and court, from which it appears that the district attorney claimed the witness had not been sworn at the coroner's inquest, and therefore the inquiry was immaterial. Subsequently the witness did state, without objection, that she had testified before the grand jury, but defendant's counsel did not further pursue the subject, and it was dropped. A somewhat similar situation was presented when the witness Spinelli, upon cross-examination by defendant's counsel, was asked the question, "You were not a witness before the coroner's inquest, were you?" The objection of the district attorney was sustained, the court stating, in substance, that, if the witness had testified at the inquest, defendant's counsel had a copy of the testimony, and could interrogate her as to any discrepancies between her testimony given at the trial and that given at the inquest. We find no error in these rulings. Defendant's counsel did not attempt to prove, and was not prevented from proving, any statement made by either of these witnesses at the coroner's inquest or before the grand jury; on the contrary, that is precisely what the court said the defendant's counsel might do, if done in the regular way.

Defendant complains because he was not permitted to testify to his state of mind while engaged in the altercation with Pinto, which occurred several days before the homicide. After having testified to certain facts, he proceeded to state what he thought, when he was interrupted by an objection from the district attorney, who insisted that the defendant should confine himself to what was said and done on that occasion. Thereupon the court directed that the testimony as to what the witness thought should be stricken out. Very soon thereafter the same question arose again, and then the court stated, "In order that he may have every opportunity, I will allow it," and the witness proceeded to give his narration of the facts, as well as the operations of his mind. After having testified at length as to Pinto's alleged attack upon him, defendant stated that one Bruno had told him what Pinto had threatened to do to him. Defendant's counsel then asked him, "What did he (Bruno) say to you that Pinto had said about what he was going to do to you?" At this juncture the district attorney appealed to the court for instructions, stating that, as

actually made would be competent, but that Bruno's statement to the defendant did not seem to come within the rule. To this the court replied, "I think the defense should first prove that the threat was made, but I will allow it, so that this man can have everything that is coming to him, and even more; but I have very grave doubts about its relevancy at this time." Thereupon the defendant testified to the threats communicated to him by Bruno and claimed to have been made by Pinto. We are at a loss to know wherein there was any error in these rulings, unless it consisted in the extreme leniency of the court toward the defendant. The criticism that the court, in expressing doubt as to the relevancy of the evidence of the alleged threats, intimated to the jury that it was not worthy of serious consideration, seems to be utterly without foundation.

The court, at the conclusion of the charge, suggested that if the jury desired any of the exhibits they could take them, if there were no objections. A juror asked for the diagram and photographs. The court asked if there was any objection, and, according to the record, defendant's counsel replied, "No objection." Then the district attorney suggested that perhaps the jury would like to take the other exhibits. Again the court asked if there was any objection, and again defendant's counsel is recorded as saying, "No objection." Thereupon the jury took all the exhibits, including the pistol and dagger above referred to. Defendant's counsel insisted upon the motion in arrest of judgment and for a new trial, and he now insists, that he did object to giving the exhibits to the jury; but the record is against him, and that must be our guide in disposing of the question.

The defendant further contends that the attitude of the court throughout the trial was unfair to the defendant, that the charge

torney was permitted to indulge in statements prejudicial to the defendant that were not supported by evidence, and that numerous erroneous rulings were made in addition to those specifically discussed. We have carefully examined the record with reference to each of these contentions, and we are convinced that they are not well founded. The trial court was not only fair, but extremely liberal to the defendant in all its rulings, and the charge was as favorable to him as the evidence would permit. When the jury, after having retired, came into court for further instructions as to the several degrees of homicide, and the defendant's counsel had been refused permission to prefer further requests to charge, the court again sent for the jury, and stated: "I have sent for you, gentlemen, in order that no injustice may be done to the defendant in any manner, shape, or form. The court has sent for you to listen to any requests the counsel for the defense may wish to make." Counsel for the defense then requested the court to read again the law with reference to justifiable homicide. The court complied with the request, and then added, "If you find from the evidence in this case that the defendant intended to kill Pinto, you cannot find him guilty of either manslaughter in the first or second degree." Defendant's counsel took an exception to this part of the charge, but we think it is unavailing, because the charge correctly stated the law.

We think the defendant had a fair trial, and that no errors have been pointed out that would warrant a reversal of the judgment. The judgment of the court below should therefore be affirmed.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, and VANN, JJ., concur.

Judgment of conviction affirmed.

(180 N. Y. 183)

BALTES v. UNION TRUST CO. OF NEW YORK.

(Court of Appeals of New York. Dec. 30, 1904.)

**TRUST—CONSTRUCTION—INTEREST OF GRANTOR
—RELEASE—RIGHTS AS REMAINDERMAN.**

1. A trust agreement provided for the payment of an annuity to the grantor, and on his death for a division of the fund between his son and daughter. On the death of the son, who was the trustee, the grantor agreed with the substituted trustee that in consideration of a provision for the payment of the annuity in another manner the fund might be divided between his daughter and his son's widow. Subsequently the daughter died before the grantor. *Held* that, if the original direction for the division of the fund was contingent on the children surviving him, and he had an interest therein as remainderman, and the trust was irrevocable under 1 Rev. St. p. 730, § 65, his substituted agreement disposed of any interest he might have in the fund, and upon his death his executors had no interest therein.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Fernando Baltes, executor of Edmund Waring, against the Union Trust Company of New York. From a judgment of the Appellate Division (77 N. Y. Supp. 1121) affirming a judgment (71 N. Y. Supp. 468) for defendant, plaintiff appeals. Affirmed.

Charles Haldane and Edward K. Jones, for appellant. Wheeler H. Peckham, for respondent.

CULLEN, C. J. Though this case was argued before us with great elaboration, we think there is a conclusive objection to the maintenance of the action which renders it necessary to discuss only that single point. The claim of the plaintiff is that his testator, one Edmund Waring, on the 16th day of March, 1881, transferred certain securities to his son, William E. Waring, in trust to collect the income thereon, and pay therefrom to said Edmund Waring the sum of \$4,800 annually, the surplus income to be divided equally between the grantor's two children, said William E. Waring and Katharine G. Secor, and upon the death of said Edmund Waring to distribute the principal or corpus between said children. The defendant denies that the trust estate proceeded from Edmund, and the trial court so held, but it is not necessary to enter into an inquiry on that subject. The trust was evidenced by a declaration signed by Edmund Waring, Katharine G. Secor, and William E. Waring. William E. Waring died October 13, 1882, leaving a will, by which he bequeathed all his estate to his widow, Fredericka. After his death the defendant was appointed trustee to carry out the trust declared in the instrument hereinbefore referred to. Fredericka, the widow

of William, refused to surrender the trust securities to the defendant, claiming that the property belonged to her testator, and that the instrument created no trust, but simply a personal covenant on the part of said William to make certain annual payments. Thereupon the defendant brought an action in replevin against said Fredericka, and recovered possession of the trust securities. After that, on February 18, 1887, Edmund Waring, Katharine G. Secor, Fredericka W. Waring, and the defendant entered into an agreement under their hands and seals, which, after reciting the litigation between the parties, and a desire that the same should be terminated, and that the trust property should be forthwith divided between Katharine Secor and Fredericka Waring, provided that the burden of the annual payments to Edmund Waring should be transferred from the personality, held in trust as before mentioned, to the income of certain real estate held under a substantially similar trust, and that said personal property and securities, after deducting therefrom certain amounts necessary to defray the expenses of the litigation, should be paid over to said Fredericka and Katharine, share and share alike. Acting under this deed, the defendant did transfer the trust estate to Katharine and Fredericka. The annuity provided for by the original trust agreement was paid to Edmund Waring during his life, or at least no claim is made in this action for any arrears of that annuity. Katharine Secor died March 9, 1892, leaving children and grandchildren. Edmund Waring, the plaintiff's testator, died August 15, 1895, leaving a will, by which he bequeathed his property to Katharine Secor if she survived him, or, if she died before him, then to her children.

The plaintiff's contention is that under the original trust agreement the direction to divide the corpus of the trust estate on Edmund's death between his two children was contingent upon such children surviving him, and that, as both said children predeceased him, the corpus on his own death reverted to his estate as undisposed of by the trust deed. We will assume, but for the argument only, that such is the proper construction of the trust deed. The plaintiff then further contends that the deed of 1887 was inoperative and void, because the trust was indestructible under our statutes, and constituted no justification for the defendant's surrender and distribution of the trust estate. Assuming that the trust in favor of the plaintiff's testator was indestructible (see, however, *Schenck v. Barnes*, 156 N. Y. 316, 50 N. E. 967, 41 L. R. A. 395), and that the case falls within the provision of the statute, "where the trust shall be expressed in the instrument creating the estate, every sale, conveyance or other act of the trustees in contravention of the trust, shall be abso-

lutely void" (1 Rev. St. 730, § 65), we cannot see how that principle in any way limits or qualifies the effect of the deed of 1887 over the corpus of the estate or the remainder therein after the death of Edmund Waring. If the trust was indestructible, it was so because under our statute the interest of Edmund in the trust income or annuity was inalienable. The estate of the trustee was limited to the life of the annuitant Edmund Waring. The trustee, like every life tenant, was doubtless also bound to preserve the trust estate in its possession for the benefit of those entitled to it upon the expiration of the trust, but not at all as against such remaindermen. It was only the interest of Edmund as equitable life tenant that was inalienable. The remainder after his death, in whomsoever it was vested, was alienable, devisable, and descendible the same as any other interest in property. *Sheridan v. House*, *43 N. Y. 569; *Moore v. Littel*, 41 N. Y. 66; *Griffin v. Shepard*, 124 N. Y. 70, 26 N. E. 339. Assuming that the action of the defendant was a spoliation of the trust, against whom was it such a spoliation? Possibly against Edmund Waring as equitable life tenant, but not against Edmund Waring as remainderman, for he, under his hand and seal, expressly assented to the distribution. It is merely the accident of this particular case that the beneficiary of the trust and the owner of the remainder were the same person. The right of that person to dispose of the remainder or reversion was not in any respect limited or qualified by the fact that he was also the beneficiary of the trust. He stood towards that remainder exactly the same as *Mrs. Secor*. No one will contend that, if *Mrs. Secor* had survived her father, she could have required the trustee on that occurrence to again pay over to her her share of the trust estate on the ground that the original payment to her by the trustee was in contravention of its duty. The situation of Edmund as reversioner is exactly the same. Though the corpus was not paid directly to him, it was paid in accordance with his directions. The case of *Douglas v. Kruger*, 80 N. Y. 15, is in precise point on this question. There was a trust in lands for a woman during coverture, remainder to her if she survived her husband. The trustee conveyed the property to the cestui que trust, who thereafter mortgaged the same. It was held that while the mortgage was void as to the trust term, it was a valid lien on the remainder. See, also, *Ham v. Van Orden*, 84 N. Y. 257.

The judgment appealed from should be affirmed, with costs.

GRAY, O'BRIEN, BARTLETT, HAIGHT,
(MARTIN, and VANN, JJ., concur.

Judgment affirmed.

(213 Ill. 174)

ILLINOIS CENT. R. CO. v. PEOPLE ex rel.
BROWN, County Collector.

(Supreme Court of Illinois. Dec. 22, 1904.)

MUNICIPAL CORPORATIONS — TAXATION — CERTIFICATE OF LEVY—STATUTE—CONSTRUCTION—EVIDENCE—ADMISSIBILITY—SUFFICIENCY.

1. *Starr & C. Ann. St. 1896, p. 3597, c. 121, § 119*, provides that the highway commissioners of each township shall annually ascertain, as near as practicable, how much money must be raised for the making and repairing of bridges, payment of damages for the opening, altering, or laying out new roads and ditches, the purchase of necessary tools, implements, and machinery for working roads, the purchase of necessary material for building and repairing or draining roads and bridges, the pay of the overseer, and for the payment of all outstanding orders drawn by the commissioners on their treasurer, which tax shall be extended on the tax-book according to the assessment of the current year, and shall levy a tax not exceeding 40 cents on each \$100, and that they shall give to the supervisors of the township a statement of the amount necessary to be raised, and the rate per cent. of taxation, signed by the commissioners or a majority thereof. *Held*, that a certificate of levy stating the total amount to be raised for the purposes as provided in the statute, and the rate per cent. of taxation, is sufficient, without stating the amount required for each purpose.

2. A levy of taxes for town purposes, certified in a single amount, without specifying the particular items for which it was made, is insufficient under the statute.

3. Where a levy of taxes for town purposes is insufficient for failing to specify the particular items for which it was made, testimony of the town clerk to show the purposes of the levy is inadmissible.

4. Where a levy of taxes for town purposes is insufficient in failing to specify the particular items for which it was made, testimony of the town clerk that he was uncertain as to whether he was present when the levy was made, and indefinite in his recollection as to the purposes for which the gross sum was to be expended, is insufficient, even if competent, to authorize an amendment of the certificate of levy to show the purposes for which the levy was made.

Appeal from Montgomery County Court; M. L. McMurray, Judge.

Application by the people, on the relation of D. F. Brown, county collector, for a judgment of sale for delinquent taxes of property of the Illinois Central Railroad Company. From a judgment for the applicant, the railroad company appeals. Reversed.

Jett & Kinder (John G. Drennan, of counsel), for appellant. H. J. Hamlin, Atty. Gen., and L. V. Hill, State's Atty., for appellee.

WILKIN, J. On the application of the county collector of Montgomery county for a judgment of sale for delinquent taxes, the appellant filed its objections to the road and bridge tax of North Litchfield township and of South Litchfield township, and to the town tax of North Litchfield township, all in said county. The objection to the road and bridge tax was that the certificates of the town authorities in each of said townships "failed to specify the amount required for each par-

ticular purpose, as well as the total amount, and that where the total amount is given the particular purpose is not given, and vice versa." The objection to the town tax was that the certificate of the town authorities shows a gross sum for "town purposes or town expenses," without designating the particular purposes for which the same, when collected, were to be used. The objections were overruled, and judgment entered against the property of the objector, from which an appeal has been prayed to this court.

The certificate of levy for North Litchfield township is, in substance, that the commissioners of highways will require \$2,600 to be raised by taxes on the real estate, personal, and railroad property in the town for the purposes as provided in the statute, said amount being a levy of 40 cents on each \$100 valuation according to the assessment of said town for the current year. The certificate also states that at the annual town meeting held on the 7th of April, 1903, an additional levy of twenty cents was ordered by the legal voters present at said meeting for the aforesaid purpose. The certificate of the commissioners of highways of South Litchfield township is that they require the sum of \$1,900, and is in substantially the same language as that of North Litchfield township. These certificates were properly signed by the commissioners, but the purposes for which the tax was required were not itemized therein.

Section 119 of chapter 121 of our Statutes (Starr & C. Ann. St. 1896, p. 3597) provides that the highway commissioners of each township shall annually ascertain, as near as practicable, how much money must be raised for the making and repairing of bridges, payment of damages by reason of opening, altering, and laying out new roads and ditches, the purchase of necessary tools, implements, and machinery for working roads, the purchase of necessary material for building and repairing or draining roads and bridges, the pay of the overseer of highways during the ensuing year, and for the payment of all outstanding orders drawn by the commissioners on their treasurer, which tax shall be extended on the taxbook according to the assessment of the current year, and shall levy a tax on all the real, personal, and railroad property in said town, not exceeding 40 cents on each \$100; and they shall give to the supervisor of the township a statement of the amount necessary to be raised, and the rate per cent. of taxation, signed by said commissioners or a majority thereof. Both of said certificates literally comply with this requirement of the statute. They state the amount of money to be raised, the purposes for which it is required, and the rate per cent. of taxation. The statute does not require the certificate to state the amount required for each purpose. The language in

Cincinnati, Indianapolis & Western Railway Co. v. People, 207 Ill. 566, 69 N. E. 938, to the contrary, must be treated as inadvertently used, and overruled in Cincinnati, Indianapolis & Western Railway Co. v. People (Ill.) 72 N. E. 770. The objections to the road and bridge tax was properly overruled.

The levy filed by the town clerk was as follows: "I, Joseph Lawrence, town clerk of said town, do hereby certify that the total amount of taxes required to be raised in said township for all purposes for the year 1903 is \$800." It seems to have been conceded that the objection to this levy was good. People v. Indiana, Illinois & Iowa Railroad Co., 206 Ill. 612, 69 N. E. 575; Cincinnati, Indianapolis & Western Railway Co. v. People, 207 Ill. 566, 69 N. E. 938. Upon the hearing the town clerk, over the objections of appellant, was allowed to testify as follows: "I am a citizen of North Litchfield township, and was present, I apprehend, when this levy for which this certificate of levy was made. I suppose the purpose of this \$800 mentioned in the certificate of levy was made for current expenses of the township. I was present at the town meeting when this levy was made. I am not positive of the purpose for which this levy was made. It was made for expense account, I understand. They were bills that had been audited before they were allowed, and this levy was to pay these bills." Upon this evidence the court permitted the levy to be amended by adding the words, "for bills that have before that time been audited against the township, and for the current expenses for the said township." These words were added immediately after the figures "\$800" at the end of the certificate. It is insisted that the court erred in admitting the testimony of the town clerk and allowing said amendment to be made.

We held in Chicago & Northwestern Railway Co. v. People, 200 Ill. 141, 65 N. E. 706, following our previous decisions there cited (page 145, 200 Ill., page 707, 65 N. E.): "Where the power to levy a tax is conferred by law and is regularly exercised by the proper authorities in substantial conformity to the law, the court, upon proof of such fact, may permit the certificate of the levy to be amended on the hearing by changing the official designation of the officers, allowing the individual signatures to be substituted for the corporate name, and correcting other like formal errors. Spring Valley Coal Co. v. People, 157 Ill. 543 [41 N. E. 874]; Chicago & Alton Railroad Co. v. People, 171 Ill. 544 [49 N. E. 489]; Chicago & Northwestern Railway Co. v. People, 183 Ill. 247 [55 N. E. 680]. But if the statute authorizing the levy of the tax has not, in fact, been followed and complied with, the levy cannot be made valid by amendments of certificates or proceedings, because that would not be a correction of a mere irregularity, but would

time of the amendment. *People v. Smith*, 149 Ill. 549 [36 N. E. 971]; *Chicago & Northwestern Railroad Co. v. People*, 184 Ill. 240 [56 N. E. 367]. There must be a valid levy, which is defective in matters merely formal, to authorize an amendment." The levy in the present case as originally made was not sufficient, under the statute, for the reason that it did not specify the particular items for which it was made, but certified the amount in a single sum. The evidence upon which the amendment was permitted, if it had been competent (which it was not), was insufficient to authorize the amendment. *Cincinnati, Indianapolis & Western Railway Co. v. People*, and *Illinois, Indiana & Western Railroad Co. v. People*, *supra*. The town clerk was very uncertain as to whether he was present when the levy was made, and wholly indefinite in his recollection as to the purposes for which the gross sum was to be expended. He did not pretend to state that the voters at the town meeting intended to levy the tax for specific purposes. The objection to the town tax should also have been sustained. The judgment of the county court will be reversed, and the cause remanded for further proceedings in accordance with the views herein expressed.

Reversed and remanded.

(187 Mass. 309)

CODMAN et al. v. BRIGHAM et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 7, 1906.)

**WILLS—CONSTRUCTION—CHARITABLE BEQUESTS
—PERPETUITIES—TITLE TO FUND—
ACCUMULATIONS—TRUSTS.**

1. Where a will devised and bequeathed all the residuary estate to the executors, to be invested and allowed to accumulate for a term of years, and then transferred to a corporation to be formed for charitable purposes, the executors took as trustees, though not so designated.

2. The will created a charitable trust from the time of probate, and both legal and equitable estates in the property vested immediately in the executors and the objects of the charity, respectively.

3. The provision for accumulation, being for a charitable purpose, was valid, even though requiring the fund to be held for a period beyond the time prescribed by the rule against perpetuities.

4. The provisions as to management of the fund and its transfer to the corporation were mere details of administration, so that, if it should be impossible to establish the corporation, the gift would not fail, but the doctrine of cy pres would apply.

5. Nothing passed directly to the corporation, but it took only by conveyance from the executors.

6. The title to the accumulations vested in the executors and the beneficiaries of the charity, just as the title to the fund did.

Report from Supreme Judicial Court, Suffolk County; Lathrop, Judge.

Bill by one Codman and others, as trustees under the will of Peter B. Brigham, de-

instructions to the trustees, for plaintiffs. L. S. Dabney, for defendant Peter Bent Brigham Hospital. Chas. A. Snow, for heirs at law.

J. L. Thorndike, for plaintiffs. L. S. Dabney, for defendant Peter Bent Brigham Hospital. Chas. A. Snow, for heirs at law.

KNOWLTON, C. J. This is a bill brought by the trustees appointed under the will of Peter B. Brigham for instructions in regard to the disposition of certain income in their hands, received under the fourteenth clause of the will. This clause is as follows:

"All the rest and residue of my property and estate of every kind and description, real, personal and mixed, of which I shall die seized or possessed, or to which I shall be entitled at the time of my decease, I direct my executors to take and hold, manage and invest, for the term of twenty-five years from the time of my decease, and to take the rents, interest, income and profits thereof, and from the net income thereof to appropriate and pay as follows, that is to say: [Then follow seven provisions for the payment of annuities to relatives and friends of the testator, with directions, on the death of the annuitants, to pay specific sums to their children, if they die leaving children.] My said executors shall add the balance of said net income, that shall remain after making the payments aforesaid, to the principal of my said estate, so that the same may be accumulating for the term of twenty-five years aforesaid, and at the expiration of said term of said twenty-five years from my decease, my said executors shall set aside a sum or sums of money, and may deposit the same in some safe trust company, preference being given, other things being equal, to the Massachusetts Hospital Life Insurance Company of said Boston, which shall be sufficient to provide for the payment of such of the foregoing legacies and bequests, if any, as shall then be unfilled, or may provide for the payment of such unpaid legacies and bequests by the purchase of annuities for the unpaid legatees, or otherwise, as my said executors shall deem expedient, and after the payment, or provision for the payment as aforesaid, of all the foregoing bequests and legacies, the unexpended balance, if any, shall be paid to and for the use of the hospital hereinafter provided for."

"Eighth. At the expiration of said term of twenty-five years from the time of my decease, my said executors shall dispose of said rest and residue of my property and estate, and of all the interest and accumulations which shall have accrued thereon, for the purpose of founding a hospital in said Boston, to be called the Brigham Hospital, for the care of sick persons in indigent circumstances residing in the said county of Suffolk, in the following manner, that is to say:

They shall procure the formation of a corporation to be called the Brigham Hospital, with suitable provisions as to officers, their powers and duties for control, direction, conduct and administration of the corporation, and the care and management of the funds in its charge, and upon the legal formation and organization of said corporation, my executors shall transfer to it all the property and estate provided for it as aforesaid, to be by it used and employed for the purposes above declared. And I give, devise and bequeath said rest and residue of my property and estate accordingly."

The testator died on May 24, 1877, leaving real estate valued at \$690,000, and personal estate which amounted to about \$325,000, after payment of debts and the legacies other than those payable under the fourteenth clause. The executors qualified, and managed the property until the death of the last survivor of them, when these plaintiffs were appointed trustees by the probate court, and, thus succeeding to the rights of their predecessors, they have since continued the execution of their trust. The corporation was formed under the general laws in May, 1902, and, because such a corporation could not hold property in excess of \$1,500,000, St. 1902, p. 330, c. 418, was passed on May 22d of that year, which authorized the corporation to hold real and personal estate to an amount not exceeding \$5,000,000. On May 24, 1902, \$4,311,935.65 was paid to the corporation by the trustees. The whole property in the hands of the corporation, with that held by the trustees to meet the remaining payments called for under the seven provisions of the fourteenth clause, amounts now to more than \$5,000,000.

It is earnestly contended by the heirs at law of the testator that the gift for the purpose of founding a hospital is void, under the rule against perpetuities. It therefore becomes necessary to ascertain the meaning and construction of the will. This clause begins with instructions to the executors in regard to the possession, management, and disposition of the residue of the estate, and, after proceeding at length with these directions, it ends with the words, "And I give, devise and bequeath said rest and residue of my property and estate accordingly." These directions involve a final disposition of the whole of the residue, and the closing words expressly devise and bequeath it. The whole language, considered together, transfers the title of all the property to the executors, charged with a trust in regard to the management and disposition of it. This involves the performance of duties beyond those which belong to executors, and they necessarily take as trustees, although the word "trustee" is not used. *Carson v. Carson*, 6 Allen, 397; *Bean v. Commonwealth*, 186 Mass. 348, 71 N. E. 784; *Fay v. Taft*, 12 Cush. 448; *Sears v. Russell*, 8 Gray, 86-89; *Mul-*

lenny v. Naugle (Ill.) 12 N. E. 330. The trust is for charitable uses, and the instrument creates, from the death of the testator, a public charity. The beneficiaries who are entitled to the equitable interest are sick persons in indigent circumstances, residing in the county of Suffolk, for whose care a hospital is to be established. *Burbank v. Burbank*, 152 Mass. 254, 25 N. E. 427, 9 L. R. A. 748. This charitable trust comes into existence immediately on the probate of the will, and it comprises all the rest and residue of the estate, except so much as is needed to make the payments called for in the seven provisions above referred to. Not only the legal, but the equitable, estate vests immediately—the legal estate in the trustees, and the equitable in that part of the public which is to be benefited. So much as is required to pay the annuities and the sums which are to go to the surviving children of annuitants is held under a private trust, and this amount, whatever it may prove to be, diminishes to that extent the amount which otherwise would be appropriated to charitable uses.

It is provided that the fund shall be held and accumulated for 25 years before it shall be put to active use for the relief of the suffering. Such a provision is not uncommon, and, even though the time for the accumulation may extend beyond the time prescribed in the rule against perpetuities, it is not invalid. *Odell v. Odell*, 10 Allen, 1; *St. Paul's Church v. Attorney General*, 164 Mass. 188-203, 41 N. E. 231; *Ould v. Washington Hospital for Foundlings*, 95 U. S. 303, 24 L. Ed. 450; *Russell v. Allen*, 107 U. S. 163, 2 Sup. Ct. 327, 27 L. Ed. 397.

These and the other provisions in regard to the management of the property, the payments from the income of the sums due the annuitants, the establishment of a corporation, and the transfer of the property to the corporation, are all mere details of administration which the testator saw fit to prescribe, and which do not affect the general character of the charitable gift, or the nature of the title created by the clause in question. Nothing passes directly to the corporation under the will. It takes through a conveyance from the trustees, made in the execution of their trust. *Ould v. Washington Hospital for Foundlings*, 95 U. S. 303-312, 24 L. Ed. 450; *Jones v. Habersham*, 107 U. S. 174, 2 Sup. Ct. 336, 27 L. Ed. 401; *Crerar v. Williams*, 145 Ill. 625-648, 34 N. E. 467, 21 L. R. A. 454. The corporation is simply a part of the machinery to be provided by the trustees, the better to execute the charitable purpose of the testator. If, for any reason, it should be impossible to establish such a corporation, the gift would not fail, but the court would apply the doctrine of cy pres, and provide some other method of administering the charity to accomplish substantially the same result. *Darcy v. Kelley*,

185 Mass. 433-437, 28 N. E. 1110; *Weas v. Hobson*, 150 Mass. 377, 23 N. E. 215, 6 L. R. A. 147; *Amory v. Attorney General*, 179 Mass. 89, 60 N. E. 391, and cases above cited.

When the corporation is established with power to hold the property, the trustees make a conveyance which transfers the legal title to the new party, who takes and holds it under the same charitable trust. The substance of the charity is a gift of property to be held and used for the care of sick persons in indigent circumstances in a hospital. That the hospital is to be established and maintained by a corporation, rather than by personal trustees, is not of the essence of the gift. *Sears v. Chapman*, 153 Mass. 400, 33 N. E. 604, 35 Am. St. Rep. 502. All of these details as to management are to be regarded and put in execution so far as practicable. But such a gift is not allowed to fail if it becomes impossible to use it in exactly the mode prescribed.

The contention that the gift is directly to the corporation, limited upon preceding bequests to individuals, and that it may not take effect until more than 21 years after the expiration of a life or lives in being, is therefore not well founded; and the same is true of the argument that the gift to the charity is contingent.

The income and accumulations of the property go with the corpus of the fund, so far as the title is concerned. *Tainter v. Clark*, 5 Allen, 66-69; *Wharton v. Masterman* (1895) A. C. 186, 192, 198. The legal title to the property having vested in the trustees, the title to its earnings was in them also. The right to have the earnings, when they should accrue, vested at once in the charity on the death of the testator. Any other doctrine

would render provisions for accumulation ineffectual. See *Odell v. Odell*, 10 Allen, 1, and cases there cited. The expressions in the opinions in *Hale v. Hobson*, 167 Mass. 397, 45 N. E. 913, and *Cronan v. Adams*, 185 Mass. 436, 70 N. E. 423, relied on by the heirs at law, do not mean that the owner of a principal fund, on which income subsequently accrues, has not a vested right to the income from the beginning. They simply mean that the income, as income, is not vested in possession until it comes into existence. See, also, *Safe Deposit & Trust Company v. Wood*, 201 Pa. 420-427, 50 Atl. 920; *Rhode Island Trust Company v. Noyes* (R. I.) 58 Atl. 999-1005. The income in this case, subject to the payments to be made from it under the seven provisions, was all the time held for charitable uses, as the principal was.

The view which we have taken of the meaning of the clause in question makes it unnecessary to consider many of the questions elaborately argued by the counsel for the heirs. These questions grow out of an entirely different construction of the language of the will.

The decision of the Circuit Court of the United States in another suit brought by one of the heirs, and raising the same questions which are before us, is in accordance with the view which we have taken. *Brigham v. Peter Bent Brigham Hospital* (C. C.) 126 Fed. 796. This decision was affirmed by the Circuit Court of Appeals in an opinion (December 7, 1904), which appears in 134 Fed. 513.

The plaintiffs are instructed to pay to the Peter Bent Brigham Hospital the income and interest which they held at the time of bringing the suit.

So ordered.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 8, 1905.)

**LIVERY STABLES—BUILDING NEAR CHURCH—
CONSTRUCTION OF STATUTE.**

1. A stable in which stall room is leased to persons who care for and control their own horses and vehicles is not "a stable for taking horses and carriages for hire," within Rev. Laws, c. 102, § 70, prohibiting the erection of such a stable within 200 feet of a church.

Appeal from Superior Court, Suffolk County.

Bill by Congregation Beth Israel against one O'Connell and others. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Chas. S. Hill, for plaintiff. Horace G. Allen and Harry W. Conant, for respondents.

LORING, J. This is a bill in equity by a religious corporation to enjoin the erection of a stable, which is being erected without its consent within 200 feet of its church building, on the ground that it is a stable within the second clause of Rev. Laws, c. 102, § 70. A final decree was entered, declaring, first, that the building complained of was "to be used as a stable in the manner following, and not otherwise: To let in such building to any person desiring to hire the same the right to keep a horse and vehicle therein in a specified place, such persons having the care, custody, and control of such horse and vehicle; that said defendants will not keep, hire, or let for hire any horses or other animals in said premises"; secondly, "that the purpose for which the stable is to be built is not that of a livery stable or for keeping horses or carriages to let or for hire"; and that the bill should be dismissed, with costs. The suit is here on an appeal by the plaintiff.

What we have under consideration here is not the rule, but an exception to the general rule, as to building stables in that class of cities which includes Boston. The rule is that no stable shall be built unless licensed by the board of health. Rev. Laws, c. 102, § 69. That rule has been complied with in the case at bar. The exception here under consideration is that buildings shall not be erected or used for certain kinds of stables within 200 feet of a church, without the consent in writing of the religious society or parish worshipping therein. Rev. Laws, c. 102, § 70. Under the general rule any kind of stable may be licensed to be built within a foot of a private dwelling house, or of a hotel, for example. The general rule deals with the stable being a nuisance by reason of noise and smell, but the exception as to a stable within 200 feet of a church must be taken to

be described in the exception will be likely to attract persons who would be obnoxious to a congregation of churchgoers. The plaintiff relies on the words "a stable for taking * * * horses and carriages for hire." These words, as well as the exception, were doubtless taken from a special act as to the town of Boston (St. 1810, c. 124), which was under consideration in *Hastings v. Aiken*, 1 Gray, 163, and was finally repealed by St. 1889, c. 89, § 839. There the words are "take in upon hire." The word "hire" in that act must be taken to have its secondary meaning of compensation or pay, as distinguished from its more accurate meaning of compensation for use, and that the words "take in upon hire" were inserted to make certain that a boarding stable was within the act. But the defendants' scheme cannot be held to come within the prohibition against taking in horses for pay. What the defendants intend to do is to let out their stable, or specified parts of it, to tenants who take care of their own horses. We have here, with respect to stables, the familiar distinction between a tenant and a lodger in case of houses, as to which see *White v. Maynard*, 111 Mass. 250, 15 Am. Rep. 28. Even if it were thought that it would be as likely that persons obnoxious to churchgoers would resort to such a stable as the defendants here intend to conduct as would go to a boarding stable or to a livery stable, consideration would not be material. Whether that is so or not so is not for the court. The Legislature has drawn the line between stables where horses are taken in for pay or are kept to be let out on the one hand and all other stables on the other hand. The only question for the court is to determine into which class the stable here in question comes. We are of opinion that it comes within the latter class, because the defendants here do not propose to take in horses for pay, but to let out their stable in tenements for rent, the tenants taking care of their own horses.

It may be worth while to point out, although it does not affect the legal merits of the case, that the stable and church here in question face on different streets, and that it is only the back of the stable that is within 200 feet of the back of the church. Under these circumstances there does not seem to be in fact much chance of the plaintiff congregation's suffering from obnoxious persons resorting to the stable.

As the decree undertakes to recite that the stable is not within the statute because it is not "a livery stable, or for keeping horses or carriages to let or to hire," omitting the word "take," the decree should be modified by inserting that word, and, so modified, the decree dismissing the bill should be affirmed.

So ordered.

(187 Mass. 315)

LIVINGSTONE v. MURPHY et al.(Supreme Judicial Court of Massachusetts.
Berkshire. Jan. 10, 1905.)**STATUTE OF FRAUDS—PLEADING—MORTGAGES—
MISTAKE—AGREEMENT TO EXECUTE—RIGHT TO
NEW MORTGAGE—BONA FIDE PURCHASERS—
NOTICE—RESULTING TRUST—QUITCLAIM.**

1. The statute of frauds must be pleaded, to be available as a defense.

2. Husband and wife executed a note, and gave a mortgage to secure it on land, executing it as though all the land was the property of the wife alone, because of a mutual mistake of the parties in supposing that a deed to the wife of part of the land, pursuant to an execution sale against the husband, was valid. It was the understanding of all parties that the mortgage should cover the husband's interest in the land. *Held* that, as against the husband, the mortgagee was entitled to have him execute a mortgage covering his interest as of the date of the mortgage given, but that he was not entitled thereto as against persons thereafter purchasing at execution sale against the husband, or taking mortgages and a deed from him without notice of his agreement to mortgage his interest in the land.

3. The record merely showing a deed on execution sale to the wife of the judgment debtor, which was void, and a mortgage by her of that and other land owned by her, in which the husband joined to release curtesy, reciting that it was to secure a note of the wife, does not put subsequent takers on notice that he had agreed to mortgage his own interest in fee in the land to secure such note.

4. There is not a resulting trust in favor of the purchaser at execution sale where the deed to her is void.

5. A second mortgagee of property is not precluded from attacking the first mortgage, he not having agreed to assume it, though the first mortgage is exempted from the covenants of the second mortgage.

6. One purchasing from a bona fide purchaser, though himself having notice, takes the title of his grantor.

7. The grantee for value in a quitclaim deed takes the land free of the equitable right, of which he has no notice, of a third person to a mortgage thereon from the grantor.

Report from Superior Court, Berkshire County; William Schofield, Judge.

Suit by Sarah P. Livingstone against James H. Murphy and others. Case reported for the determination of the Supreme Judicial Court. Bill dismissed conditionally.

Pingree, Dawes & Burke, for plaintiff. P. J. Moore, for defendants Murphy. Wm. Tuttle, for defendant E. P. Wood.

HAMMOND, J. This is a bill to reform a mortgage deed. While its allegations, especially with reference to the existence and nature of the agreement under which the mortgage was given, are somewhat defective, and might perhaps be held insufficient as against a special demurrer, still, in the absence of such a demurrer, the bill may be construed as setting out in substance that there was an agreement between the

plaintiff on the one hand and the mortgagor, Margaret J. Murphy, and her husband, James H. Murphy, on the other, that the mortgage should cover the entire interest both of the husband and wife in all of the land therein described; that by reason of a mutual mistake as to the ownership of the northerly part of the land, the title to which part was in the husband, and not in the wife, the mortgage does not in fact cover that part, and therefore it is not in accordance with the agreement. The prayer of the bill is, in substance, that the mortgage be reformed, and that to that end James H. Murphy be ordered to execute and deliver to the plaintiff a mortgage conveying his right in all the land, to take effect as of the time of the date of the plaintiff's mortgage.

The bill, with its amendments, sets out the names of various parties who, since the mortgage to the plaintiff, have, either as attaching creditors, mortgagees, or grantees, become interested in the land, and they are all made defendants. At the trial, however, the only defendants represented were the two Murphys and Wood. The bill has since been taken for confessed against all the others.

The defendant James H. Murphy urges that, even if there was a contract, he was not a party to it. It appears, however, that, although the mortgage describes the mortgage note as "signed by the said Margaret J. Murphy," it was in fact signed by her and her husband jointly, and hence his liability on the debt was the same as that of his wife. It further appears that it was the understanding of all parties that the mortgage should cover his interest in the whole land, and that in pursuance thereof he signed it to release his right of curtesy, which was supposed at that time to be all the interest he had. The court further finds that he was then ready and willing, and by implication agreed, to do whatever might be necessary to give a valid first mortgage upon the whole land. Under these circumstances he must be regarded as a party to the contract, so far, at least, as concerns his interest in the land. The mistake was as to the title to the northerly lot. All supposed that the wife owned it, whereas it was in fact owned by the husband. She had received in 1893 a deed of it from a deputy sheriff, made in pursuance of an execution sale against her husband. This deed was supposed by all parties to be valid, and to work a change in the title from James to Margaret, but it was in fact void, and of no legal effect whatever. *Stetson v. O'Sullivan*, 8 Allen, 321. The mistake was mutual, and it was one of fact, namely, as to the ownership of the northerly lot. "Private right of ownership is a matter of fact. It may be the result also of matter of law; but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights the

¶ 8. See *Vendor and Purchaser*, vol. 42, Cent. Dig. §§ 580, 581.

be set aside as having proceeded upon a common mistake." Lord Westbury, in *Cooper v. Phipps*, L. R. 2 H. L. 149, 170. And this is so although the mistake arises from an erroneous view of the legal effect of a deed in the chain of title. Against such a mistake equity will relieve. *Cooper v. Phipps*, ubi supra; *Baker v. Massey*, 50 Iowa, 399; *Griffith v. Townley*, 69 Mo. 13, 33 Am. Rep. 476; *Pomeroy, Equity*, § 849, and cases cited. See, also, *Canedy v. Marcy*, 18 Gray, 373, 377.

The defendant Wood contends that the agreement was within the statute of frauds. But the statute was not pleaded, nor does it appear to have been relied upon at the trial. Under the familiar rule, that ground of defense must, therefore, be regarded as having been waived. Nor do we think that the plaintiff is chargeable with laches. She seems to have moved within a reasonable time after she became aware of the mistake. *Canedy v. Marcy*, ubi supra. The court therefore rightly ruled upon the facts found that, "as against the mortgagor and her husband, the plaintiff, immediately upon the execution of the mortgage, had an equity to compel them to execute a new mortgage, which should be a first lien upon the northerly and southerly lots"; and this equity would prevail against all parties who subsequently took with notice.

The main question is whether there was enough upon the record to give to attaching creditors and purchasers notice of this equitable right of the plaintiff, or at least to put them on their inquiry. It will be observed that this was a right to have the defendant James H. Murphy convey to her the title which at the time of her mortgage he had in the northerly lot. To sustain this right it is not enough to show the mutual mistake as to ownership of the lot. It must further appear that there was an agreement on the part of James to convey his interest in it. Strictly speaking, the bill requests not a reformation of the terms of the mortgage actually given, but that a new person shall be made a grantor. It seeks to compel James to execute a new mortgage, and it cannot be maintained against him unless he originally agreed, in substance, to convey his interest. In a word, the two essential facts upon which the equitable right of the plaintiff rests are, first, the mutual mistake, and, second, the agreement of James to convey all his interest in the land. With this view of the plaintiff's case we proceed to examine the records. Margaret's title to the northerly lot rests upon the deed of Deputy Sheriff Wood (not the defendant Wood) to her, dated November 7, 1893. The deed recites that the consideration—\$745—was paid by her, and it purports to convey to her the interest of her husband, James, in the northerly lot. The next conveyance

is the sole grantor named at the beginning of the mortgage, but after the condition the husband substantially joins therein; and there is a statement at the end of the description that the land is the same conveyed to Margaret by the above-mentioned deed of the deputy sheriff. Of this mortgage and its recitals the defendant Wood of course had actual notice, because he was the mortgagee, but, inasmuch as it had been discharged, and no one claims under it, the record is not constructive notice to the other defendants of the recitals therein contained. Next comes the plaintiff's mortgage. Margaret is the sole grantor, while James just before the in testimonium clause releases all right of curtesy. Although, as above stated, the mortgage note was actually signed both by Margaret and James, still that fact does not appear in the mortgage. On the contrary, the note is therein described as signed "by the said Margaret J. Murphy." Up to this time the record only shows at the most that Margaret received from the deputy sheriff a deed of the lot in question, for which she seems to have paid a valuable consideration; that from that time to the time of the plaintiff's mortgage both Margaret and James acted as if the title to that lot was in Margaret, and that the plaintiff, in taking her mortgage, seems to have acted upon the same view. But that is not enough to put attaching creditors and subsequent purchasers upon their inquiry. This is not the case where the record by fair implication refers to an unrecorded deed, as in cases like *George v. Kent*, 7 Allen, 16, nor where one of the parties is declared to be acting in a representative capacity, as in cases like *Hayward v. Cain*, 110 Mass. 273. The plaintiff's mortgage proceeded upon the theory that Margaret owned the lot in her own right. So far as shown by the record, the loan was made to and the note was signed by Margaret alone. The most natural inference would be that the only parties to the contract for the loan were Margaret and the plaintiff, and that the plaintiff was content to rely upon Margaret's title for security; that, neither as a party to the contract nor as the owner of the fee, was James concerned in the transaction, and that the only thing he was expected to do was to release curtesy. There is nothing on record to show that he acted even as the agent of Margaret, or that he was in any way concerned in the transaction except to do what he did, namely, release his curtesy. It is going too far to say that the simple fact that a husband releases his curtesy in the land described in a mortgage by his wife purporting to convey the land as hers is notice that he has agreed to convey his own interest in the fee if it should turn out that he and not she is the owner. No notice,

by the record, nor was there enough to put a person on inquiry.

It is urged by the plaintiff that the recital in the deed from the deputy sheriff to Margaret that the consideration was paid by her gives notice of a resulting trust, within the doctrine recognized in *Hayward v. Cain*, *ubi supra*. But that doctrine is applicable only where the legal title is conveyed by the deed. The equitable title is attached to such legal title; and, where the deed is void, of course the doctrine is not applicable. Margaret simply paid a claim of one of her husband's creditors, but that did not give her a resulting trust in the land.

Nor is there anything in either of the two subsequent mortgages to the defendant Wood to show that the plaintiff's mortgage was not exactly what she was entitled to have under her contract. While it is true that the plaintiff's mortgage is exempted from the covenants contained in each of these two mortgages, still there is no agreement on the part of Wood to assume it, and there is nothing to estop him from contesting its validity as against the holder of it. *Weed Sewing Machine Co. v. Emerson*, 115 Mass. 554.

We do not understand that the plaintiff now contends that the instrument of release executed by the defendant Wood of the date of June 16, 1898, had any other legal effect than simply to discharge the mortgage given to him as above stated on February 22, 1894.

It follows from what has been said that the plaintiff's equity cannot prevail except as against persons who took their title with notice other than that contained in the record. Applying this principle to the facts, it is clear that it cannot prevail as against the two mortgages held by Wood. Nor can it prevail over the execution sale to the Third National Bank, since it is not proved that either the attaching creditor, White, or the bank had notice. Although Wood had notice when he purchased from the bank, still he took the title the bank had. As to all the other defendants who have not seen fit to contest, except Renfrew, we think that the plaintiff's equity should prevail. So far as respects the deed to Renfrew, we have had some difficulty as to the true effect of the report. The deed seems to have been given after "it was whispered in Pittsfield that there was a flaw in the plaintiff's title." No copy of it is before us. It was given by James H. Murphy, but it does not appear whether there was any release of dower by his wife. It was a quitclaim deed. No finding is made as to whether Renfrew had notice of the plaintiff's equitable right. A deed under seal, however, imports a consideration, and a quitclaim deed in the ordinary form would have been sufficient to convey the title to Renfrew free from the equitable right of the plaintiff, if he was a purchaser for valuable consideration without notice (*Rev. Laws, c. 127, § 2*); and the burden of proving notice

Wood had notice when he bought from Renfrew, still, as in the case of his purchase from the bank, he would take the title his grantor had. The bill was not taken pro confesso against Renfrew until long after the deed from him to Wood, and, in any event, Wood's rights are not affected by this order.

After the original hearing, and after the court had filed a memorandum of its findings, the plaintiff moved to amend the bill by adding the following: "In the event of the court finding that the plaintiff is not entitled to have her said mortgage reformed as against the owners of the said Wood mortgages and of the title under the said execution sale, the plaintiff offers to pay such amount as is found due for redemption. And the plaintiff prays that in such case the court will determine the amount due for redemption from said mortgages and said execution sale, and that the plaintiff be allowed to redeem by paying such amount." The proposed amendment was opposed by Wood and was disallowed by the court upon the ground that under the facts found by the court the "plaintiff has no right of redemption which extends or applies to the northerly lot." The court then ordered the bill to be dismissed, and by consent of parties reported the cause for the determination of this court upon certain reservations, the first of which was that "if, upon the * * * facts" reported by the court, "the order dismissing the bill was right, and if upon those facts the plaintiff is not entitled to redeem, the order is to be affirmed, and a decree prepared and entered dismissing the bill." In view of the state of the record with reference to the Renfrew deed, we think that the order dismissing the bill was right, because all the title of James H. Murphy in the property seems to have passed to Renfrew free from the plaintiff's equitable right, and hence a conveyance from James to the plaintiff would be of no avail. And for the same reason she is not entitled to a decree allowing her to redeem. But it may be remarked that there was no need of the proposed amendment. All the parties were before the court, and their rights, both as to priority of title and of redemption, could have been settled by the decree upon the bill as it now stands. The fact that more than a year has expired since the execution sale is of no consequence, since the bill was brought within the year. The result is that upon the report as it stands the bill should be dismissed. But, inasmuch as there is quite a large interest in the property to which, but for the deed to Renfrew, the equitable right of the plaintiff would attach, and there has been no actual finding as to whether he did have notice in fact or was a purchaser for value, we are disposed, in view of the manifest equity of the plaintiff's case, to allow the plaintiff to make an application to the trial court to have the case reopened and the report amended so as to contain a finding upon those points.

Unless such an application be made and allowed within 60 days the bill is to be dismissed. If the report be so amended, then there is to be a further hearing, if necessary, upon the report as amended; such hearing to be only upon the question of the effect of the deed to Renfrew upon the rights of the plaintiff.

So ordered.

(187 Mass. 326)

McREA v. HOOD RUBBER CO.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 16, 1905.)

INJURIES TO EMPLOYÉ—NEGLIGENCE—FELLOW
SERVANTS—EXCLUSION OF EVIDENCE.

1. In an action for injuries to an employé, evidence held insufficient to show negligence of defendant.

2. Where the slippery condition of the floor in a rubber factory, causing plaintiff's injury, resulted from the spilling of rubber cement by a fellow workman, without negligence by the employer, plaintiff cannot recover for the injury.

3. In an action by an employé of a rubber factory for injuries resulting from the slippery condition of the floor, evidence as to appliances once furnished to prevent the floor from becoming slippery was immaterial.

Exceptions from Superior Court, Suffolk County.

Action for personal injuries by Henry A. McRea against the Hood Rubber Company. To a judgment on a verdict directed for defendant, plaintiff brings exceptions. Exceptions overruled.

The plaintiff testified substantially as follows: That he was a rubber-boot maker, and had worked for the defendant as such at its factory for about 15 months prior to the accident. That on the morning of September 11, 1902, at 10 minutes before 8 o'clock, he was walking from his bench in said factory to a certain chute, carrying in his arms 11 pairs of men's rubber boots, weighing between 50 and 60 pounds; it being his duty each morning to take from his bench the boots upon which he had worked the previous day, and carry them to this chute, by which they were carried to lower floors of the factory. The plaintiff worked at a bench some 50 feet from this chute, and was obliged to traverse various aisles and passageways in his journey with the boots. The chute was situated near the end of an 8-foot passageway running between a main aisle and another aisle, and perpendicular to the main aisle. On the left hand side of this 8-foot passageway, as the plaintiff was facing when the accident happened, were placed two tanks containing rubber cement, and just beyond these two tanks was the chute spoken of. These tanks were barrel-shaped, from 2½ feet to 3 feet in

diameter, and from 3½ to 4 feet high. They were set on a platform about 15 inches from the floor. The width of the passageway between the two tanks and the bench on the opposite side of the passageway was from 2 to 2½ feet. The plaintiff, just before entering the passageway where the tanks and chute were situated, was obliged to cross a broad aisle, upon which large iron trucks, which were pushed by hand, were run upon an iron track. Upon the morning in question the plaintiff was carrying the boots, as usual, over the usual and shortest route from his bench, and had crossed the main aisle upon which the trucks were run, had entered the passageway where the two tanks and chute were, had taken one step on this passageway, bringing him near the first of the two cement tanks, when he slipped and fell, breaking his leg, and suffering the injuries for which he seeks to recover damages in this action. The plaintiff testified further that he had worked on rubber cement for about eight years prior to the accident; that he had had experience in mixing cement, and had observed its behavior when spilt upon floors, benches, etc.; that after the accident he sat upon the floor for some minutes, before he was removed, and he noticed the place on the floor where he slipped, and its surroundings; that the floor in front of and near the first tank was covered with thin rubber cement; that the space on the floor so covered with cement was about 3 feet square; that the cement is what is known as thin, dry-heat cement, used by arctic makers, and that he had used such cement frequently in his work, and was familiar with its behavior when spilt or poured upon a floor and exposed to the air; that he had seen cement spilled 50 times, perhaps, at the Hood Rubber Company; that the cement on the floor was about one-sixteenth of an inch in thickness here, and that the cement had begun to thicken; and that, in his opinion, it had been on the floor 20 minutes. He further testified that rubber cement is made up of naphtha, rubber, and litharge, and, when placed upon a floor or smooth surface, is very slippery. He further testified that there was another way to go, but that he had almost invariably, since entering this shop, 15 months previous to the accident, gone over this same route with his boots, and that he had almost always seen a man, whose name he did not know, and whom he took to be an Armenian, engaged at work about these cement tanks, cleaning them, drawing cement, and cleaning the floor of the passageway, and that the Armenian was not near the tanks at the time of the accident, and that no one was near the tanks or in the passageway. The light was good. The place where he fell was 10 or 12 feet from the windows. The arctic makers always got their cement in the morning, from 6:30 to 7:30.

¶ 2. See Master and Servant, vol. 24, Cent. Dig. § 352.

Richard W. Pearce testified that he had been the foreman in charge of the making department of the defendant's factory for five years previous to May 24, 1902, at which time he left the defendant's employ; that he was in charge of the room where the plaintiff worked; that he hired and discharged the help; that he had hired the plaintiff; that during the time he was in the defendant's employ he had directed two men to bring up the cement tanks filled each morning, and to replenish them when empty; that he did not know the names of these men; that one of them (an Armenian), at the time the witness left the defendant's employ, and for some time hitherto, had each morning, by order of the witness, helped the arctic makers draw the cement from this particular tank, near which the plaintiff fell, and that it was the duty of this Armenian, in accordance with orders received from the witness, to keep the tanks clean, and also to keep the floors near the cement tanks clean and free from cement; and that he had directed this Armenian to remain by this tank every morning from half past 6 till 8 o'clock. On cross-examination he stated that thin cement, if spilled, will flow in all directions.

John E. Bradley, called by the plaintiff, testified that he was the foreman of the making department of the defendant; that he had held this position from June 1, 1902; that he saw the plaintiff lying on the floor of the factory a few minutes after the accident—it might have been 7:45. He further testified that when he became foreman, on June 1, 1902, he found certain men bringing up the cement in the tanks, and taking general charge of the cement in his department, and that prior to the accident he gave these men no further instructions as to what to do, except that he told them to clean things up; and that the same men were in charge of the cement in his department on the day of the accident as were there when he became foreman of the department. Thin cement is of about the consistency of water, and dries

very quickly. It is slippery when wet, but when dry is the opposite.

One Brewster, an employé of the defendant, called by the plaintiff, testified on cross-examination that the arctic makers draw from 7 to 7:45 a. m. He further said that he was familiar with thin cement. When wet it is slippery, but when dry it is not. It dries as soon as the naphtha dries. He also testified that there were two tanks holding cement; the one nearest the broad aisle holding thick cement, and the one furthest from the broad aisle holding arctic cement.

Richard W. Pearce, one of the plaintiff's witnesses, testified that he was the foreman of the department where the plaintiff worked up to June 1, 1902, and that he had given certain instructions to a man in regard to the cement tanks, and in regard to the cleaning of the floors near the tanks. The witness was then asked in direct examination: "What, if any, appliances were furnished this man with which to keep the floors from becoming slippery?" This question was objected to by the defendant, and was excluded by the court, and the plaintiff duly excepted. It was the purpose of the plaintiff, in asking this question, to show that sand and burlap were furnished this employé, to be used upon the floors, to keep them from becoming slippery by reason of cement getting upon them.

The jury, by order of the court, returned a verdict for the defendant, and the plaintiff, being aggrieved thereby, and by the refusal of the court to admit the evidence which he sought to have admitted, brings exceptions.

H. H. Folsom, for plaintiff. John & Jas. A. Lowell, for defendant.

PER CURIAM. There was no evidence of negligence on the part of the defendant. If the condition of the floor was due to the negligence of any one, it was that of a fellow servant of the plaintiff, for whose acts the defendant is not liable to the plaintiff.

The evidence offered and excluded was immaterial.

(137 Mass. 323)

BATES v. BOSTON ELEVATED R. CO.
et al.(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 17, 1905.)**EMINENT DOMAIN—INJURY TO LAND—COMPEN-
SATION—PARTIES INTERESTED—MORTGAGEES—
PRIORITIES—RIGHT TO REACH FUND—EFFECT
OF FORECLOSURE—RIGHT OF REDEMPTION—
JUDGMENTS—RES ADJUDICATA.**

1. Under St. 1894, p. 761, c. 548, as amended by St. 1897, p. 498, c. 500, providing for compensation for injuries done to land by the location, construction, and operation of an elevated railway, and specifically providing that a petition for compensation may be filed by a person entitled thereto at any time within three years after the construction of the railway upon or in front of his premises, the date of the beginning of the physical construction of the railway upon or in front of the premises in respect to which compensation is claimed is the date to be taken in determining what persons are entitled to compensation for injury to the land.

2. A third mortgagee is a mortgagee within St. 1894, p. 764, c. 548, § 8, providing for the compensation of lessees and mortgagees having an estate in premises abutting on an elevated railway.

3. Where land taken or otherwise affected by the exercise of the power of eminent domain is subject to a mortgage when the compensation therefor becomes due, the compensation, in the absence of statute, is, at law, the property of the mortgagor; but in equity the mortgagee can follow the land taken, and subject the compensation fund to a lien for the payment of the mortgage debt due him.

4. St. 1855, p. 660, c. 247, gives a court of law, in which a petition for compensation for land taken for railroad purposes is pending, jurisdiction to administer the mortgagee's equitable right to a lien on the compensation fund. St. 1881, p. 426, c. 110, extends the provisions of the act of 1855 to all cases of mortgaged land taken for public uses. St. 1894, p. 764, c. 548, § 8, entitles mortgagees to compensation for the construction of an elevated railway in the street on which the premises abut. *Held*, that the last-named act did not give the mortgagees other rights than those given by the previous statutes, but merely put beyond question their right to compensation in the manner provided by such statutes in a case where the land was not actually taken for a public use, but was damaged.

5. Where part of a parcel of land covered by a mortgage is taken for public uses, nothing remains subject to the mortgage except the land not taken, and that only can be sold on a foreclosure of the mortgage; and the right of the mortgagee to reach the compensation fund is an equitable right, distinct from his rights under the mortgage on the remaining land.

6. Land abutting on an elevated railroad was subject to first, second, and third mortgages. Petitions for compensation for the injury done were brought under St. 1894, p. 761, c. 548, as amended by St. 1897, p. 498, c. 500, by certain of the parties interested. Thereafter the second mortgage was foreclosed, and the debt paid by the proceeds of the sale. *Held* that, while the land itself was no longer subject to redemption by the third mortgagee, the foreclosure sale under the second mortgage did not affect the third mortgagee's rights in the compensation fund, the right to reclaim which was entirely distinct from the right to redeem the land itself, and was not foreclosed by the foreclosure of the mortgage on the land, so that the third mortgagee could redeem the fund and apply it to the satisfaction of his lien merely by paying off the first mortgage.

7. Under Rev. Laws, c. 48, § 114, and chapter 111, §§ 112, 113, providing for proceedings to determine the compensation of mortgagors and mortgagees of land taken for railroad purposes, and authorizing the rendition of judgment apportioning the damages assessed among the various mortgagees according to the priority of their mortgages, the court has no jurisdiction to inquire into and adjust the equitable rights existing between the various mortgagees where the mortgage debts are secured by liens on other funds.

8. Land subject to mortgages of varying priorities was damaged by the construction of an elevated railroad in the abutting street. Petitions under Rev. Laws, c. 48, § 114, and chapter 111, §§ 112, 113, were filed by certain mortgagees to procure an assessment and apportionment of damages. The second mortgage was foreclosed, and the third mortgagee, who was a party to the proceedings for damages, thereupon brought a bill to compel the first mortgagees to resort to the land before resorting to the compensation fund, or to be permitted to redeem the first mortgages and be subrogated to their lien. *Held*, that the rights of the third mortgagee were preserved by the pendency of the equity suit, and were not concluded by judgment in favor of the first mortgagees in the damage proceedings, which did not and could not take into consideration the equities of the parties, aside from the bare question of priorities, and the application of the compensation fund to the first mortgagees pending the determination of the equity suit was unauthorized, and was no protection against such suit.

9. Where land subject to first, second, and third mortgages was damaged by the construction of an elevated railway, and, the second mortgage being foreclosed and satisfied by a sale of the property, compensation was obtained for the damage done, the burden of satisfying the first mortgages should be apportioned between the land and the compensation fund, proportionally to the value of the land, subject to the injury done by the elevated railway, free of incumbrances, and the amount of compensation found due for the injury.

Case reserved from Superior Court, Suffolk County.

Bill in equity by one Bates against the Boston Elevated Railroad Company and others. In the superior court the case was reserved for the Supreme Judicial Court. Decree ordered.

Benj. E. Bates and Jas. D. Colt, for plaintiff. L. S. Dabney and E. M. Parker, for defendants Richd. T. Parker et al. Jas. R. Dunbar, Henry M. Williams, Harrison M. Davis, and Harvey H. Baker, for defendants Francis Peabody et al. Elder & Whitman, Frank E. Bradbury, and H. Ware Barnum, for other defendants.

LORING, J. The plaintiff in this bill in equity held a third mortgage on four lots of land, in respect of which compensation was due under St. 1894, p. 761, c. 548, and St. 1897, p. 498, c. 500, for injury done to it by the location, construction, maintenance, and operation of the elevated railway. There were four first mortgages—one upon each of four lots which made up the estate covered by the plaintiff's mortgage. As matter of convenience, these will be spoken of as the first mortgages. After petitions for compen-

three first mortgagees, the second mortgage was foreclosed. Thereupon this bill was brought to have the first mortgagees directed to enforce payment of the amounts severally due them out of the land before resorting to the compensation due, or, if they were allowed to resort to the compensation fund, the plaintiff might be subrogated to the lien of the first mortgages, which at the trial the plaintiff offered to redeem. It appeared at the hearing that, after the bill now before us was brought, the petitions for compensation came on for trial; that a verdict was rendered by agreement for \$17,500, as the damages to the mortgaged premises as a whole; and that judgments were entered directing \$4,375 to be paid to each of the four first mortgagees. It also appeared that the judgments had been paid. It was agreed that the value of the premises before the construction of the elevated railway was begun exceeded the amount of the first and second mortgages, and that at the time of the foreclosure of the second mortgage "the rental value of said premises had been greatly decreased, and the rentals of said premises, if fully occupied, then amounted approximately to the sum of \$3,960 per year, and the yearly expenses, including interest on the mortgages underlying the plaintiff's, amounted approximately to \$7,200. These facts were then known to the plaintiff, and influenced him in deciding not to bid in the property, although present at the sale, and of sufficient ability to have purchased the property, had he thought it advisable so to do." The case is here on a reservation made by the superior court.

The first defense set up is that the mortgage to the plaintiff was made after the date when the right to compensation accrued, and for that reason he has no claim on that fund for injury to the land described in the bill. The question of the date when the right to compensation accrues under St. 1894, p. 761, c. 548, as amended by St. 1897, p. 498, c. 500, is a question of great practical importance, affecting parties in other cases. For this reason the court has taken briefs from persons not parties to this suit, whose rights are affected, and the question has been ably and exhaustively argued.

The defendant railway has argued with great confidence that the parties now entitled to compensation are those who owned the property when the right came into existence to do that for which compensation is given, and that in the case at bar this was on July 11, 1898, when the plans of the railway were approved by the railroad commissioners, "showing the form and method of construction proposed, and the proposed location of the tracks, elevated structure and stations, with such detail as may be necessary to show the extent to which any street, way, avenue, bridge, public or private lands are to be en-

ture described in those plans opposite the premises in question, and to operate a railway upon it, became complete by force of St. 1897, p. 502, c. 500, § 6. As to the clause of section 8 of St. 1894, p. 764, c. 548, which provides that, if a petition for compensation is brought, it must be brought "at any time within three years after the construction of such railway upon or in front of his premises," the defendant railway's contention is that this is a limitation on the time when the action which had previously accrued must be brought; being in this respect somewhat analogous to the provision introduced into the highway act by St. 1842, p. 538, c. 86 (extended by St. 1847, p. 477, c. 259, § 4, to cases where selectmen laid out townways), in which it was enacted that the damages should not be paid until an actual entry was made on the land taken for the purpose of constructing the way, although the damages were due as soon as the way was laid out, and even though it never was built. *Harrington v. County Commissioners*, 22 Pick. 263, 33 Am. Dec. 741. See, also, *Hallock v. Franklin County*, 2 Metc. 558. In support of this contention this defendant also refers to the rule in case of railroads, namely, that the owner at the time of filing the location of the railroad is the person entitled to compensation. *Charlestown Branch Railroad v. County Commissioners*, 7 Metc. 78; *Hampden Paint & Car Co. v. Springfield, Athol & Northeastern Railroad*, 124 Mass. 118. And it contends that this result was reached, in case of both highways and railroads, by the application of the rule for which it contends here, namely, that the persons entitled to compensation are those who own the property when the right becomes complete to do the thing for which compensation is given. It further contends that this is an established principle of law, applicable to all cases where compensation is due by reason of the exercise of the power of eminent domain. But the result arrived at in case of railroads and public ways was not reached by the application of a general principle of law. It was reached as a matter of the interpretation of the provisions adopted by the Legislature in the statutes there in question.

It was provided by Rev. St. 1836, c. 24, § 11, under which the first case as to highways arose (*Harrington v. County Commissioners*, 22 Pick. 263, 33 Am. Dec. 741), that the county commissioners, in laying out a highway, should estimate the amount of damage sustained by any persons, and should state the amount thereof in their return laying out the way, and also that, if an application should be made for a jury to revise their award of damages, it must be made within six months thereafter. Rev. St. 1836, c. 24, § 14. As matter of construction of that act, the *punctum temporis* was held to be the lay-out of the

463; *Loring v. Boston*, 12 Gray, 209; *Edmands v. Boston*, 108 Mass. 535, 547. With the modification introduced by St. 1842, p. 538, c. 86, and St. 1847, p. 477, c. 259, § 4, already referred to, the provisions of the Revised Statutes were re-enacted in Gen. St. 1860, c. 43, §§ 14, 22, 62, 63, and Pub. St. c. 49, §§ 14, 33, 68, 69, 79. It was changed in the Revised Laws. It is there provided that no petition for a jury shall be brought until an entry is made upon the land taken for the purpose of constructing the way. Rev. Laws, c. 48, § 28. See, also, §§ 68, 80.

The rule in case of railroads was originally established by a decision as to when the three years within which a petition had to be brought began to run, under Rev. St. 1836, c. 39, § 58. This statute provided that "no application to the commissioners to estimate said damages for land or property hereafter to be taken shall be sustained unless made within three years from the time of taking the same"; and it was held, as matter of construction, that the taking was the written location which had to be filed by the railroad company in the registry of deeds, defining the courses, distances, and boundaries of the railroad location. *Charlestown Branch Railroad v. County Commissioners*, 7 Metc. 78. In the subsequent case of *Hampden Paint & Car Co. v. Springfield, Athol & Northeastern Railroad*, 124 Mass. 118, it was held that the date as of which the damages were to be assessed was the date of filing the location.

In case of the lay-out of a public way, and the location of a railroad, a formal act of taking has to be made by the body which is authorized to exercise the power of eminent domain; and there was in each case, when the rule was established, a provision limiting the time within which a petition for compensation could be brought to so many months or years from that act—the return in case of highways, and the location in case of railroads. But there is another class of statutes, namely, statutes where the body empowered to act under the right of eminent domain is not required to make a formal taking, and where either the Legislature has expressly provided that the time within which a petition for compensation can be brought is to run from actual physical interference on the part of the person or body empowered to act under the power of eminent domain, or this conclusion has been reached by the court a matter of construction. To this class belong *Ipswich Mills v. County Commissioners*, 108 Mass. 363, and *Heard v. Proprietors of Middlesex Canal*, 5 Metc. 81—two of the cases relied on by the defendant railway—to which may be added *Call v. County Commissioners*, 2 Gray, 232. A collection of statutes where towns and other bodies have been authorized to take water without any formal act of taking is to be

Gloucester, 179 Mass. 363, 373, 376, 60 N. E. 977. The time within which a petition for compensation for the taking of water rights by the plaintiff corporation in *Gloucester Water Supply Co. v. Gloucester* was "within three years from the time the water is actually withdrawn or diverted," and it is there stated that such "is a common, if not a usual, form of limitation of such petitions." See page 877, 179 Mass., page 979, 60 N. E. In the case of the elevated railway the Legislature might, perhaps, have considered as a taking the approval by the railroad commissioners of the plans specifying the kind of structure to be built, although that was not the primary purpose of that approval. But the Legislature did not do so. It provided that the time within which a petition for compensation should be brought should run neither from a taking, nor from the approval of the plans by the railroad commissioners. What it did provide was that such a petition may be filed by a person entitled to compensation "at any time within three years after the construction of such railway upon or in front of his premises." In other words, the Legislature put the statute into the class of statutes where no taking is required, and where the time runs from the physical interference with the rights for which compensation is given. And as matter of construction, we are of opinion that that is the time when the person entitled to compensation is to be ascertained; following the reasoning in *Charlestown Branch Railroad v. County Commissioners*, 7 Metc. 78, and *Hampden Paint & Car Co. v. Springfield, Athol & Northeastern Railroad*, 124 Mass. 118, and the result as well as the reasoning reached in *Ipswich Mills v. County Commissioners*, 108 Mass. 363, *Heard v. Proprietors of Middlesex Canal*, 5 Metc. 81, and *Call v. County Commissioners*, 2 Gray, 232.

It follows that under St. 1894, p. 761, c. 548, and St. 1897, p. 498, c. 500, the physical construction of the railway upon or in front of the premises in respect of which compensation is claimed is the date to be taken in determining who are entitled to compensation therefor. The language of the act means, on the face of it, within three years after the construction at the point in question is completed. But it is apparent that the process of constructing the elevated structure in front of a store or a house probably would last some time. As matter of fact, the work of laying the foundations opposite the premises in question began May 4, 1899, and was completed on May 11, 1899. The erection of the superstructure was begun on November 16, 1899, and was completed March 15, 1901—a period of one year and four months. The first train was run on May 1, 1901. It is apparent that the buildings abutting on the streets through which the elevated railway could be built must have been largely in the

hands of tenants, and also that this was recognized by the Legislature. "Lessees" are specially mentioned in the act (St. 1894, p. 764, c. 548, § 8) as persons entitled to compensation. If we were to adopt as the true construction of the act the meaning which the words used bear on their face, compensation for loss of light and air during construction could not be claimed, and a lessee whose lease expired after the construction had been going on for over a year, but yet expired just before the construction was completed, would not be paid, although he may have suffered a serious damage, of the kind for which by the act compensation is to be made. Damage done by construction alone is contemplated by the act. The first line of the act is in the disjunctive, and the effect of that is not affected by the use of the conjunctive in the following sentence. For these reasons, we are of opinion that the date must be held to be the beginning of the construction of the railway. In the case at bar that date is May 4, 1899. The result is that the mortgage to the plaintiff was executed four months before the date when damages accrued under the act, and the first defense fails. The plaintiff was a mortgagee, within St. 1894, p. 764, c. 548, § 8.

The defendants' next contention is that all rights of the plaintiff (the third mortgagee) were cut off by the foreclosure of the second mortgage. But a majority of the court is of opinion that this position is not well taken. Where land taken or otherwise affected by the exercise of the power of eminent domain is under a mortgage or mortgages when compensation therefor becomes due, the compensation, in the absence of any statute on the matter, is, at law, the property of the mortgagor. *Breed v. Eastern Railroad*, 5 Gray, 470, note; *Farnsworth v. Boston*, 126 Mass. 1. In equity, however, the mortgagee can follow the land taken, and subject the proceeds (i. e., the compensation fund) to a lien for the payment of the mortgage debt due to him. This was decided in *Wood v. Westborough*, 140 Mass. 403, 5 N. E. 618. The doctrine is not one peculiar to cases where land is taken under the power of eminent domain. It rests upon the principle that, although the land has been taken out of the mortgage by the paramount power of eminent domain, yet, in equity, the proceeds (that is to say, the compensation due) remains land, and can be subjected to a lien for the payment of the mortgage debt. The doctrine is one of general application, and the cases on it are collected in *Worcester v. Boston*, 179 Mass. 41, 50, 60 N. E. 410, and *Knowles v. Sullivan*, 182 Mass. 318, 65 N. E. 389. But this matter has been regulated to some extent by statute. The first act on the subject was St. 1855, p. 686, c. 247. That act gave to the court of law in which a petition for compensation was pending jurisdiction to administer this equitable right in

all cases where the land mortgaged was taken for railroad purposes; and by St. 1881, p. 426, c. 110, the provisions of that act were extended to all cases of mortgaged land taken for public uses under authority of law. These statutes followed and seem to have been caused by the decisions in *Breed v. Eastern Railroad*, 5 Gray, 470, note, and *Farnsworth v. Boston*, 126 Mass. 1, already referred to. The effect of these enactments was settled in *Wood v. Westborough*, 140 Mass. 403, 5 N. E. 618. It was there held that they did not create new rights, but gave to the court of law in which the compensation due was recovered jurisdiction to administer this equitable right of the mortgagee. We are of opinion that the reference to mortgagees in St. 1894, p. 764, c. 548, § 8, did not give mortgagees other or different rights. It could not have been the intention of the Legislature, by mentioning mortgagees in section 8 of St. 1894, p. 764, c. 548, to break in on the general system which had been previously adopted for all cases where mortgaged land is taken for public uses, and to give to mortgagees of land in respect of which compensation is due by reason of the elevated railway a different right. Inasmuch as compensation is given by St. 1894, p. 761, c. 548, for injury to what was not, or may not have been, a common-law right, it was proper to mention mortgagees in section 8, and in that way to avoid any question of the statute's applying in case of a mortgage on land of an abutter who did not own the fee in the street; having regard to the language of St. 1881, p. 426, c. 110, which, in terms, refers to land taken for public uses only.

This brings us to a consideration of the respective rights of the parties at law and in equity in the case at bar.

After a part of a parcel of land covered by a mortgage is taken for public uses, all that remains subject to the mortgage is the remaining land not taken. When the part taken is taken for public uses, the mortgagee's title to it is wiped out, and the land taken is no longer subject to the mortgage. It has been withdrawn from the operation of the mortgage by title paramount. This is the situation at law. It follows that at law, in case the mortgagee undertakes to foreclose the mortgage by sale, all that is to be sold is the remaining land. That is all that remains for the mortgage to operate on as a common-law conveyance, and it is as a common-law conveyance that it is to be foreclosed. So far as what it operates on is concerned, it is immaterial whether it is foreclosed by an entry in pais, a writ of entry, or a sale under a power. In equity, however, the mortgagee has a right to follow the land into the chose in action for the compensation due, and to subject it to a lien for the payment of the mortgage debt due to him. But that is an equitable lien which

the mortgagee has in addition to his common-law mortgage on the remaining land. For a discussion of these principles, see *Home Ins. Co. v. Smith*, 28 Hun, 296, cited with approval in *Gates v. De La Mare*, 142 N. Y. 307, 315, 37 N. E. 121. It was held in *Gates v. De La Mare*, 142 N. Y. 307, 37 N. E. 121, that the right to the compensation due passed to a purchaser under a foreclosure sale. But in another case of land taken for the construction of the same street it was held that a conveyance of the land after the taking transferred the right to the compensation. *Magee v. Brooklyn, Delap v. Brooklyn*, 144 N. Y. 265, 39 N. E. 87. That is not the law in this commonwealth. And apparently it is not law in New York, for it was said by O'Brien, J., in the latter cases, that "the case has always been considered as *sui generis*, and the rights of the parties determined according to the peculiar facts and circumstances, upon equitable principles." Page 268, 144 N. Y., page 88, 39 N. E. The situation is the same in the case at bar, where the compensation is due for injury done the estate, in place of being due for a taking of a portion of the land mortgaged. Before the foreclosure of the second mortgage took place, in the case at bar, the plaintiff, as third mortgagee, had a right to redeem the land which was subject to the first and second mortgages, and a right to redeem the chose in action for the compensation due, which also was subject to an equitable lien in favor of the first and second mortgagees. The two rights of redemption were independent of each other in the same way that they would have been, had they originally been brought into being by a mortgage at law on the land, and an equitable lien on the chose in action for compensation due. If the plaintiff thought that the sum bid at the foreclosure sale for the equity of redeeming the remaining land from the incumbrance of the first mortgage (which was all there was for sale in the foreclosure of the second mortgage) was as much as the remaining land, subject to its share of the first mortgages, was worth, he had a right to let that security be realized for payment of the second mortgage debt, and to rely on his equitable lien on the chose in action for payment of the third mortgage debt due to him. See *George v. Wood*, 11 Allen, 41, where it was held that, after a foreclosure of one of two parcels of land covered by the same mortgage, the mortgagor could redeem by paying the balance of the debt due, after deducting the value of the parcel foreclosed. After the foreclosure of the second mortgage, the second mortgage debt was paid by the proceeds of the sale of the equity of redeeming the land from the first mortgages, subject to the injury done by the elevated railway, which, for convenience, may be spoken of as the remaining land. That left the plaintiff with no rights in the remaining

land, but with an equitable lien on the chose in action for the compensation due, subject only to the equitable lien of the first mortgagees thereon. It was at this time that the bill now before us was filed.

The defendants' next contention is that the right to redeem the chose in action for the compensation due, which the plaintiff had when the bill was filed, was lost when the superior court entered judgments in favor of the first mortgagees in the petitions to recover the compensation due; that the plaintiff was a party to those petitions, was in court at the time, and made no objection to the entry of those judgments; that this appropriation is binding on the plaintiff, and is final; and that by the payment under the judgment, if not by the judgment itself, the plaintiff's right in the chose in action came to an end. As to an appropriation by payment to a first mortgagee cutting off the right of a junior incumbrancer to redeem, see *Romer, J., in Flint v. Howard* [1893] 2 Oh. 54, 60. But we are of opinion that neither the action of the superior court in rendering judgments for the first mortgagees, nor the payment under it, has cut off the plaintiff's right in the fund. A judgment entered by the superior court under Rev. Laws, c. 48, § 114, re-enacting St. 1881, p. 426, c. 110, and Rev. Laws, c. 111, §§ 112, 113, re-enacting St. 1855, p. 666, c. 247, is ordinarily final and binding on the persons who are parties to the petitions. See *Wood v. Westborough*, 140 Mass. 403, at page 410, 5 N. E. 613, at page 614. But the jurisdiction given by these statutes to courts of law to administer the equitable rights of the mortgagee in regard to the compensation due in respect of the mortgaged land is a restricted one. Under the statutes, no discretion is given to the court of law. The statutes are mandatory that judgment shall be entered in favor of the several mortgagees in the order of their priority. The court of law has no jurisdiction to inquire into and adjust the equitable rights, if any, between the several mortgagees, where the mortgage debts are also secured by liens on other funds. If such rights exist, they must be enforced by a court of general equity jurisdiction. The superior court therefore was right in refusing to postpone the trial of the petitions for compensation until the bill in equity now before us was heard, on the ground that his rights would not be prejudiced thereby. The plaintiff's right to redeem was preserved by the fact that the bill now before us was pending when the judgments were rendered.

The answer to the contention that the payment ended the plaintiff's rights is the same. While this bill was pending the first mortgagees ought not to have applied, in reduction *pro tanto* of the respective debts due them severally, the money paid to them; and if the statement in the report is to be taken to mean that they have done so in fact,

since they ought not to have done so, they must stand, as against the plaintiff in this bill in equity, as not having done so.

To redeem, the plaintiff must pay the whole first mortgage debt. On so doing, he would be subrogated to the lien of the first mortgagees, and could set up those mortgages for the amounts due thereon, respectively, without regard to the payments made by the elevated railway, were the mortgagor the only person interested. But the plaintiff seeks to set up the first mortgages and throw the whole burden of paying the first mortgage debts not on the mortgagor but on the purchaser of the land at the foreclosure sale of the second mortgage. There is no reason why the whole burden of the first mortgage debts should be borne by the land now owned by the defendant Green, rather than by the plaintiff, who has a lien on the chose in action for the compensation due; and, conversely, there is no reason why it should be borne by the plaintiff, rather than by Green, unless the sale was made under some condition which does not appear in the agreed facts before us. Their rights in this respect are equal, and the burden of the first mortgages should be apportioned between the land and the compensation fund, proportionally to the value of the land, subject to the injury done by the elevated railway free of incumbrances, and the amount of the compensation fund due for that injury. The case comes within *Flint v. Howard* [1893] 2 Ch. 54; *Barnes v. Raester*, 1 Y. & C. C. 401; *Bugden v. Bignold*, 2 Y. & C. 377.

In the opinion of a majority of the court, there must be a decree accordingly.

(187 Mass. 290)

WARREN v. MAYOR AND STREET
COM'RS OF CITY OF BOSTON.

JORDAN et al. v. SAME.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 7, 1905.)

MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—DEFECTIVE ASSESSMENTS—REASSESSMENTS—CONSTITUTIONALITY—CONSTRUCTION OF STATUTES—UNEQUAL TAXATION.

1. The assessment of betterments for street improvements is merely a mode of special taxation, which may be authorized after as well as before the expenditure is incurred.

2. Where a defect rendering an assessment void consists of an irregularity or error which the Legislature might have authorized, or an omission of something which it might have dispensed with, in the first instance, the error may be cured by a subsequent act authorizing a reassessment.

3. St. 1902, p. 439, c. 527, authorizing street commissioners to assess betterments for public improvements completed by a city within six years before its enactment, consisting of laying out or altering the grade of highways or parkways, the object of which was to permit the reassessment of benefits for improvements which were originally assessed in disregard of the requirements of St. 1894, p. 462, c. 416—that the work should all be done by contract, that the number of contracts should not exceed five, and that, when work was to be done by the super-

intendent of streets at an estimated cost of over \$2,000, he should invite proposals therefor by advertisement—is constitutional.

4. St. 1902, p. 439, c. 527, authorizing street commissioners to assess betterments for public improvements completed by a city within six years before its enactment, consisting of laying out or altering the grade of highways or parkways, authorizes a reassessment for improvements made under general or under special laws in cases where the original assessment was unconstitutional, or when it was merely informal or illegal.

5. St. 1902, p. 439, c. 527, authorizing street commissioners to assess betterments for public improvements completed by a city within six years before its enactment, consisting of laying out or altering or changing the grade of highways or parkways, does not contemplate the making of assessments for improvements for which valid assessments of betterments have previously been made, but applies, in its reference to former assessments, to those which are invalid.

6. St. 1902, p. 439, c. 527, authorizes street commissioners to assess betterments for public improvements completed by a city within six years before its enactment, consisting of laying out or altering or changing the grade of highways or parkways. It further provides that estates of owners who have voluntarily paid former invalid assessments in full shall not be subject to another assessment. In cases of reassessments, not more than one-half of the expense incurred for the improvements can be assessed, while in former statutes the whole could be assessed, if it did not exceed the special benefits. *Held*, that it would be presumed that the statute was enacted under the assumption that previous invalid assessments which had been paid, so that the estates paying them were exempt, were not less in amount than the sum otherwise recoverable under the statute on account of invalid assessments not paid, and that therefore those liable under the statute were not prejudiced by the exemption, which does not render the statute unconstitutional, as productive of unequal or disproportionate taxation.

Separate petitions by Winslow Warren, trustee, and by Eben D. Jordan and others, for a writ of certiorari to the mayor and board of street commissioners of the city of Boston, to quash proceedings of the commissioners in assessing betterments. Petitions dismissed.

Gaston, Snow & Saltonstall and Malcolm Donald, for petitioners Eben D. Jordan et al. Moorfield Storey, Chas. Warren, and Warren, Perry & Codman, for petitioner Winslow Warren. Thos. M. Babson, for defendants. Henry W. Putnam, for parties having similar interest with petitioner.

KNOWLTON, C. J. These are petitions for a writ of certiorari to quash the proceedings of the street commissioners of Boston in assessing betterments under St. 1902, p. 439, c. 527, for the laying out, extension, and construction of Huntington avenue. Our decision will depend upon the construction to be given to this statute. It was passed on June 27, 1902, and it is a law giving general authority to the street commissioners of Boston to assess betterments for public improvements completed by the city within six years before its enactment, "consisting of laying out, relocating, altering or widen-

a highway, or a highway and parkway, public way or public alley, or of changing the grade of or constructing, with or without a sewer, a highway, or a highway and parkway," etc. At that time assessments of betterments in Boston under different statutes had been held invalid by this court—in some cases on account of the unconstitutionality of the statute, and in others on account of irregular or illegal action of the public authorities in proceedings on which the assessments were founded. *Lorden v. Coffey*, 178 Mass. 489, 60 N. E. 124; *Warren v. Street Commissioners*, 181 Mass. 6, 62 N. E. 951; s. c., 183 Mass. 119, 66 N. E. 412. See *Harwood v. Street Commissioners*, 183 Mass. 348, 67 N. E. 362; *White v. Gove*, 183 Mass. 333, 67 N. E. 359. It was supposed that there were other invalid assessments or other public improvements, to pay the cost of which assessments of betterments had been contemplated, which, in view of these decisions, could not then be legally made. *Huntington avenue* had been constructed at an expense to the city of about \$675,000, in disregard of the requirements of the statutes as to the mode of doing the work. An assessment of betterments for this construction had been held to be invalid, because of the violation of law that entered into the cost of the work which the abutters were asked to pay. *Warren v. Street Commissioners*, *ubi supra*. It seemed that no part of this cost could be assessed upon the estates specially benefited, without additional legislation. Under these circumstances, the act in question was passed. Two questions arise under it. One is whether the Legislature constitutionally could authorize a reassessment of betterments from the construction of *Huntington avenue*, so as to include in the assessment a portion of the expenditures made in violation of the statute. The other is whether the Legislature intended to authorize such a reassessment. As to the first question, the counsel for one of the petitioners concedes that the Legislature may authorize the reassessment of a betterment tax if the original assessment failed because of informality or other defect. But we have before us an argument that the statute, if construed according to the contention of the respondents, is unconstitutional.

The assessment of betterments under statutes of this kind is simply a mode of special taxation to meet the expenses of government in making public improvements which specially benefit particular property. If the other necessary conditions exist, such taxation may be authorized after as well as before the expenditure is incurred. *Hall v. Street Commissioners*, 177 Mass. 434, 59 N. E. 68, and cases there cited. This proposition includes, of course, the authorization of a reassessment to take the place of one which is void for irregularity or error. *State v.*

Con., 21 Wis. 322; *Re Piedmont Avenue East*, 59 Minn. 522, 61 N. W. 678; *Manley v. Emilen*, 46 Kan. 655, 27 Pac. 844; *Musselman v. Logansport*, 29 Ind. 533; *City of Chicago v. Sherman* (Ill.) 72 N. E. 396. If the defect that makes the assessment void is an irregularity or error which the Legislature might have authorized, or an omission of that which it might have dispensed with by a proper statute, it is not beyond the power of the Legislature to correct the error by a subsequent act. The illegality in this case, which rendered the former assessment void, was a disregard of the requirements of the statutes that the work should all be done by contract, that the number of contracts should not exceed five, and that when work was to be done by the superintendent of streets, the estimated cost of which was \$2,000 or more, he should invite proposals therefor by advertisements in daily newspapers, unless he had authority in writing from the mayor to do otherwise. There was a wide and apparently deliberate departure from these requirements, which relieved abutters from liability to special assessment to meet such expenditures, under St. 1894, p. 462, c. 416. *Warren v. Street Commissioners*, 181 Mass. 6, 62 N. E. 951. But the only illegality was the failure to observe the methods which had been prescribed for the protection of taxpayers. It was in the power of the Legislature to authorize the performance of such public work precisely as this was performed. The methods adopted may or may not have caused the city substantial loss. However that may be, notwithstanding the previous disregard of the law, it was in the power of the Legislature to relieve the general taxpayers by assessing a part of this expense upon estates specially benefited. So far as appears, the expenditures were not of such a kind that the indebtedness created by them may not be made the subject of either general or special taxation. We are of opinion that the statute is constitutional.

It is contended by the petitioners that the Legislature did not intend to make the statute apply to *Huntington avenue*. But the language is broad and sweeping, including in its ordinary meaning this public improvement as well as numerous others. The provision is general, referring to all such improvements which had been completed within six years. It contains nothing to suggest that the Legislature had in mind cases in which the work had been done under any particular statute or class of statutes. This work had been done under a special act. But it was a work of great magnitude, and other very expensive public works in Boston had been constructed under special acts. See St. 1893, p. 978, c. 339; St. 1894, p. 462, c. 416; St. 1895, p. 377, c. 334; St. 1896, p. 152, c. 209; St. 1896, p. 520, c. 516. There is nothing to indicate that

Nor is there any reason to think that it should apply to cases in which the defect arose from the unconstitutionality of a statute, rather than to those in which the original assessment was defeated by some informality or illegality in the proceedings. It is plain that the statute was enacted to enable the city to assess betterments in cases where, on account of unconstitutionality or illegality or other defect in the statutes or proceedings, a valid assessment could not otherwise be made. The fact that there were defects of different kinds, which made such an enactment desirable, is a sufficient reason for making it in general terms, without reference to any particular kind of defect. This great expenditure, and the fact that the general assessment founded on it had been declared invalid, were known to the Legislature. It is hardly conceivable that, in framing this statute with its general provisions, they intended that the payment of a part of the cost of Huntington avenue by special assessment should be left unprovided for.

Under this statute the assessment cannot exceed one-half of the cost of the improvements, and thus abutters are relieved from a part of the charge that might have been put upon them under the original act, which authorized a special assessment of the whole cost. This indicates liberality towards those upon whom invalid assessments had been or might be made under former statutes. Another statute, passed about the same time, indicates also the adoption of a more liberal policy towards abutters generally in the city of Boston. St. 1902, p. 430, c. 521.

It is contended that the statute in question contemplates the making of assessments for improvements for which valid assessments of betterments have previously been made, and that in its provisions in reference to prior assessments which have not been wholly paid, or have been paid under protest, and suits brought within three months after the payment to recover them, which suits are pending, it purports to authorize assessments which are not proportional or equal, and that therefore it is unconstitutional. If it were true that the statute authorized assessments in cases in which prior valid assessments had been made, there might be force in this suggestion. If such valid previous assessments which had not been wholly paid might be revised and made to conform to the new assessment, under the language of this statute, while such valid assessments as had been wholly paid were allowed to stand under the provision that no parcel for which an assessment shall have been paid, and not recovered back, shall be subject to the payment of another assessment for that im-

inal assessments being valid, those who had paid without protest would be assessed at one rate, which they would have no power to change, while those who had not paid would be entitled to revision, and presumably reduction, to conform to the new assessment at a different rate. But we are of opinion that the statute contemplates the making of but one valid assessment for any improvement, and that its reference to former assessments is to those that are invalid. In that view, this objection does not arise. Everybody who is affected at all by the proceedings under this statute will be entitled to be assessed in the same manner and at the same rate. The only peculiar provision is that the estates of owners who have voluntarily paid former invalid assessments in full, so that there is no right to recover them back, shall not be subject to another assessment. Such owners cannot complain of the statute, for it does not affect their rights in any way, except as it diminishes for every taxpayer the amount to be paid by general taxation. The owners of other estates which are assessed under it cannot complain, because their estates are all assessed upon the same basis, and they do not suffer from leaving out those estates for which ample payments have already been made. If it appeared probable that there were numerous previous invalid assessments which had been fully paid without protest, and which were less in amount than those which are likely to be made under this statute, so that the later assessments would be increased by omitting those estates for which previous invalid assessments had been paid, it might well be contended that the assessments are not proportional and equal, and that the statute is invalid. But presumably the Legislature did not contemplate the existence of such an assessment. It does not appear, and we have no reason to suppose, that there are any such. On the other hand, under this statute, not exceeding one-half of the expenses incurred for the improvement can be assessed, while under former statutes the whole could be assessed, if it did not exceed the special benefits. The statute must be presumed to have been enacted under an assumption by the Legislature that any previous invalid assessments that had been paid in full without protest, so that the estates would be exempt under this statute, were not less in amount than the sums that otherwise would be assessed upon them under this statute, and that therefore the owners of other estates do not suffer from their exemption. In this view, the statute is constitutional in this particular.

In each case the entry should be: Petition dismissed.

CHICAGO, I. & L. RY. CO. v. CITY OF CRAWFORDSVILLE. (No. 20,808.)

(Supreme Court of Indiana. Jan. 5, 1905.)

MUNICIPAL ORDINANCES—LIGHTS AT RAILROAD CROSSINGS—ACTION FOR PENALTY—DEFENSE.

1. In an action against a railroad company for failure to light street crossings as required by a city ordinance authorized by an act of the Legislature, an answer alleging that there is a device which can be attached to the railroad track so that an approaching train at a distance will ignite a lamp at the crossing, and continue the light until the train passes, but by reason of the ordinance requiring a constant light defendant is unable to install the device, constitutes no defense.

2. Burns' Ann. St. 1901, § 5173, grants to cities the power to require railroad companies to maintain at street crossings the same kind of lights maintained by the city on all nights that the city may direct, and to provide what kind of lights shall be maintained. *Held*, that an ordinance in conformity to the section is not rendered invalid for indefiniteness because it excuses lighting by the company at such times as the moon furnishes sufficient light to light such crossings and at all times when the city lights are not in operation.

Appeal from Circuit Court, Montgomery County; Jere West, Judge.

Action for penalty by the city of Crawfordsville against the Chicago, Indianapolis & Louisville Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

E. C. Field and H. R. Kurrie, for appellant.
F. P. Mount, for appellee.

HADLEY, C. J. Suit by appellee to recover a penalty for the violation of a city ordinance requiring the lighting of street intersections. The act of March 4, 1893, p. 302, c. 137 (section 5173, Burns' Ann. St. 1901), grants to cities, for the security and safety of persons from running trains, the power to require, by ordinance, railroad companies to maintain, at the points where the railroad track crosses the streets of the city, the same kind of lights maintained by the city on all nights that the common council may direct, and the power to provide what kind of lights the railroad company shall maintain. The above act effects a delegation of police power to cities, and the power granted is limited and specific: (1) It can be exercised only as a means of safety to citizens against running trains; (2) the council shall determine at what particular intersections lights are necessary to safety against trains; (3) shall only require the same kind of lights maintained by the city; and (4) shall have the right to determine the nights on which the lights shall be maintained. In attempting to exercise the power granted by this statute the city of Crawfordsville, appellee, passed an ordinance, the first and second sections of which are as follows:

"Section 1. Be it ordained by the mayor and common council of the city of Crawfordsville, Indiana, that it shall hereafter be the

duty of every railroad company running and operating a railroad through the city, to keep and maintain an electric light at every point where the main track of said railroad company, upon which it runs any regular train or trains during the nighttime, crosses or intersects at grade any public street in said city. Such electric light shall be of sufficient power to light the crossing of such railroad where they are placed and maintained in such a manner as to enable citizens and other persons traveling and passing over such crossing to see the track or tracks and protect themselves from the danger of running trains on such railroad; provided, such lights shall not be required to exceed in power those now in use for lighting the streets of said city.

"Sec. 2. All lights provided in section 1 hereof shall be kept lighted and burning during the hours of nighttime of every day in the year, beginning at twenty minutes after sunset and continuing to burn until twenty minutes before sunrise of each day during the months of October, November, December, January, February and March of each year, and beginning at thirty minutes after sunset and continuing until thirty minutes before sunrise of each day during the months of April, May, June, July, August and September of each year: provided, said lights shall not be required to be kept burning or lighted during any of such hours, or parts of hours, when the moon shall be shining so as to give sufficient light to light such crossing, as hereinbefore provided. And provided further, such lights shall not be required to be kept burning or lighted during any of such hours, or parts of hours when the lights in use for lighting the streets of said city shall not be lighted or burning. The purpose of such last provision being to exempt such railroad company or companies from lighting such crossings at any time or times when the streets of said city are not lighted."

The third section provides that for a violation of the ordinance the offending company shall pay a fine not exceeding \$100.

Appellant, having been tried and convicted of a violation of this ordinance, challenges its validity, chiefly on the ground of unreasonableness in its excessive and indefinite requirements as to the time when the lights shall be maintained. The court correctly sustained a demurrer to appellant's third answer. It was, in effect, that there is a device which can be attached to the railroad track in such way that a moving train at a distance away will ignite a lamp at the crossing, which will continue to burn and light the crossing until the train has passed over and beyond; that such device would furnish ample protection to citizens against moving trains, but, by reason of the ordinance requiring the lights to burn constantly, it is unable to install such device, and the ordinance is therefore unreasonable and void.

In the first place, when appellant has installed the device and adequately lighted the

trains, or has been obstructed by appellee in a bona fide effort to do so, will be time enough to present such a defense.

In the second place, the Legislature has declared that the city council shall have power to determine what kind of light shall be used, and during what nights they shall be maintained. The power to require lights on all nights embraces the power to require them all hours of the night or parts of nights. This is a grant of specific power by the Legislature. Such a grant, when in harmony with the Constitution, cannot be questioned by any other body as to its reasonableness. *Champer v. City of Greencastle*, 138 Ind. 339, 35 N. E. 14, 24 L. R. A. 768, 46 Am. St. Rep. 390; 1 Dill. Mun. Corp. (4th Ed.) § 323. There is no pretense but the city of Crawfordsville maintains a system of electric lighting of its streets, and is fully within the provisions of the statute as to the right to require electricity as the kind of light to be employed by appellant. And if the council of appellee city has determined the kind of light appellant shall use, and it is the same kind maintained by the city, and has further provided on what nights or parts of nights the lights shall be kept burning, and has expressed its conclusions upon these things in an ordinance in clear and certain language, such provisions in the ordinance are not open to attack in a proceeding of this kind.

But it is urged, as a matter of insufficiency of the evidence, that the ordinance is void for unreasonableness in exacting a particular kind of light, and for uncertainty as to the time or times when the company is required to have the crossing lighted. The insistence is that the duty to light depends upon so many contingencies—the going of the city lights, adequacy of moonlight, etc., as to make it impossible for appellant to determine with reasonable accuracy when the duty to light arises, and when it is excused. It is true, as contended, that, as the ordinance imposes a penalty solely as a punishment for its transgression, it must therefore be classed as penal, and subject to strict construction. *Sutherland*, St. Con. § 208. But it is proper to take a reasonable view of the ordinance as a whole for the purpose of ascertaining the objects the Legislature had in view. From such inspection it is plain that both the statute and the ordinance are drawn in a spirit of liberality towards the railroad companies. By the statute, unless the city is maintaining a system of street lighting, it cannot require railroad companies to light their street intersections, and it can then require only such lights as the city itself maintains. By the ordinance railroad companies may choose their own class of electric lighting, and they need be no stronger than those maintained by the city for street lighting, and when the city lights are out for any cause the companies' lights may also remain unlighted. All this legislation looks to the amelioration

not be expected that such companies will erect their own gas, or electric light, plants to supply lights at their crossings. They are expected to use, because they can more economically use, the same kind of lights with which the city is supplied. Such utilities, whether maintained by the city or private corporation, are public, and occupy the streets and ways of a city for distribution to the people, and must, under the law, be supplied to all inhabitants fairly and alike. There is therefore no chance for oppression, and no ground for the charge of unreasonableness in being required to employ the same kind of light, or in being required to keep them burning when the city's lights are burning.

The question remains, is the ordinance before us sufficiently definite and certain, with respect to the times when the crossing shall be lighted, to inform appellant of what is commanded of it. It has been held that an ordinance prescribing that "the number of hours that said electric lights shall be required to be lighted during each period of 24 hours shall be the same as the said council does now or may hereafter require the lights of said city to be lighted" is sufficiently definite to advise the railroad of what it is required to do. *Railroad Co. v. Bowling Green*, 57 Ohio St. 336, 49 N. E. 121, 41 L. R. A. 422. And we perceive no reason why it would not be sufficient for an ordinance to provide that lights shall be maintained by railroad companies in accordance with the schedule of street lighting then or thereafter maintained by the city, or why such a provision would not be preferable to the moonlight provision of the ordinance before us. What, then, shall be said of this ordinance as modified by the proviso "that said lights shall not be required to be kept lighted and burning during any time when the moon shall be shining, so as to give sufficient light to light such crossing, as hereinbefore provided"; that is, as provided in section 1, when the moon is shining so as to give sufficient light to enable travelers over the crossing to see the track, and protect themselves from running trains. When the ordinance and its provisions are considered as an entirety, what does it all mean? Simply this: Railroads shall maintain during all and every night in the year some pattern of electric light at all crossings over which trains run in the nighttime. The lights should be sufficient to enable the traveler to see the crossing, but need not be of a greater power than the lights in use by the city for street lighting. The lighting is excused on all nights and parts of nights (1) when the moon furnishes the traveler the same amount or strength of light required of the company by the first section of the ordinance, namely, not exceeding in power the lights in use by the city; and (2) at all times when the city lights, for any reason, are not going. The exemptions are beneficial to appellant. The city had, under the statute, the undoubted au-

thority to require all-night lighting in a proper case, and the fact that it exonerated the company from lighting, under certain conditions, was a matter of grace, and not of duty. Appellant is not, therefore, in a situation to complain of unreasonableness in the concessions because too vague and uncertain. When there is not reasonable certainty as to the sufficiency of the moonlight, the lighting should go on if the city lights are burning. We therefore conclude that the ordinance was sufficiently definite and certain to inform appellant of what it was required to do.

The expressions and rulings in *City of Shelbyville v. C., C. & St. L. Ry. Co.*, 146 Ind. 68, 44 N. E. 929, and *C., C. & St. L. Ry. Co. v. City of Connersville*, 147 Ind. 277, 46 N. E. 579, 87 L. R. A. 175, 62 Am. St. Rep. 418, which announce a contrary doctrine, are modified to conform to the rulings in this case.

Judgment affirmed.

(164 Ind. 77)

**BLAIR-BAKER HORSE CO. v. FIRST NAT.
BANK OF COLUMBUS, IND.**
(No. 20,402.)

(Supreme Court of Indiana. Jan. 5, 1905.)

**PROOF OF AGENCY—DECLARATIONS OF AGENT—
INSTRUCTIONS.**

1. Evidence of declarations or admissions of an alleged agent, made in the absence of the principal, is not admissible to prove the agency or its extent.

2. Though it is not error to incorporate the pleadings in instructions, it is the better practice for the court to advise or instruct the jury as to the issues in the case.

Appeal from Circuit Court, Hancock County; E. W. Felt, Judge.

Action by the First National Bank of Columbus, Ind., against the Blair-Baker Horse Company. From a judgment for plaintiff, defendant appeals. Transferred from the Appellate Court under Burns' Ann. St. 1901, § 1337u. Reversed.

L. P. Harlan and Marsh & Cook, for appellant. C. S. Baker, for appellee.

JORDAN, J. Appellee, a national bank engaged in doing a general banking business in the city of Columbus, Ind., prosecuted this action to recover money alleged to have been obtained from it by appellant. The latter is an incorporated company engaged in the business of buying and selling horses, etc., at the city of Indianapolis.

In substance, the first paragraph of the complaint alleges that the defendant is indebted to the plaintiff for \$1,500, for money had and received by it for the use and benefit of plaintiff. By the second paragraph it is alleged that the defendant is indebted to the plaintiff in the sum of \$1,500 for money paid by the plaintiff for the use of the defendant

at its request. The third paragraph charges, in substance, that the plaintiff is a duly authorized national bank; that the defendant was engaged in the business of buying and shipping horses and mules at Columbus, Ind.; that it carried on its said business by and through one Charles Decker, as its agent; that said Decker paid for stock purchased by him for defendant by making drafts upon the latter and its predecessor, Blair, Baker & Walter, "in favor of plaintiff, and by depositing the amounts of such drafts in the bank of plaintiff, at Columbus, Indiana, and by checking against such deposits to the person from whom he purchased the live stock; that said defendant and its predecessor aforesaid well knew that said Decker was holding himself out as a buyer or purchasing agent of the defendant and said Blair, Baker & Walter, and that plaintiff gave credit to said Decker on account of the credit of the defendant, and, by reason of said agency, that said business relations continued for a period of about five years, and the money so furnished by plaintiff and paid out by said Decker as aforesaid amounted to \$125,000; that on November 23, 1901, said Decker drew his draft as aforesaid for \$1,000, and placed the same to his credit as aforesaid, and checked against the amount for mules and horses purchased for the defendant to the amount of \$1,181.83; that said draft was duly presented to defendant on November 25, 1901, and the same was dishonored, and payment therefor refused; that defendant accepted the stock so purchased and paid for as aforesaid by the money so advanced on said draft and overdraft aforesaid, and accepted the benefits of the use made by said Decker of said money; that plaintiff demanded payment of said amounts from the defendant, which was refused, and the same is due and unpaid." Answer, general denial. On the issues joined, the cause was submitted to a jury for trial, and a general verdict was returned in favor of appellee for the sum of \$1,150.16. Over appellant's motion for a new trial, assigning various reasons therefor, judgment was rendered in favor of appellee for the amount assessed by the jury.

Numerous alleged errors are discussed by appellant, and relied upon for a reversal, among which are the following: (1) Erroneous ruling of the court in admitting certain evidence in favor of appellee; (2) error in giving certain instructions to the jury.

The evidence in the cause shows that the predecessor of appellant was the firm of Blair, Baker & Walter. This firm was engaged in the business of buying and selling horses and mules at the stockyards in the city of Indianapolis. On March 12, 1901, the firm was incorporated under the name of the Blair-Baker Horse Company, and continued to do a general commission business at said stockyards. The evidence discloses that appellant's method, as a general rule, of doing business, both before and after its incorpora-

signed to it by horse buyers and shippers. The horses and mules so consigned would be sold by the company for the consignor, and after its commission (being a certain amount per head) and the expenses of yardage, feeding, and other expenses were deducted from the proceeds of the sales, the remainder would be entered on the company's books to the credit of the consignor or shipper. The cashier of appellee bank testified that in March, 1897, Mr. Blair, of said firm of Blair, Baker & Walter, came to the bank at Columbus, Ind., and was introduced to him by Mr. Lucas, the president. The witness further testified as follows: "He [Blair] asked that I would arrange to cash drafts to be made by Charles Decker; that he wanted to establish a buyer there in the market; that he would honor the checks or drafts drawn by Mr. Decker on them. He made no limit neither as to the amount nor time, but he would want it so Mr. Decker could draw money on his own check." This witness also testified that at other times, in the bank, after the occasion in question, Blair told him that "Decker was all right, that he was their buyer, and that they would furnish him the funds." The witness further testified that, in pursuance of the arrangement made as above mentioned, the bank from time to time cashed drafts drawn by Charles Decker on the firm of Blair, Baker & Walter, and so continued to do after the incorporation of the company, until November 23, 1901. It appears that, when Decker would draw a draft on the company, the bank would give him credit for the same as a deposit for the amount thereof. Against this deposit Decker would draw checks for horses purchased by him, and for expenses or debts incurred by him, other than for the purchase of horses or mules. All of these checks were honored and paid by the bank, and at times the bank permitted him to overdraw his deposit. All of the drafts drawn by Decker through the bank on the Blair-Baker Horse Company were paid by the latter until November 23, 1901. The draft of that date it failed and refused to pay, assigning as a reason therefor at the trial that Decker had become largely indebted to the company. The nonpayment by appellant of this latter draft led up to the commencement of this action. Blair, on the witness stand, denied that he had made any arrangement with the bank to pay drafts drawn by Decker on his company, and also denied that the conversation between him and the cashier, as testified to by the latter, at any time or place, occurred. In fact, Blair, together with others who were officials in appellant company, gave evidence in denial of the alleged fact that Decker in any manner acted as appellant's agent either in drawing the drafts in question, or in purchasing horses which he shipped to said company. They also denied that the company had in any manner held Decker out to the appellee and to the public in general as the com-

is evidence given by witnesses introduced in behalf of appellant and appellee going to show that Decker was not the agent of appellant either in purchasing or paying for horses which he shipped to said company. Decker, as one of appellee's witnesses, testified that he was not acting as the company's agent in the transaction in controversy. He testified that he bought the horses in Bartholomew county and the vicinity thereof, and paid for them himself, and shipped them to appellant, to be sold on commission. If any profits were realized out of the sale of the horses, they belonged to him, and all losses sustained by such sales were borne by him. He testified that the money which he used in paying for the horses purchased by him was secured by his drawing drafts on appellant payable to appellee. Upon drawing a draft the appellee would credit the amount thereof to his deposit account in the bank, and would pay the checks drawn by him out of such account. All of his checks, whether drawn in payment of horses purchased by him, or to defray other expenses or debts which he had incurred, were paid from the same deposit. We have deemed it proper to give the above outline of the evidence, as it will serve to more fully reveal the fact that the court committed reversible errors in admitting evidence in behalf of appellee, as hereinafter shown.

In the examination of Jerome Wessel, a witness testifying in behalf of appellee, its counsel was permitted to ask him if he had ever heard Mr. Decker (meaning Charles Decker, whom appellee claimed was the agent of appellant) say anything about the relationship which existed between him and Blair, Baker & Walter, or the Blair-Baker Horse Company. The witness responded that he had. He was then asked what he heard Decker say, and how many times. The witness, in response to the question, testified as follows: "I heard him say a good many times that he was using Blair & Baker's money to buy horses, and that he was buying for them." Appellee was also allowed to ask another witness, William Schooler, who testified in its behalf, if he had ever heard Decker say anything concerning his relationship to the Blair-Baker Horse Company. In response to this question the witness testified that he heard him say that he had bought with Blair & Baker's money. These questions were propounded to the witnesses over the objections of appellant, and the evidence elicited thereby was likewise permitted to go to the jury over their objections and exceptions. As previously shown, appellant's claim was that Decker was not buying horses for them, nor with its money; that he was using his own money in the purchase of horses; and that in the transaction in question the relationship of principal and agent did not exist between it and him. The declarations in question were made by Decker during casual

conversations between him and the witnesses who testified thereto for appellee. The questions propounded to these witnesses disclosed upon their face that they were intended to elicit evidence from the witnesses in respect to the declarations of Decker for the purpose of proving that he was buying and shipping horses as the agent of appellant, and that he was using its money, and not his own, for that purpose.

It is earnestly insisted—and properly so, we think—that the court, under the circumstances, committed a reversible error in permitting the declarations of Decker to be given in evidence. It is a principle of law well affirmed by the authorities that, where the agency of another is called in question, the declarations of the agent made in the absence of the principal are not competent to prove the agency. Neither are they admissible as evidence to establish the extent of such agency. It is true, as a general rule, that the declarations or admissions of an agent made during a transaction which is within the scope of the agency are competent evidence against the principal as a part of the *res gestæ*, but this rule does not extend so far as to authorize them to be admitted for the purpose of establishing the relation of principal and agent. *Tomlinson v. Collett*, 3 Blackf. 436; *Trustees, etc., v. Bledsoe*, 5 Ind. 133; *Union Central, etc., Co. v. Thomas*, 46 Ind. 44; *Johnston Harvester Co. v. Bartley*, 81 Ind. 406; *Coon v. Gurley*, 49 Ind. 199; *Gillett, Ind. & Col. Ev. § 36*; 1 Am. & Eng. Ency. of Law (2d Ed.) 690; 1 Ency. of Ev. 546.

Conceding *arguendo* that the agency of Decker was clearly established by evidence dehors his declarations, and that the latter were not admitted to prove the agency, the question still arises, for what purpose, under the circumstances, were they permitted to be given to the jury? They were not made at a time when he (the alleged agent) was engaged in the transaction of any business for appellant to which they related. Upon no view of the case can they be said to be anything more than the mere admissions or declarations of Decker, and they can only be regarded as are the hearsay declarations of a third person. That they were wholly incompetent is beyond successful controversy. See *Rowell v. Klein*, 44 Ind. 290, 15 Am. Rep. 235; *La Rose v. Logansport Nat. Bank*, 102 Ind. 332, 1 N. E. 805, and cases there cited; *Gillett, Ind. & Col. Ev. § 35*. As shown, the agency of Decker was denied by appellant, and sharply contested under the evidence. What effect, under the circumstances, this evidence may have had on the jury in its deciding the contested issue of agency, we are not able to determine. In reason, it certainly cannot be asserted that the evidence in question was harmless.

Complaint is made by appellant because the court, in instruction No. 3, fully incorporated therein the third paragraph of the complaint.

In so doing, however, it may be said the court committed no error, for, in contemplation of law, the pleadings in a cause are always before the jury. *Clouser v. Ruckman*, 104 Ind. 588, 4 N. E. 202. Of course, it is the duty of the court to instruct the jury in respect to the issues to be tried and determined by them; and, while it is not error to incorporate the pleadings in the court's charge, nevertheless, in a case where they are voluminous, it is the better practice, and one to be commended, for the court to advise or instruct the jury as to the substance of the issues in the case.

Other questions relative to giving instructions and rulings upon the evidence by the trial court are raised and discussed by appellant's counsel, but we pass these without consideration, as they may not necessarily arise upon another trial.

For the error of the court in admitting in evidence the declarations in question, the judgment is reversed and the cause remanded, with instructions to the lower court to grant appellant a new trial.

(164 Ind. 108)

ADAMS v. BOARD OF COM'RS OF WHITLEY COUNTY.

(Supreme Court of Indiana. Jan. 11, 1905.)

APPEAL—QUESTIONS REVIEWABLE—RULING ON DEMURRER—FAILURE TO TAKE EXCEPTION.

1. The ruling of the trial court on a demurrer is not reviewable on appeal unless the record shows an exception taken at the proper time.

Appeal from Circuit Court, Whitley County; J. H. Rose, Special Judge.

Action by Andrew A. Adams against the board of commissioners of Whitley county. From a judgment sustaining a demurrer to the complaint, complainant appeals. Affirmed.

T. R. Marshall, W. F. McNaguy, and P. H. Clugston, for appellant. B. E. Gates and D. V. Whiteleather, for appellee.

MONTGOMERY, J. The assignment of errors is that the court below erred in sustaining the demurrer of the appellee to appellant's complaint. It is sought by this appeal to determine the constitutionality of section 27 of "An act concerning county business" (Acts 1899, p. 352, c. 154), and that question has been argued in the briefs on file with signal ability. A reference to the record, however, discloses the fact that no exception was taken or reserved to the ruling of the court upon appellee's demurrer to the complaint. An exception, taken in some form in the court below to the ruling, is indispensable to bring the question judicially before the Supreme Court. If not taken at the proper time, and shown by the record, the exception is waived, and this court cannot review the ruling. *Zehnor v. Beard*, 8 Ind. 96; *Johnson v. Hatch et al.*, 10 Ind. 7;

No other alleged error is presented, and the judgment must be affirmed.

(165 Ind. 224)

BARTHOLOMEE v. TOWN OF LOWELL.
(No. 20,217.)*

(Supreme Court of Indiana. Jan. 8, 1905.)

ESTOPPEL—PLEADING—ESSENTIAL ELEMENTS.

1. When an estoppel is relied on, it must be set forth with particularity and precision, and nothing can be supplied by inference or intendment; and where a reply alleged facts estopping defendant to set up his defense, but failed to allege ignorance of the truth of matters alleged in estoppel, the reply was insufficient.

Appeal from Circuit Court, Lake County; J. B. Peterson, Judge.

Action by Robert H. Bartholomee against the town of Lowell. From a judgment for defendant, plaintiff appeals. Affirmed.

F. William Kraft, for appellant. J. F. Meeker and F. B. Pattee, for appellee.

MONKS, J. This action was brought by appellant against appellee to recover upon 15 unpaid interest coupons on certain bonds alleged to have been issued by appellee, a municipal corporation, for the extension of its waterworks system. Appellee answered in two paragraphs. The first was a general denial. In the second, facts were alleged showing that the unpaid interest coupons sued upon and said bonds were issued in violation of section 1 of article 13 of the Constitution of this state, which limits the power of any political or municipal corporation in this state to become indebted. Appellant filed a reply alleging facts which he claims estopped appellee from asserting the matters set up in said second paragraph of answer for the purpose of defeating a recovery by appellant in this action. Appellee's demurrer for want of facts was sustained to said reply, and, appellant refusing to plead further, judgment was rendered on demurrer in favor of appellee. The assignment of errors calls in question the action of the court in sustaining the demurrer to said reply.

Appellee insists (1) that no recitals or representations in bonds issued by a municipal corporation in violation of section 1, art. 13, of the Constitution, can estop such corporation from alleging and proving that the same were issued in violation of said provision of the Constitution, and were therefore void; (2) that, even if a municipal corporation could be so estopped, the facts alleged in the reply are not sufficient, for the reason that an essential element of estoppel is lacking—that of ignorance of the truth of the matters alleged in estoppel. 1 Woolen's Trial Procedure, §§ 1842-1844. It is a

when an estoppel is relied upon, it must be set forth with particularity and precision, and nothing can be supplied by intendment or inference, and, when there is ground for inference or intendment, it will be against, and not in favor of, an estoppel. Field v. Noblett, 154 Ind. 357, 361, 56 N. E. 841, and cases cited. As the essential element of estoppel mentioned in appellee's second insistence is not set forth in the reply, the same was clearly insufficient, and the court did not err in sustaining the demurrer thereto. 1 Woolen's Trial Procedure, §§ 1842-1844; 1 Work's Practice & Pleading, § 606.

The reply being insufficient for the reason named, we need not and do not decide as to the correctness of the appellee's first insistence.

Judgment affirmed.

(164 Ind. 59)

SNODGRASS et al. v. BRANDENBURG.
(No. 20,355.)

(Supreme Court of Indiana. Jan. 8, 1905.)

CONSTRUCTION OF WILL—ESTATE DEVISED—FEE.

1. Burns' Ann. St. 1901, § 2737, provides that "every devise in terms denoting the testator's intention to devise his entire interest in all his real or personal property, shall be construed to pass all the estate in such property." *Held*, that under a clause in a will that "I bequeath my entire estate, both real and personal, to my beloved wife," the wife acquired a fee-simple title in testator's real estate, though there was in a subsequent clause a "request that at the death of my wife my estate that I am now seized of be equally divided between my children."

2. The word "heirs" is not required, even in the absence of a statute, to convey a fee by will.

On petition for rehearing. Overruled.

For former opinion, see 71 N. E. 137.

GILLETT, J. Appellee's counsel have filed a petition for a rehearing herein, together with a brief in support of their petition. We have carefully considered the brief, and have made an independent and an exhaustive examination of the authorities, preparatory to passing on the petition.

Our statute provides "that every devise in terms denoting the testator's intention to devise his entire interest in all his real or personal property shall be construed to pass all the estate in such property." Section 2737 Burns' Ann. St. 1901. The devise found in the second clause of the will in question is couched in words which approximate the provisions of the statute, even if the language is not "in terms" that which the enactment contains. See *Korf v. Gericha*, 145 Ind. 134, 44 N. E. 24. However, the word "heirs" is not required, even in the absence of statute, to convey a fee by will. Other words denoting the intention may be employed.

* 1. See Estoppel, vol. 19, Cent. Dig. § 302.
* Rehearing denied.

* 2. See Wills, vol. 48, Cent. Dig. § 1237.

Kent states that a "devise of 'all my estate,' 'all my interest,' 'all my property,' 'my whole remainder,' 'all I am worth or own,' 'all my right,' 'all my title,' or 'all I shall be possessed of,' and many other expressions of like import, will carry an estate of inheritance, if there is nothing in the other parts of the will to limit or control the operation of the words." 4 Kent, Comm. (13th Ed.) 535. A well-known writer on the law of wills says: "The word 'estate' is a general term, and in modern construction may be said to embrace prima facie the whole estate of the testator, both real and personal, and his property of every description." Schouler on Wills (3d Ed.) § 510. We have before us a case where the testator not only used the word "estate" in describing what he desired to pass by will to his wife, but where he gave it the broadest meaning, since he used the words "my entire estate, both real and personal." This is comprehensive, not circumscriptive, language. At common law, words of inheritance were not required to bequeath the entire title to personal property, and it is a rule of construction that, where a testator has classed his real property with his personal property, the presumption is that he intended to convey as ample a right in the one as in the other. *Mulvane v. Rude*, 146 Ind. 476, 45 N. E. 659, and cases there cited.

Having ascertained that the words of the second clause, when standing alone, are clearly sufficient to indicate the intent of the testator to devise a fee to his wife, the question arises whether the subsequent, and not immediately connected, language, found in the fourth item of the will, was sufficient to denote his intention to limit her interest in the real property to a life estate. In *Mulvane v. Rude*, supra, this court said: "It is thoroughly settled that a devise in fee, clearly and distinctly made, or necessarily implied, cannot be cut down or modified by subsequent provisions not clearly and distinctly manifesting the testator's intention to limit such devise." The authorities clearly vindicate this statement of the law. See, in addition to the cases cited in support of the proposition in the *Mulvane Case*, *Ross v. Ross*, 135 Ind. 367, 35 N. E. 9; *Rogers v. Winklespleck*, 143 Ind. 373, 42 N. E. 746; *Helmer v. Shoemaker*, 22 Wend. 137; *Barrett v. Marsh*, 126 Mass. 213; *Halliday v. Stickler*, 78 Iowa, 388, 43 N. W. 228; *Bills v. Bills*, 80 Iowa, 269, 45 N. W. 748, 8 L. R. A. 696, 20 Am. St. Rep. 418, and cases cited; *Benz v. Fabian*, 54 N. J. Eq. 615, 35 Atl. 760; *McKenzie's Appeal*, 41 Conn. 607, 19 Am. Rep. 525; *Jones v. Jones*, 25 Mich. 401; *Davis v. Boggs*, 20 Ohio St. 550; *Bradley v. Carnes*, 94 Tenn. 27, 27 S. W. 1007, 45 Am. St. Rep. 696.

If it be admitted that the second clause was sufficient, standing alone, clearly and decisively to evince the purpose of the testator to give his wife a fee, we are unable

to perceive how it can be seriously contended that the request in the fourth clause that at her death the estate of which the testator was "seised" should be "equally divided" between his children can be said clearly and distinctly to rebut the provision of the former clause with respect to the remainder interest. It is pointed out in *Anderson's Law Dictionary* that in usage there is a difference in intensity between "request" and "require," the latter being nearer a command. It was said of old time that "the wish of a testator, like the request of a sovereign, is equivalent to a command," and on this ground the English courts were formerly disposed to seize upon such expressions as amounting to grants of definitive rights—a tendency that is frowned upon by the modern authorities. *Lamb v. Eames*, L. R. 10 Eq. Cas. 267; *In re Hutchinson*, L. R. 8 Ch. Div. 540; 2 Story, Eq. Jur. § 1069; *Fullenwider v. Watson*, 113 Ind. 18, 14 N. E. 571, and cases cited; *Mitchell v. Mitchell*, 143 Ind. 113, 42 N. E. 465; *Allen v. McGee*, 158 Ind. 465, 62 N. E. 1002. These questions usually arose where there had been a general devise to a particular person, and the testator had added words of a precatory character, and it was to be determined whether the subsequent language was intended to be mandatory, or whether it was his purpose to give the person first mentioned full discretion. In this case, however, there was no direct charge laid upon the conscience of the first taker. For aught that appears, the testator merely sought to express a desire that upon the death of his wife his real estate should descend from her to his children. In nearly all of the cases in which the effect of the word "request" has been discussed it is stated that its precise meaning must depend upon the circumstances in which it is employed. As between the wife of a man's bosom and his children, it cannot be said, in the absence of any direction, that his desire will be best conserved by his widow taking an estate in fee, or by her interest being limited to a life estate and his children taking the remainder. In a case like the one before us, where the prior clause is sufficient, standing alone, clearly to indicate an intent to give the wife a fee, and the request is not laid upon her directly, a court could have no ground of assurance that the testator did not wittingly employ the word "request," not with a purpose of varying the legal effect of the language employed in creating the devise in her favor, but in expressing the natural desire that the real estate should remain in her hands, to be inherited by their children. In a case of this kind, we think we are far within the authorities in holding that the language of the second clause was not cut down by words which, in the circumstances in which they were employed, were at most but sufficient to raise a doubt as to the testator's intent. While every case involving the construction of a will must largely depend upon its own particular words, yet

ow in language which, under settled rules of construction, clearly amounts to a grant of the fee, mere precatory words, subsequently used, evincing the desire of the testator that his children should enjoy the estate upon her death are not sufficient to limit the force of the prior language. In *Good v. Fichthorn*, 52 Pa. St. 287, 22 Atl. 1032, 27 Am. St. 630, the court, after stating the facts involved in the case, said: "Did this clause reduce the fee previously given to a life estate as to the unconsumed residue? That such effect may be produced is admitted, but the presumption is against it. The rule is well expressed by Strong, J., in *Sheet's Estate*, 52 Pa. 257, thus: 'If a testator give an estate of inheritance, and in subsequent passages unequivocally shows that he means the devisee to take a lesser interest only, the prior gift is restricted accordingly.' As it must unequivocally appear that the testator meant to limit the estate, it has been uniformly held that no merely precatory words will be sufficient." In *Bills v. Bills*, 80 Iowa, 269, 45 N. W. 748, 8 L. R. A. 696, 20 Am. St. Rep. 418, the Supreme Court of Iowa declared its view of the law thus: "When there is an absolute or unlimited devise or bequest of property, a subsequent clause expressing a wish, desire, or direction for its disposition after the death of the devisee or legatee will not defeat the devise or bequest, nor limit the estate or interest in the property to the right to possess and use during the life of the devisee or legatee. The absolute devise or bequest stands, and the other clause is to be regarded as presenting precatory language. The will must be interpreted to invest in the devisee or legatee the fee-simple title of the land, and the absolute property in the subject of the bequest." It was said in *Taylor v. Brown*, 88 Me. 56, 33 Atl. 664, that the general rule we have referred to "sometimes operates harshly, no doubt, in defeating the real intention of testators; but it is a safer rule than one which, for want of strictness, would be attended in its application with all sorts and shades of doubt and uncertainty." And the court added: "However strong the language of recommendation or request may be, a trust will not be implied if such a construction of the words will be repugnant to, or inconsistent with, other parts of the same will, as by cutting down an absolute estate, first clearly given, to an estate for life." In a case which arose in Massachusetts, a will contained, in substance, the following provisions: (1) I give my wife all the furniture and house situate in B. (2) I give my wife one half of my other real and personal estate. (3) It is my desire that the other half should be divided equally between my two daughters. (4) I wish my wife and daughters to receive an income from all my real and personal estate during their natural lives after they have got their portions. (5) I wish my

and money to my daughters. (6) It is my desire that my property, of whatever kind, should, after the decease of my wife and daughters, descend to the children of my daughters respectively, if they are married. In deciding the case the court said: "It is insisted on the part of the defendant that the devises contained in the previous clauses are qualified by the fourth and sixth. But we find nothing in the fourth in conflict with those that precede it, and, it may be added, very little that is really distinct and intelligible. With regard to the fifth and sixth clauses, it may be enough to say that it is not every expression of a wish in the interpretation of a will that is to be construed as a command, or as the creation of a trust. * * * The previous clause gave the property absolutely and without restriction, and a trust is not lightly to be imposed upon mere words of recommendation and confidence. The fifth clause merely expresses a wish that the testator's widow, at her death, shall make an equal division of her estate among the children, but does not purport to give them any legal or equitable estate. It looks to a disposition to be made by her at her death. A general intent, clearly expressed in a will, is not to be defeated by the addition of equivocal language, or expressions of doubtful or uncertain meaning. To give to the sixth clause the effect contended for by the defendant would require that the terms in which the testator had expressed his primary purpose should be deprived of their legitimate and universally recognized import." *Barrett v. Marsh*, 126 Mass. 213. See, also, *Foose v. Whitmore*, 82 N. Y. 405, 37 Am. Rep. 572; *Roseboom v. Roseboom*, 81 N. Y. 356; *Spears v. Ligon*, 59 Tex. 233; 22 Am. & Eng. Ency. of L. 1170, and authorities cited.

Some of our own cases go far in support of the conclusion reached by us as expressed in the principal opinion. In *Orth v. Orth*, 145 Ind. 184, 42 N. E. 277, 44 N. E. 17, 32 L. R. A. 298, 57 Am. St. Rep. 185, this court, in stating the effect of an expression of confidence by a testator that his wife, to whom his estate was given in express terms, would give what was left to their children, said: "There is not a syllable expressing the intention to charge the estate devised with an enforceable legal or equitable trust in favor of the children. There is that which, from various expressions, denotes a confiding trust in the wife that she will deal fairly, justly, and equitably with his children. That trust raises but a moral obligation, and creates no interest in the property in favor of the children, and does not burden the absolute title given by the will to the wife. * * * The one inquiry arising from the letter is, does it point a trust in the property devised, or bespeak the testator's intention to raise a trust in favor of his children? Very clearly, we think, it does not. But while consider-

ing it as a part of the will, suppose its terms were much more obscure and doubtful than we have regarded them, and that they should make the question doubtful as to whether the testator intended to narrow the otherwise free and unfettered devise and bequest. Our duty would then be to disregard the doubt, and adhere to the clearly expressed provisions as indicating the intention of the testator." In *Mitchell v. Mitchell*, 143 Ind. 118, 42 N. E. 465, a will was before this court for construction, in which there was at the outset a devise of lands in fee simple to the testator's widow, and near the close of the will there was an expression of the testator's "request and wish" that his wife would make provision by will so that a son of the testator by a previous marriage might share equally with his other children in the estate devised. It was contended that a trust was created; but the court, in considering the effect of the precatory words, said: "We cannot believe that upon the whole they ought to be construed as imperative. They are, when construed as restricting the absolute title, in positive antagonism to that title, while, if construed according to their natural and ordinary import, as implying a recommendation, they do no violence to the clearly and emphatically expressed intention to impart an absolute title." See, also, *Lumpkin v. Rodgers*, 155 Ind. 285, 58 N. E. 72. The vigor of the general rule, where the first grant is plainly unrestricted, is shown by the case of *Thornhill v. Hall*, 2 Clark & F. 22, in which the Lord Chancellor used the following language: "I hold it to be a rule that admits of no exception, in the construction of written instruments, that, where one interest is given; where one estate is conveyed; where one benefit is bestowed in one part of an instrument by terms clear, unambiguous, liable to no doubt, clouded by no obscurity, by terms which, if they stood alone, no man breathing, be he lawyer or be he layman, could entertain a doubt—in order to reverse that opinion, to which the terms would of themselves and standing alone have led, it is not sufficient that you should raise a mist, it is not sufficient that you should create a doubt, it is not sufficient that you should deal in probabilities, but you must show something in another part of that instrument which is as decisive the one way as the other terms were decisive the other way; and that the interest first given cannot be taken away either by tacitum or by dubium, or by possibile, or even by probabile, but that it must be taken away, and can only be taken away, by *expressum et certum*."

If, upon an examination of a will, a court concludes that it was the purpose of the testator to make a grant, and that he attempted, by subsequent language, to create a legal estate in derogation of the grant, that is the end of the discussion, for a testator must effectuate his intent within the rules of law.

The rule that we have invoked does not apply to such cases. It is one of construction, and is wholly consistent with the proposition that the court will explore the four corners of the instrument to bring out its meaning; but, if it is found that one clause, standing alone, clearly evinces a purpose to create a certain interest, and the subsequent language merely operates to create a doubt about the testator's intent in that particular, the latter words will be disregarded.

There is a marked tendency upon the part of testators who are without the benefit of legal advice to indulge, after providing for a definite estate in the first taker, in the expression of some ultimate desire not really intended to impinge upon the prior language. In all such cases the application of the rule brings the right result; but, whether it does or not, if a study of the instrument as a whole does not reveal its meaning, there must be some rule of interpretation. It would be intolerable if there were no such rule, thus leaving the result of the idiosyncrasies of each obscure will dependent upon the mind of the particular court which might be called on to interpret it, and placing a premium on the indulgence in wasteful litigation in the endeavor of the disappointed to reach some court which might solve the doubt in favor of their contention.

Authority settles the question in hand, but in disposing of the case we may add that it seems scarcely necessary to have gone to the books to reach the conclusion that the widow took a fee. There is no other admissible view, if a construction is sought which will give to all of the words employed a just meaning.

The petition for a rehearing is overruled.

(34 Ind. App. 456)

DELANEY et al. v. SHIPP. (No. 4,956.)

(Appellate Court of Indiana, Division No. 2)

Jan. 12, 1905.)

APPEAL—QUESTIONS PRESENTED—STATEMENTS IN BRIEF.

1. Where appellants' brief stated that they had carefully set out therein the record material to the appeal, and realized that the findings of the court were against them, and therefore questioned such findings as being unsupported by the evidence, and the record set out in the brief did not show any exceptions to conclusions of law, nothing but the sufficiency of the evidence was before the court for review.

On petition for rehearing. Overruled.

For former opinion, see 71 N. E. 973.

ROBY, J. One ground upon which a rehearing herein is sought is on account of the statement in the opinion that no exception was taken to the conclusions of law, the record in fact showing that appellant did except thereto. The original brief for appellant contained the following: "Appellants have carefully set out in this brief the record material to this appeal, for the reason that the clerk's

transcript is in script, and the carrying in of fuel are only incidents to the office. In the absence of a contract with a county, the county would be a stranger to the transaction. Board Commissioners v. Axtel, 96 Ind. 385. Within their discretion, the board might have contracted for the services rendered, but the clerk is not the agent of the board for making contracts of the character here involved.

The judgment is reversed, with instructions to the trial court to sustain the demurrer to the complaint.

The disposition made of the case accords with the merit of the controversy as disclosed by the evidence, the sufficiency of which is alone questioned, and the petition for a rehearing is therefore overruled.

(34 Ind. App. 352)

**BOARD OF COM'RS OF HARRISON
COUNTY v. BLINE.** (No. 5,307.)

(Appellate Court of Indiana, Division No. 2.
Jan. 3, 1905.)

**COUNTIES—IMPLIED CONTRACTS—SERVICES—
CIRCUIT COURT CLERK—AUTHORITY.**

1. Since a claim for services against a county can only be founded on a statute or a contract entered into with the proper officer, acting within the scope of his authority, the mere beneficial character of services performed is insufficient to support a claim against the county for compensation.

2. The clerk of a circuit court is not the agent of the board of county commissioners to make a contract for janitor's services with reference to his office, and could not, therefore, compel the county to reimburse him for payments made for such services.

Appeal from Circuit Court, Harrison County; C. W. Cook, Judge.

Claim by Charles A. Bline against the board of commissioners of Harrison county. From a judgment in favor of plaintiff, defendant appeals. Transferred from Supreme Court. Reversed.

R. S. Kirkham, for appellant. William Ridley, for appellee.

COMSTOCK, C. J. Appellee, as clerk of the Harrison circuit court, filed his claim against appellant for cash paid by him to divers persons for cleaning and sweeping out the clerk's office, and carrying coal therein. The board refused to allow the claim, and appellee appealed to the circuit court, in which tribunal appellee recovered judgment for \$48.50, the amount of his claim.

The first error assigned, and the only one necessary to consider, questions the sufficiency of the complaint. The money expended appears to have been entirely voluntary. Its expenditure was not authorized by the board. A claim for service against a county can only be founded upon a statute or a contract entered into with the proper officer, acting within the scope of his authority. The mere beneficial character of the service is not sufficient to support the claim. Moon v. Board, 97 Ind. 176; Sherfey v. Board, 28 Ind. App. 70, 59 N. E. 186. The sweeping

¶ 1. See Counties, vol. 13, Cent. Dig. § 186.

of an office and the carrying in of fuel are only incidents to the office. In the absence of a contract with a county, the county would be a stranger to the transaction. Board Commissioners v. Axtel, 96 Ind. 385. Within their discretion, the board might have contracted for the services rendered, but the clerk is not the agent of the board for making contracts of the character here involved.

The judgment is reversed, with instructions to the trial court to sustain the demurrer to the complaint.

(35 Ind. App. 467)

INDIANAPOLIS ST. RY. CO. v. SEERLEY.¹
(No. 5,030.)

(Appellate Court of Indiana. Jan. 11, 1905.)

**STREET RAILROADS—PERSONAL INJURIES—NEG-
LIGENCE—LAST CLEAR CHANCE.**

1. It is not essential to proof of negligence of a street railroad, whose car is alleged to have injured a person on the track, that the motorman be shown to have had actual knowledge of the peril of the person injured.

On rehearing. Motion for rehearing overruled.

For former opinion, see 72 N. E. 160.

PER CURIAM. A rehearing is asked upon the grounds that the original opinion holds that the seventh instruction, given to the jury by the court, was not error, and that a certain question propounded to the witness Selby was erroneously held to be proper.

Upon reference to said instruction it will appear that it attempts to state the theory of "last clear chance." It is claimed now, as in the original brief of appellant, that the peril must be actually known to the motorman, before he can be held negligent on that theory. Upon this question, in 2 Thompson on the Law of Negligence, § 1476, that author says: "There is scant propriety in admitting this doctrine in the case of steam railroads at places other than highway crossings and at places where their tracks do not traverse the surface of public streets or highways. * * * But with respect to street railroads, where the public have the right to use the street, including that part on which the track is laid, in common with the railroad company, and where the railroad company is consequently bound to anticipate the rightful presence of men, women and children on the track in front of its cars, the sound and just rule must be different. * * * It has the effect of absolving the street railway company from keeping that constant lookout ahead, which, as already seen, the law demands of corporations which have received from the public a license to propel cars at a high rate of speed along the surface of the highway, in populous districts, which the public have a right to use in common with them." So that, if the instruction was not harmless, as stated in the opinion.

¹ Transfer denied.

and for a new trial, judgment was rendered in appellee's favor.

by reason of the special findings, still the giving of it was not error. As to the admission of the testimony of the witness Selby, we do not deem it necessary to add to the original opinion.

Petition for rehearing overruled.

14 Ind. App. 337)

FIRE ASS'N OF PHILADELPHIA v. YEAGLEY. (No. 4,760.)

(Appellate Court of Indiana, Division No. 1.
Jan. 5, 1905.)

**FIRE INSURANCE—PROPERTY—INCUMBRANCES—
FORFEITURE—PROOFS OF LOSS—WAIVER—AC-
TIONS—FINDINGS—SPECIAL INTERROGATO-
RIES—EVIDENCE.**

1. Where insurer issued a policy, and retained the premium, knowing of a chattel mortgage on the property, it thereby waived a condition that the policy should be void if the property insured was so incumbered, and a provision requiring waiver to be indorsed on the policy, whether the waiver was by insurer itself, or by its agent issuing the policy.

2. In an action on a policy, a special interrogatory requesting a finding whether insurer's local agent had authority to consent to incumbrances on the property, otherwise than by agreement indorsed on the policy or added thereto, did not request a special finding on a "particular question of fact," as required by Burns' Ann. St. 1901, § 555, and was therefore properly refused.

3. In an action on a policy, evidence held to justify a finding that insurer's agent had notice of the existence of a mortgage on the property when he issued the policy, and that insured sufficiently complied with the requirements of the policy respecting the furnishing of proofs of loss.

4. Where the grounds on which insurer denied liability did not appear, and there was no showing as to when an alleged waiver of proofs of loss thereby was claimed to have become effective, insured was not relieved of the requirement of furnishing such proofs.

5. Though, in an action on a policy, no issue as to waiver of proofs of loss was tendered, it was not reversible error to permit plaintiff's attorney to testify that plaintiff and himself made a demand for the amount of the policy, and that the adjuster replied that insurer was not legally liable, and would not pay.

6. Where there was some evidence that the policy sued on was a renewal of a former policy issued by the same agent, in which there was a recognition of the existence of an incumbrance on the property, because of which insured denied liability, evidence as to the former policy was properly admitted.

Appeal from Circuit Court, Miami County;
Joseph N. Tillett, Judge.

Action by Daniel W. Yeagley against the Fire Association of Philadelphia. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Chambers, Pickens & Moores and James F. Stutesman, for appellant. Cox, Reasoner & O'Hara, for appellee.

ROBINSON, P. J. Suit by appellee on a policy of fire insurance upon a stock of goods. The jury returned a general verdict for appellee, and, over appellant's motions for judgment on answers to interrogatories

and for a new trial, judgment was rendered in appellee's favor.

Errors are assigned (1) upon the court's refusal to strike out portions of the second paragraph of reply to the second paragraph of answer; (2) overruling a demurrer to the second paragraph of reply to the second paragraph of answer; (3) overruling a demurrer to the third and fourth paragraphs, respectively, to the second paragraph of answer; (4) refusing to submit to the jury a certain interrogatory; (5) overruling appellant's motion for judgment on the answers to interrogatories; and (6) overruling the motion for a new trial.

The complaint avers appellee's ownership of the stock of goods, issuing of the policy (a copy of which is an exhibit), appellee's performance of all conditions, the loss, and appellant's failure to pay. Appellant answered: (1) Denial. (2) That the insurance was void because the property, when the policy was issued, was mortgaged; the policy providing, "This entire policy, unless otherwise provided by agreement endorsed hereon and added hereto, shall be void * * * if the subject of insurance be personal property and be or become incumbered by a chattel mortgage." (3) A partial answer alleging other and concurrent insurance—the total insurance exceeding the value of the property—and appellant's liability only for its proportionate share of the loss, as provided by a clause in the policy requiring the loss to be borne pro rata by all companies issuing policies. Appellee replied: (1) Denial. (2) That appellant, without requiring any written application, with full knowledge of the mortgage, accepted the premium, and delivered the policy to appellee, who was never notified of the provision for a forfeiture; that the provision was in very small print; that appellee accepted the policy, believing it was valid and a security against loss, and without notice from appellant, until after the loss, that the policy contained such a condition. (3) Facts are pleaded to show that appellant's agent wrote the policy and accepted the premium with full knowledge of the mortgage; that appellee was never notified by appellant, or any one in its behalf, that the policy was void, until after the loss. (4) That appellant accepted the premium, and underwrote and delivered the policy to appellee, with notice of the mortgage, and without notice to appellee that the provision in the policy for a forfeiture in case the property was mortgaged was not waived by appellant.

The policy provides that, if fire occur, the insured shall give immediate notice, make an inventory showing the quantity and cost of each article and the amount claimed thereon, and within 60 days after the fire, unless the time is extended in writing by the company, render a verified statement to the company, stating the insured's knowledge and belief as to the origin of the fire,

until 60 days after the notice, ascertainment, estimate, and satisfactory proofs of loss have been received by the company. The policy also provides: "This policy is made and accepted subject to the foregoing stipulations, together with such other provisions, agreements or conditions as may be endorsed hereon or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto, and as to such provisions and conditions no officer, agent or representative shall have such power, or be deemed or held to have waived such provision or condition, unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

Upon the question of the waiver of the condition in the policy in regard to incumbrances on the goods insured, whether the supposed waiver be by appellant, or by the agent who issued the policy, the case is controlled by *German-American Ins. Co. v. Yeagley* (Ind. Sup.) 71 N. E. 897.

There was no error in refusing to submit the following interrogatory to the jury: "Did the defendant's local agent have authority, as such agent, to consent to incumbrances on the property described in the policy, otherwise than by agreement indorsed on said policy, or added thereto?" It cannot be said that it asks the jury to find specially upon a "particular question of fact." Section 555, *Burns' Ann. St. 1901*. If it could be said to embrace questions both of law and fact, it was proper not to submit it. *Korrad v. Lake Shore, etc., Ry. Co.*, 131 Ind. 261, 29 N. E. 1069. But it seems the interrogatory calls for a legal conclusion, and for that reason was properly refused. *Chicago, etc., v. Ludington*, 10 Ind. App. 636, 38 N. E. 842; *Keeley Brewing Co. v. Parnin*, 13 Ind. App. 588, 41 N. E. 471; *Chicago, etc., R. Co. v. Ostrander*, 116 Ind. 259, 15 N. E. 227, 19 N. E. 110; *Ohio, etc., Ry. Co. v. Standberry*, 132 Ind. 533, 32 N. E. 218; *Roller v. Kling*, 150 Ind. 159, 49 N. E. 948.

There is evidence that on July 16, 1900, appellee was a merchant of Thorntown, Ind., and on that date took a policy for \$2,000 on his stock with appellant company, through one Underwood, appellant's agent at Lafayette, Ind. Appellee informed the agent that the stock was mortgaged, and, when the policy was sent by the agent to appellee, it contained the clause, "Payable in case of loss to E. C. Voris, as his interest may appear." In April, 1901, appellee moved his stock to Bunker Hill, Ind., and about the same time appellee sent the policy to Underwood to be transferred, which was done by Underwood, and returned by mail to appellee. About the

same agent for \$1,000 insurance; that the agent answered, and asked appellee if the mortgage on the stock was paid off, to which appellee replied that it was not. The agent then sent the policy requested, stating that he didn't think the mortgage would make any material difference. Afterwards, on June 26th, appellee wrote to Underwood, stating that he had canceled a policy that another agency had issued, leaving only the \$3,000 issued by Underwood, and asking Underwood to write \$3,000 more insurance. Policies were issued, but for what amount does not appear, and afterwards, at Underwood's request, they were returned to him; he stating, in answer to why he wanted them returned, that it was hard for him to get a policy on a stock that had a mortgage on it. On July 2, 1901, appellee wrote Underwood that he "received policy O. K.," and asking him to "renew the policy that runs out the 16th"; having reference to policy in appellant company dated July 16, 1900. On July 16, 1900, Underwood sent to appellee the policy in suit. The premium of \$20 was paid. On April 11, 1901, appellee executed to E. C. Voris a mortgage on his stock to secure three promissory notes executed by appellee to Voris—one dated January 12, 1900, and due in 1 year; one dated June 27, 1900, and due in 18 months; and one dated April 11, 1901, and due in 12 months; the mortgage reciting that the first two of the above notes were at that time secured by a chattel mortgage on the stock executed June 27, 1900. The mortgage was in force, and a part of the debt secured was unpaid, when the policy in suit was issued. The property insured was destroyed by fire February 27, 1902. Its value was \$8,000 to \$8,500, and the total insurance was \$6,000. Notice of the fire and loss was given, and duplicated proofs of loss were made, one of which was delivered to appellant's agent at Peru, Ind., who testified that he sent it either to the company or the state agent—he didn't remember which.

Taking all the evidence in the record, and the inferences that may properly be drawn from the facts proven, we think it can be said that there is evidence that appellant's agent had notice of the existence of the mortgage when he issued the policy, and that there was a sufficient compliance with the provision in the policy relative to furnishing proofs of loss by appellee. It cannot be said that the furnishing of such proofs of loss was unnecessary because of the denial of liability by appellant's adjuster, for the reason that it does not appear upon what grounds a liability was denied, and when, with reference to the time for furnishing proofs of loss, the waiver is claimed to have become effective. See *Fidelity, etc., Co. v. Sanders*, 32 Ind. App. 448, 70 N. E. 167. Moreover, the pleadings tender no issue that the furnishing of proofs of loss was

waived by appellant. But because no such issue was tendered, it was not reversible error to permit appellee's attorney to testify that he and appellee made a demand for the amount of the policy, and that the adjuster said "they were not legally liable, and would not pay anything—the amount of the policy or any other amount."

Evidence as to the former policy was properly admitted. There was some evidence that the policy in suit was a renewal of the former policy issued by the same agent in July, 1900, in which there was a recognition of the existence of the incumbrance. The policy in suit was issued in response to a letter from appellee requesting that the agent renew the policy of July 16, 1900.

We find no error in the record. Judgment affirmed.

(34 Ind. App. 246)

ACME FERTILIZER CO. v. STATE. (No. 5,144.)

(Appellate Court of Indiana, Division No. 2, Jan. 8, 1905.)

PUBLIC NUISANCES—RENDERING PLANTS—CORPORATIONS—PROSECUTION—BURDEN OF PROOF.

1. An information charging that defendant corporation unlawfully erected and maintains a public nuisance, to the injury of the citizens, by erecting near the dwelling houses of divers citizens in a specified county a certain rendering plant, and that it did wrongfully create and suffer to escape therefrom divers noisome and poisonous smells, so that the air for a great distance was impregnated thereby, to the injury to the health and property of many persons residing in the neighborhood, sufficiently charged a public nuisance, as defined by Burns' Ann. St. 1901, § 2154.

2. Where an information for a public nuisance charged the erection and maintenance of a rendering plant, and the carrying on of the business of manufacturing products from the bodies of dead animals, it sufficiently charged that the building was used or maintained "for the exercise of a trade, employment, or business," within Burns' Ann. St. 1901, § 2154, defining a public nuisance.

3. The facts so alleged were sufficient to charge a public nuisance at common law.

4. In an information under Burns' Ann. St. 1901, § 1970, providing that corporations may be prosecuted by indictment or information for maintaining a public nuisance, the burden of proof that defendant was a corporation was on the state.

Comstock, C. J., dissenting in part.

Appeal from Circuit Court, Gibson County; O. M. Welborn, Judge.

Action by the state against the Acme Fertilizer Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

L. C. Embree and Luther Benson, for appellant. O. W. Miller, Atty. Gen., W. C. Geake, C. O. Hadley, and L. G. Rothschild, for the State.

ROBY, J. This is an appeal from a judgment of the Gibson circuit court imposing a fine of \$100 and the costs of the suit upon the appellant for maintaining a nuisance in

the operation of a factory for the manufacture of products of merchandise from the bodies of dead animals. The prosecution was upon affidavit and information. The information was in three counts. Motions to quash were sustained as to the first count, and overruled as to the second and third. The appellant was found guilty upon the third count.

The first question for decision arises upon the action of the court in overruling the motion to quash the second count. So far as essential to the decision, it was as follows: "That the Acme Fertilizer Company, a corporation, on the 10th day of February, 1903, and at divers other times since said day, at Gibson county, state of Indiana, did unlawfully erect, continue, use, and maintain a public nuisance, to the injury of many of the citizens of the state of Indiana, by erecting and maintaining near the dwelling houses and homes of divers citizens of said county a building known as the 'Acme Fertilizer Plant,' situate on the following described real estate in Gibson county, in the state of Indiana, to wit [specific description omitted], in and about which the said Acme Fertilizer Company did manufacture products from the bodies of dead animals, and at the same times and place aforesaid the said Acme Fertilizer Company did carry on, and cause and procure to be carried on, the business of manufacturing products from the bodies of dead animals then and there by it collected, and did then and there and thereby wrongfully and unlawfully create and suffer to escape said building, into the open air, divers noisome, offensive, unwholesome, and poisonous smells, so that the air for a great distance in every direction about said building was thereby impregnated with said smells, and rendered noisome, offensive, unwholesome, and noxious, and injurious to the health, comfort, and property of many of the citizens of the state of Indiana residing in the neighborhood of said building, and where the air was so impregnated with said smells as aforesaid." If the acts charged amount to a public nuisance, the information was sufficient. "Anything which is 'an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life and property by an entire community or neighborhood, or any considerable number of persons,' is a public nuisance." State v. Ohio Oil Co., 150 Ind. 37, 49 N. E. 814, 47 L. R. A. 627. "A nuisance is literally an annoyance, and signifies, in law, such a use of property or such a course of conduct as, irrespective of actual trespass against others, or of malicious or actual criminal intent, transgresses the just restrictions upon use or conduct which the proximity of other persons or property in civilized communities imposes upon what would otherwise be rightful freedom." 21 Amer. & Eng. Ency. Law, 682. "Our statute, perhaps, gives as accurate a definition of the term 'nuisance,'

as understood at common law, as can be found elsewhere: 'Whatever is injurious to health, or indecent or offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property.' Section 290, Burns' Ann. St. 1901. If the injury was limited to an individual, it gave a private right of action. If it affected the public it was the subject of a public prosecution." *State v. Taylor*, 29 Ind. 517. "Every person who shall erect or continue and maintain any public nuisance to the injury of any part of the citizens of this state shall be fined not exceeding one hundred dollars." Section 2153, Burns' Ann. St. 1901. Corporations may be prosecuted by indictment or information for erecting, continuing, or maintaining a public nuisance. Section 1970, Burns' Ann. St. 1901; *State v. Sullivan*, etc., 14 Ind. App. 369, 42 N. E. 963; *Paragon Paper Co. v. State* (Ind. App.) 49 N. E. 600. A standard text-writer, after defining public nuisances strictly as those resulting from the violation of public rights, and producing no special injury to one more than another of the people, and private nuisances as injuries resulting from the violation of private rights, producing damages to but one or a few persons, as in the building of a house with the eaves projecting over the land of another, says: "There is a class of acts which may properly be denominated mixed nuisances, being both public and private in their effects—public, in that they produce injury to many persons or all the public, and private because at the same time they produce a special and particular injury to private rights, which subjects the wrongdoer to an indictment by the public, and to damages at the suit of persons injured. Of this class are * * * establishments which, by reason of the nature of the business carried on, produce such noxious smells and vapors as to annoy the whole community, and are at the same time a special injury to those residing or doing business in their immediate vicinity, by rendering their houses untenable, or their enjoyment so uncomfortable that they sustain a special and particular damage, apart from and beyond the rest of the public." *Wood on Nuisances* (3d Ed.) pp. 34, 35, §§ 14-16; *Kinney v. Koopman*, 116 Ala. 310, 22 South. 593, 37 L. R. A. 497, 67 Am. St. Rep. 119.

Appellant's contention is that there are no facts stated in the information showing other than individual injury to natural persons in respect to their private enjoyment of their homes and property; that any one of such persons could have maintained a civil action, but that no injury to any one in his capacity as a part of the public is shown. If the nuisance charged is a mixed one, as above defined, the right to maintain a private action would depend upon proof of a special injury, different in kind from, and additional to, that suffered by the general

public. *Sohn v. Cambern*, 106 Ind. 302, 6 N. E. 813. The charge is that appellant "did unlawfully erect, continue, use, and maintain a public nuisance, to the injury of many of the citizens of the state of Indiana, by erecting and maintaining near the dwelling houses and homes of divers citizens of said county," etc., "and did," etc., "wrongfully and unlawfully suffer to escape from said building, into the open air, divers noisome, offensive, unwholesome, and poisonous smells, so that the air for a great distance * * * was thereby impregnated with said smells, and rendered noisome * * * and injurious to the health, comfort, and property of many citizens of the state of Indiana residing in the neighborhood of said building." The facts thus stated are sufficient to show that the public was affected by the acts complained of. *Dennis v. State*, 91 Ind. 291; *State v. Ohio Oil Co.*, 150 Ind. 21-37, 49 N. E. 809, 47 L. R. A. 627; *State v. Well*, 89 Ind. 286.

It is contended that section 2154 defines the form of a public nuisance that arises in the maintenance of any building for the exercise of any trade, employment, or business, which, by occasioning noxious exhalations or noisome and offensive smells, becomes injurious to the health, comfort, or property of individuals or the public; that the definition includes every element necessary to create a nuisance at common law, and specifically adds elements not necessary at common law; and that a prosecution for a nuisance thus created will not lie, except under section 2154. The objection to the information—assuming that the offense is defined by section 2154—is that there is no averment that the building was erected, continued, used, or maintained for the exercise of any trade, employment, or business, and that such averment is an essential element of the definition given in section 2154. The information is not subject to the criticism. To charge the erection and maintenance of a building for the manufacture of products from the bodies of dead animals, and the carrying on of the business of manufacturing products from the bodies of dead animals, is sufficient to show that such building was used or maintained "for the exercise of any trade, employment, or business." An expression contained in the brief filed on behalf of the state, which is relied upon as admitting the insufficiency of the indictment under section 2154, was evidently made through inadvertence. If the offense charged in the information under consideration is not within the definition contained in section 2154, supra, the sufficiency of the facts stated to constitute a nuisance must be determined by a reference to the definition of that term, which, as has been before stated, is not substantially different at common law from the definition contained in the Civil Code. Thus measured, the facts stated are sufficient to constitute a nuisance. There-

fore to quash the third count of the information.

The burden was on the state to prove that the defendant was a corporation. Section 1970, Burns' Ann. St. 1901. The allegation that appellant was a corporation was a part of the description of the offense. Paragon Paper Co. v. State, supra. There was evidence from which the inference that appellant was a duly organized corporation was deducible.

The argument made as to the sufficiency of the evidence to support the finding generally, and as to the admissibility of the testimony, is ineffective, in view of the construction given to the information herein.

Judgment affirmed.

COMSTOCK, C. J., concurs in the result, but dissents from any expression in the opinion which would seem to recognize common-law offenses in this state.

(34 Ind. App. 393)

STATE v. TABLER et al. (No. 5,492.)

(Appellate Court of Indiana. Jan. 6, 1905.)

INTOXICATING LIQUORS—ILLEGAL SALE—PUBLIC NUISANCE—INDICTMENT.

1. Though there is no statute making a place where intoxicating liquors are sold a nuisance per se, yet even a license to sell such liquors does not protect the holder from liability to a property owner individually damaged by unlawful practices on the premises.

2. An indictment alleged that defendants were in control of a building, in which they erected screens and other devices for the illegal sale of intoxicating liquors, and that drunken men were seen in and about the building, and on the public streets of the town; that men congregated in front of the building described, blocked the sidewalk, and used profane, obscene, and indecent language, to the annoyance of inhabitants dwelling near such building. *Held*, that though the erection of the screens and other devices to make an illegal sale of liquor more safe did not constitute a nuisance, as a matter of law, the gravamen of the charge was the alleged public intoxication, and open violation of law, constituting an annoyance to the public necessarily coming in contact therewith, and therefore sufficiently charged a public nuisance, within Burns' Ann. St. 1901, § 2153, providing that every person who shall maintain a public nuisance, to the injury of any part of the inhabitants of the state, shall be fined, etc.

Appeal from Circuit Court, Harrison County; C. W. Cook, Judge.

Harriet Tabler and another were indicted for maintaining a public nuisance. From an order quashing the indictment, the state appeals. Transferred from Supreme Court. Reversed.

O. W. Miller, Atty. Gen., J. H. Luckett, G. W. Self, William Ridley, R. S. Kirkham, W. C. Geake, C. C. Hadley, and L. G. Rothschild, for the State. Stotsenburg & Weathers, C. O. Jordan, and E. H. Breeden, for appellees.

COMSTOCK, C. J. Appellees were indicted for maintaining a public nuisance. A motion to quash was sustained by the trial court, and from that ruling appellant appeals.

The indictment charges that the appellees, Harriet and James Tabler, on the 1st of August, 1902, at Harrison county and state of Indiana, near unto the dwelling and business houses of divers inhabitants of the town of Corydon, in said county and state, unlawfully made, erected, set up, and arranged, and did cause and procure to be made, erected, arranged, and set up, in a certain room and building in said town of Corydon (describing the room and building), a certain partition, elevator, screens, curtains, revolving waiters, screen sash, blind door, blind window, paraphernalia, and other devices for the purpose of unlawfully selling and bartering and giving away intoxicating liquors in less quantities than five gallons at a time, and for the purpose of conducting unlawfully a saloon in said room and building; that they did unlawfully, at said date, and injuriously, maintain and permit, and from thenceforth up to and including the time of the making of this presentment do maintain, permit, and operate, in said room and building in said town, the said partition, elevator, screens, etc., for the purpose of unlawfully and illegally selling, bartering, and giving away intoxicating liquors in less quantities than five gallons, and for the purpose of unlawfully conducting a saloon; that, by reason of said partition, elevator, screens, etc., intoxicating liquors, in less quantities than five gallons at a time, are sold, bartered, and given away in said room and building, and have been so sold, bartered, and given away since the 1st of August, 1902, including Sundays and legal holidays, up to and including the time of the making of this presentment; said sales were made with the knowledge and consent of said defendants; that they have absolute control over said room in which said devices before described are located, and in which said illegal business was conducted; that said sale of intoxicating liquors can be made with impunity, and said saloon business can be conducted without fear on the part of the defendants of the consequences of selling intoxicating liquors without license, for the reason that said partition, elevators, etc., so screen and hide the seller of intoxicating liquors from the view of the public that it is impossible to ascertain who is the seller; that no person has a state license to sell intoxicating liquors in said room and building; that, by reason of said partition, elevator, screens, etc., by means of which illegal sales of liquors have been made by and with the consent of the defendants, and by reason of the existence of said illegal saloon maintained by and with the consent of the defendants, and each of them, "men are made

building and on the public streets of said Corydon." Men congregated in crowds in and in front of said room and building before described, blocking the sidewalk, using profane, obscene, and indecent language, all to the damage, inconvenience, annoyance, and injury of divers inhabitants situated and dwelling in said town of Corydon, and near unto said room and building above described. It is further alleged that the people of the town of Corydon are of a high grade of morality, and that, until the acts complained of, there was no place in said town where intoxicating liquors could be purchased for a beverage; that, by reason of the absence of saloons, Corydon was a more desirable place for business and residence purposes, and that, by reason of the acts complained of, the town is less desirable either for business or residence purposes; and that said illegal saloon is a public nuisance, contrary to the form of statute, etc. It is also alleged that said room and building containing said structures and devices is called and is known to the inhabitants of the town of Corydon as a "blind pig" or "blind tiger."

There is no statute in this state making a place where intoxicating liquors are sold a nuisance per se, but even a license to sell intoxicating liquors does not protect the holder from the consequences of unlawful practices on the premises, and persons so offending may be liable to a property owner individually damaged. *Haggart v. Stehlin*, 137 Ind. 48, 85 N. E. 997, 22 L. R. A. 577; *Tron v. Lewis*, 31 Ind. App. 178, 66 N. E. 490; *Kissel v. Lewis*, 156 Ind. 233, 59 N. E. 478. In Indiana there are no crimes except those defined by statute. *Stephens v. State*, 107 Ind. 185, 8 N. E. 94, and cases cited. Section 2153, Burns' Ann. St. 1901, provides that every person who shall erect and maintain any public nuisance, to the injury of any part of the inhabitants of the state, shall be fined, etc. "The term 'public nuisance' has, as used in the foregoing section, a well-defined legal meaning, and sufficiently designates the class of prohibited acts." *Gillett's Criminal Law* (2d Ed.) § 460; *Burk v. State*, 27 Ind. 430. A nuisance is a public nuisance if it annoys such part of the public as necessarily comes in contact with it. *Hackney v. State*, 8 Ind. 494; *Moses v. State*, 58 Ind. 185; *Acme Fertilizer Co. v. State* (present term of the court) 72 N. E. 1037; *Paragon Paper Co. v. State*, 19 Ind. App. 321, 49 N. E. 600. "It is well known that a 'keeper of a blind tiger,' in its general acceptation and understanding, means a person engaged in the unlawful sale of intoxicating beverages." *Rush v. Commonwealth (Ky.)* 47 S. W. 586; *Standard Dictionary*. "The words used in

strued in their usual acceptance in common language." Section 1805, Burns' Ann. St. 1901. The indictment charges, in terms, the keeping of a public nuisance, under which evidence may be properly introduced to show that the public who necessarily came in contact with the conditions set out were annoyed. It avers that the defendants, at the time of the acts charged, had control over said room and building; that they were in control at the time of the making of the presentment. The mere erection of screens and other devices described in the indictment cannot be said to be, as a matter of law, a nuisance, no matter what the motive of their erection and maintenance may be; but the indictment avers that, by means of said devices, liquors were sold in violation of law, and it is further averred that men are made drunken, and are seen in and about said building and on the public streets of said town of Corydon; that men congregate in crowds in and in front of said room and building before described, blocking the sidewalk, using profane, obscene, and indecent language, all to the annoyance, etc. The gravamen of the charge is that the alleged public intoxication, and open, notorious, and continuous violation of law, are offenses to decency. A statute of the state of Georgia makes any place commonly known as a "blind tiger," where intoxicating liquors are sold in violation of law, a common nuisance. *Cannon v. Merry*, 116 Ga. 291, 42 S. E. 274. In *Legg v. Anderson*, at page 404 of the same volume (116 Ga.), page 721, 42 S. E., the court holds that a blind tiger is a public nuisance, independently of said statute. This expression from the learned court, although not binding here, is commended by the able reasoning of the opinion. The maintenance of a public place equipped with devices intended to make the violation of the law comparatively safe from criminal prosecution, and in which it is well known the law is systematically violated, is certain to induce the lamentable results and exhibitions designated in the indictment, and which can only be "offensive to the senses." Such results are not only a nuisance, but a menace to the peace of the community.

The court erred in sustaining the motion to quash the indictment, and the record shows, notwithstanding the claim of the appellees to the contrary that the state excepted, in substantial compliance with the law, to said action of the court.

The judgment is reversed, with instructions to overrule the motion to quash.

BLACK, WILEY, ROBINSON, ROBY, and MYERS, JJ., concur.

(Supreme Court of Indiana. Jan. 12, 1905.)

WRONGFUL DEATH — STREET RAILROADS — PERSONS ON TRACK — CARE REQUIRED — NEGLIGENCE — EVIDENCE — INSTRUCTIONS — HARMLESS ERROR.

1. In an action for the death of a young child by being run over by a street car, an instruction that in such a case the motorman "must make sure" that the child will be free of the track at the point where it is crossing or approaching the track, before the car reaches him, was objectionable, as requiring too high a degree of care; the railroad company not being an insurer of the child's safety.

2. Where, in an action for the killing of a child in collision with a street car, the uncontradicted evidence clearly established that the verdict was right, and that the merits of the cause had been fairly tried, a judgment on such verdict will not be reversed because of an erroneous instruction, under Burns' Ann. St. 1901, § 670, forbidding reversal where it appears to the court that the merits of the cause have been fairly tried and determined in the trial court.

3. Where a child killed in collision with a street car was non sui juris, it was only required to exercise such care as could be reasonably expected of a child of its age and intelligence.

4. In an action against a street railway company for killing a child on the track, evidence held to establish the motorman's negligence in not stopping the car when he first saw the child in the roadway, going toward the track.

Appeal from Circuit Court, Johnson County; W. J. Buckingham, Judge.

Action by William L. Schomberg against the Indianapolis Street Railway Company. From a judgment in favor of plaintiff, defendant appeals. Case transferred from the Appellate Court, as authorized by Burns' Ann. St. 1901, § 1337, cl. 2. Affirmed.

F. Winter, Miller & Barnett, and W. H. Latta, for appellant. W. W. Thornton, Ayres, Jones & Hollett, and Wm. A. Johnson, for appellee.

JORDAN, J. Appellee instituted this action against appellant to recover damages for the negligent killing of his minor child. The child, it appears, was killed at a point on Alabama street, in the city of Indianapolis, by being run over by one of appellant's cars. The complaint upon which the cause was tried contained five paragraphs. Briefly stated, the first paragraph, among other things, after disclosing that appellee was the father of the child, named Allen Schomberg, of the age of three years, charges, in general terms, negligence on the part of appellant company in running the car in question over the child, thereby killing it. The second paragraph charges negligence against appellant because the motorman in charge of the car failed to look and see the child. The third alleges that the car was old, and that the brake thereof was defective, and in such condition that the motorman was unable to stop the car in time to prevent the accident.

The fourth alleges that the car was negligently constructed, and the life guard thereof was defective, and by reason thereof the child, after it was struck by the car, passed over the life guard under the car. The fifth alleges that appellant did not comply with the provisions of an ordinance passed by the city of Indianapolis, which required it to use the most improved pattern of cars, and to keep them in good repair, and to provide them with the most improved life guards, etc. Appellant's answer to the complaint was the general denial. The case was venued to the Johnson circuit court, where a trial by jury upon the issues joined resulted in a verdict in favor of appellee for \$1,350. Appellant's motion for a new trial, assigning as reasons, among others, that the court erred in giving and refusing certain instructions, was denied, and judgment was rendered on the verdict. The evidence is in the record by a bill of exceptions. The only questions discussed and relied upon for a reversal by appellant relate to instructions given and refused.

By reason of the conclusion reached, we do not deem it necessary to set out the instructions of which appellant complains. We have examined the entire charge of the court, however, and, in the main, at least, it may be said that the jury thereby was fairly advised relative to the law applicable to the case at bar. Some of the instructions criticised by appellant's counsel contain inaccurate expressions of law. Especially is this true of instruction 82, in the use of the term "sure." By this charge the court advised the jury in regard to the general rule controlling rights of persons in the use of the streets of the city, and as to the duty resting on a street railway company in respect to persons using the streets over which its cars were running. In the closing part of the instruction in question, the court said: "In the case of a young child, the motorman or person controlling the movement of such car must make sure that the child will be free of the track at the point where it is crossing or approaching such track, before the car reaches him." (Our italics.) There is merit in the contention of counsel that appellant could not in this case be held to be an insurer of the safety of the child. Instruction 42, and possibly some others criticised by appellant, may be said to be open to its objection that they assume that a certain fact or facts mentioned in the instruction had been established. If we had any reason to believe, from an examination of the record, that the inaccuracies in the instructions in question were influential in bringing about a wrong result, or were probably prejudicial to appellant, we would not hesitate to order a reversal of the judgment. But what may be said to be the uncontradicted evidence in the case clearly establishes that the verdict of the jury is right, and that the merits of the cause have been fairly tried and determined. It has been frequently affirmed by this court

¶ 2. See Street Railroads, vol. 44, Cent. Dig. § 217, 72 N.E.—66

that the giving of an inaccurate instruction, which, under the facts in the case, cannot be said to have prejudiced the complaining party in his substantial rights, will not justify a reversal of the judgment. Neither will an erroneous instruction warrant a reversal where it appears that the judgment, upon the evidence, is a correct result. In fact, section 670, Burns' Ann. St. 1901, forbids a reversal in cases "where it shall appear to the court that the merits of the cause have been fairly tried and determined in the court below." The decisions in which this rule is sustained and enforced are numerous, and a reference to all is not necessary. See *Stanley v. Dunn*, 143 Ind. 495, 42 N. E. 908; *Mode v. Beasley*, 143 Ind. 334, 42 N. E. 727; *Swain v. Swain*, 134 Ind. 596, 33 N. E. 792; *Badger v. Merry*, 139 Ind. 631, 39 N. E. 309; *Ellott's App. Proc.* §§ 292, 632, 635, 643, and authorities there cited.

What may be said to be the undisputed evidence in the case discloses the following facts: Appellee was the father of the child in question, which at the time of the fatal accident was two years and eight months old. Appellee's family consisted of his wife and two children, and their home was situated on Alabama street, which runs north and south, in the city of Indianapolis. The width of the roadway of this street opposite appellee's home is shown to be 36 feet. The distance from the north property line of appellee's lot to the corner of Massachusetts avenue is 250 feet. The accident occurred about 11 o'clock a. m. on April 8, 1900. Appellee at that time was absent from home. The child was at home with its mother, who testified that, just before the accident occurred, it, together with its older brother, had gone out on the front porch, which faces Alabama street. She could see the children, where they were playing on the porch, from the sitting room. She testified that she left the sitting room and went into her kitchen to look after some work, and was there about five minutes, when she heard the child scream. She ran out onto the street, where the car had stopped, and discovered that her child had been run over by the car, and from the effects of its injury it died about 3 o'clock on the following morning. The car which struck it belonged to the Central avenue line of appellant's railway, and at the time of the accident was running north. Aside from the evidence of eyewitnesses who testified in behalf of appellee relative to the accident, which evidence clearly establishes negligence on the part of the motorman who was operating the car, that introduced in behalf of appellant alone clearly proves the fact that the death of the child was due to the negligence of the motorman. It appears that the motorman operating the car at the time of the accident had no regular run. He was simply being used as a substitute for another. It is shown that there is a switch on Massachusetts avenue, by the means of

which the cars of the Central avenue line of appellant's road are turned onto Alabama street. The testimony of the motorman, together with that of other witnesses, discloses that when the cars turn from the avenue onto Alabama street the view ahead towards the north is unobstructed. It appears that, had the motorman looked ahead of his car as it entered onto Alabama street, he could have seen the child in the roadway, about 90 feet beyond the car; that at that time it was between the curb and the tracks of the railway, about 15 feet from the tracks. It was walking towards the tracks. In fact, the motorman testified that there was nothing to prevent him from seeing the child when his car entered from Massachusetts avenue onto Alabama street. He testified that just as the car entered onto Alabama street he saw the child ahead of the car; that it was about halfway between the curb and the track, and about 15 feet from the track, towards which it was then going. He states himself that it was at that time about 75 feet beyond the car. He testified that when he first saw the child going towards the track he rang the gong in order to attract its attention, and after it had entered onto the track, and when the car was within 10 feet of it, he reversed the power and tried to stop the car. When he first saw the child, as he states, the car was running at full speed, but was running slowly at the time when it struck and ran over the child. The child, by reason of its tender age, was, in the eye of the law, non sui juris, and was incapable of being guilty of contributory negligence. It would be required to exercise only such care and discretion as could be reasonably expected of a child of its age and intelligence. *Elwood St. R. Co. v. Ross*, 26 Ind. App. 258, 58 N. E. 535, and cases there cited. The motorman's own testimony establishes that he was guilty of negligence in not stopping his car, as it is shown he could when he first saw the child in the roadway, going toward the tracks. Instead of endeavoring to stop the car, he sounded the gong in order to attract the child's attention. It was not until within 10 feet of the child—virtually upon it—did he endeavor to stop the car and thereby prevent the accident. It was clearly his duty at the time he first saw the child approaching, as it was, a place of danger, to have at least made a proper effort to control the car so as to stop it before it reached the child. It is evident that, had he done so, the car could have been stopped, and the fatal accident avoided. Under the circumstances, the motorman had no right to assume that this little boy would exercise the care of older persons, and would not enter onto the track as the car was approaching. He ought to, under the circumstances, have acted on the belief or presumption that the child might go onto the track, and should therefore have immediately endeavored, by the use of proper means, to have controlled the car. Indign-

appeals in *Co. v. Miller*, 100 Ind. 118, 3 N. E. 310, 10 N. E. 70, 58 Am. Rep. 387, and authorities there cited; *Elwood St. R. Co. v. Ross*, supra; *Sample, Adm'r, v. Consolidated L. & R. Co.*, 50 W. Va. 472, 40 S. E. 597, 694, 57 L. R. A. 186; *Lake Shore, etc., R. Co. v. Miller*, 25 Mich. 274; 2 Thompson on Neg. (New Ed.) § 1424.

There is no evidence in the case which can be said to impute contributory negligence either to appellee or his wife. *Sample, Adm'r, v. Consolidated L. & R. Co.*, supra, and cases there cited.

Judgment affirmed.

(164 Ind. 109)

PENNSYLVANIA CO. v. NEWBY. (No. 20,436.)

(Supreme Court of Indiana. Jan. 11, 1905.)

RAILROADS—CATTLE GUARDS—CARE REQUIRED—USAGES.

1. Burns' Ann. St. 1901, § 5323, requiring railroad companies to erect cattle guards, is a police regulation, and requires such companies, in so far as they can do so consistently with their obligation to protect life and freight on their trains, to provide cattle guards sufficient to prevent stock from getting on their railroad.

2. A usage, by first-class railroads, as to the form of cattle guards in use, does not fix the standard of care required of a railroad, by Burns' Ann. St. 1901, § 5323, in constructing cattle guards.

Appeal from Circuit Court, Morgan County; J. O. Robinson, Judge pro tem.

Action by William Newby against the Pennsylvania Company. From a judgment in favor of plaintiff, defendant appeals. Case transferred from Appellate Court, as authorized by Burns' Ann. St. 1901, § 1337u. Affirmed.

S. O. Pickens and R. F. Davidson, for appellant. O. Matthews, for appellee.

GILLET, J. Action under section 5323, Burns' Ann. St. 1901, to recover the value of two mules belonging to appellee, and killed on appellant's right of way. The question before us is presented by an assignment of error which draws in question the propriety of the action of the lower court in overruling a motion, made by appellant, for judgment on answers to interrogatories notwithstanding the general verdict. The contention of appellant's counsel is summarized in their brief as follows: "A special finding that cattle guards at a crossing were of the style in general use by first-class railroads shows a sufficient compliance with the statute requiring railroads to be securely fenced." The question as to the sufficiency of a cattle guard over which an animal has passed in getting on the right of way is ordinarily to be submitted to the jury, under appropriate instructions from the court. The statute is a police regulation, and at points where cattle guards should be placed it is the duty of a

¶ 1. See *Railroads*, vol. 41, Cent. Dig. § 319.

railroad company, in so far as it can do so consistently with its higher obligation to protect life and freight upon its trains, to provide "cattle guards suitable and sufficient to prevent cattle, horses, sheep, hogs, and other stock from getting on such railroad." It may be the law in negligence cases—at least as applied to cases involving the sufficiency of complicated pieces of mechanism, concerning which the jury is presumably without experience—that it is competent to introduce evidence concerning the general usage of others in a like situation, on the theory, as has been stated, that the fact that a usage or custom is general or universal tends to show its reasonableness. But at the furthest this would only be a matter of evidence. We need not advert to the settled rules concerning the answers to interrogatories which are sought to be used to overthrow the general verdict further than to state that as evidence might have been introduced under the issues which showed, notwithstanding such usage, that the cattle guard in question was insufficient in fact, we are bound to presume that evidence tending to show that fact was offered, and that the jury gave credence to such evidence. Whatever may be the rule as to the competency of evidence tending to show that the style of cattle guards used by appellant was in general use by first-class railroads, it is not the law that the usage of such railroads fixes the standard of care. *Louisville, etc., R. Co. v. Wright*, 115 Ind. 378, 16 N. E. 145; 17 N. E. 584, 7 Am. St. Rep. 432; *Lake Erie, etc., R. Co. v. Mugg*, 132 Ind. 168, 31 N. E. 564; *Allen v. Burlington, etc., R. Co.*, 64 Iowa, 94, 19 N. W. 870; *Wright v. Boller*, 42 Hun, 77; *Malloy v. Township of Walker*, 77 Mich. 448, 43 N. W. 1012, 6 L. R. A. 695; *Gulf, etc., R. Co. v. Evansich*, 61 Tex. 3; *Lawson, Usages and Customs*, § 172; *Black, Law & Prac. in Accident Cases*, § 193.

Judgment affirmed.

JORDAN, J., did not participate.

(164 Ind. 104)

WELCH v. STATE ex rel. BEAUCHAMP. (No. 20,890.)

(Supreme Court of Indiana. Jan. 10, 1905.)

HIGHWAYS — ESTABLISHMENT — REFUSAL OF TRUSTEE TO ACT — MANDAMUS — APPEAL — WAIVER OF ERRORS—BRIEF—SUFFICIENCY.

1. Where no alternative writ of mandamus is issued, the verified petition or affidavit and motion for the writ will be treated as a complaint; but where an alternative writ has been issued it must be taken as in the nature of a complaint.

2. Under Burns' Ann. St. 1901, § 6745, requiring a township trustee, to whom an order establishing a highway has been transmitted by the board of commissioners, to cause a copy of the order to be entered at length on his record book, and to give notice to the supervisor to do the necessary work, a petitioner for a highway,

¶ 1. See *Mandamus*, vol. 23, Cent. Dig. § 327.

state to a writ of mandamus to compel a trustee on whom a copy of the order of the commissioners has been served to perform the duty enjoined upon him by the statute.

3. Grounds of a motion for a new trial which are not pointed out or discussed in appellant's brief are waived.

4. A brief omitting the names of some witnesses and merely referring to the general tenor and effect of the evidence, and not attempting to set out its substance in narrative form, does not comply with rule 22, cl. 5, of the Court of Appeals (55 N. E. vi), requiring the statement in appellant's brief to contain a condensed recital of the evidence in narrative form, where the question of the sufficiency of the evidence to sustain the verdict is raised.

5. A township trustee is not justified in refusing to cause a road which has been adjudged to be of public utility to be opened because he has not sufficient funds on hand at any one time to make all the necessary or desirable improvements.

Appeal from Circuit Court, Starke County; John C. Nye, Judge.

Mandamus proceedings by the state, on the relation of Peter M. Beauchamp, against Morgan H. Welch, as trustee of California township. From a judgment awarding a peremptory writ, defendant appeals. Affirmed.

A. L. Courtright, for appellant. Robbins & Pentecost, for appellee.

MONTGOMERY, J. This action was commenced upon the verified petition of the relator, Peter M. Beauchamp, for an alternative writ of mandate directed to the appellant, Morgan Welch, as trustee of California township, in Starke county, requiring him to open a certain public highway in said township, theretofore established, or to show cause why the same should not be done. The writ was issued and served, and at the time fixed by the court appellant appeared in response thereto, and demurred to the alternative writ for want of sufficient facts. This demurrer was overruled, and an exception saved to the ruling. Appellant filed his return or answer to the writ in two paragraphs. Appellee replied to the affirmative answer, and the cause was tried by the court without a jury. The court's finding was in favor of appellee, and thereupon a judgment was entered for the issuance of a peremptory writ of mandate commanding appellant, as such trustee, to open the highway. A motion for a new trial was filed and overruled, and an exception saved to the ruling by the filing of a general bill of exceptions within the time given. The assignment of errors challenges the correctness of the court's ruling upon demurrer to the alternative writ and upon the motion for a new trial, and also the sufficiency of facts in the alternative writ to constitute a cause of action. Appellee alleges by way of cross-error that the court below erred in overruling the demurrer to the affirmative paragraph of answer or return to the alternative writ of mandate.

It will not be necessary to decide the assignment of the errors assigned by appellant, it will not be necessary to decide the assignment of cross-errors. The language of the assignment of errors in regard to the sufficiency of the complaint is somewhat indefinite, and might be construed as addressed to the petition or application for the alternative writ of mandate. If no alternative writ had been issued in the cause, the verified petition, or affidavit and motion, for the alternative writ, would be treated as the complaint; but when, as in this case, an alternative writ has been issued, such alternative writ must be taken as in the nature of a complaint. Board, etc., v. State, 61 Ind. 75; Gill v. State, 72 Ind. 286; Wampler v. State, 148 Ind. 557, 47 N. E. 1068, 38 L. R. A. 829; Appelgate v. State, 158 Ind. 119, 63 N. E. 16. The substantial facts of the alternative writ of mandate are that the relator was a petitioner for the road in question, and the owner of real estate abutting thereon; that the road was duly established by the order of the board of commissioners, and a copy of such order, with a command to open the road, served on appellant as such trustee on September 5, 1900; but that, with abundant means in his hands with which to open said road, he had failed and refused to do so for almost three years, without cause for such refusal. No specific defect in the writ is pointed out by appellant, and none is apparent. When an order establishing a highway has been made by the board of commissioners, and transmitted to the trustee, section 6745, Burns' Ann. St. 1901, enjoins upon such trustee the duty of causing a copy of such order to be entered at length on his record book, and notice thereof to be given to the proper supervisor to work such location or change. The demurrer to the writ confesses that this duty has not been performed by appellant. Mandamus is the appropriate remedy to compel the performance of the statutory duties of township trustees with respect to the opening of established highways, and the allegations of the alternative writ of mandate in this case, taken as true, are sufficient to require the performance of the duties enjoined upon appellant, as trustee, by the provisions of the statute above quoted, and the court did not err in overruling appellant's demurrer for want of facts. State v. Bell, 157 Ind. 25, 60 N. E. 672; Wampler v. State, 148 Ind. 557, 47 N. E. 1068, 38 L. R. A. 829; Moore v. State, 72 Ind. 358; Potts v. State, 75 Ind. 336.

Appellant's motion for a new trial assigns, among other causes, that the decision of the court is not sustained by sufficient evidence, and is contrary to law. All causes embraced in the motion other than these have been waived by a failure to point them out or discuss them in appellant's brief. A consideration of these statutory grounds for a new trial necessitates an examination of the evidence; but appellee insists that the evidence

as not in the record, for the reason that appellant's praecipe calls for a transcript of the bill of exceptions, and the clerk has certified to this court the original bill without copying the same. The General Assembly of 1903 has changed the law upon this point. (Acts 1903, p. 338, c. 193); but without determining whether that act applies to this appeal or not, it is manifest that the evidence cannot be considered. Clause 5 of rule 22 of this court (55 N. E. vi) requires that, "if the sufficiency of the evidence to sustain the verdict or finding, in fact or law is assigned, the statement [in appellant's brief] shall contain a condensed recital of the evidence in narrative form so as to present the substance clearly and concisely." Appellant's brief omits the names of some witnesses, and a mere reference to the general tenor and effect of the evidence is given, but no attempt is made to set out its substance in narrative form. This is not a sufficient compliance with the requirements of the rule, under the decisions of this court. *Security, etc., Ass'n v. Lee*, 160 Ind. 249, 68 N. E. 745; *Boseker v. Chamberlain*, 160 Ind. 114, 68 N. E. 448; *Pittsburgh, etc., R. Co. v. Wilson*, 161 Ind. 701, 68 N. E. 899. It will be presumed, in the absence of the evidence, that the court's ruling on the motion for a new trial was not erroneous.

It is deemed appropriate to add that, the road having been adjudged to be of public utility, the appellant could not be justified, as he claimed in his answer to be, in refusing to cause the same to be opened because he may not have had at any one time on hand sufficient funds to make all the improvements necessary or desirable.

No error appearing of record, the judgment is affirmed.

(163 Ind. 702)

LEONARD v. WHETSTONE et al. (No. 20,221.)

(Supreme Court of Indiana. Jan. 5, 1905.)

APPEAL—SUPREME COURT—JURISDICTIONAL AMOUNT.

1. Under Burns' Ann. St. 1901, § 1337j, cl. 3, providing for appeals from the Appellate Court to the Supreme Court "only when the amount in controversy, exclusive of costs and interest on the judgment of a trial court, exceeds \$6,000," no appeal lies to the Supreme Court from a judgment of the Appellate Court affirming a judgment of the trial court sustaining a demurrer to a complaint demanding judgment for \$10,000.

Appeal from Circuit Court, Tipton County; W. W. Mount, Judge.

Action by Della Leonard against John Whetstone and others. From a judgment of the Appellate Court affirming a judgment for defendants, plaintiff appeals. Appeal dismissed.

Shirts & Fertig, John E. Garver, and Dan Waugh, for appellant. Stuart & Reagan, for appellees.

2. Appellant commenced this action against appellee in the Tipton circuit court, and demanded judgment for \$10,000. A demurrer for want of facts was sustained to the complaint, and judgment rendered against her on demurrer. She appealed to the Appellate Court, where the judgment of the lower court was affirmed. From this judgment of the Appellate Court appellant seeks to prosecute an appeal to this court, under clause 3, § 1337j, Burns' Ann. St. 1901 (section 10, Acts 1901, p. 567). These facts are substantially the same as those in *Crum v. North Vernon, etc., Co.* (this term) 72 N. E. 587, where it was held by this court that no appeal would lie in such a case under the third clause of section 1337j, supra. Upon the authority in that case, this appeal from the Appellate Court is dismissed.

(164 Ind. 155)

INDIANAPOLIS ST. RY. CO. v. TAYLOR. (No. 20,395.)*

(Supreme Court of Indiana. Jan. 8, 1905.)

STREET RAILWAYS—COLLISION—ACTION—EVIDENCE—DECLARATION OF BYSTANDER—INSTRUCTIONS—CARE REQUIRED IN A CITY.

1. In an action for injuries the action of the court in overruling a motion of defendant for a peremptory charge to find for him on a paragraph of the complaint charging a willful infliction of the injury, if error, was harmless, it appearing from special findings that the general verdict for plaintiff was not based on that paragraph.

2. In an action for injuries to one who was run down by a street car, the testimony of a witness who saw the accident as to remarks made by him to the motorman when he stopped the car were inadmissible.

3. In an action for injuries to one run down by a street car, an instruction that greater care in operating cars is required in populous cities and crowded streets than in sparsely settled districts and streets or highways upon which there are few travelers, was erroneous, as invading the province of the jury.

4. In an action for injuries to one run down by a street car any evidence tending to show that the place where the accident occurred was in a populous city or crowded street was proper to be considered by the jury in the determination of defendant's negligence.

Appeal from Circuit Court, Hancock County; E. W. Felt, Judge.

Action by Charles E. Taylor against the Indianapolis Street Railway Company. From a judgment in favor of plaintiff, defendant appeals. Transferred from the Appellate Court under section 1837u, Burns' Ann. St. 1901. Reversed.

F. Winter, Marsh & Cook, and W. H. Latta, for appellant. W. V. Rooker, for appellee.

JORDAN, J. Action by appellee to recover for personal injuries. The first and second paragraphs of the complaint charge negligence in the operation of the car by which appellee was struck. The third paragraph alleges that the injury was willfully

* 4. See *Street Railroads*, vol. 44, Cent. Dig. § 228. Rehearing denied. See 80 N. E. 436.

the 11th day of November, 1899, appellee was riding a bicycle in the city of Indianapolis, and while attempting to ride across a double line of tracks of appellant's railway on Illinois street he was struck by a car running south thereon, and was seriously injured. The cause was originally tried on change of venue in the Shelby circuit court, wherein appellee recovered a judgment, which subsequently, on an appeal to this court, was reversed on account of error in the trial court's charge to the jury. *Indianapolis St. R. Co. v. Taylor*, 158 Ind. 274, 63 N. E. 456. After the cause was reversed and remanded, it was tried by jury on change of venue in the Hancock circuit court, and a verdict in favor of appellee for \$6,000 was returned. Along with this general verdict the jury returned answers to a series of interrogatories. Over appellant's motion for a new trial, judgment was rendered against it for the amount of damages assessed by the jury. From this judgment it appeals.

Among the alleged errors discussed and relied upon for reversal are the following: (1) Denying a request for the court to instruct the jury to find in appellant's favor on the third paragraph of the complaint; (2) admission of certain evidence; (3) giving certain instructions to the jury. In answer to the objections of counsel for appellee it may be said that the court's rulings on giving and in refusing certain instructions, together with its rulings on other motions and matters which appellant urges for a reversal, have all been properly brought into the record by bills of exceptions. At the close of the evidence appellant unsuccessfully moved the court to give a peremptory charge to the jury to find in its favor on the third paragraph of the complaint. Appellant contends that in overruling the motion the court erred, as there is no evidence whatever to warrant a finding that the injury was willfully inflicted, as charged in said paragraph. It will, however, serve no useful purpose for us to review the evidence in order to determine this question, for such error, if any, was harmless, because the special findings of the jury disclose that the general verdict is not based upon the third paragraph, but is predicated on the paragraphs of the complaint which charge that the injury resulted from negligence in the operation of the car by which appellee was struck. It is shown by the evidence that the accident in controversy occurred between 8 and 9 o'clock on the night of November 11, 1899. Appellee at the time was riding a bicycle on Vermont street, going east across Illinois street, and in his attempt to cross the latter street he was struck by one of appellant's cars going south thereon on the west track. The west track was used by cars running south, and the east track by cars running north. After appellee was struck he was carried by the fender of the car some distance, until the car stopped

at an establishment on Illinois street, in front of which there was a light burning. James H. Bacon, a witness on behalf of appellee, testified that on the night of the accident he and his wife, about 8:30 o'clock, were walking on Illinois street between Vermont and New York streets. As they were passing along, his attention was attracted by a noise which sounded as though the street car going south at the time had struck something. The witness stated that soon after he heard this noise the car in question stopped in front of the above-mentioned undertaking establishment. He testified that he had reached this point by the time the car stopped. When it stopped he stated he saw a man under the car, who proved to be appellee. After the car stopped it appears the motorman alighted therefrom. The witness was asked by appellee's counsel to state to the jury what he (the witness) said at that time to the motorman. In response to this question he testified as follows: "When he [the motorman] got off of the car I says to him, 'You run without any lights; you are running dark.' I says, 'You had better get up there and back the car so we can get this party out.'" To these remarks the motorman made no reply. This evidence was permitted to go to the jury over the objections and exceptions of appellant. After the evidence had been given, appellant unsuccessfully moved the court to strike it out. Its counsel earnestly contend that in admitting the declaration or remarks in question, and also in denying its motion to strike them out, the court clearly erred. The decision in the appeal of *Indianapolis St. R. Co. v. Whittaker*, 160 Ind. 125, 66 N. E. 433, is cited and urged in support of their contention. The question, as here presented, is on "all fours" with the one involved in that case, and the decision therein must be accepted as a ruling precedent on the point here involved. Counsel for appellee, however, insist that the evidence was admissible as a part of the *res gestae*. In the *Whittaker Case*, supra, a witness on behalf of the plaintiff was asked the following question: "Was anything said by you to the conductor while she (meaning plaintiff) was on the ground about them stopping the car, or Mrs. Whittaker falling?" The witness, over the objections of the defendant in that case, was permitted to testify in response to the question as follows: "Yes, I said when she first fell, 'If you had stopped, and let her off, this would not have occurred.'" To this remark the conductor in that case made no reply. The declarant, James H. Bacon, under the facts as shown, was wholly disconnected with the occurrence, as was the witness in the case cited. He was nothing more than a mere bystander or looker-on at the time he made the remarks or declarations in question. This court, in the *Whittaker Case*, in reviewing the admissibility of the evidence as there involved, said: "Utterances and exclama-

of participants, or of persons acting in concert, made immediately before or after or in the execution of an act, which go to illustrate the character and quality of the act, are usually admissible on the ground that they are a part of the res gestae, and provable like any other fact that elucidates the issue. The rule, however, seems to be exclusive that, to render the expression or declaration of another admissible, the party making it must have been so related to the occurrence as to make his declaration a part of it. The test seems to be that, to render the utterance or declaration of another admissible, it must flow from one of the actors, or from one sustaining some relation to the transaction, and be so intimately connected with the litigated act as to be the act speaking of itself through the witness speaking the words of another employed concerning the act. *Gillett, Ind. & Col. Ev. § 290; Wilkins v. Ferrell, 10 Tex. Civ. App. 231, 30 S. W. 450; State v. Riley, 42 La. Ann. 995, 8 South. 469; Kaelin v. Commonwealth, 84 Ky. 354, 366, 1 S. W. 594; Senn v. Southern R. Co., 108 Mo. 142, 18 S. W. 1007; Kirkpatrick v. Briggs, 78 Hun, 518, 29 N. Y. Supp. 532.* In the last case cited the plaintiff fell through an open trapdoor in the sidewalk. On the trial for negligent injury the plaintiff was permitted to testify that after he was helped out of the hole by the defendant's servant, who had left the trapdoor open, a man came along, and remarked to the defendant's servant, "That is a very careless way to leave that, young fellow." Held to constitute reversible error." The fact that the declarations in question were testified to by the person who made them does not present the question in any different light, so far as their admissibility is concerned, than if they had been introduced in evidence through some other person who was present at the time and heard them made. In the case at bar, among the things sharply contested was whether the car which struck and injured appellee was being run at the time of the accident without lights, or, in the language of the witness, was "running dark." What influence or effect the evidence in controversy may have had upon the jury in arriving at their verdict we are unable to say. That in admitting this evidence the trial court clearly erred is beyond controversy.

Appellant, among others, complains of instruction No. 54. By this charge the court informed the jury that "a street railway company operating cars is required to use ordinary and reasonable care to avoid injuring persons who are using the highways upon which the cars are being operated. The degree of care and the means to be employed depend upon the conditions existing at the time and place in question." Immediately following, in the same instruction, the court stated to the jury that "greater care is required in populous cities and crowded streets than in sparsely settled districts and streets

or highways upon which few cars are driven." One of the principal questions to be determined by the jury was that of negligence on the part of appellant in running the car in question at the time of the accident. This question was one of fact to be determined by the jurors under all of the evidence and circumstances in the case. It is contended, therefore, by counsel for appellant, that the court, in stating to the jury that "greater care is required in populous cities and crowded streets," etc., clearly invaded the province of the jury. They say: "Ordinary care alone was required of the motorman, and, while we do not dispute the proposition that the jury have a right, in determining what is ordinary care, to take into consideration the number of people living along and using the streets, we do say that the degree of diligence necessary to make ordinary care does not depend upon the density of the population alone. * * * No more than ordinary care is required in either city or country. The court might as well say that greater care is required in Indiana than in Illinois, or in Marion county than in Hancock county." As a general rule, which is fully supported by the decisions in this jurisdiction, where it appears that the trial court, in its charge to the jury, has overstepped the line which separates the law from the facts, such instructions will constitute reversible error, unless it is affirmatively disclosed by the record that the error was harmless. While it is the province or right of the trial court to instruct the jury fully, freely, and pointedly on all matters of law applicable to the case, still the court in doing so is not authorized to usurp or intrench upon the functions of the jury in the determination of matters of fact. This rule is well affirmed by the following authorities, and many others: *Garfield v. State, 74 Ind. 60; Finch v. Bergins, 89 Ind. 360; Goodwin v. State, 96 Ind. 550; Lewis v. Christie, 99 Ind. 377; Union Mut. Ins. Co. v. Buchanan, 100 Ind. 63; Unruh v. State, etc., 105 Ind. 117, 4 N. E. 453; Abbitt v. L. E. & W. R. Co., 150 Ind. 498, 50 N. E. 729; Latschaw v. State, etc., 156 Ind. 194, 59 N. E. 471; Fassnacht v. Emsing, etc., 18 Ind. App. 80, 46 N. E. 45, 47 N. E. 480, 63 Am. St. Rep. 322; Pennsylvania Co. v. Hunsley, 23 Ind. App. 87, 54 N. E. 1071.* Whether appellant at the time of the accident had exercised the care which the law exacted in the operation of its car was a question of fact to be determined by the jury under all the circumstances and evidence in the case applicable to that point. It is true that any evidence tending to show that the place where the accident occurred was in a populous city or crowded street was proper to be considered by the jury, along with all other applicable evidence, in the determination of appellant's alleged negligence. While, as a matter demonstrated by common experience, it may be true that greater care in the operation of street cars is necessary to avoid accidents

ways than is necessary in sparsely settled districts or on streets or highways where there are few travelers," nevertheless such a question, so far as involved in the case at bar, was a matter of fact to be decided by the jury, and not a matter of law to be announced by the court from the bench. This court said in *Goodwin v. State*, supra: "It is proper for the court to direct the minds of the jury to the facts of the case, but it is not proper for it to annex weight and value to them. That is the exclusive province of the jury." Of course, it was within the province of the court to have directed the minds of the jurors to any particular evidence in the case applicable to the question of ordinary care to be considered by them along with all of the other evidence upon the same point in determining whether appellant, at the time of the accident, was exercising such care in the operation of its car; but it was not the right of the court to advise the jurors, as it in effect did, what weight or value they should attach to any such evidence. Whether the instruction in question is impressed with other infirmities we do not decide. That it is bad for the reason stated is manifest.

Other alleged errors are discussed by counsel for appellant, but as these may not necessarily arise in another trial we pass them without consideration.

For the errors pointed out, the judgment is reversed, and the cause remanded, with instructions to the lower court to grant appellant a new trial, and for further proceedings not inconsistent with this opinion.

(34 Ind. App. 343)

CHEEK v. PRESTON. (No. 5,106.)

(Appellate Court of Indiana, Division No. 2.
Jan. 3, 1905.)

LANDLORD AND TENANT—NONPAYMENT OF RENT—NOTICE TO QUIT—TIME—COMPUTATION—ACTIONS—COMMENCEMENT.

1. A notice to quit, served on a tenant for nonpayment of rent, directed to him, and notifying him to deliver the premises described, to the landlord, at the expiration of 10 days from the time of receiving the notice, unless the rent due was paid within that time, constituted a sufficient compliance with Burns' Ann. St. 1901, § 7093, prescribing the form of such notice.

2. A legal day commences at 12 o'clock midnight, and continues until the same hour the following night.

3. Burns' Ann. St. 1901, § 7092, provides that, if a tenant refuses to pay rent when due, 10 days' notice to quit shall determine the lease, unless such rent be paid at the expiration of the said 10 days; and section 1304 declares that the time within which an act is to be done shall be computed by including the first day and excluding the last. *Held*, that where a tenant was notified on October 13, 1902, to quit "at the expiration of ten days" from the time of receiving the notice, "unless the rent * * * be paid within that time," the tenant had the entire legal day of October 23d in which to pay the rent, and hence a suit for possession brought on that day was premature.

¶ 2. See *Time*, vol. 45, Cent. Dig. § 10.

James M. Flety, Judge.

Action by Samuel Cheek against Morgan Preston. A justice's judgment in favor of plaintiff was reversed on appeal to the circuit court, and plaintiff appeals. **Affirmed.**

Albert J. Kelley, for appellant. P. M. Foley and S. D. Royse, for appellee.

WILEY, J. This cause originated before a justice of the peace, where the appellant brought an action in ejectment against the appellee. The complaint shows that appellant leased to appellee certain premises for a stipulated sum, to be paid monthly; and appellant bases his right of action upon the nonpayment of rent, and the service upon appellee of notice to quit within 10 days, unless the rent due for the premises should be paid within that time. The complaint, as a part thereof, sets out the notice served upon appellee. The notice is as follows:

"Notice to Quit for Nonpayment of Rent. Terre Haute, Ind., Oct. 13th, 1902. To Morgan Preston: You are hereby notified to deliver up to me at the expiration of ten days from the time of receiving this notice the possession of the following premises [describing the leased premises] unless the rent due for said premises be paid within that time."

This notice was served on the 13th day of October.

In the justice's court the case was tried by a jury, resulting in a verdict in favor of appellant. The appellee appealed to the court below, where he interposed a motion to dismiss the cause upon three grounds: (1) That the complaint did not state facts sufficient to constitute a cause of action; (2) because sufficient notice to quit had not been served upon appellee; and (3) because the action was prematurely brought. This motion the court sustained, and dismissed the action. The motion and the ruling thereon are brought into the record by a bill of exceptions, and the sustaining of said motion is the only error assigned.

Section 7092, Burns' Ann. St. 1901, reads as follows: "If a tenant refuses or neglects to pay rent when due, ten days' notice to quit shall determine the lease, when not otherwise provided therein or agreed to by the parties, unless such rent be paid at the expiration of said ten days." Section 7093, supra, prescribes the form of notice, and the complaint herein shows that the notice served upon appellee was in substantial compliance with the provisions of the statute. Section 1304, supra, is as follows: "The time within which an act is to be done, as herein provided, shall be computed by excluding the first day and including the last." Section 7092, supra, requires a 10-days notice to a tenant to terminate his lease for nonpayment of rent, and gives him the full 10 days in which to pay the same. In the case of *Adams v. Dale*, 29 Ind. 273, it is held

that, if an act is to be performed on or before a given day, the party who is required to perform the act has all of such day for performance. It also has been held that, when an act is to be performed by a given day, performance may be made before such day, or at any time during the day. *Parker v. McAllister*, 14 Ind. 12; *Walters v. Stockberger*, 20 Ind. App. 277, 50 N. E. 763. A legal day commences at 12 o'clock at night, and continues until the same hour the following night. *Benson v. Adams*, 69 Ind. 353, 35 Am. Rep. 220. In the case of *Newby v. Rogers*, 40 Ind. 9, it is held that, where a party has from a certain day to a certain other day to perform the act, both such days are excluded. In the case of *Erb v. Moak*, 78 Ind. 569, and also in the case of *Eshelman v. Snyder*, 82 Ind. 498, it was held that, where a party had until a day named in which to perform an act, such day is excluded. Taking the plain provision of section 1804, supra, and the cases to which we have referred, it is clear that the appellee had all of the legal day of October 28d in which to pay his rent, so as to avoid a forfeiture of his lease. As the suit in ejectment was commenced on that day, it necessarily follows that it was prematurely commenced. That fact appearing upon the face of the complaint, the motion to dismiss was properly sustained.

Judgment affirmed.

(35 Ind. App. 104)

GREEN v. McGREW. (No. 4,889.)¹

(Appellate Court of Indiana, Division No. 1.
Jan. 8, 1905.)

TAX SALE—DESCRIPTION OF PROPERTY—ILLEGAL PENALTY—DE MINIMIS—EXECUTION OF DEED—FINDINGS—RIGHTS OF GRANTEE UNDER INVALID DEED.

1. Where property was platted as "outlot No. 2," and no platted subdivision of it was made, but it was sold in 10 parcels, described by metes and bounds, but, for convenience of taxing purposes, the taxing officers assigned to them numbers running from 1 to 10, a tax sale of one of the parcels will not pass title; the description in all the papers, books, and advertisements of the taxing officers prior to the tax deed being "lot 9 in outlot No. 2," though to this in the deed reference is made to the description in the recorded deed to the owner of the property, containing a sufficient description.

2. The intentional inclusion in the amount for which a tax sale is made of an unauthorized penalty of six cents will invalidate the sale.

3. A tax deed not signed, witnessed, or acknowledged by the persons designated by statute is not prima facie evidence of title.

4. Special findings in a suit to quiet title to land depending on a tax deed should state it was signed, witnessed, and acknowledged by the persons designated by statute.

5. Though a tax deed does not pass title because of insufficient description of the land in the tax proceedings, and the inclusion of an illegal penalty in the amount for which sale is made, the grantee acquires the lien of the estate, and may be granted the compensation provided by the statute in such case for his outlays.

¹Rehearing denied, 73 N. E. 522.

Appeal from Circuit Court, Huntington County; Levi Mock, Special Judge.

Action by George S. Green against William McGrew. Judgment for plaintiff. Defendant appeals. Reversed.

Spencer & Branyan, for appellant. Kenner & Lucas, for appellee.

BLACK, J. The appellee, as plaintiff, recovered judgment quieting his title as the owner in fee simple to certain real estate, described in the judgment as follows: "Beginning at a point on the east line of Cherry street, 66 feet north of John street, running thence in an easterly direction parallel with John street, 115 feet, thence northwardly at right angles with said line 68 feet, thence westwardly parallel with John street to Cherry street 115 feet, thence southwardly along the east line of Cherry street to the place of beginning, 68 feet; the same being a part of outlot 2 in the original plat of the town [now city] of Huntington, Indiana;" and judgment was rendered in favor of the appellee against the appellant (defendant) for costs.

The court made a special finding, in which the following facts appear: March 28, 1892, one Murphy and his wife conveyed by warranty deed to the appellant real estate in Huntington county, Ind., described in the deed as in the judgment herein, which deed was duly recorded March 30, 1892, in the recorder's office of that county, and was entered of record in Deed Record No. 66, p. 8, of the records of that county. The appellant has never been a resident of this state, and has never owned any personal property situated in this state, and at the time of the finding he had no other real estate in that county. Outlot No. 2 in the original plat of the town (now city) of Huntington, of which the real estate described above is a part, was a regularly platted lot in the original plat of that town, and the original plat was duly recorded in the recorder's office of that county. In 1849 one Kenower was the owner of the whole of this outlot No. 2, and he afterward, at different times, sold and conveyed different parcels thereof to various purchasers, describing the parcels sold by metes and bounds. No subdivision or plat of the outlot has ever been made or recorded in any public office, fixing the location or size of these different parcels. For convenience in listing for taxation, the county auditor "many years ago," assigned to each of these parcels certain numbers, running from 1 to 10, so describing the parcels upon the assessment list, duplicates, and advertisements for delinquent taxes; and the county auditor, without making any record thereof, for his own convenience, assigned No. 9 to the tract in the outlot owned by the appellant, described in the judgment herein. It was found that after the several parcels were so sold by Kenower, and prior to the year 1860, they were numbered from 1 to 10, inclusive;

that these numbers were adopted by the several owners for identification, and by the auditor and taxing officers of Huntington county for convenience in listing and assessing taxes, and that this system of numbering "said lots, so adopted" had been maintained for such purposes ever since, and the real estate so described in the judgment herein, and so conveyed to the appellant by Murphy, "has been commonly known and designated on the tax duplicate as lot No. 9 in outlot No. 2 in the original plat of the town of Huntington for forty years"; that on July 16, 1860, John Alexander was the owner of the undivided two-thirds of lots numbered 2 and 9 according to this system of numbering, and he then deeded to Sylurius W. Alexander an interest in said real estate by the following description: "The undivided two-thirds of lots 2 and 9 in Kenower's division of outlot No. 2 in the original plat of the town of Huntington, and described as follows: Commencing on Jefferson street at the southeast corner of a lot or tract of land in said town owned by David S. Tuttle, running thence west at right angles with Jefferson street to Cherry street, thence southward on Cherry street 68 feet, thence at right angles and parallel to the first line of [to] Jefferson street, thence north on Jefferson street to the point of beginning;" that this deed was recorded in Deed Record O, p. 347, of the records of Huntington county, and "is of the title deeds through which" the appellant derives his title to the real estate in controversy; that Sylurius W. Alexander deeded said real estate to Keziah E. Alexander September 20, 1862, as recorded in Deed Record Q, p. 459, by the same description; that Mary M. Frume, Angeline A. Irvin and her husband, and Maria L. Mills deeded said real estate to Edith Alexander, September 1, 1869, as recorded in Deed Record Z, p. 573, by the same description; that Kizzie E. Alexander deeded to Sylurius W. Alexander an interest in said real estate by the following description: "Lots 2 and 9 in outlot 2 in the town of Huntington"—this deed being dated October 16, 1868, and recorded in Deed Record No. 29, p. 370; that Sylurius W. Alexander deeded said real estate, November 11, 1869, to Henry Hessin and William Hessin, as recorded in Deed Record No. 29, p. 402, by the same description as that in the above-mentioned deed, recorded in Deed Record O, p. 347. It was found that "all said deeds are severally parts of the title deeds through which" the appellant derives his title to the real estate in controversy; that in the years 1895 and 1897 the real estate described in the deed of Murphy above mentioned was regularly viewed and appraised for taxation as required by law, and it was designated in such appraisal by the following description, "Lot No. 9 in outlot No. 2 in the original plat of the town of Huntington," and it was so listed and assessed in the name of the appellant; that this real estate was duly en-

tered on the auditor's and treasurer's tax duplicates for the years 1896 to 1899, inclusive, in the name of the appellant, and by the description "lot 9 in outlot No. 2 in the original plat of the town of Huntington." There are a number of findings relating to sales for city taxes to which we need not further refer, inasmuch as the conclusions of law in favor of the appellee are therein expressly based upon a conveyance of the county auditor, and we may confine ourselves to the facts relating to it. It was found that the state and county taxes for the years 1896 and 1897 on said real estate were returned delinquent for the nonpayment of said taxes, and the real estate was duly advertised for sale for such taxes on and before February 13, 1898, and on that day said real estate was duly sold for such taxes, and was purchased by the First National Bank of Huntington, Ind., for \$43; that a penalty of 6 cents was in November erroneously added to the penalty that accrued in May, and the true amount of delinquent penalty and current tax due at the time of the sale was \$42.92; that said purchaser received the statutory certificate therefor, and said real estate was described in said certificate as "Inlot 9 in original outlot 2 in the city of Huntington, Indiana." The real estate was not redeemed from this sale, and February 21, 1901, the auditor of Huntington county duly executed and delivered to the First National Bank a tax deed for said real estate, which tax deed was in the statutory form, and conveyed the real estate by the following description: "Inlot No. 9 in the original outlot No. 2 in the city of Huntington, Indiana, described in deed record No. 66, page 8." This tax deed was recorded February 22, 1901, in Deed Record No. 84, p. 509, of the records of Huntington county. October 1, 1902, during the pendency of this action, said First National Bank conveyed all its right, title, and interest in the real estate so conveyed to it to the appellee, who was substituted as plaintiff in this action, which had been commenced by the bank, as plaintiff, after the recording of its tax deed. The court further found that the tract described in the deed of Murphy was the same as lot No. 9 in outlot 2, and was the property which was duly listed for taxation in the county offices for the years 1895 to 1902, inclusive; that this tract was regularly listed and assessed for taxation for each of the years from 1895 to 1902 in the books of the auditor of said county in the name of the appellant, and under the description, "Lot 9 in outlot 2 in the original plat of the town of Huntington." It was found that the appellee had paid certain taxes and street improvement assessments set forth in detail in the finding. It was also stated in the finding that "lot 9 in outlot 2 in the original plat of the town of Huntington" is a description which has been carried on the records and through the deeds of Huntington county for more than 40 years, "and that by such de-

scription and that set out by Deed record No. 66, page 8 [the deed of Murphy to the appellant], and the tax deeds of the plaintiff in this case, is sufficient to locate and definitely describe the land, and that a competent surveyor can locate the same"; that the land described in the complaint herein and the deeds mentioned in these findings was duly subject to taxation at the date of the assessment of the taxes thereon; "that the taxes, for the nonpayment of which the land was sold, were unpaid, and that the land had been duly assessed for the taxes for which it was sold, and that the said land had never been redeemed according to law, and no certificate in proper form had or has been issued by the proper officer within the time limited by law for paying taxes, or from [for] redeeming from sales made for the nonpayment of taxes, or these taxes, stating that no taxes were due at the time such sale or sales were made, or any such certificate issued stating that the land in controversy was not subject to such taxation."

The court stated the following as conclusions of law: (1) That the tract of land described in the deed of Murphy, as above shown, is the same real estate as is described in the various public records for the collection of taxes as lot No. 9 in outlet 2 in the original plat of the town of Huntington, and that this description is a sufficient description to identify the real estate described in the deed of Murphy. (2) That the deed from the auditor of Huntington county, dated February 21, 1901, to the First National Bank of Huntington, Ind., conveyed a good and sufficient title to certain real estate (describing it): the description being that above set forth as the description in the judgment herein, and in the deed of Murphy. (3) That the appellee is the owner of said real estate, and has title thereto in fee simple. (4) That upon the facts found, as above stated, the law is with the appellee, and he ought to have his title quieted in and to the real estate described in conclusion No. 2, above set out, and that he recover of the appellant his costs in and about this cause laid out and expended.

Our statute (section 8624, Burns' Ann. St. 1901) provides that the tax deed, executed as there prescribed, shall be prima facie evidence of the regularity of the sale of the premises described in the deed, and of the regularity of all prior proceedings, and prima facie evidence of a good and valid title in fee simple in the grantee. Such prima facie evidence is not sufficient to establish title where it is affirmatively proved that in the sale or conveyance the description was so imperfect as to fail to describe the land or lot with reasonable certainty. *Brown v. Reeves & Co.*, 81 Ind. App. 517, 68 N. E. 604. If the description in all the papers and books and advertisements of the taxing officers prior to the execution of the tax deed were radically insufficient, we apprehend that the mere fact

that these officers had employed such descriptions for a number of years would not cure them of their inadequacy for the purposes of a tax deed. The appellant received from his grantor a deed of conveyance in which the real estate was described by metes and bounds, and was stated to be a part of outlet 2 in the original plat of the town (now city) of Huntington, Ind.; no reference being made to any numbered lot or inlet in such outlet. It does not appear that he had any notice of the designation of separate parcels of the outlet by numbers, except what, if any, might be inferred from the mere use of such descriptions by the taxing officers, and the existence of such numbers in certain deeds of conveyance from owners of some portions of the outlet, which deeds of conveyance were deeds through which he derived his title. Such descriptions, so far as they employed only such numbers of lots in the outlet to indicate the property conveyed, were manifestly misdescriptions. The only ones of such deeds shown to have descriptions by metes and bounds purported to describe lots 2 and 9 in the outlet, and the metes and bounds employed indicated for the two lots a width the same as the one parcel conveyed by Murphy to the appellant, and it cannot be known from such description of the two lots by metes and bounds that either of those lots was the land conveyed to the appellant. In the matter of description of real estate, there is between deeds of conveyance executed by owners, and tax deeds made by officers, and based upon the prior performance of official acts, an important difference. Faulty descriptions in the deed of conveyance of an owner of the land may serve, because of the intention of the parties relating to the particular real estate so conveyed; but, in the case of a tax deed, mere intention cannot be thus effectual, and mutual mistake will not cure a radically insufficient description. It is not impossible that one, by a sufficient conveyance, as that of Murphy to the appellant, may obtain a good title to land, in some of the conveyances of which, executed more than 20 years earlier, and forming links in the chain of title, there were radically defective descriptions, which would be inadequate for the support of a tax title. It will have been observed that, in the execution of the tax deed in question, the description in the taxing papers and books and in the certificate of sale given by the auditor was not treated as an adequate description for the tax deed, and there was added thereto the words "described in deed record No. 66, page 8"; reference thus being made to the record of the deed of Murphy to the appellant. If such addition were legitimate, such supplementary reference would cure the inadequacy of the preceding portion of the description in the deed; but if in all the previous descriptions of the taxing officers, including that in the certificate of sale, there was insufficiency, the description could not

thus be made good in the deed. See *Cooley on Taxation* (3d Ed.) 1000, and notes.

It has sometimes been held that in tax sales the maxim, "*De minimis lex non curat*," is not applicable, and there is much reason for such a rule, for there is no satisfactory standard for determining what, in such case, should be regarded as a very small sum; and the taxpayer should be strictly protected from all exactions, however small, in excess of what the government, by due, legal processes, has imposed upon him as his share of the public burden. The maxim, when deemed applicable, "is one to be applied with caution." *Cooley on Taxation* (3d Ed.) 591. If the addition of so small an amount as eight cents could certainly be attributed to a mere miscalculation, and therefore could be regarded as unintentional, we might be inclined to regard it as unimportant (see *Burt v. Hasselman*, 139 Ind. 196, 38 N. E. 598); but such a question is not before us, for here it appears that the sum of six cents of this amount was purposely added; it being expressly found that "a penalty of six cents was in November erroneously added to the penalty that accrued in May, and the true amount of delinquent penalty and current tax due at the time of sale was \$42.92," instead of \$43, the amount for which the real estate was purchased at the tax sale. See *Evansville, etc., R. Co. v. West*, 139 Ind. 254, 37 N. E. 1009. There is no attempt to account for the additional two cents of the excess. As to a portion of the excess, there is an affirmative explanation inconsistent with its legality. It is not a case of a trifling excess in amount in a matter between individuals, but is one of the sale by the government, for its own benefit, of private property, for the payment of a sum, a portion of which taxing officials have added contrary to law. If such administrative exaction were upheld as against one delinquent landowner, it would be allowable as against all other such landowners in the taxing district; and thereby a large amount, in the aggregate, might be imposed and taken without authority of law. In *O'Brien v. Coulter*, 2 Blackf. 421, it was said that whenever any authority is given to any person or officer of law, whereby the estates or interests of other persons may be forfeited and lost, such authority must be strictly pursued in every instance; that, in the sale of land for taxes, every substantial requisite of the law must be complied with. In that case a sale for taxes, small in amount, where a part of the property conveniently and reasonably could have been detached and sold separately, was held invalid. In *Doe, etc., v. McQuilkin*, 8 Blackf. 335, where there was a sale of land for taxes amounting to \$4.48, of which the sum of 80 cents for county tax was not shown to be authorized by law, the sale for this reason was not upheld. This case was afterwards referred to as holding that, unless the land was liable for all the taxes for which it was sold, the sale

could not be sustained. *McQuilkin v. Doe, etc.*, 8 Blackf. 581. In the case last named, a sale of land for road tax, county tax, and state tax could not pass title, because the statute providing for the road tax and prescribing the mode of its collection had been repealed. In *Hutchens v. Doe, etc.*, 3 Ind. 528, where land was sold on two executions issued on two judgments in favor of the purchaser, and one of the judgments had been reversed as to the costs, and the sale was made for the payment of these costs, as well as the valid portions of the judgment, it was held that the purchaser did not acquire title. It was said: "The execution plaintiff caused the land to be sold for a greater amount than he had a right to make by virtue of his execution, and, as he is not a bona fide purchaser without notice, he can take nothing by his purchase." The case was said to be analogous to a sale of land for taxes where the land was not liable for all the taxes for which it was sold, referring to *McQuilkin v. Doe, supra*. In *Cooley on Taxation* (3d Ed.) 955, it is said: "It has been shown in the preceding chapter that an excessive levy is void, whether it is made excessive by including with lawful taxes those which are unlawful, or in any other manner. If the levy should be void, there would, of course, be nothing to uphold a sale. And if a valid levy were to be increased afterward by unlawful additions, the sale would be equally bad. The statutory power is a power to sell for lawful taxes and lawful expenses, and if it is exceeded by including unlawful items of either class, the power is exceeded, and its exercise is invalid in toto, from the manifest impossibility of saving the sale in part where the invalidity extends to the whole. Nor can the maxim *de minimis* be applied so as to prevent a slight excess from invalidating the sale." See, also, 27 Am. & Eng. Ency. of Law (2d Ed.) 837; *Key v. Ostrander*, 29 Ind. 1; *Vail v. McKernan*, 21 Ind. 421.

A tax deed not witnessed by the county treasurer as required by the statute is not prima facie evidence of title. *Gabe v. Root*, 93 Ind. 256; *Armstrong v. Hufty*, 156 Ind. 606, 55 N. E. 443, 60 N. E. 1080; *Bowen v. Striker*, 100 Ind. 45. In *Essex v. Meyers*, 27 Ind. App. 639, 62 N. E. 96, it was said that in a special finding in such a case it should be stated that the tax deed was signed, witnessed, and acknowledged by the persons designated by the statute. In a special finding all necessary facts must be stated with reasonable certainty, leaving nothing to be supplied by presumptions or intendments. *Hill v. Swihart*, 148 Ind. 319, 47 N. E. 705.

Though by the auditor's deed of conveyance to the appellee's grantor the title to the real estate did not pass, the grantee, and through him the appellee, acquired the lien of the state, and may be granted the compensation provided by the statute in such case for his outlays.

Judgment reversed, with instruction to state conclusions of law in accord with this opinion.

(34 Ind. App. 377)

SOUTHERN RY. CO. v. DAVIS. (No. 5,076.)
(Appellate Court of Indiana, Division No. 2.
Jan. 5, 1905.)

RAILROADS — CROSSING — ACCIDENT — DEATH —
CONTRIBUTORY NEGLIGENCE — DEFENSIVE
MATTER — EVIDENCE — PLEADING — STATUTE.

1. By the express provisions of Burns' Ann. St. 1901, § 359a, in an action for injuries contributory negligence is a matter of defense.

2. Burns' Ann. St. 1901, § 359a, making contributory negligence a matter of defense does not change the rule that one about to cross a railroad track must look and listen.

3. In an action for the death of one killed by a train at a railroad crossing, evidence held to show contributory negligence precluding recovery.

4. In an action for the death of a pedestrian killed at a railroad crossing it will be assumed that he saw what he could have seen if he had looked and heard what he could have heard if he had listened.

5. Where the facts specially found show that decedent, killed at a crossing, did not use ordinary care, and that a failure to do so was the proximate cause of the accident, such findings are in irreconcilable conflict with a general verdict for plaintiff, and such verdict must yield to the facts specially found.

Appeal from Circuit Court, Crawford County; C. W. Cook, Judge.

Action by Jacob W. Davis, as administrator, against the Southern Railway Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

C. L. & H. E. Jewett, A. P. Humphrey, J. D. Welman, and J. L. Suddarth, for appellant. Major W. Funk, John H. Weathers, and William Ridley, for appellee.

WILEY, J. Appellee's decedent was killed at a grade crossing by coming into contact with a moving train on appellant's railroad, and this action was prosecuted to a successful termination in the court below to recover damages resulting therefrom. The complaint was in one paragraph, to which an answer in general denial was filed. The cause was tried by a jury, resulting in a general verdict assessing damages at \$250, and with the general verdict the jury found specially by answering interrogatories submitted to them.

Appellant moved for a judgment on the answers to interrogatories notwithstanding the general verdict, which motion was overruled, and the overruling of that motion is the only error assigned. The facts stated in the complaint are sufficient to charge appellant with actionable negligence, and by the general verdict the jury determined that question against it. The complaint also pleads certain facts bearing upon the conduct of the decedent immediately preceding

her death in her attempt to cross appellant's tracks, and avers that she was using due care, and was without fault. Since the passage of the act of 1899 (section 359a, Burns' Ann. St. 1901) in actions of this character a plaintiff is not required to allege or prove the want of contributory negligence on his or her part, or on the part of the person for whose injury or death the action may be brought. It follows from the provisions of the statute that the allegation that the decedent was free from fault, and in no manner contributed to her death, adds no force to the complaint. In such case the statute lays the burden upon the defendant of proving contributory negligence as a matter of defense. By its general verdict the jury found that appellant had not proven contributory negligence, and reached the conclusion that the decedent was free from fault. It was only upon this theory that the general verdict could be based. Hence by the general verdict we find the two vital issues in the case resolved against appellant: (a) That appellant was guilty of the negligence charged, and (b) that the decedent was free from fault. This finding must stand unless the answers to interrogatories are in irreconcilable conflict with one or both of the issues thus determined by the general verdict.

The question presented by overruling the motion for judgment on the answers to interrogatories is not a difficult one, as will appear by the facts exhibited by the answers to interrogatories. The material facts disclosed by the answers may be fairly and briefly stated as follows: At the time of her death decedent was 55 years old, was in good health, and possessed good hearing and eyesight. She had for nine years lived near the Fredericksburg and Corydon Road, which was a public highway, about a mile south of the railway crossing where she met her death, and during all these nine years she had passed over the crossing once or twice a week, and was familiar with it and its surroundings. The public highway referred to runs north and south, and intersects with appellant's main track and side track, which runs east and west, at right angles. The crossing formed by the intersection of the highway and the railroad is in the small village of Ramsey, and such village contains only 17 dwellings. There was no other railroad passing through Ramsey, and there was no other locomotive than that with which the decedent collided at or near that point. The decedent was killed on the 12th of February, 1901, and the day was clear and cold, and the wind was blowing from the northwest. She left her home about 8 o'clock in the morning, and went to White's store, 260 feet north of appellant's tracks and of the crossing where she was killed. At this store she made some purchases, and started on foot back home about 8:30, and was carrying a can of coal oil and other articles purchased. She had her neck and ears

§ 1. See Negligence, vol. 37, Cent. Dig. §§ 221-223, 223-224.

heavily wrapped to protect them from the cold. When she left White's store to start home she walked down the street about 152 feet to a place known as "Stierstetter's Corner," where another store was located, 98 feet from the railroad crossing. At this point, by looking east, she could have seen the approaching train for a distance of over 1,500 feet. She passed down to the crossing in a rapid walk, and crossed over the side track onto the main track, and was struck by the locomotive just as she was stepping over the south rail of the main track, that being the rail farthest from the place where she entered the crossing. The whistle on the locomotive was blown so loud that it was heard by a man about a mile from the village. If the decedent had stopped and listened for the approaching train, she could have heard it, unless prevented by the muffling of her ears. From the time she left Stierstetter's corner until she went upon the railroad track she did not stop and listen. Before going upon the main track, if she had looked east, she could have seen the approaching train in time to avoid injury. From the time she left Stierstetter's corner until the moment she was struck by the locomotive, she did not, at any time, look toward the approaching train. By the answers to interrogatories the question of appellant's negligence is eliminated in so far as that question was determined by the general verdict, for there are no facts found that are irreconcilable with the general verdict as affecting appellant's negligence as charged. We need, therefore, give no further heed to that issue. As to the other issue—that of the decedent's negligence contributing to her death, the facts specially found show that she did not observe the legal requirements as to the care she was bound to use before going into a place of danger, and such findings contradict the general verdict on that issue, and are in irreconcilable conflict with it. Under such circumstances the rule is uniform in this state that the facts specially found will control, and the general verdict must yield thereto. The act of 1899, *supra*, does not abate the legal requirements as to the care a traveler crossing a railroad track must use, and it does not change the rule that it is presumed that the traveler saw and heard or was heedless of that which an ordinarily prudent person ought to have taken notice of. It is the rule in this jurisdiction that a grade crossing, to a person acquainted with its existence and surroundings, and who is about to pass on it, is a warning of danger, and, as a result, the law has marked out the quantum of care that should be observed. *Malott v. Hawkins*, 159 Ind. 127, 63 N. E. 308. There are many statements in the decided cases to the effect that under such circumstances the traveler who intends to cross a railroad track at a highway crossing must look and listen. *Cin-*

cinnati, etc., Ry. Co. v. Howard, 124 Ind. 280, 24 N. E. 892, 8 L. R. A. 593, 19 Am. St. Rep. 96; *Louisville, etc., Ry. Co. v. Stommel*, 126 Ind. 35, 25 N. E. 863; *Smith v. Wabash Ry. Co.*, 141 Ind. 92, 40 N. E. 270; *Engler v. Ohio, etc., Ry. Co.*, 142 Ind. 618, 42 N. E. 217; *Pittsburgh, etc., Ry. Co. v. Frazee*, 150 Ind. 576, 50 N. E. 576, 65 Am. St. Rep. 377. This rule especially applies to a case of the character we are considering. Exceptional circumstances may also require the traveler to stop before entering upon the crossing, although this proposition generally presents itself as a mixed question of law and fact. *Malott v. Hawkins, supra*; *Elliott, Railroads*, § 1167; *Cincinnati, etc., Ry. Co. v. Howard, supra*; *Chicago, etc., Ry. Co. v. Thomas*, 155 Ind. 634, 58 N. E. 1040. As a correlative of the proposition that the traveler must look and listen, it results that the law will assume that he actually saw what he could have seen if he had looked, and heard what he could have heard if he had listened. *Malott v. Hawkins, supra*; *Pittsburgh, etc., Ry. Co. v. Frazee, supra*. These rules of law laid upon the decedent the duty of looking and listening for the approaching train before casting herself into a place of known danger. The facts specially found without conflict show that she wholly disregarded the requirements of the law of travelers about to cross a railroad at a highway crossing. We are brought face to face, by the answers to interrogatories, with two facts which affirmatively show that the decedent was guilty of contributory negligence, namely (a) that she could have seen the approaching train in ample time to have avoided colliding with it, and (b) that she did not look to see if a train was approaching, while she walked a distance of nearly 100 feet, immediately before entering upon the tracks. These facts cannot, upon any reasonable hypothesis, be reconciled with the general verdict, whereby the jury found she was free from contributory negligence. Two essential elements of contributory negligence are want of ordinary care by the injured party and a casual connection between such want of care and the injury. *Salem-Bedford Stone Co. v. O'Brien*, 12 Ind. App. 217, 40 N. E. 430. The facts specially found show that the decedent did not use ordinary care, and that her failure to do so was the proximate cause of the accident. A person must use his own faculties so as to avoid danger, if he can reasonably avoid it; and the failure to do so, if it contributes proximately to his injury, will prevent a recovery for resulting injuries. *Salem-Bedford Stone Co. v. O'Brien, supra*. It is needless to multiply authorities in support of the rules of law we have been considering. As the answers to interrogatories show that the decedent was guilty of contributory negligence, they are in irreconcilable conflict with the general verdict on that issue, and hence

the general verdict must yield to the more potent force of the facts specially found.

Judgment reversed, and the trial court is directed to sustain appellant's motion for judgment on the answers to interrogatories.

INDIANAPOLIS ST. RY. CO. v. SLIFER.
(No. 4,877.)¹

(Appellate Court of Indiana, Division No. 2
Jan. 4, 1905.)

STREET CARS—COLLISION WITH TEAM—NEGLIGENCE—PLEADING AND PROOF—CONTRIBUTORY NEGLIGENCE—FAILURE TO SEE CAR—DRIVING ON LEFT-HAND SIDE OF STREET.

1. A complaint for injury from the negligence of defendant's employes need not in terms aver they were acting in the line of their duty, but it is enough to aver that defendant, by its agents, etc., negligently operated the street car by collision with which plaintiff was injured.

2. Though the complaint allege various acts of negligence, they need not all be proved to make defendant liable.

3. One driving on the left-hand side of the street because the right-hand side was in such condition as to render it impracticable or unsafe to travel thereon does not violate an ordinance requiring drivers "to keep as nearly as practicable to the right of such street."

4. Plaintiff, while driving on a dark, foggy night, with a companion, like himself, of mature age, and in possession of his faculties, with the wheels on one side of the wagon within the street car tracks, though there was plenty of room outside the tracks, was struck at a point, where there was no obstruction to the view for 500 feet, by a street car lighted by electricity coming from the opposite direction. The car was not seen by them till just before it struck the wagon. *Held*, there was contributory negligence barring recovery.

Appeal from Superior Court, Marion County; Vinson Carter, Judge.

Action by Isaac Slifer against the Indianapolis Street Railway Company. Judgment for plaintiff. Defendant appeals. Reversed.

F. Winter and W. H. Latta, for appellant.
R. F. Stuart and P. W. Bartholomew, for appellee.

ROBY, J. Suit to recover damages for personal injury; complaint in one paragraph; answer of general denial; trial by jury; verdict for \$1,000 with answers to interrogatories; motion for judgment on answers to interrogatories notwithstanding the general verdict overruled; motion for a new trial overruled; judgment on verdict.

The first assignment of error is that the complaint does not state sufficient facts to constitute a cause of action. The point made in support of the assignment is that the complaint does not contain a specific averment that the defendant's employes, who are alleged to have negligently operated the street car by a collision with which appellee was injured, were acting in the line of their duty. It is not necessary that such

averment should be, in terms, made. *Greenfield Ry. Co. v. Derry* (this term, Oct. 7th) 71 N. E. 912. It is averred that the defendant, by its agents, etc., negligently, etc., which is sufficient after judgment as it would be against a demurrer.

Various acts of negligence were alleged in the complaint. The court instructed the jury that if it found from the evidence that appellant was negligent in running the car at the rate of 20 miles an hour, or in failing to sound a gong or bell on the car for the purpose of giving warning to travelers of its approach, or in failing to have a lighted headlight on the car, it would be warranted in finding actionable negligence upon its part. The contention is that the instruction was outside the issue in that the duty of appellee was to prove that one of the acts of negligence complained of produced injury "acting conjointly with the others." If it took all the acts averred to make a charge of actionable negligence, then the point would be well taken; but in a civil suit it is only necessary to prove so many of the facts alleged as constitute a cause of action, and the liability of the appellant upon proof of negligence in one respect indicated by the instruction in no wise depends upon proof of the others or either of them. The instruction was correct. *Long v. Doxey*, 50 Ind. 385; *Shea v. City of Muncie*, 148 Ind. 15-34, 46 N. E. 138.

An ordinance of the city of Indianapolis was introduced in evidence. The first section thereof was in terms as follows: "Section 1. Be it ordained by the common council of the city of Indianapolis, Indiana, that it shall be unlawful for all riders and drivers of vehicles, whether such vehicles are drawn or propelled by animal or other power, to ride or drive on, over and along the middle, or on, over and along the left side of any street in the city of Indianapolis, except in the necessary act of crossing the same, or of passing a vehicle going in the same direction, and all such riders and drivers shall keep as nearly as practicable to the right of such street, but the provisions of this section shall not apply to street railways." The court instructed the jury that, if it found such ordinance to have been in force at the time of the accident appellee was traveling upon the left-hand side of the street in violation thereof, then he would be guilty of such contributory negligence as would bar his recovery for damages received while thus violating such ordinance, and received in consequence of such violation, unless it should also find that the right-hand side of the street was in such condition as to render it impracticable or unsafe to travel thereon, in which case he would not be chargeable with negligence solely because he was traveling on the left-hand side of the street. The ordinance required drivers of vehicles "to keep as nearly as practicable to the right of such street." If appellee did this, there was no violation

¹ See *Street Railroads*, vol. 44, Cent. Dig. § 224.

¹ Superseded by opinion in Supreme Court, 74 N. E. 19. Rehearing denied.

whether he did it or not was, under the evidence, a question of fact.

One reason given for a new trial was that the verdict of the jury is not sustained by sufficient evidence, which, together with the refusal of the court to give a peremptory instruction, required a consideration of the evidence. In the following summary appellee is given the benefit of the general verdict and the statement favorable to him where there is conflict. On the 5th day of July, 1902, accompanied by a man named Harris, at 11 o'clock p. m., appellee drove a horse hitched to a spring wagon on Shelby street, in the city of Indianapolis, north from Sutherland avenue, keeping on the east and right-hand side of the street a short distance, and then crossing to the west and left-hand side thereof, two wheels running inside appellant's street railway tracks, until he was struck by a south-bound car, receiving injuries of which he complains. Shelby street was not at that place a paved street. Appellant was extending its double track over the same, and had excavated large portions of the street. There is a conflict as to whether the east side of the street was occupied by piles of dirt and otherwise obstructed. There is no conflict as to the fact that it had been recently filled-in with fresh dirt, which was at the time soft and wet. Appellee crossed to the west side of the street on account of the condition of the driveway on the right hand. Shelby street was straight. There was no obstruction to cut off appellee's view for 500 feet at least. The car was a summer car, lighted by electricity, and made a noise which could be heard for some distance. There was a switch engine operating in the vicinity, and an electric street lamp at the intersection of Raymond street. Said lamp hung over the east track, and was distant about one block from the point of collision.

and the curb on the west side of the street along which appellee was traveling varied slightly, but approximated 11 feet. There are references in the evidence to the gutter next to the sidewalk, but its extent does not plainly appear. Appellee and his companion were both of mature years, and in possession of their faculties. Harris was familiar with the street, but appellee was not. Appellee gave his attention to his horse and the road, and told Harris to watch for a car, which he says he did. Harris did not see the approaching car until it was within 20 feet of him. It was a dark, foggy night. His explanation of his failing to see the car was that the electric light at Raymond street "dazzled" him. Appellee did not see the car until about the time it struck the vehicle. The car was running at from 25 to 30 miles an hour. A passenger sitting on the third seat from the front testified that the conductor first saw the vehicle ahead, and shouted a warning to the motorman, who was at the time adjusting his glove, or otherwise similarly engaged. It was then too late to avoid collision. The car ran about 10 feet after the collision. Neither motorman nor conductor were witnesses at the trial.

The failure of appellee and his companion to see the approaching car under the circumstances existing does not accord with the exercise of any vigilance on their part. Had the car been discovered and the appellee yet been unable to leave the track, on account of its rapid approach, in time to escape the collision, a different question would be presented; but he wholly failed to see it, or, so far as the evidence shows, to look for it. His attention was only secured when it struck him. The inference deducible from such facts is one with regard to which ordinarily reasonable men ought not to differ. The judgment will therefore be reversed.

GLOS v. STERN.*

(Supreme Court of Illinois. Dec. 22, 1904.)

TAXATION—TAX DEEDS—CANCELLATION—DESCRIPTION OF DEED—COPIES OF RECORD—CERTIFICATION—SUFFICIENCY—COSTS—APPORTIONMENT—APPEAL—SUIT INVOLVING FREEHOLD.

1. Where, in a suit to cancel a tax-sale certificate, and to set aside any tax deed that might have been issued thereon, as a cloud on plaintiff's title, defendant claimed title under such a deed, and the decree ordered the deed canceled, a freehold was involved, so that the Supreme Court had jurisdiction of an appeal.

2. Where a bill prayed the cancellation of a tax-sale certificate and a deed issued thereon, and no objection was made for multifariousness, error, if any, in canceling the certificate as well as the deed, was harmless.

3. In a suit to cancel a tax deed, a description of the deed as being based on a certain specifically described tax-sale certificate is sufficiently definite.

4. Where plaintiff in a suit to cancel a tax deed tendered to defendant all he was entitled to receive, which defendant refused, defendant was properly charged with all the costs made necessary by such refusal.

5. In a suit to cancel a tax deed, a county clerk's certificate to copies of records that "the foregoing is a true copy, in so far as said record relates to the premises described," is sufficient.

Appeal from Circuit Court, Cook County; M. F. Tuley, Judge.

Action by Harris Stern against Jacob Glos. From a judgment for plaintiff, defendant appeals. Affirmed.

Harris Stern on the 9th day of July, 1903, filed a bill in chancery in the circuit court of Cook county against Jacob Glos to set aside, as a cloud upon his title to lot 5, in block 2, in Brainard & Evans' Addition to the city of Chicago, a tax-sale certificate based upon a tax sale made in the year 1900 for a delinquent special assessment upon said lot falling due in the year 1899; also to cancel any tax deed which may have been issued at the time of the filing of the bill upon said tax-sale certificate. The bill averred that complainant was the owner of said premises in fee, and was in possession thereof, and that said tax-sale certificate was void by reason of the failure of Glos to comply with the requirements of the statute authorizing the same to issue—specifying wherein—and prayed that the tax-sale certificate, and any tax deed that may have been issued thereon, might be set aside as a cloud upon his title. The bill made any unknown owners of said tax-sale certificate, claiming any interest in the premises through said certificate or any unrecorded deed issued thereon, parties defendant, and prayed the same relief as against said unknown owners as was prayed against Jacob Glos. Jacob Glos appeared and filed an answer, in which he averred title in himself and Emma J. Glos by virtue of said tax-sale certificate and a tax deed issued thereon. The appellee then tendered to Jacob Glos, in open court, the amount of the tax sale, interest, penalty,

and costs, which was refused by him, and the amount tendered was deposited in court. The case was thereupon referred to a master in chancery. The evidence in support of the bill was taken, and a report was filed by the master, wherein he found the material allegations of the bill to be true; and a decree was entered in accordance with the prayer of the bill, and the costs were apportioned between the appellant and appellee, and Jacob Glos has prosecuted an appeal to this court.

Jacob Glos (John R. O'Connor, of counsel), for appellant. William A. Adams, for appellee.

HAND, J. (after stating the facts). The contention is made by appellee that the case should have gone to the Appellate Court, as it is said no freehold is involved. The period of redemption had expired at the time the bill was filed, and appellant averred in his answer that he and Emma J. Glos claimed title to said premises by virtue of a tax sale thereof and a deed issued thereunder, and the decree ordered said tax-sale certificate and any deed issued thereon, so far as it related to the property in question, canceled and set aside. This case differs from the case of *Gage v. Busse*, 94 Ill. 590, relied upon by appellee, in this: In that case no claim was made that a deed had been issued upon the tax-sale certificate, and the sole effect of the decree rendered in that case was to cancel the tax-sale certificate. We are of the opinion a freehold is involved, and that the case was properly brought to this court.

The appellant contends that at the time the bill was filed the time of redemption had expired, and a deed had been made to the appellant, and that said tax-sale certificate had thereby become inoperative, and that a bill in chancery will not lie to set aside and cancel a tax-sale certificate after a deed has been issued thereon. The bill was not filed alone to cancel the tax-sale certificate, but also to cancel any tax deed which might have been issued, based thereon. The bill was not attacked as being multifarious, and, the appellant having admitted in his answer that he and Emma J. Glos claimed title to said premises by a tax deed based upon said tax-sale certificate, he is not now in a position to complain that the tax deed by which he claims to hold said premises, and which is based upon a void tax-sale certificate, has been set aside, by reason of the fact that the decree also cancels the tax-sale certificate. If it was error to cancel the tax-sale certificate because a deed had been issued thereon, the error was harmless, and the cause should not be reversed for that reason, as the tax deed was properly canceled.

It is further contended that the bill does not sufficiently describe the deed sought to be set aside. The deed is described as a deed based upon a certain tax-sale certificate, which was specifically described.

*Rehearing denied February 3, 1905.

and others. From a decree dismissing the bill, plaintiff appeals. Affirmed.

It is next contended that the court erred in requiring the appellant to pay a portion of the costs. We think the court did not err in apportioning the costs in this case. When the case was at issue the appellee offered to pay to the appellant all he was entitled to receive, which he refused to accept. A reference to the master by reason of such refusal, and the subsequent steps in the case, were made necessary, and there was no injustice to the appellant in requiring him to pay all costs occasioned by his wrongful conduct. *Gage v. Du Puy*, 137 Ill. 652, 24 N. E. 541.

The contention of the appellant that the certificates of the county clerk to the certified copies of the judgment record and other records offered in evidence were insufficient is without force. The form of the certificates was "that the foregoing is a true copy, * * * in so far as said record relates to the premises described in the foregoing copy." If the last clauses of the certificates, which are those to which objection is made, were omitted, the certificates would be untrue, unless the clerk incorporated into the copies of said records a description of all the property similarly situated to the property in question, located in Cook county. This the law did not require. We find no reversible error in this record. The decree of the circuit court will therefore be affirmed.

Decree affirmed.

(213 Ill. 332)

SHARP v. SHARP et al.*

(Supreme Court of Illinois. Dec. 22, 1904.)

WILLS—CONTEST—TIME OF FILING—STATUTES—CONSTRUCTION—RETROACTIVE APPLICATION—REASONABLENESS.

1. A bill in chancery to contest a will and to set aside the probate thereof, can be maintained only by virtue of the proviso to section 7 of the statute of wills (2 Starr & C. Ann. St. 1885 [1st Ed.] p. 2470), expressly allowing the same, and not by virtue of any inherent jurisdiction in courts of equity.

2. The act of 1895 (Laws 1895, p. 327), allowing two years for filing a bill to contest a will, conferred no vested right such as to preclude the legislature from totally abolishing the remedy there provided for.

3. Laws 1903, p. 355, limiting the time in which a bill to contest a will may be filed to a period of one year from the probate thereof, and thus amending the act of 1895, which allowed two years for such purpose, is retroactive in operation, and applies to suits brought to contest wills probated prior to its passage.

4. Laws 1903, p. 355, amending the act of 1895 by limiting the period within which a bill may be filed to contest a will to one year, which was passed April 11, 1903, and went into effect July 1, 1903, is not, though applied retroactively, so as to cover the case of a contestant of a will probated in February, 1902, who brought suit in January, 1904, void for unreasonableness.

Appeal from Circuit Court, Bureau County; R. M. Skinner, Judge.

*Rehearing denied February 8, 1905.

This was a bill in chancery filed on the 9th day of January, 1904, in the circuit court of Bureau county, by the appellant, against the appellees, to set aside the will, and the probate thereof, of Robert Sharp, deceased, on the ground of mental incapacity and undue influence. The bill alleged that Robert Sharp executed said will on the 4th day of January, 1902; that he died on the 13th day of the same month; that the will was admitted to probate on the 24th day of February, 1902; that he left, him surviving, the complainant, and Robert Pearl Sharp and Martha Sharp, his children and sole heirs at law; that by the terms of the will he gave to the complainant \$5, to Martha Sharp the use of the remainder of his estate during her natural life, and upon her death the fee thereof to Robert Pearl Sharp; that he nominated John E. Pickering executor of his will, who qualified as such, and that Martha Sharp died unmarried and without issue on December 4, 1902; also the mental incapacity of the testator, and that the execution of the will was brought about by the undue influence of Robert Pearl Sharp and Martha Sharp. A demurrer was interposed to the bill on the ground that it was filed more than one year after the probate thereof, and for that reason it appeared from the face of the bill that the court was without jurisdiction to hear and determine the case. The demurrer was sustained, and the bill dismissed, and, the testator having died seised of real estate the title to which was disposed of by said will, an appeal has been prosecuted by the complainant direct to this court.

Charles F. Davies (Sol Rosenblatt, of counsel), for appellant. Watts A. Johnson, for appellees.

HAND, J. (after stating the facts). The bill was filed 1 year, 10 months, and 15 days after the will was admitted to probate, and the sole question presented to this court for determination is, was the bill filed in time? It has been repeatedly held by this court that a bill in chancery to contest a will and to set aside the probate thereof can only be maintained in this state by virtue of the proviso to section 7 of the statute of wills (2 Starr & C. Ann. St. 1885 [1st Ed.] p. 2470). *Luther v. Luther*, 122 Ill. 558, 13 N. E. 166; *Wheeler v. Wheeler*, 134 Ill. 522, 25 N. E. 588, 10 L. R. A. 613; *Sinnet v. Bowman*, 151 Ill. 146, 37 N. E. 885; *Jele v. Lemberger*, 163 Ill. 338, 45 N. E. 279; *Kelster v. Kelster*, 178 Ill. 103, 52 N. E. 948. In *Chicago Title & Trust Co. v. Brown*, 183 Ill. 42, 55 N. E. 632, 47 L. R. A. 798, on page 49, 183 Ill., page 635, 55 N. E., 47 L. R. A. 798, it was said: "Courts of equity in this state have no jurisdiction to contest a will or impeach a judgment of probate except such jurisdiction

as has been conferred by the statute. Indeed, the statute conferring jurisdiction is the only source of power intrusted to a court of equity in this state. *Luther v. Luther*, 122 Ill. 558, 13 N. E. 166; 2 Freeman on Judgments, §§ 484a, 608. Such being the case, a court of equity can only entertain a bill in the mode and within the time prescribed by the statute."

The proviso above referred to, as it existed in the act of 1872 (Laws 1871-72, p. 777), read as follows: "Provided, however, that if any person interested shall, within three years after the probate of any such will, testament or codicil, in the county court as aforesaid, appear, and by his or her bill in chancery, contest the validity of the same, an issue at law shall be made up, whether the writing produced be the will of the testator or testatrix or not; which shall be tried by a jury in the circuit court of the county wherein such will, testament or codicil shall have been proven and recorded as aforesaid, according to the practice in courts of chancery in similar cases; but if no such person shall appear within the time aforesaid, the probate as aforesaid shall be forever binding and conclusive on all the parties concerned, saving to infants, *femes covert*, persons absent from the state, or non compos mentis, the like period after the removal of their respective disabilities." 2 Starr & C. Ann. St. 1885 (1st Ed.) p. 2470. By an amendment passed in 1895 (Laws 1895, p. 327) the time allowed for filing a bill to contest a will and the probate thereof was reduced to two years, and the words "*femes covert*, persons absent from the state," were omitted from the saving clause of said proviso. By a further amendment, which was approved on May 15, 1903 (Laws 1903, p. 355), and went into force on July 1, 1903, the time in which such a bill might be filed was limited to a period of one year from the time of the probate of the will. Laws 1903, p. 355.

In *Spaulding v. White*, 173 Ill. 127, 50 N. E. 224, and *Storrs v. St. Luke's Hospital*, 180 Ill. 368, 54 N. E. 185, 72 Am. St. Rep. 211, it was held that the act in force at the time the bill was filed, and not the act in force at the time the will was admitted to probate, governed the time within which a bill to contest a will and the probate thereof must be filed. The basis of these decisions is that the proviso in said section 7 is not a limitation law, but a law conferring jurisdiction and fixing the time within which it may be exercised. In *Spaulding v. White*, 173 Ill., on page 130, 50 N. E. 224, it was said: "There is a material distinction between a statute conferring jurisdiction and fixing a time within which it may be exercised, and a statute of limitations. The seventh section, as it stood before this amendment, conferred jurisdiction on a court of chancery to entertain a bill to contest a will. The act as it stood prior to the amendment gave no vested

right to any one interested, who desired to contest a will, to have the full term so fixed within which a court should entertain jurisdiction. By the general jurisdiction of courts of equity a bill will not lie to set aside a will or its probate independently of statutes enacted conferring such jurisdiction. The power to entertain a bill for that purpose is derived exclusively from the statute, and the jurisdiction can be exercised only in the manner and under the limitations prescribed by the statute. The time within which such bill may be filed, under the statute, by any person interested, is not a limitation law. *Luther v. Luther*, 122 Ill. 558, 13 N. E. 166; *Wheeler v. Wheeler*, 134 Ill. 522, 25 N. E. 588, 10 L. R. A. 613; *Jele v. Lemberger*, 163 Ill. 338, 45 N. E. 279. The statute in force at the time of the filing of the bill is the statute which confers jurisdiction on the court to entertain a bill to contest the validity of the will, and must govern."

It is contended by the appellant, if it be held that the amendment of 1903 applies to this case, then she will be deprived entirely of the right to file a bill to contest said will. If this contention be conceded to be correct, that would be no reason why the amendment of 1903 should not apply to a bill to contest a will filed after the passage of said amendment. The appellant had no vested right in the statute of 1895, and the legislature could have, had it seen fit, entirely abrogated said proviso, and thereby swept away the entire remedy provided for by said proviso. *Dobbins v. First Nat. Bank*, 112 Ill. 553; *People v. Binns*, 192 Ill. 68, 61 N. E. 376. In the *Binns* Case, on page 71, 192 Ill., page 377, 61 N. E., it was said: "There is no vested right in a public law which is not in the nature of a private grant. 'However beneficial an act of the legislature may happen to be to a particular person, or however injuriously its repeal may affect him, the legislature would clearly have the right to abrogate it.' *Dobbins v. First Nat. Bank*, 112 Ill. 553."

It is also contended that the amendment of 1903 should be given a prospective and not a retroactive application. In *Spaulding v. White*, supra, and *Storrs v. St. Luke's Hospital*, supra, the act of 1895 was given a retroactive operation; that is, it was held to apply to all bills filed to contest wills, or the probate thereof, after its passage, although the wills sought to be contested were admitted to probate prior to its passage. The terms of the act of 1903 are identical with the act of 1895, except the time in which the bill may be filed is fixed by the act of 1903 at one instead of two years, as it was by the act of 1895. To hold the act of 1903 should be given a prospective application only would be to overrule those cases, which we are not disposed to do.

The appellant had from February 24, 1902, to July 1, 1903, in which to file her bill, and from April 11, 1903, to July 1, 1903, after the

amendment of 1903 had been passed by the legislature and before it went into effect. As she had no vested right in the two years provided for by the act of 1895, and was bound to take notice that the legislature at any time had the right to change the time provided for by the act of 1895 in which a bill might be filed or to entirely abrogate such right, there is no force in the contention that the amendment of 1903 should be held void as being unreasonable. Neither is a different rule of practice laid down by the legislature to be applied to the appellant from that which must be applied by the courts to all persons similarly situated to her, who may desire to file a bill to contest a will, and the probate thereof, subsequent to the passage of the amendment of 1903.

We are of the opinion the act of 1903, which was in force at the time the bill was filed, is the statute that fixes the time, after the probate of the will, within which the complainant's bill was required to be filed, and that the circuit court did not err in sustaining a demurrer to said bill. The decree of the circuit court will be affirmed.

Decree affirmed.

(213 Ill. 341)

SPRING VALLEY COAL CO. v. BUZIS.*
(Supreme Court of Illinois. Dec. 22, 1904.)

**MASTER AND SERVANT—PERSONAL INJURIES—
TRIAL—QUESTIONS FOR JURY—EVIDENCE—RE-
LEASE—VALIDITY—FRAUD—ACTION AT LAW
—APPEAL.**

1. Where, in an action by a miner against a coal mining company for injuries, the evidence tended to show that defendant's engineer, whose duty it was to raise and lower the cages or elevators, put a cage in which plaintiff and others were descending in rapid and dangerous motion, and permitted it to strike the bottom of the shaft with great force and violence, injuring plaintiff and others, the question of negligence was for the jury.

2. It was competent to show, in an action at law, that the execution of a release was obtained by fraud, and was therefore void, and it was not necessary to return the consideration, or go into equity to cancel the instrument.

3. Where there was evidence tending to show that the release of a claim for personal injuries was obtained by the fraudulent representations of the defendant that the release to which the plaintiff's signature was desired was but a receipt for money advanced for doctor's bill, medicines, and expenses, whether its execution was obtained by fraud was for the jury.

4. Where it is assigned for error that the court refused certain instructions, but the counsel's brief does not disclose the ground of objection to the court's action or discuss the instructions, the point is waived.

Error to Appellate Court, First District.

Action by Simon Buzis against the Spring Valley Coal Company for personal injuries. There was judgment by the Appellate Court affirming the judgment in plaintiff's favor, and defendant brings error. Affirmed.

Daniel Belasco and Collins & Abraham, for defendant in error. A. R. Greenwood and Henry S. Robbins, for plaintiff in error.

*Rehearing denied February 8, 1905.

BOGGS, J. The plaintiff in error company in July, 1901, owned and operated a coal mine at Spring Valley. The defendant in error was then in the employ of the company in the capacity of a miner. The vein of coal that was being mined was about 500 feet below the surface of the ground, and the plaintiff in error maintained, and by means of a steam engine operated, two elevators or cages which it used for the purpose of lowering its workmen into and hoisting them out of its mine, and also for the purpose of hoisting coal. The opening of the shaft was inclosed within a building known as the "tower." This tower was of the height of 75 feet, and it inclosed the engine room. The engineer controlled the movements of the cages from his station in the engine room, which was about 50 feet from the mouth of the shaft. He could not see the elevators or cages from his place in the engine room, but set his engine in motion to lower or raise the cages on signals made by a workman of the plaintiff in error company known as the "top cager," who was employed for that purpose, and was stationed at the top or mouth of the shaft. On the 8th day of July, 1901, the defendant in error and 10 other miners in the employ of the plaintiff in error company entered one of the elevators or cages to be conveyed down the shaft to the bottom of the mine. At a signal given by the top cager, the engineer put the machinery in motion to lower the cage, and the cage was let down with such rapidity that it struck the bottom of the shaft with great force and violence, and seriously injured the defendant in error, and also other of the workmen. The defendant in error, in an action on the case instituted in the superior court of Cook county, was awarded judgment in the sum of \$2,500, and the Appellate Court for the First District affirmed the judgment on an appeal prosecuted by the company. This writ of error asks the reversal of these judgments.

It is first complained that the court erred in overruling the motion entered by the plaintiff in error company to direct a peremptory verdict in its favor. Two reasons are advanced in support of this position: First, that there was no evidence tending to show that the injury received by the defendant in error was the result of any negligence on the part of the plaintiff in error company; and, second, that the defendant in error, for a valuable consideration, executed, under his hand and seal, and delivered to the plaintiff in error, a release of any and all claim for damages because of or arising from the injuries received by him.

It was the duty of the engineer to exercise reasonable care to control the downward motion of the cage, to the end that it should convey the persons riding therein to the bottom of the shaft without injury. The evidence tended to show that he put the cage in rapid and dangerous motion, and that it moved with such speed as to strike the bot-

tom of the shaft with great force and violence. The mere fact that an employé has been injured is not sufficient to establish that an employer was guilty of negligence, and may have no tendency to show that the injury was the result of negligence on the part of the employer, but the manner of and circumstances under which an injury was received may furnish proof of such negligence. The fact in the case at bar that the cage was allowed to descend with such great rapidity and force tended to show negligence on the part of the engineer in handling and operating the machinery. The court could not declare as a matter of law that the release operated as a bar to the right of the defendant in error to recover, for the reason there was evidence tending to show that the signature of the defendant in error thereto was obtained through fraud and circumvention. It was proven that the defendant in error was unable to read or clearly understand the English language. His tongue was Lithuanian, but he could speak a few words in English. In the interview which resulted in the execution of the paper purporting to be a release one Mr. Novak acted as interpreter. He died prior to the hearing. The purported release was dated July 17, 1901—about nine days after defendant in error received his injuries. He was then confined to his bed. The defendant in error, as interpreted, testified: "I remember when I made my mark on this paper (referring to the paper handed witness). It was three or four days after I was hurt. There were present a clerk, interpreter, and somebody else. They said that they would give \$35 to pay the doctor's bill. They said, when they gave money, 'You must give a receipt for the money.' The man that gave the money spoke to me, but I said that I can't write. He says, 'It is nothing.' I talked in the Lithuanian language. They said they would give money for medicine. He was talking to me. He told me, 'We will give you money for medicine.' I gave a receipt for the \$30. Nothing else was said to me about this paper. Q. Did Mr. Novak tell you what is on that paper, and then you tell him what is on that paper? (The interpreter here translated said document to the witness.) A. No, he didn't say that. Mr. Novak said that you must give a receipt for the money." Charles Buzis, a son of the defendant in error, testified, in substance, that he was present when the paper was signed, and that he speaks both English and Lithuanian, and that Mr. Novak spoke to his father in the Lithuanian language. He further testified: "The first thing Novak said to my father when he came in was, 'How are you making out?' and my father said he is awful sick now; he got his leg broke. Mr. Novak then said, 'We came over here to see you; we came over to settle the case;' and my father said he won't settle the case until he gets better. Novak then told my father they would try to help him

along, and give him \$30 or \$35 doctors' bills, for to help him along until he gets better, and my father said, 'All right.' After that they took out a receipt. I don't know now which one of the fellows took it out. The man that did it was the highest clerk, I think, of the Spring Valley Coal Company. He took it out of his pocket, and told my father to sign down his name, and he said he didn't know how to write, and he told him to put a cross on the receipt, and so he did. Mr. Novak told my father what he put his mark on the paper for. He said, 'That is for the \$30—for the \$35.' He didn't read the paper to my father, or tell him that this receipt released the company from all claims and demands for his injuries. Mr. Novak did not repeat to my father in the Lithuanian language what you have just read to me, being the contents of that release. He said that was the receipt for the \$30. That is all I know that he told my father." Plaintiff in error insists that there was no proof that the representatives of the company made any misrepresentations whatever to Mr. Novak to be translated to the defendant in error, and could not understand the language in which Novak spoke to the defendant in error, and, if Mr. Novak deceived the defendant in error with reference to the character of the instrument to which the defendant in error made his mark, it was the deceit and fraud of the interpreter, and that the interpreter was acting as the agent of the defendant in error. There was a conflict in the testimony as to the party for whom Mr. Novak was acting. The son of the defendant in error testified that Novak said to his father: "We [clearly meaning himself and the representatives of the plaintiff in error company who were then present] came over to see you; we came over to settle the case;" and that his father said "he would not settle the case until he got better"; and that Novak said "they would try to help him along until he got better, and would give him \$30 or \$35 for that purpose," etc. We find nothing in the record to show that Novak was present at the request or instance of the defendant in error, and the statement made by Novak, as testified to by Charles Buzis, tended to show that Novak came there with, and was acting in conjunction with, the representatives of plaintiff in error. There was therefore evidence tending to show that defendant in error was deceived into signing the release by the belief that the paper he was signing was a receipt for money advanced by the company to enable him to pay for medicine and the services of a physician, and that he did not intend to execute a release of damages, or understand that he was signing a release. It is competent to show, in an action at law, that the execution of a release was obtained by fraud and circumvention. It was a question of fact to be determined by the jury whether the execution of the release was obtained by fraud and circum-

vention. The instrument was void if so obtained, and it was not necessary to return the consideration or to remove the instrument by a decree in chancery out of the way of the maintenance of the action at law. *Papke v. Hammond Co.*, 192 Ill. 631, 61 N. E. 910; *Indiana, Decatur & Western Railroad Co. v. Fowler*, 201 Ill. 152, 68 N. E. 394, 94 Am. St. Rep. 158. The court did not err in overruling the motion for a peremptory verdict.

It is assigned as for error that the court refused the first and fourth instructions asked in behalf of the plaintiff in error, but the brief of counsel does not disclose the ground of objection to such action of the court, or discuss either of the instructions. The point is therefore waived. The judgment must be and is affirmed.

Judgment affirmed.

(213 Ill. 347)

GAGE et al. v. PEOPLE ex rel. HANBERG,
County Treasurer.*

(Supreme Court of Illinois. Dec. 22, 1904.)

STREET IMPROVEMENTS—ASSESSMENTS—LETTING
OF CONTRACT—EVIDENCE—JUDGMENT OF SALE
—SHOWING AMOUNT—JURISDICTION—ORDER
OF SALE.

1. That the steps for letting the contract for a street improvement were not taken within 15 days after the final determination of the appeal from the judgment of confirmation of the special assessment for the work, or the determination of any stay thereof by a supersedeas or other order of a court having jurisdiction, as provided by the local improvement act (Laws 1897, p. 127), as amended by Laws 1901, p. 113, § 75, is not shown by evidence merely that six months after the affirmance of such judgment an order for an advertisement for bids was entered by the board of local improvements; there being no evidence that no previous step had been taken by it towards letting the contract, or that there had been no stay of proceedings after affirmance of the judgment of confirmation.

2. A judgment of sale for an assessment for street improvements, entered against the lots set forth in a schedule attached to the order of sale, is defective in not showing the several amounts due for the assessment and costs; there being merely in a column in the schedule following the numbers of the lots, headed "total," certain numerals, with nothing therein or in the judgment to show that they stand for dollars and cents.

3. A judgment of sale for an assessment for a street improvement, showing jurisdiction by a recital of the appearance of the parties and a hearing of the objections, is not defective in omitting the recital in the statutory form that the court has obtained jurisdiction by notice, which recital is necessary and proper only when jurisdiction is acquired in that way.

4. The omission from an order of sale of lots for an assessment for street improvements of the words, "or so much of each of them as shall be sufficient," contained in the statutory form, is proper; the method of sale being changed by Revenue Act, § 202 (Hurd's Rev. St. 1899, p. 1428), so that the whole lot is sold to the one offering to buy for the least percentage as penalty.

Appeal from Cook County Court; O. N. Carter, Judge.

Application by the people, on the relation of John J. Hanberg, county treasurer and ex officio county collector of Cook county, for judgment and order of sale on a delinquent warrant for the collection of a special assessment for a sidewalk. From such a judgment and order, Henry H. Gage and others, who filed objections, appeal. Reversed.

F. W. Becker, for appellants. William M. Pindell (Edgar Bronson Tolman, Corp. Counsel, and Robert Redfield, of counsel), for appellee.

CARTWRIGHT, J. From a judgment and order of sale entered by the county court of Cook county against appellants' lots for a delinquent special assessment, they have prosecuted this appeal.

One of the objections filed by appellants was that the contract for the work on the improvement for which the assessment was levied was not let, nor any steps taken to let the same, within the time prescribed by section 75 of the local improvement act (Laws 1897, p. 127) as amended in 1901, and this is the only objection now insisted upon. The judgment confirming the assessment was entered in the county court on September 26, 1902, and an appeal was taken to this court. The provision of section 75 applicable to such cases is as follows: "If the judgment of condemnation or of confirmation of the special tax or special assessment levied for such work be appealed from, or stayed by a supersedeas or other order of a court having jurisdiction, * * * then the steps herein provided for the letting of the contract for such work shall be taken within fifteen (15) days after the final determination of said appeal or writ of error, or the determination of such stay, unless the proceeding be abandoned as herein provided." Laws 1901, p. 113. Appellants assumed the burden of proving the fact alleged in the objection, that no steps were taken to let the contract within the time prescribed by the statute, and the only evidence on that subject was that the judgment confirming the assessment was affirmed by this court on February 18, 1903, and that an order for an advertisement for bids was entered by the board of local improvements on July 30, 1903. There was no evidence that no previous step had been taken by the board of local improvements toward letting the contract, nor that there had been no stay of proceedings after February 18, 1903, by an order of a court having jurisdiction. In fact, counsel for appellants says in his brief, although we have not found it in the abstract, that there was a petition to this court for a rehearing, which was denied on June 11, 1903. Our rules provide for an order staying proceedings on the filing of such petition in a proper case, and there was no evidence whether such an order was granted, nor of the final determination of any stay. The statute extends the time 15 days beyond the final determination of an appeal or the

*Rehearing denied February 9, 1905.

other order of a court having jurisdiction. If the fact alleged had been proved, questions whether the statute is mandatory or directory, and whether a property owner who stands by while a beneficial improvement is being made is estopped from objecting as to a matter which perhaps has not been in any manner detrimental to him, would have arisen, but we do not regard the fact as proved. The court did not err in overruling the objection.

Errors are assigned as to the form and sufficiency of the judgment and order of sale. One of them is that the judgment is defective in failing to state the amount for which it was rendered. A judgment for a tax or special assessment must be certain in amount. *Gage v. People*, 207 Ill. 61, 69 N. E. 635. If it does not, in terms or by reference, find the sums of money due for the tax or assessment and costs, it is fatally defective. *Pittsburgh, Ft. Wayne & Chicago Railway Co. v. City of Chicago*, 53 Ill. 80. The form of judgment given in section 191 of the revenue act (*Hurd's Rev. St.* 1899, p. 1426) is adapted to a judgment following the delinquent list, and found in the judgment, sale, and redemption record, to which the word "aforesaid" refers. In this case judgment was entered against the tracts or lots of land set forth in a schedule attached to the order, which would be sufficient if the schedule showed the property and the several amounts due for the special assessment and costs. But it does not. At the head of one column is the word "lots," at the head of another "blk.," and at the head of the next is "total." In the columns there are numbers of the lots with numerals opposite them in the last column, but there is no word, mark, or character to show what the numerals are designed for, either at the head of the column or elsewhere. There is no reference in the judgment to the delinquent list or to anything in the record from which it can be said that the numerals stand for dollars and cents. The judgment does not, either in terms or by reference, find or state the several amounts for which it was rendered, and it is for that reason defective.

It is also insisted that the judgment is erroneous in omitting the jurisdictional clause contained in the statutory form of judgment. That clause is a recital that the court has obtained jurisdiction by the giving of notice of the intended application. The statute requires the order to be substantially in the form there given, and it is essential that the record should show jurisdiction, but it is manifest that the jurisdictional clause must be varied to suit the conditions of the case. In this judgment the jurisdiction is shown by a recital of the appearance of the parties and a hearing of the objections. It is only necessary or proper to recite the obtaining of jurisdiction by a notice when jurisdiction is acquired in that way.

It is further urged that the judgment is defective in ordering a sale of the several tracts or lots without the words "or so much of each of them as shall be sufficient," contained in the statutory form. The judgment orders the several tracts or lots to be sold as the law directs to satisfy the assessment and costs. The method of sale has been changed by section 202 of the revenue act, which provides that the person offering to pay the amount due on each tract or lot for the least percentage thereon for penalty shall be the purchaser thereof. *Hurd's Rev. St.* 1899, p. 1428. The provision now is that the whole lot shall be sold to the one offering to buy for the least percentage as penalty, and, the former provision being inapplicable, the order was properly modified accordingly. The omission of the words which are in conflict with the present statute was proper. The only error committed by the county court was in the entry of the judgment, and for that error the judgment is reversed, and the cause is remanded to the county court, with directions to enter a proper judgment showing the several amounts for which it is rendered against the several lots.

Reversed and remanded.

(213 Ill. 351)

MAGERSTADT et al. v. SCHAEFER.*

(Supreme Court of Illinois. Dec. 22, 1904.)

HUSBAND AND WIFE—MANAGEMENT BY HUSBAND—EXTRINSIC EVIDENCE—RIGHTS OF HUSBAND'S CREDITORS—BURDEN OF PROOF.

1. As against the husband's judgment creditors it may be shown, by extrinsic evidence, that shares of corporate stock issued and held in the name of the husband were in fact the property of the wife, the judgment against the husband having been taken before the issue of the stock, and there being no intention to deceive creditors.

2. A wife who allows corporate stock owned by her to stand on the corporate books in the name of her husband has the burden of showing that no fraud or injury resulted to her husband's creditors.

Appeal from Appellate Court, First District.

Two actions by Lottie E. Schaefer against Ernest J. Magerstadt and others. The two cases were consolidated and tried together, and a decree for complainant was affirmed by the Appellate Court (110 Ill. App. 166), and defendants appeal. Affirmed.

F. P. Read (E. Allen Frost, of counsel), for appellants. Rogers & Mahoney and Chilton P. Wilson, for appellee.

WILKIN, J. In 1895 and 1896 four judgments, aggregating about \$1,900, were rendered in Cook county in favor of Owen F. Aldis and others against Andrew McAnsh and P. F. Schaefer. In October, 1901, these judgments were assigned to one of the appellants, William B. Hiller, and executions

*Rehearing denied February 8, 1905.

by the sheriff of Cook county on 40 shares of stock in the North Shore Advertising Company and a like number of shares in the Joliet Billposting Company, corporations organized under the state of Illinois, all of which stock stood upon the books of said corporations in the name of P. F. Schaefer. On January 9, 1902, the appellee, his wife, filed two bills in chancery in the superior court of Cook county, one against the Joliet Billposting Company, Ernest J. Magerstadt, sheriff of Cook county, and William B. Hiller, and the other against the North Shore Advertising Company and said Magerstadt and Hiller. In each of these bills she alleged that she was the owner of said 40 shares of stock of each of the corporations; that certificates therefor were issued to her husband, P. F. Schaefer, but that he never paid for or owned the stock, nor had any interest therein except as her agent and trustee; that when the same was issued, the latter part of 1900, when the company was organized, her husband immediately assigned and delivered the stock in the Joliet Billposting Company to her; that the stock in the North Shore Advertising Company, immediately after it was issued, was hypothecated to one Burr Robbins as collateral security for a \$6,000 note of her husband, being a part of the consideration paid for said stock, which note was paid by her on February 7, 1902, and said stock then delivered to her; that she neglected to have said stock transferred on the corporation's books and new certificates issued to her until November 21, 1901, when she demanded that this be done, but that they had each refused to comply with her request. She prayed for an order directing such transfer and registry, and that an injunction be issued restraining the defendants Magerstadt, as sheriff, and Hiller, as such judgment creditor, from in any way selling or interfering with the said shares of stock. A preliminary injunction was issued, and the two cases consolidated. Upon final hearing, on answers denying the allegations of the bills and replications thereto, which hearing was before the chancellor in open court, a decree was rendered finding that the shares of stock in each company had always been and were then the individual property of the complainant, and the corporations were ordered to transfer the same to her within three days, and the lien created by the levy of said executions ordered removed and declared null and void, and the sheriff enjoined from enforcing his levy or selling the same. From that decree an appeal was taken to the Appellate Court for the First District, where it was affirmed; hence this appeal.

The evidence shows that P. F. Schaefer, Burr Robbins, and R. C. Campbell, on December 21, 1900, organized the Joliet Billposting Company and the North Shore Advertising Company, corporations for the purpose of carrying on the business of general

corporation had a capital stock of \$6,000, divided into 120 shares of \$50. The incorporators each subscribed and paid for 40 shares, or one-third of the capital stock, in said companies, and certificates for the shares in each company were issued to P. F. Schaefer, and receipted for on the corporation books by him, the latter part of January, 1901. Appellee and her husband testified, upon the hearing, that in the transaction the husband acted as her agent and trustee, and paid for the stock with her money, and they explained the source from which she derived the money, the original funds being received from her father's estate, \$10,000 when she was married, and \$9,000 at the time of the World's Fair. Dividends were declared upon the stock from time to time and paid to the husband, the money being deposited to his credit in bank. He had been an officer and director in each of the corporations, and attended all stockholders' meetings, and voted and represented said shares of stock as though they were his own. They both testify positively that, in all his transactions concerning the issuing and managing of the stock, he acted for her as her agent.

The principal ground of reversal insisted upon is that the title to the shares of stock in a corporation, as to third parties, can only be shown by the stockbooks of the corporation, and that the mere delivery of certificates of stock without a transfer upon the stockbooks passes no title. In other words, the contention is that the books of a corporation showing who the stockholders are is conclusive evidence of the title or ownership of the shares of stock when attempted to be seized by an execution creditor of the one in whose name the stock is registered. In support of this contention, reliance is placed upon sections 52 to 56 of chapter 77 of our Statutes of 1874, relating to the levying and sale of stock of corporations, as construed by this court in the case of *People's Bank v. Gridley*, 91 Ill. 457. The language of section 52 of the statute at the time that case was decided provided that "the shares or interest of a stockholder in any corporation may be taken on execution and sold as hereinafter provided." By an amendment passed in 1883, there was added to that language the following: "But in all cases where such shares or interest has been sold or pledged in good faith for a valuable consideration and the certificate thereof has been delivered upon said sale or pledge, such share or interest shall not be liable to be taken on execution against the vendor or pledgor except for the excess of the value thereof over and above the sum for which the same may have been pledged and the certificate thereof delivered." In construing this amendment, we held in *Rice v. Gilbert*, 173 Ill. 348, 50 N. E. 1087, that a pledge or sale of stock made by a stockholder in good faith for a valuable consideration was valid, as against credit-

ors of such stockholder, without the transfer being registered upon the company's books. It may be admitted, as contended by counsel for appellants, that in the present case the stock levied upon was not, strictly speaking, sold or pledged. The certificates were, however, delivered to the wife in consideration of her having paid for the same, and in that sense we think there was a sale, within the meaning of the amendment of 1883. That statute was evidently intended to protect the equitable rights of persons interested in the stock of corporations as it had been construed in the Gridley Case. But in that case there was no question but that the pledgor was the legal owner of the stock, and the point decided was that, in view of the charter of the company, which expressly provided that the transfer of stock should only be made upon the books of the secretary on the presentation of the stock certificates properly indorsed, an attempted transfer in any other manner was ineffectual to pass the title. It did not hold that the real owner of the stock could not in any case be shown, notwithstanding the registration thereof upon the company's books in the name of another.

In our opinion, however, this case may be decided without reference to what was held in either of the foregoing decisions. At common law, shares of stock could not be taken upon execution, being in the nature of choses in action. Our statute makes such shares or interest of a stockholder in a corporation liable to levy and sale upon a judgment and execution. It does not, however, authorize the levy of such execution upon stock which is not owned by the judgment debtor, though standing in his name on the company's books. Here, according to the finding of the chancellor, which is sustained by the evidence, the defendant in the execution, P. F. Schaefer, never was the actual owner of the shares of stock levied upon. They belonged to his wife, and were paid for with her money. All that can be said is that they were issued in the name of the husband, delivered to him, and so registered upon the company's books, and that the wife permitted this to be done, allowing him to deal with the stock as his own; and therefore it is said she ought not, in equity, to be allowed to assert her ownership against the execution creditor. The statute having made the shares of stock liable to execution, they stand in the same position as any other goods and chattels liable to be seized and sold in satisfaction of a judgment. Notwithstanding the ownership of the wife as her separate property, she might permit her husband to so deal with it as to make it liable for his debts; but in the absence of anything tending to show that, by her conduct and that of her husband in dealing with the property, his creditors have been misled to their injury, there is no reason why she may not assert her title to the same extent as if

the shares of stock had been any other class of personal property. We have frequently held that under our married woman's act a wife may own property and allow her husband to act as her agent in transacting business growing out of such property, such as procuring and transferring the same, without subjecting it to the payment of his debts. As was said in *Tomlinson v. Matthews*, 98 Ill. 178: "As to the property of the wife, protected as her separate property by the statutes in force in reference thereto, the husband occupies the same relation as does a stranger. She may sell it or loan it to him, or constitute him her agent for its management and disposition; but a gift of it by her to him will not be presumed, in the absence of proof to that effect." See, also, *Dean v. Bailey*, 50 Ill. 481, 99 Am. Dec. 533; *Bongard v. Core*, 82 Ill. 19; *Primmer v. Clabaugh*, 78 Ill. 94; and *Alsdurf v. Williams*, 196 Ill. 244, 63 N. E. 686.

Under the undisputed evidence in this case there can be no serious question but that, as between the complainant in the bill below and her husband, she was entitled to the property and could have recovered the same in an action against him. It is true that, by the manner in which she allowed her husband to deal with it, she assumed the burden of showing that such conduct resulted in no fraud or injury upon her husband's creditors, and that she had no fraudulent purpose or design in permitting the stock to be issued to and stand in his name. From the record in this case no conceivable injury could have resulted to the plaintiff in the execution by reason of the complainant's conduct or the manner of dealing with the stock by her husband. The judgments upon which the executions were issued were rendered long before the organization of either of the corporations, and hence prior to the issuing of the stock to the husband, and therefore it could not be claimed that the judgment creditors were induced to give credit to him because of the fact that the stock stood upon the company's books in his name. Those judgments were also obtained on account of an indebtedness in no way connected with the corporations or shares of stock.

The question as to the ownership of the property, the manner in which it was dealt with, and whether or not the complainant below was guilty of any fraudulent conduct or improper motive in allowing her husband to deal with it as his own so as to hinder or delay his creditors, were all questions of fact submitted to the chancellor, who saw the witnesses and heard them testify, and we think his finding and decree in favor of the complainant were fully authorized by the testimony.

We think all other questions raised upon this appeal have been properly disposed of by the Appellate Court. Its judgment will accordingly be affirmed.

Judgment affirmed.

(213 Ill. 358)

MORGAN & WRIGHT v. McCASLIN.*

(Supreme Court of Illinois. Dec. 22, 1904.)

APPEAL—SUFFICIENCY OF EVIDENCE.

1. Under Hurd's Rev. St. 1903, c. 110, § 90, providing that the Supreme Court shall determine questions of law only, that court cannot, on appeal, consider a contention that the verdict is unsupported by the evidence, where no effort was made below to withdraw the case from the jury.

Appeal from Appellate Court, First District.

Action by Elton W. McCaslin against Morgan & Wright. From a judgment of the Appellate Court affirming a judgment for plaintiff, defendant appeals. Affirmed.

John C. Farwell and Gerald G. Barry, for appellant. Colson & Johnson, for appellee.

WILKIN, J. On April 2, 1902, appellee brought a suit in assumpsit against appellant in the superior court of Cook county to recover damages for the breach of a contract of employment, and also to recover a balance claimed to be due him for services rendered. The declaration contained two special counts and the common counts. The first count alleges that in January, 1900, the defendant, being engaged in the manufacture of rubber goods, employed the plaintiff as superintendent of its factory at a salary of \$5,000 per year, which was duly paid for that year; that he continued in the same employment at the same salary for the following year, but received therefor only the sum of \$3,500. The second count alleges that he continued in the employment of defendant at the same salary for the year 1902, but on January 18th of the year was discharged for the remainder of the year, without cause, and in violation of the contract. His demand is for \$1,500 balance of salary for the year 1901, together with \$75 interest thereon, and also a balance of \$4,541.68, balance of salary for the year 1902, which he alleges he was unjustly deprived of; making a total of \$6,041.69. The plea was the general issue. Upon the trial before a jury, judgment was rendered in favor of the plaintiff for \$3,013, which, on appeal to the Appellate Court for the First District, has been affirmed. This appeal is from the judgment of affirmance.

The jury found specially that the plaintiff and defendant made a contract in 1900 concerning the employment of the plaintiff for that year; that the evidence showed that the plaintiff held his services subject to the order of the defendant from the time of his discharge by defendant, August 9, 1902; that it found from the evidence, under the instructions, a contract of employment between the parties covering the year 1902; that plaintiff, after his discharge, held himself in readiness to render services to the defendant during the year 1902, and was holding his services on August 9, 1902, subject to the

orders of the defendant; that he could not by reasonable diligence have obtained other employment similar to that which he had with the defendant during the year 1901, between the time of his discharge and the time he actually entered the employment of other parties.

The grounds of reversal here urged are stated by counsel for appellant as follows: "(1) That the verdict is not supported by the evidence and is illogical; (2) the grounds urged in support of this verdict and judgment are inconsistent with the theory of the appellee on the trial in the court below; (3) there is no evidence tending to establish a contract of hiring for a year or for any definite period, and hence no evidence tending to establish a cause of action."

There was no instruction asked by the defendant to withdraw the case from the jury at the close of the evidence or at any time, but it was submitted to the jury on instructions given both on behalf of plaintiff and defendant. Manifestly the grounds of reversal now urged raise no question of law, and, by the express provisions of the statute, cannot be assigned for error in this court in this class of cases. Hurd's Rev. St. 1903, p. 1413, c. 110, § 90.

No objection is urged against the ruling of the trial court either as to the admission or exclusion of evidence, or the giving or refusing of instructions. We are not called upon, in this state of the record, nor are we permitted by the statute, to follow counsel in their discussion of the case on the facts. The judgment of the Appellate Court will accordingly be affirmed.

Judgment affirmed.

(213 Ill. 360)

WINKELMAN v. CITY OF CHICAGO.*

(Supreme Court of Illinois. Dec. 22, 1904.)

APPELLATE JURISDICTION—CONSTITUTIONAL QUESTION—CONDEMNATION PROCEEDINGS—INJURY TO LANDOWNER—DELAY IN PROCEEDINGS—LIABILITY OF CITY—ESTOPPEL—DAMAGES—ATTORNEY'S FEES.

1. An action was brought against a city for damages occasioned by the failure to bring to trial condemnation proceedings against plaintiff's property for a period of more than 5 years after the commencement of the proceedings, and by then abandoning the proceedings after more than 15 months from the entry of judgment fixing the damages. Held, that the cause of action involved the taking or damaging of private property for public use, within Const. 1870, art. 2, § 13, so as to confer on the Supreme Court appellate jurisdiction in the first instance.

2. Where plaintiff in condemnation proceedings wrongfully delayed the trial of the cause, and omitted to make its election to take the land or abandon proceedings within a reasonable time after the amount of the judgment had been fixed, and then elected to discontinue, it is liable to the landowner for the damages occasioned by such wrongful acts.

3. Where the trial court has for years allowed the corporation counsel to assume control of the trial calendar and delay the trial of con-

*Rehearing denied February 8, 1905.

*Rehearing denied February 9, 1905.

demnation cases until he wishes to try them, the city is estopped to say that the landowner should have applied to the court, rather than to such corporation counsel, to have the case placed on the trial calendar.

4. A delay of 15 months between the entry of judgment in condemnation proceedings and the election by the city to abandon the proceedings is *prima facie* unreasonable.

5. A landowner may recover damages for wrongful delay of the city in bringing condemnation proceedings to trial within a reasonable time, though he purchased the land after the proceedings were commenced, if such delay occurred after his purchase.

6. Where the trial of condemnation proceedings was unreasonably delayed and the proceedings abandoned after judgment of condemnation was entered, the measure of damages to which the landowner is entitled is the difference between the value of the land at the time he could have sold it, but for the pendency of the proceedings, and its value at the time the proceedings were dismissed.

7. Where the right to abandon condemnation proceedings is absolute, defendant is not entitled on dismissal of such proceedings to recover counsel fees and expenses in defending the same, in the absence of statutory provisions therefor.

Error to Superior Court, Cook County; M. Kavanagh, Judge.

Action by Frederick A. Winkelman against the city of Chicago. From a judgment for defendant, plaintiff brings error. *Reversed.*

Samuel B. King, for plaintiff in error. William D. Barge (Edgar Bronson Tolman, Corp. Counsel, of counsel), for defendant in error.

SCOTT, J. This writ of error is sued out from this court directly to the superior court of Cook county. A preliminary question is presented by a motion to dismiss the writ on the ground that this court is without jurisdiction to entertain it. Plaintiff in error sought to recover damages occasioned by the fact that the city of Chicago failed and refused to bring to trial a condemnation proceeding instituted by it in the circuit court of Cook county to condemn a strip of land off of a parcel of real estate now the property of plaintiff in error for a period of more than 5 years after the beginning of the proceeding, and by the fact that the city abandoned the proceeding, but did not elect to do so for a period of more than 15 months after the judgment fixing the amount of damages was entered, and also sought to recover money expended in the employment of counsel, and for other expenses in carrying on the litigation.

Section 13 of article 2 of the Constitution of 1870 provides: "Private property shall not be taken or damaged for public use without just compensation." Plaintiff in error contends that the acts complained of amount to a taking or damaging of his property for public use, within the meaning of this provision of the Constitution. It is apparent that the cause involves a construction of the Constitution, and that the writ was properly sued out of this court in the first instance. The motion to dismiss will be denied.

The proceeding was instituted on July 8,

1890. The cause was tried in November, 1895. The judgment of condemnation was entered on January 31, 1896, and on May 17, 1897, the city council passed an ordinance directing the corporation counsel to have the judgment vacated and the petition dismissed. Plaintiff in error introduced evidence showing that he acquired title to the property within a few days after the condemnation proceeding was instituted, and became a party defendant to the condemnation suit, by appearing therein, two days before the trial of the cause, in November, 1895; that between the time he acquired title and the time the proceeding was abandoned there was a material decrease in the value of this property; that he sought to sell it before this decrease took place, and would have done so but for the fact that no one would buy while the suit was pending. When plaintiff in error closed his proof, this evidence, on motion of the defendant in error, was stricken out, and this action of the court is assigned for error. The amount of damages sought on account of delay is the difference between the value of the real estate at the time plaintiff in error would have sold it but for the pendency of the suit and its value at the time the judgment was vacated and petition dismissed. When a municipal corporation institutes a proceeding to condemn land, it should prosecute the suit with diligence. Upon the damages being fixed by the judgment, it is its duty to determine within a reasonable time whether it will pay the damages and enter upon the land, or abandon the proceeding; and, if it takes the latter course, its purpose should be promptly and unequivocally made a matter of record by the vacation of the judgment and the dismissal of the petition. If it wrongfully delays the trial of the cause, and omits to make its election to take the land or abandon the proceeding within a reasonable time after the amount of the judgment has been fixed, and then elects to discontinue, it is liable to the owner of the land for damages occasioned by such wrongful acts. If the acts be not both wrongful and injurious, there is no liability, but where they are both wrongful and injurious the landowner is entitled to recover. 2 Dillon on Mun. Corp. (4th Ed.) § 609; 7 Ency. of Pl. & Pr. p. 686; Simpson v. Kansas City, 111 Mo. 237, 20 S. W. 38; Feiten v. City of Milwaukee, 47 Wis. 494, 2 N. W. 1148; Carson v. City of Hartford, 48 Conn. 68; Norris v. City of Baltimore, 44 Md. 598; Graff v. City of Baltimore, 10 Md. 544.

The right to recover is based, not upon the fact that there is delay in the prosecution of the suit, and consequent damage, or that there is delay in determining to abandon the proceeding after the amount of damages is fixed, and resulting damage to the land, but upon the theory that the delay in prosecuting the suit has been wrongful, or that the abandonment was not determined upon within a

reasonable time after the award had been fixed, and that in either case the delay occasioned damage to the landowner.

In the case at bar it appears from the evidence that the courts of Cook county permit a clerk employed in the office of the corporation counsel to make up a trial calendar for the trial of condemnation proceedings, on which he places all condemnation suits in which the city is petitioner and which it is prepared to try and desires to try, and thereafter, at some convenient time, cases on this calendar are taken up and disposed of by one of the judges who is assigned to try the causes on that calendar; that such suits are not placed on any other trial calendar, and are not placed on that calendar until the corporation counsel desires to have them tried; and that plaintiff in error applied to the corporation counsel at frequent intervals to have this cause placed on trial, but that his request was not complied with for a period of more than five years. If it be true that the practice obtains in Cook county of having this calendar made up in the manner indicated above, it should be discontinued. Our statute contemplates that the preparation of trial calendars shall be under the control of the courts, and that control should not be surrendered to one of the parties to the cause. The petitioner in an eminent domain proceeding has no right whatever to determine when the cause shall be tried. That right rests exclusively with the court, or with the judge of the court if the petition is presented to him in vacation.

It is urged by the city that the plaintiff in error cannot recover because he did not apply to the court in which the cause was pending to have it placed upon the trial calendar and disposed of. Ordinarily, we think, there would be force in this objection. The defendant who stands by and makes no effort to bring his cause to trial should be considered as waiving damages caused by the delay. If he desires a speedy trial, it is his duty to advise the court of that fact. Here, however, according to the proof, the corporation counsel had assumed, and the court had permitted him to assume, control of the trial calendar. He was given the right and assumed the right to say at what time the defendant's cause should be heard, and, despite the repeated requests of the defendant for an early setting of the cause, refused to place it upon the trial calendar so that it could be reached for trial until a time more than five years after the beginning of the suit, and until 140 cases begun after that case was begun had been disposed of. Under these circumstances, the city is estopped to say that plaintiff in error should have applied to the court to have his case placed upon the trial calendar, and the proof made by plaintiff in error placed upon the city the burden of showing that it had not wrongfully delayed the trial of the cause.

More than 15 months intervened between

the time the judgment was entered and the time the ordinance abandoning the proceeding was passed. Here everything necessarily awaited the action of the city. The owner of the land was entirely without any means of hastening the time when the city would elect. Such a delay is *prima facie* unreasonable. Public policy forbids that a municipal corporation should be permitted to practice such an imposition upon the property owner.

It is also urged that the damages claimed, even if recoverable, could be sued for only by the grantor of plaintiff in error, who was the owner when the condemnation suit was instituted, and in support of this position the doctrine is invoked that the right of action against a corporation taking private property without making compensation therefor is vested in the person who owned the property at the time it was taken. This doctrine is not applicable, because plaintiff in error does not seek to recover for the actual taking of the property. What he seeks is damages occasioned by wrongful delay. Such damages necessarily accrue to the person owning the property when such delay occurred, and are payable to the person who owned the real estate at the time of the wrongful delay. Plaintiff in error is therefore entitled to recover any damages sustained in the manner aforesaid which were visited upon the property after the delivery to him of his deed. The court erred in striking out the evidence of the plaintiff in so far as it tended to establish such damages accruing after he was vested with the title. The damages sought to be established by the proof stricken were damages to private property, falling within the language of the Constitution hereinabove quoted.

The court peremptorily instructed the jury to find the defendant below guilty, and to assess the damages at \$450, which was the amount paid by plaintiff in error for attorney's fees and other expenses in defending the condemnation suit. The city questions the giving of this instruction by cross-errors assigned in this court. We find that such expenses have been allowed in other jurisdictions where statutes exist authorizing their recovery, or where the right to abandon the condemnation proceeding is not an absolute right, but rests in the discretion of the court. Where such discretion exists it has been held that the court may impose conditions upon the discontinuance of the proceeding, and that it is reasonable to require the petitioner, under such circumstances, to pay the attorney's fees and other expenses incurred by the defendant in the litigation. Where the right to abandon the proceeding is an absolute right, and where there is no statute authorizing a recovery of such expenses, they cannot be recovered. In this state the right of the petitioner to discontinue is absolute, and, at the time this proceeding was abandoned, we had no statute authorizing the allowance to the defendant in

such event of costs, expenses, and attorney's fees incurred in the defense of the petition; our statute authorizing such an allowance having become effective on July 1, 1897. It follows that the plaintiff in error is not entitled to recover his attorney's fees and other expenses incurred in the defense of the condemnation suit, and that the court below erred in giving the peremptory instruction. The judgment of the superior court will be reversed, and the cause will be remanded to that court for further proceedings consistent with the views herein expressed.

Reversed and remanded.

(213 ILL. 367)

PEOPLE ex rel. MERRIAM, County Collector,
v. ILLINOIS CENT. R. CO.*

(Supreme Court of Illinois. Dec. 22, 1904.)

SPECIAL SEWER ASSESSMENT—VALIDITY—NOTICE TO PROPERTY OWNER—JUDGMENT OF CONFIRMANCE—REVIEW.

1. A special sewer assessment is not void because the real owner of the property assessed did not receive notice thereof, where notice was sent to the person who paid the taxes during the preceding year, in compliance with section 41 of the local improvement act of 1901 (Hurd's Rev. St. 1903, p. 400), which makes no other requirements as to notice in such cases.

2. A judgment confirming a special sewer assessment being regular on its face, showing that every provision of the statute had been complied with and that the court had jurisdiction to confirm the roll, an objection which does not appear on the face of the record, but is made apparent from evidence aliunde, should be overruled.

Appeal from Lee County Court; Robt. H. Scott, Judge.

Action by the people, on relation of W. B. Merriam, county collector, against the Illinois Central Railroad Company. From a judgment sustaining objections to an application for judgment and order of sale for a delinquent special sewer assessment against lands of defendant, the relator appeals. Reversed.

Charles H. Wooster, State's Atty., Harry Edwards, Asst. State's Atty., and John S. Dornblaser, City Atty., for appellant. William Barge (J. M. Dickinson, of counsel), for appellee.

WILKIN, J. This is an appeal from a judgment of the county court of Lee county sustaining objections to an application for judgment and order of sale for a delinquent special sewer assessment of the city of Dixon against certain lands of the appellee, described as the southerly 90 feet of the block west of the Illinois Central Railroad, in said city.

The appellee acquired title to the land in 1852 and has remained the owner since that time. In 1902 the city of Dixon sought to levy a special assessment against this and

other property for the construction of a sewer. A commissioner was duly appointed to spread the assessment, and he filed his assessment roll, together with an affidavit of the posting and mailing of notices, as provided by statute. Under sections 18 and 22 of its charter (Laws 1851, pp. 71, 72) appellee pays into the state treasury a certain per cent. of its gross income in lieu of general taxes, and for this reason the premises in question did not appear upon the tax book in its name; but for some reason, unexplained by this record, the property did appear on the tax book in the name of O. B. Dodge, and was so assessed from 1897 to 1902, inclusive, and he (Dodge) paid the taxes assessed thereon for those years. The commissioner entered the property on the roll in the name of Dodge and mailed the notice to him. It is now contended by appellee that the assessment is illegal and void because the notice was sent to Dodge, and not to the railroad company, and therefore it had no opportunity to appear in the county court and object to the assessment.

Section 41 of the local improvement act of 1901 (Hurd's Rev. St. 1903, p. 400), after providing what the notice of the assessment shall contain, is as follows: "Such notices shall be sent by mail post-paid to each of the said persons paying the taxes on the respective parcels during the last preceding year in which taxes were paid. * * * An affidavit shall be filed before the final hearing showing a compliance with the requirements of this section, and also showing that the affiant * * * made a careful examination of the collector's books showing the payments of general taxes during the last preceding year in which the taxes were paid thereon, to ascertain the person or persons who last paid the taxes on said respective parcels, and a diligent search for their residences, and that the report correctly states the same as ascertained by the affiant; and said report and affidavit shall be conclusive evidence, for the purpose of said proceeding, of the correctness of the assessment roll in said particulars; but in case the said affidavit shall be found in any respect willfully false, the person making the same shall be deemed guilty of perjury," etc. It appears from this clause that the commissioner is to ascertain the residence of "the persons paying the taxes on the respective parcels during the last preceding year in which taxes were paid" by an examination of the collector's books. If he examined those books, and ascertained who paid the taxes during the preceding year, and sent the notice to that person, he fully complied with all the requirements of the statute, and his affidavit to this effect is conclusive evidence of the correctness of the roll in that particular. There is no claim that the commissioner did not act in perfect good faith in sending the notice to Dodge, and there is no contention that the premises did not appear upon the

*Rehearing denied February 9, 1905.

difference between the real owner of the property did not receive the notice. The tax might have been paid by an entire stranger, or by a mortgagee, or by some person who had previously owned the land and at the time of payment had parted with the title. It makes no difference that the land may have been assessed in the name of Dodge by mistake. Full compliance with the statute gave the court the necessary jurisdiction over the property to subject it to the payment of the assessment. The judgment of confirmation was legal and valid, and in strict conformity with the requirements of the statute.

We have always held that where a special assessment has been confirmed, and application is made for judgment and order of sale upon delinquent installments, the validity of the assessment cannot be attacked except for matters going to the jurisdiction of the court to render the same; the application for judgment and order of sale being a collateral proceeding. *Johnson v. People*, 189 Ill. 83, 59 N. E. 515; *Steenberg v. People*, 164 Ill. 478, 45 N. E. 970; *Gross v. People*, 172 Ill. 571, 50 N. E. 334; *Foster v. City of Alton*, 173 Ill. 587, 51 N. E. 76; *Glover v. People*, 188 Ill. 576, 59 N. E. 429. We have also held that such want of jurisdiction in the county court must appear upon the face of the record itself; otherwise, it cannot be taken advantage of. *Young v. People*, 171 Ill. 299, 49 N. E. 503; *Dickey v. People*, 160 Ill. 633, 43 N. E. 600; *Casey v. People*, 165 Ill. 49, 46 N. E. 7. In this case the judgment of confirmation is regular upon its face, showing that every provision of the statute has been complied with, and that the court had jurisdiction to confirm the roll. The objection urged by appellee does not appear upon the face of the record, but is made apparent from evidence aliunde. It is not even claimed that the authorities levying the assessment have been guilty of any fraud. The objection should have been overruled.

The judgment of the county court is reversed, and the cause remanded, with directions to render judgment for the delinquent assessment, together with an order of sale of the premises.

Reversed and remanded, with directions.

(213 Ill. 370)

WEBER v. POWERS.

(Supreme Court of Illinois. Dec. 22, 1904.)

LANDLORD AND TENANT—RENT—POWER TO CONFESS JUDGMENT—CONSTRUCTION.

1. Authority to confess judgment without process must be strictly pursued, and, if there is no power to enter the appearance of the debtor and confess the judgment, such judgment is a nullity, and binds no one, and may be collaterally attacked for want of jurisdiction to render it.

2. A power to confess judgment for rent due by the terms of a written lease cannot be construed into a power to enter up judgment for rent accruing under an implied contract result-

ant, or under a new agreement made between the parties for a renewal of such lease.

Appeal from Appellate Court, First District.

Motion to vacate a judgment by confession in favor of Ordell H. Powers against Max Weber. From an order denying the motion, defendant appealed to the Appellate Court, which affirmed the same, and he appeals. Reversed.

This was a motion to vacate a judgment by confession, entered on May 6, 1903. The motion to vacate was denied, and the order denying it was entered on May 16, 1903, by the superior court of Cook county. An appeal from said order was taken to the Appellate Court, and the Appellate Court affirmed the order denying the motion to vacate the judgment, granting at the same time a certificate of importance. The present appeal is from such order of affirmation.

The facts are substantially as follows: The declaration was filed on May 6, 1903, in the superior court of Cook county, and avers that on May 14, 1900, the plaintiff below, appellee here, demised 4346 Forestville avenue in Chicago to the defendant below, the appellant here, for and during the term of 23 months, commencing on the 1st day of June, 1900, and ending on April 30, 1902, and that said demise was on, to wit, the 1st day of May, 1902, renewed for a period of one year, beginning on, to wit, May 1, 1902, "and paying therefor during the said term and the renewal thereof to the said plaintiff the rent at the rate of \$600.00 per year, payable monthly—that is to say, on the first day of each and every month of said term, in advance, by even and equal installments of \$50.00 each—by virtue of which said demise the said defendant entered into possession of the said demised premises," and was possessed thereof from the 1st day of October, 1902, until the ——— day of April 1903, during which period a large sum of money, to wit, the sum of \$350, of seven liquidated installments of \$50 each (mentioning them), became and was due and payable from the said defendant to the said plaintiff, and is unpaid, whereby an action has accrued to the plaintiff to have and demand from the defendant the sum of \$350, parcel of the said sum above demanded.

The cognovit was filed on the same day, May 6, 1903, and recites that the defendant, by his attorney, comes and defends the wrong and injury, when, etc., and waives service, and says "that he cannot deny the action of the said plaintiff, nor but that he, the said defendant, owes and is indebted to the said plaintiff in manner and form as the said plaintiff has above complained against him, nor but that the said plaintiff has sustained damages on occasion of the nonperformance of the several agreements and undertakings of said declaration mentioned, including the sum of \$20.00 attorneys' fees for

his reasonable attorney's fees for entering up this judgment, over and above other costs and charges by him about his suit in this behalf expended to the amount of \$370.00," and defendant waives errors and appeal "on the judgment entered by virtue hereof." There was an affidavit of plaintiff's agent to the effect that defendant was indebted in the sum of \$360, and \$20 attorney's fees. Plaintiff also filed an affidavit with the declaration that he owns the premises, and knows the handwriting of Max Weber, and that the signature on the attached lease is that of Max Weber, who is still living, and that there is due as rent under the renewal of said lease \$350.

The lease, containing the warrant of attorney filed in the cause, is dated May 14, 1900, and made by appellee to appellant, demising said premises, "to have and to hold the same unto the party of the second part from the first day of June, A. D. 1900, until the last day of April, A. D. 1902. And the party of the second part, in consideration of said demise, does covenant and agree with the party of the first part as follows: First, to pay as rent for said demised premises the sum of \$1,150.00, payable in monthly installments of \$50.00 each in advance, upon the first day of each and every month of said term, at the office of Draper & Kramer."

The lease contains also the following provision: "Eighth—At the termination of this lease by lapse of time or otherwise, to yield up immediate possession to said party of the first part, and, failing so to do, to pay, as liquidated damages for the whole time such possession is withheld, the sum of \$5.00 per day. * * * The party of the second part hereby irrevocably constitutes any attorney of any court of record of this State attorney for him in his name * * * to enter appearance in such court, waive process and service thereof, and confess judgment from time to time for any rent which may be due to said party of the first part, or the assignee of said party, by the terms of this lease, with costs and \$20.00 attorney's fees, and to waive all errors and all right of appeal from said judgment and judgments, and to file a consent in writing, that a writ of restitution or other proper writ of execution may be issued immediately," etc. The lease is under seal.

The judgment, entered upon the same day, to wit, May 6, 1903, was as follows: "And now on this day comes the plaintiff to this suit by Jule F. Browsers and Samuel B. King, his attorneys, and files herein his certain declaration in a plea of trespass on the case upon promises, and thereupon also comes the said defendant by Otis King Hutchinson, his attorney in fact, and files herein his warrant of attorney, the execution of which being duly proven, and also his cognovit confessing the action of the plaintiff against him, the said defendant, and that the plaintiff has sustained damages

herein by reason of the premises against him, the said defendant, to the sum of three hundred seventy dollars, and no cents, on motion of plaintiff leave is given him by the court to enter up a judgment herein for the amount due on the lease filed in said cause, together with attorney's fees, as provided in said warrant of attorney. Therefore it is considered by the court that the plaintiff do have and recover of and from the defendant his said damages of three hundred seventy dollars, and no cents, in form as aforesaid by the said defendant confessed, together with his costs and charges in this behalf expended, and have execution therefor."

The bill of exceptions was filed on July 18, 1903, and recites that on the hearing of the motion made by the defendant to set aside and vacate the judgment by confession entered in said cause on May 6, 1903, and to quash the execution issued thereon, and for leave to plead to the declaration filed therein, which hearing was had on the 16th day of May, 1903, the defendant, to maintain said motion, submitted the same in writing, and assigned the following reasons in favor thereof, to wit: (1) That the rendition of the judgment herein was improper and illegal. (2) That no power to confess the judgment entered herein was given by the defendant, Max Weber, in and by said lease and warrant of attorney attached to the declaration. (3) That the lease attached to the declaration, and in which a warrant to confess judgment was contained, expired by its own limitation on the 30th day of April, 1902, and that no new lease was signed, or any written agreement entered into, by the defendant, Max Weber. (4) That the declaration alleges the lease to have expired on April 30, 1902, and that on May 1, 1902, a new contract for a period of one year was entered into by the parties, and no statement is contained in the declaration as to whether said new contract was a valid or written contract, and no warrant of attorney to confess judgment under said new contract alleged in the declaration is attached thereto or was presented to or filed in court. (5) That a lease filed in this case, of which the warrant of attorney is a part, expired on the 30th day of April, 1902, and the declaration shows that the rent claimed as due, and for which judgment was rendered, accrued after April 30, 1902, and under the new contract alleged in said declaration, and after the said warrant of attorney had expired. (6) That at the time of the rendition of the judgment the defendant was not indebted to the plaintiff in the sum of \$370, or in any sum whatever.

The bill of exceptions also recites that the defendant read in evidence in support of his motion his own affidavit, in which he states that he entered into the lease in question with the plaintiff, Powers, for a period from June 1, 1900, to April 30, 1902, at a yearly rental of \$1,150, payable monthly at the rate

of \$50 per month, as is stated in the lease; that before the expiration of the lease, on, to wit, April 20, 1902, a representative of the plaintiff asked affiant if he wanted to make a new lease of the said premises from May 1, 1902, to April 30, 1904, and affiant then refused to enter into a new lease for said premises, stating, however, that, if the plaintiff would make certain repairs on and about said property to the satisfaction of affiant, affiant would execute such a lease; that shortly before the expiration of the lease, and prior to May 1, 1902, the plaintiff, Powers, called on affiant, and asked him if he would be willing to remain at the rate of \$50 per month for rental; that affiant agreed to remain provided Powers would make certain repairs within a reasonable time, and that, after making the repairs within a reasonable time, affiant would sign the lease; that Powers accepted the proposition, and that this agreement was made during April, 1902; that affiant then remained in possession until the latter part of September, 1902, waiting for such repairs to be made, and paid all the rent to Powers for all the time he was in occupation of said premises; that Powers did not make all the repairs as agreed to by him, but attempted from time to time to make a few repairs, and in the latter part of September, 1902, said repairs were not finished, and therefore this affiant, during the month of September, 1902, moved out of said premises and surrendered the keys and the possession thereof to the plaintiff; that affiant vacated the premises because plaintiff would not and did not fulfill his contract to make repairs, and because of the fact that the premises were in such a condition, occasioned by the plaintiff herein, that this affiant was deprived of the beneficial enjoyment of said premises; that the lease expired April 30, 1902, and no new lease was executed, except the verbal agreement above stated, being a tenancy from month to month; that affiant was not indebted to the plaintiff in any sum at the time of the entry of the judgment by confession herein; that no warrant of attorney was signed by him, except the one contained in the lease which expired on April 30, 1902, and that he at no time authorized any attorney in any manner to appear for him in the above-entitled cause and confess judgment; and that he has a good defense to this action upon the merits to the whole of the plaintiff's demand.

The bill of exceptions also stated that the plaintiff, Powers, read in evidence his own affidavit in opposition to the motion of the defendant to vacate the judgment, and therein swore that prior to May, 1902, when the lease between him and Weber—being the instrument sued on—expired, affiant agreed with Weber that the latter should remain in possession of the premises at the same rental reserved in the lease, namely, \$50 per month, and upon the same conditions and

terms set forth in the said lease, and affiant agreed to execute a new lease of said premises upon the same conditions, terms, and promises as set forth in said lease; that during the month of August, 1902, and subsequent to May 1, 1902, Weber agreed with affiant to sign a two-year lease of said premises upon the same conditions as set forth in said lease expiring April 30, 1902, and that this affiant agreed at the same time to make certain repairs, amounting to \$100; that the same were made, and the making of the same superintended by said Weber and his wife, and completed to their satisfaction before Weber vacated the premises; that, when the repairs were made, no time was set by Weber, or by affiant, when they were to be made, but Weber requested affiant to permit him and his wife to superintend them and attend to the same, which they did; that affiant was not aware that Weber had vacated the premises until he received a letter from him, dated October 11, 1902, telling him to call and get the keys for the house on the premises, and stating that they had been ready for Powers since Monday, and asking him to call for the same at 4404 Prairie avenue; that affiant called upon Weber about September 15th at his office, and Weber refused to sign the lease, and stated that he intended to vacate the premises because the price of coal for heating the house was high, and that he intended to move into a steam-heated apartment to save the expense of heating the house; that appellant never complained to affiant that any of the repairs were not such as affiant had agreed to make, or as to their sufficiency and extent, but expressed his satisfaction with them; that Weber did not vacate the premises until October 1, 1902, and, when he abandoned the same, neglected to lock the same, but left the front door unlocked.

The bill of exceptions also states that a certain affidavit of one Crawford was read in evidence by the plaintiff in opposition to the motion, in which Crawford stated that he made the repairs and decorations upon the premises upon the order of Powers, and that Weber's wife selected the colors, style, and materials for the decorations and repairs from the firm of which Crawford was foreman, and superintended the same, and that the same were completed to the satisfaction of Weber; that, when they were made, no time was set by either Weber or Powers when they should be made, but Weber requested affiant to permit him and his wife to superintend the same, which they did; and that the same were finished before August 20, 1902.

Kraus, Aischuler & Holden, for appellant.
Jule F. Brower and Samuel B. King, for appellee.

MAGRUDER, J. (after stating the facts).
The material question presented by the record in this case is whether the appellee was

fess judgment to enter up a judgment for rent alleged to have accrued after the expiration of the written lease, and while appellant was in possession of the premises after such expiration, either by virtue of holding over under the lease, or by virtue of a new agreement made between the parties.

By the terms of the written lease under which appellant originally entered he was to hold the premises from the 1st day of June, 1900, until the last day of April, 1902, a period of 23 months, and to pay as rent therefor "the sum of \$1,150.00, payable in monthly installments of \$50.00 each in advance upon the first day of each and every month of said term." Appellant paid all the rent due by the terms of the written lease up to the last day of April, 1902. He remained in possession five months after the lease expired, and until the latter part of September, 1902, when he abandoned the premises. He paid rent at the rate of \$50 per month for each of the five months during which he remained in possession after the expiration of the lease. The judgment was entered for rent at the rate of \$50 per month for the seven months, inclusive, from October 1, 1902, when appellant left the premises, up to May 1, 1903, together with costs and attorney's fees. Did appellee have any authority, under the warrant of attorney contained in the lease, to enter up judgment by confession against appellant for the period of seven months from October 1, 1902, to May 1, 1903?

Certainly, the warrant of attorney contained in the lease did not in express terms confer any authority to enter up judgment for any rent accruing after April 30, 1902, when the term mentioned in the written lease expired.

It is claimed, on the part of appellee, that after April 30, 1902, the date of the expiration of the lease, appellant held over with the consent of the appellee, the landlord, upon the same terms and conditions which are prescribed in the original lease, and that, inasmuch as the landlord was authorized by the terms of the lease to enter up judgment for the rent accruing while the lease was in force, he was also authorized to enter up judgment for the rent which accrued while the appellant was holding over, it being contended that the power to confess judgment was continued, after the expiration of the lease, during the period of the holding over by the appellant, if there was such holding over.

It is the settled doctrine of this court that the authority to confess a judgment without process must be clear and explicit, and must be strictly pursued; and that, if there is no power to enter the appearance of the debtor and confess the judgment, such judgment is a nullity, and binds no one, and may be attacked collaterally for want of jurisdiction in the court to render it. *Chase v. Dana*, 44

v. Hunt, 24 Ill. 598; *Frye v. Jones*, 78 Ill. 627; *Mayer v. Pick*, 192 Ill. 561, 61 N. E. 416, 85 Am. St. Rep. 352; *Whitney v. Bohlen*, 157 Ill. 571, 42 N. E. 162; *Blake v. State Bank of Freeport*, 178 Ill. 182, 52 N. E. 957; *Krickow v. Pennsylvania Tar Manf. Co.*, 87 Ill. App. 653; *Hall v. Hamilton*, 74 Ill. 437; *Frear v. Commercial Nat. Bank*, 73 Ill. 473; *Little v. Dyer*, 188 Ill. 272, 27 N. E. 905, 32 Am. St. Rep. 140.

Here the warrant of attorney authorized any attorney of any court of record "to enter [appellant's] appearance in such court, waive process and service thereof, and confess judgment from time to time for any rent which may be due to said party of the first part * * * by the terms of this lease." The only rent which might be due to appellee by the terms of the written lease was the sum of \$1,150, payable in monthly installments of \$50 each in advance, upon the first day of each and every month during the period of 23 months extending from June 1, 1900, to April 30, 1902. For any of the installments of rent at the rate of \$50 per month which might be due during this period of 23 months, and which was a part of the sum of \$1,150, judgment by confession could be entered up. But the warrant of attorney confers no authority to confess judgment for any other amounts, or for any amounts accruing during any other period. The warrant of attorney does not authorize the confession of judgment for rent which may be due according to the terms of an oral demise existing after the expiration of the written lease. The lease itself does not contain any covenant or agreement on the part of the lessor for a renewal of the lease. The old, or written, lease is not the contract of the parties for a new term, but is only evidence to uphold the implied contract resulting from the holding over of the tenant. 1 *Wood on Landlord and Tenant*, § 13. Such holding over, where it exists, becomes in effect a parol demise during the holding, and will be barred in due time by the statute of limitations. 2 *Taylor on Landlord and Tenant*, § 525; *Stewart v. Apel*, 5 *Houst. (Del.)* 180.

Parol evidence must be resorted to to show that, where the tenant remains in possession after the expiration of the written lease, he holds over under the terms of such lease. A power to confess judgment for the rent due by the terms of the written lease cannot be construed into a power to enter up judgment for rent accruing under an implied contract resulting from the fact of a holding over by the tenant. In this case, to give the warrant of attorney such a construction would be in violation of the rule that such warrants of attorney should be strictly construed.

"Where a tenant for a year or years holds over after the expiration of his lease, without having made any new arrangement with his landlord under which such holding over

takes place, the landlord, at his election, may treat the tenant as a trespasser, or as a tenant for another year, upon the same terms as in the original lease, and this though the tenant has no intention of holding over for a year, or of paying the same rent. The law fixes the tenant's liability for holding over, independent of his intention. The legal presumption of a renewal from the holding over cannot be rebutted by proof of a contrary intention on the part of the tenant alone." *Clinton Wire Cloth Co. v. Gardner*, 99 Ill. 151. The right of election as to whether the tenant, remaining in possession after the expiration of the lease, is holding over upon the same terms as in the original lease, is a right which belongs to the landlord, and not to the tenant. It is the landlord alone whose intention on the subject is to be ascertained, as it is he alone who may elect to treat the tenant as holding over under the terms of the old lease. *Keegan v. Kinnare*, 123 Ill. 280, 14 N. E. 14. It is true that, as a general rule, the law by implication creates a new tenancy from year to year where the tenant holds possession of the premises after the expiration of a lease for year, or years, under which he went into possession, but such implication is not conclusive; it may be rebutted by the acts of the parties; and it is a question of fact for the jury to determine, under the instructions of the court, whether or not the holding over is such as to create a new tenancy. While the legal presumption of a renewal of the tenancy from the holding over of the tenant cannot be rebutted by proof of a contrary intention on the part of the tenant alone, it can be rebutted by proof of a contrary intention on the part of the landlord alone, or on the part of both parties. *Clinton Wire Cloth Co. v. Gardner*, *supra*. If it be a question of fact to be determined by the jury, under the instructions of the court, whether the holding over is such as to create a new tenancy, then such question of fact cannot be determined by a confession of it in a cognovit, and by a judgment of confession entered in pursuance of such cognovit. So to hold would be to deprive the debtor of his right to a trial by jury. The debtor, in authorizing a confession of judgment against him for rent due by the terms of a written lease which he has signed, cannot be thereby made to confess judgment in favor of a renewal of such lease, or in favor of a holding over under such lease. The fact of a renewal, or the fact of a holding over, is a fact dehors the written lease, and the terms of the written power of attorney contained in the lease. A judgment by confession must be for a fixed and definite sum, and not in confession of a fact that can only be established by testimony outside of the written documents required by the statute to be filed in order to enter up a judgment by confession.

In *Smith v. Pringle*, 100 Pa. 275, the Supreme Court of Pennsylvania held that a

confession of judgment for a term certain has reference to that particular term only, and does not authorize the entry of judgment for rent accruing after the expiration of the term certain, where the tenant has held over. In that case a judgment by confession was entered up for a certain amount upon a confession of judgment contained in a lease of certain premises executed by Pringle to Smith. Smith obtained a rule to show cause why the judgment should not be opened and he be let into a defense, which rule was afterwards made absolute, but the judgment was reversed, and the court there said: "The judgment in this case was entered under the power contained in the lease by Pringle to Smith for one year from April 1, 1875, at the rent of \$450. The judgment was confessed for the full sum of \$450, evidently to secure the payment of that rent. There is nothing to extend it as security beyond that amount. The renewal of the lease by the tenant continuing in possession clearly would not do so. When, therefore, the rent for the term of the lease was paid, the judgment was paid. The implied renewal of the lease could not revive the judgment once extinguished and dead. That the plaintiff might have recovered the rent accruing subsequently was nothing to the purpose." So, in the case at bar, the warrant of attorney gave authority to confess judgment for \$1,150, or for monthly installments of that sum amounting to \$50 each, and accruing during the period of 23 months from June 1, 1900, to April 30, 1902. The warrant of attorney could not be extended as security beyond that amount, and the continuation of appellant in possession beyond the expiration of the lease could not do so. When appellant paid all the rent, amounting to \$1,150, which became due in monthly installments during the period of 23 months, he paid all the money for which the warrant of attorney authorized judgment to be entered up against him. The power conferred by the warrant of attorney was thereby exhausted, and could not be revived by an implied contract resulting from a holding over by appellant. Counsel for appellee say that a warrant of attorney to confess judgment is a familiar common-law security, and is extended with the extension of the principal obligation; citing *Bush v. Hanson*, 70 Ill. 480. Undoubtedly, if the principal obligation named in the present lease—that is to say, the obligation to pay \$1,150 of rent in monthly installments during a period of 23 months—had been assigned by appellee, the security afforded by the warrant of attorney would have passed to such assignee. But in such case the debt assigned would be the same debt for which the warrant of attorney authorized the confession of judgment, and not a new and different debt accruing subsequently, and growing by implication out of a holding over by the tenant.

The rule that, where a tenant for year or

lease, the landlord, at his election, may treat the tenant as a tenant for another year upon the same terms as in the original lease, is subject to the condition that such holding over after the expiration of the lease is not under any new arrangement made by the landlord with the tenant. The rule does not apply where there is a new contract between the landlord and tenant under which the latter remains in possession. *Clinton Wire Cloth Co. v. Gardner*, supra; *Keegan v. Kinnare*, supra; *Goldsbrough v. Gable*, 140 Ill. 269, 29 N. E. 722, 15 L. R. A. 294. The doctrine is thus stated in 18 Am. & Eng. Ency. of Law (2d Ed.) p. 407: "In the absence of any express stipulations, the new tenancy created by a tenant's holding over after the expiration of his lease is implied by law to be upon the same terms and subject to all the covenants contained in the expired lease." In *Prickett v. Ritter*, 16 Ill. 96, it was held that where a tenant under a lease for a year or years, or for a stated period, holds over, it will be construed as an implied agreement that he shall hold over for a corresponding period upon the same terms as to rent and times of payment, unless there be some act of one or of both the parties which rebuts the implication. See, also, *Hunt v. Morton*, 18 Ill. 75; *McKinney v. Peck*, 28 Ill. 174.

In the case at bar the affidavits filed upon the motion to vacate the judgment, and for leave to plead to the declaration show that there was some new arrangement between appellee and appellant in reference to holding over and to the continued possession of the premises by the appellant. Appellant in his affidavit swears that appellee or his representative proposed to him, before the expiration of the written lease, to give him a new lease of the premises for two years, and that appellant agreed to remain upon the premises, and pay the same rent which he had already paid, on condition that certain repairs should be made. Appellee himself in his affidavit swears that before the expiration of the old lease he agreed with appellant that the latter should remain in possession of the premises at the same rent and upon the same terms, and that appellant agreed to execute a new lease upon the same conditions, terms, and promises as set forth in the old lease; and he also swears that in August, 1902, after the expiration of the lease, appellant agreed with him to sign a lease of the premises for two years upon the same terms as set forth in the old lease which expired on April 30, 1902. The new agreement thus made between the parties was different from the old agreement. The old agreement provided for a demise of the premises for a period of 23 months, while the new agreement provided for a demise of the premises for a period of 2 years. The presumption which would arise from the holding over by the appellant would be that the tenancy was renewed for a

presumption is rebutted by the statement, made in the affidavits, that the parties agreed upon a lease for two years, one of them saying that such lease was to be made absolutely and without condition, and the other that it was to be made upon the condition that certain repairs were to be made by the lessor. The new arrangement made, or sought to be made, as set forth in the statement preceding this opinion, is inconsistent with the idea that appellee, as landlord, was treating the appellant as a tenant holding over under the same terms as were prescribed by the lease.

It is true that the new agreement for a lease for a period of two years was an oral agreement, and, under the statute of frauds, was void as being an agreement that was not to be performed within the space of one year from the making thereof. 2 Starr & C. Ann. St. 1896 (2d Ed.) p. 1901, c. 59, § 1. But although the agreement may have been void under the statute of frauds, yet inasmuch as the treatment by the landlord of the tenant, who holds over, as one who holds over under the terms and conditions of the old lease, is a matter of intention on the part of the landlord, such void verbal agreement serves to explain the holding over after the expiration of the written lease, and to show that it was not upon the terms of the original lease. That such a new verbal contract, void under the statute of frauds, may serve to show that the landlord did not intend to treat the tenant as holding over under the terms of the original lease, was held by the Supreme Court of Alabama in the case of *Crommelin v. Thiess & Co.*, 31 Ala. 412, 70 Am. Dec. 499, and approved of by this court in *Clinton Wire Cloth Co. v. Gardner*, supra. It being true, then, that the execution of a new agreement between the parties, or the pendency of a treaty between them for a further lease, rebuts the presumption that appellee intended to treat appellant as a tenant holding over under the old lease, it cannot be said that the power conferred by the warrant of attorney to confess judgment for rent due under the old lease was continued after the expiration of such lease, and warranted the entry of judgment against the appellant for the rent accruing after such expiration. If appellant was not holding over under the terms and conditions of the old lease, he was not holding over subject to the right of the appellee to enter judgment under the warrant of attorney as expressed in the old lease.

There is another qualification to the rule, already announced, as to the presumption of the implied contract from the fact of the holding over by the tenant. Taylor, in his work on *Landlord and Tenant* (volume 2 [9th Ed.] § 525), says: "Where the landlord suffers the tenant to remain in possession after the expiration of the original tenancy, the law presumes the holding to be upon the

same rent and to the covenants of the original lease, so far, at least, as these are applicable to the new condition of things." The qualification here referred to is that the covenants of the original lease shall be applicable to the new condition of things. If, in the present case, the warrant of attorney to confess judgment, as embodied in the lease, is a covenant, and not a mere collateral agreement, it cannot be said that it is applicable to the new condition of things created by the holding over of appellant under the circumstances already stated. A power of attorney to confess judgment is a written instrument, and the covenant to pay rent, as embodied in the lease, is a written obligation. Therefore the warrant of attorney in the lease is a written power of attorney to enter judgment upon a written obligation. If the warrant of attorney is applicable to the holding over as thus indicated, then there would be a mere oral or implied power of attorney to enter judgment upon an oral or implied contract. Therefore, upon the doctrine of inapplicability, it cannot be said that the authority to confess judgment was extended from the original lease to the subsequent implied contract created by the holding over.

For the reasons above stated, we are of the opinion that the Appellate Court, and the superior court of Cook county, erred in denying the motion to vacate the judgment, and in refusing to allow appellant to plead to the declaration. Accordingly, the judgments of the Appellate Court and of the superior court of Cook county are reversed, and the cause is remanded to the superior court for further proceedings in accordance with the views herein expressed.

Reversed and remanded.

(213 Ill. 389)

RAY v. LOBDELL.*

(Supreme Court of Illinois. Dec. 22, 1904.)

MORTGAGES—ASSUMPTION—TRANSFER OF PROPERTY—CONSIDERATION—PROMISE TO PAY DEBT—EXTENSION OF TIME—ATTORNEYS—AUTHORITY.

1. Where a grantee of land purchases for full value, and retains in his hands from the consideration a sufficient sum to satisfy the incumbrance, he is personally liable for the payment thereof, though he has not expressly agreed to pay such incumbrance.

2. A corporation, indebted on notes, agreed to convey its equity of redemption in certain mortgaged real assets to defendant for the benefit of the holders of such notes. The holders formed an association and employed an expert to value the property, whose valuations were accepted as the basis of a settlement, by which the real assets were conveyed to defendant, subject to the incumbrances thereof, in full satisfaction of the notes held by the members of the association. No purchase money was agreed to be paid to the grantor, and after the delivery of the deeds to defendant no purchase money remained in his hands, or in the hands of the

such incumbrances. *Held*, that the transaction was not a sale of land in which the incumbrance was deducted from the purchase price, and hence neither defendant nor the association was personally liable to pay such incumbrances.

3. Where land was conveyed by defendant in trust for certain creditors of the grantor, the agreement of the creditors' attorneys, on defendant's behalf, in negotiating an extension of time for the payment of certain incumbrances on the land, in defendant's absence, and without his knowledge or authority, to pay such indebtedness, did not bind defendant.

Error to Appellate Court, First District.

Action by Julia M. Ray against Edwin L. Lobdell. From a decree of the Appellate Court (110 Ill. App. 230), reversing a judgment in favor of complainant, she brings error. Affirmed.

This was a bill in chancery, filed by the plaintiff in error in the superior court of Cook county to foreclose a trust deed executed by Willie W. Henderson to the plaintiff in error to secure the payment of his two promissory notes, for the sum of \$12,500 each, upon a leasehold interest for 99 years in certain real estate located upon Van Buren street, in the city of Chicago. The defendant in error, at the time the suit was commenced, held the title to said leasehold interest for the benefit of the Bankers' Land Association, and the complainant sought by her bill to hold him personally liable for any deficiency which might remain unpaid after the sale of said leasehold interest. The issues were made up and the cause was referred to a master, and upon the coming in of his report a decree of sale was entered and the leasehold interest was sold. Afterwards the master reported a deficiency, and a decree for the sum of \$26,521.08 was rendered against defendant in error, which decree for said deficiency, on appeal to the Appellate Court for the First District, was reversed, and the complainant has sued out this writ of error.

Myron H. Beach, for plaintiff in error. Ullmann & Hacker, Defrees, Brace & Ritter and Sears, Meagher & Whitney (Nathaniel C. Sears and William Brace, of counsel), for defendant in error.

HAND, J. (after stating the facts). The sole question presented in this case for determination is: At the time the defendant in error acquired title to said leasehold interest, did he assume and agree to pay the indebtedness secured by said trust deed in such manner as to make him personally liable in this proceeding for any deficiency which might remain unpaid thereon after a sale of said leasehold interest? There is no contention that the defendant in error, at the time he acquired title to said leasehold interest, assumed or agreed to pay the incumbrance thereon by express contract; but it is urged the law raised an implied promise on his part to pay, by reason of the fact that the amount of the trust deed was deducted

*Rehearing denied February 9, 1905.

from the purchase price at the time and date acquired title to the leasehold interest—the contention of plaintiff in error being that the leasehold interest was purchased by the defendant in error for \$40,000; that the incumbrance, \$25,000, was deducted therefrom; that \$15,000 of the purchase money was paid; and that \$25,000, the balance of the purchase money, remained in his hands with which to pay said incumbrance. Hence his liability. There is but little chance for controversy as to the law governing this case, as the rule is well settled in this state, if the incumbrance is deducted from the purchase price (*Comstock v. Hitt*, 87 Ill. 542; *Rapp v. Stoner*, 104 Ill. 618; *Siegel v. Borland*, 191 Ill. 107, 60 N. E. 863), the grantee becomes liable for the debt. The controlling question, therefore, is one of fact.

It appears from the evidence that Lobdell, Farwell & Co., a corporation, of which the defendant in error was president, was engaged in loaning money and handling commercial paper in the city of Chicago; that the Harvey Lumber Company, also a corporation doing business in the city of Chicago, had outstanding notes, drafts, accounts, etc., to an amount exceeding \$88,000, a portion of which indebtedness was held by Lobdell, Farwell & Co. and the balance of which had been negotiated by said company; that to secure said indebtedness said Harvey Lumber Company had conveyed to a trustee or trustees its equity in five pieces of Chicago real estate, including said leasehold interest; that subsequently it became apparent to the Harvey Lumber Company and its creditors that it could not pay said indebtedness, at least in cash, and an arrangement was made between said Harvey Lumber Company and its creditors that it should convey or have conveyed to the defendant in error, for the benefit of said creditors, three pieces of said real estate and said leasehold interest, subject to the incumbrances thereon, in full payment and satisfaction of the indebtedness for which said real estate and leasehold interest were then held as surety. Prior to such transfers an expert examined the different pieces of real estate, including the leasehold interest, proposed to be taken in satisfaction of said indebtedness and fixed a valuation thereon. In his report to the creditors of said company said leasehold interest was valued at \$40,000, incumbrance \$25,000, equity \$15,000. Thereafter the three pieces of real estate and the leasehold interest, which, according to said report, were valued at \$208,000 and which were incumbered to the amount of \$95,000, leaving an equity therein of \$112,400, were conveyed to the defendant in error in payment and satisfaction of \$88,072.32 in the notes and accounts of the Harvey Lumber Company, which notes and accounts were surrendered and canceled. During the negotiations between the Harvey Lumber Company and its creditors, the creditors of the Harvey Lum-

ber Company, for the purpose of securing the properties which the Harvey Lumber Company proposed to convey to the defendant in error for the benefit of said creditors, entered into a voluntary association known as the Bankers' Land Association. After said properties were conveyed to defendant in error, he paid with the funds of the association the back taxes and ground rent upon the lease, and the interest upon the notes secured by the trust deed to January 1, 1894, and \$5,000 upon the note first maturing, and \$2,500 of said note was extended one year, and the balance thereof, \$5,000, and all of the other note, was extended five years. The deed conveying the leasehold interest to the defendant in error was made to him individually, and recited a consideration of \$1 and that the deed was made subject to said trust deed.

It clearly appears that the creditors of the Harvey Lumber Company, who were mainly banking corporations and individuals engaged in loaning money, several of whom were not residents of the state, who had purchased the paper of said Harvey Lumber Company, had not, at the time title to said leasehold interest and other properties was taken by defendant in error, voluntarily entered upon the purchase of real estate in the city of Chicago, but found themselves the holders of a large amount of overdue paper of a corporation which was unable to meet its obligations and whose assets consisted mainly of equities in heavily incumbered Chicago real estate. To meet the situation then confronting them, they accepted, in satisfaction of the obligations which they held against said corporation, the equities which it held in three pieces of Chicago real estate and said leasehold interest, which equities said corporation conveyed or caused to be conveyed to defendant in error for their benefit. The creditors of the Harvey Lumber Company, for whom the defendant in error took title to said leasehold interest and other properties, did not purchase said properties for cash, but released the indebtedness of the Harvey Lumber Company to the members of the association in exchange for the equities of the Harvey Lumber Company in said properties, including said leasehold interest. No purchase money was agreed to be paid to the Harvey Lumber Company, and after the delivery of deeds to the defendant in error no purchase money remained in the hands of the members of the association or in the hands of the defendant in error. While it may be true that the valuations fixed by the expert and afterwards carried onto the books of the association were the valuations that controlled the creditors of the Harvey Lumber Company in determining whether they would accept deeds to said properties, including said leasehold interest, and release and discharge the indebtedness of the Harvey Lumber Company held by the members of the association, it cannot be said that the

leasehold interest was purchased at \$40,000, or any other sum. The Harvey Lumber Company owed the members of the association \$88,072.32. It owned equities which the expert estimated of the value of \$112,400, which it offered to give the members of the association in exchange for the release and satisfaction of said indebtedness. The members of the association had the choice to accept the equities of the Harvey Lumber Company in said properties and release said indebtedness, or to enforce their lien. The members of the association elected to accept a transfer of the equities and released the indebtedness. Under such circumstances it would be inequitable to decree that the creditors, had deeds been made directly to them, had bound themselves to pay the incumbrances upon said properties in full, by reason of the fact they had employed an expert to report upon the value of the properties, the amount of the incumbrances, and the equities of the Harvey Lumber Company remaining therein, and had used such report as the basis of their calculations in making a settlement of the indebtedness of the Harvey Lumber Company. If it would be inequitable to hold the creditors of the Harvey Lumber Company liable for said incumbrances, it would be doubly so to hold the defendant in error liable for the payment thereof, who took title to said premises only for the benefit of said creditors.

In *Rapp v. Stoner*, supra, the consideration stated in the deed was \$15,000, and the deed was made subject to three mortgages, aggregating \$10,070. The difference between these two amounts was paid by the grantee by the conveyance to the grantor of a Kansas farm, consisting of 560 acres. It was sought to hold the grantee personally liable, on the ground the amount of said mortgages had been deducted from the purchase money and remained in his hands, by reason of which fact it was contended he was equitably bound to pay said mortgages. The court, on page 624, said: "In this case there is, perhaps, no doubt, from the evidence, that the parties, in making the trade, estimated the value of the Stoner lots at some \$15,000. The incumbrances were known to be some \$10,000, and the Kansas lands estimated at some \$5,000; but there was no such deduction of the \$10,000 incumbrance from the purchase money agreed to be paid, and leaving it in the hands of the purchaser, as to create a personal liability. It may be, if Reiss had paid \$15,000 to Stoner for the property, and the latter had left in the hands of Reiss \$10,000 of the amount to be paid by him in discharge of the mortgages, the money might, under such circumstances, be regarded as a trust fund, and Reiss as a trustee, holding the money for the benefit of those who had the mortgages. But no such case is presented by this record. Here was a mere exchange of Kansas lands for incumbered property. Doubtless Reiss expected,

when he made the trade, that he would, in time, pay off the incumbrances and clear the property of all liens. Unless he entertained this expectation, it would have been folly on his part to have made the trade and paid anything for a deed from Stoner; but the fact that he expected to pay the mortgages, and even paid some interest to the holders of the mortgages, cannot be held sufficient to fix his personal liability."

In *Siegel v. Borland*, supra, there was an exchange of properties; the property acquired by appellant being subject to a mortgage. There was no express agreement on his part to pay the mortgage, but it was held by the court below that an implied agreement to assume the same arose out of the transaction. In reversing the decree, on page 111, it was said: "The deed was to be made, and was made, subject to the trust deed. The contract and deed not only failed to imply any assumption of the debt, but rather excluded the implication. Complainant can only establish the liability of appellants by proving a contract to assume and pay the debt, or some part of it. To sustain the decree, the facts proved must amount to an agreement to pay the \$25,000 upon the debt secured by the trust deed. It is true that a contract may be implied, and that if the amount of an incumbrance is included in and forms a part of the consideration which a grantee promises to pay for premises, and he retains that part of the purchase price, the law will create a personal liability against him, on the ground that he has agreed to pay such indebtedness. In such a case the law presumes that the grantee has agreed to apply the money so retained for the purpose of paying the incumbrance. Either there must be an express assumption of the indebtedness, or the amount must be allowed in the purchase price, so that the law will imply the promise."

The rule to be deduced from the authorities is, if the vendee of land incumbered by mortgage or trust deed purchases only the vendor's equity of redemption, he is not personally liable to pay the incumbrance resting upon the land, unless he expressly assumed and agreed to pay the same. If, however, he purchases land for its full value, and retains in his hands, out of the consideration, a sufficient sum to satisfy the incumbrance, he may be held personally liable for the payment thereof, even though he has not expressly agreed to pay the incumbrance resting upon the land. *Comstock v. Hitt*, supra; *Hammer v. Johnson*, 44 Ill. 192; *Fowler v. Fay*, 62 Ill. 375; *Rapp v. Stoner*, supra; *Drury v. Holden*, 121 Ill. 130, 13 N. E. 547; *Consolidated Coal Co. v. Peers*, 166 Ill. 361, 46 N. E. 1105, 38 L. R. A. 624; *Crawford v. Nimmons*, 180 Ill. 143, 54 N. E. 209. We think it clear in this case the equity of redemption of the Harvey Lumber Company in said leasehold was all that was sold to its creditors and conveyed to defendant in

expressly agree to pay the incumbrance resting on the leasehold, he cannot be held personally liable to pay the balance due upon said notes and trust deed.

The further contention is made that at the time the taxes, ground rent, interest, and \$5,000 upon the first note were paid, in consideration of the extension of the time of payment of the balance due upon the notes and trust deed, the defendant in error agreed to pay said indebtedness. An arrangement for the extension was made by the attorneys of the Bankers' Land Association with the husband of plaintiff in error, who represented her. The defendant in error was not present at the time the contract for the extension of the time of payment was made, and he and the attorneys of the association concur in testifying that the attorneys who represented the association when such extension was obtained had no authority to represent the defendant in error. While there is ample evidence in the record that the time of payment of the balance of the notes was extended by the plaintiff in error, the evidence in the record does not show that the defendant in error ever agreed, in consideration of such extension, to pay the balance due upon said notes.

The question whether the same rule as to implied assumptions of indebtedness obtains in case of one taking title as trustee as would apply if he took title in his individual capacity has been discussed in the briefs. In the view we have taken of this case it has been unnecessary to consider that question. The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

(218 Ill. 397)

WENHAM et al. v. INTERNATIONAL PACKING CO.*

(Supreme Court of Illinois. Dec. 22, 1904.)

APPEAL AND ERROR—DECISIONS REVIEWABLE—JUDGMENT OF APPELLATE COURT—LIEN OF JUDGMENT—LIMITATIONS—NECESSITY OF ISSUING EXECUTION.

1. An order setting aside an execution levy and sale thereunder was reversed on appeal to the Appellate Court in a case wherein the sole question was whether the purchaser took anything by his purchase at the sale, and the judgment of the Appellate Court was that the order be reversed and the cause remanded in accordance with the views expressed in its opinion, which declared that the purchaser took nothing, and that the motion for such order should have been allowed. *Held*, that the judgment of the Appellate Court was such that no further proceedings could be had in the court below except to carry into effect its mandate, and an appeal was therefore properly prosecuted to the Supreme Court on that theory, pursuant to Hurd's Rev. St. 1903, c. 110, § 91.

2. Hurd's Rev. St. 1903, c. 77, § 1, provides that a judgment of a court of record shall be a lien on real estate for seven years, but that, if execution is not issued thereon within a year

after that time. Section 2 provides that, when a party in whose favor a judgment is rendered is restrained by a judicial order from issuing execution or selling thereon, the time he is so restrained shall not be considered as any part of the year mentioned in section 1. *Held* that, where a defendant defaulted and judgment was rendered for plaintiff, and thereafter defendant was given leave to plead, and it was ordered, "The judgment heretofore entered herein of record to stand as security," plaintiff was restrained within the meaning of section 2, so that the limitation of section 1 as to issuing execution ceased to run until his recovery of a subsequent judgment.

Appeal from Appellate Court, First District.

Action by John Cichowicz against the International Packing Company. There was judgment for plaintiff, which was afterwards reversed (107 Ill. App. 234), and from an order setting aside an execution issued thereon, and the sale and certificate of purchase thereunder, and requiring plaintiff's attorney, David K. Tone, to pay to the clerk of the court for Charles F. Wenham, the purchaser, the full amount bid at the sale, the purchaser and plaintiff's attorney appealed to the Appellate Court. The order was reversed, and defendant appeals. Reversed, and order affirmed.

On June 21, 1900, John Cichowicz brought an action on the case in the superior court of Cook county against the International Packing Company, the appellee, to recover damages for a personal injury. The defendant defaulted, and on July 10, 1900, judgment was rendered by the court for \$5,000 in favor of the plaintiff. Afterwards, on July 14, 1900, leave was given the defendant to plead *instanter*, on payment of \$100 to plaintiff's attorney and \$250 to plaintiff, the said sums to be deducted from any amount subsequently recovered. It was further provided in the order that "the judgment heretofore entered herein of record to stand as security." A trial on December 24, 1901, resulted in a verdict for \$3,000 in favor of the plaintiff, and, after overruling motions for a new trial and in arrest of judgment, the court, on February 14, 1902, entered judgment against the defendant, which provided that "the judgment entered herein of record on the 10th day of July, A. D. 1900, for the sum of \$5,000, stand in as full force and effect as at the time of the rendition thereof," and that such judgment be satisfied in full of record upon payment of \$2,650, together with interest and costs of suit. The defendant prayed an appeal from that judgment to the Appellate Court for the First District, but the appeal was not perfected.

On March 20, 1902, the plaintiff caused an execution to be issued on this judgment, and a levy was made thereunder on certain real estate in the city of Chicago which had belonged to the defendant on July 10, 1900, but which had been sold and transferred to Isadore Schmitt for an expressed consideration of \$75,000, by deed dated July 18, 1900,

*Rehearing denied February 9, 1905.

and recorded July 23, 1900. This real estate was sold by the sheriff on July 15, 1902, under the execution and levy to Charles F. Wenham, for \$2,990, and on July 23, 1902, a certificate of sale therefor was issued by the sheriff to him. On the day of sale the sheriff paid to David K. Tone, plaintiff's attorney, \$2,935 in full of the judgment and interest.

On July 1, 1902, after levy but before sale, a writ of error, which did not operate as a supersedeas, was sued out of the Appellate Court for the First District to the superior court, by the International Packing Company, to review the judgment rendered against it, and on March 19, 1903, that judgment was reversed, but the cause was not remanded. *International Packing Co. v. Cichowicz*, 107 Ill. App. 234. On May 4, 1903, the International Packing Company, pursuant to a written notice served upon David K. Tone, as the plaintiff's attorney, and upon him individually, and upon Charles F. Wenham, presented to the superior court of Cook county its motion in writing for an order setting aside the execution, levy and sale, and certificate of purchase above mentioned, and requiring David K. Tone to pay to the clerk of the court for Charles F. Wenham, or whoever may be entitled thereto, the full amount of the bid made by Wenham at the sale. Defendant contended that the order of July 14, 1900, did not stay the judgment; that, as no execution actually issued within a year after the date of the judgment, the lien was lost; and that, as the deed to Schmitt conveyed all the title held by defendant, Wenham took nothing by the sale and certificate of purchase, and the relief sought by the motion should be awarded. The motion was accompanied by affidavits setting out the facts heretofore recited in this statement, and also averring that no execution was issued on the judgment within one year from July 10, 1900, and that plaintiff was not restrained by injunction, appeal, or by the order of a judge or court, nor was he delayed on account of the death of the defendant, from issuing execution on the judgment between July 10, 1900, and March 20, 1902. It is also stated in the affidavits, upon information and belief, that David K. Tone, on July 15, 1902, was claiming to be the owner of the judgment; that the \$2,990, less costs of sale, was paid to him; and that he still holds in his possession and under his control the amount so paid to him by the sheriff.

At the hearing of the motion, David K. Tone appeared in court in his own behalf and for and on behalf of Cichowicz and Wenham, and objected to the jurisdiction of the court to enter any order affecting the rights of any of the parties. A hearing was had on the motion, appellee herein introducing the documentary evidence of the proceedings in the cause and the affidavits hereinabove referred to, which was all the evi-

dence heard on said motion, and the court thereupon entered an order overruling the motion of the defendant. The packing company appealed from that order to the Appellate Court for the First District, and that court, after stating, in its opinion, that the motion should have been allowed, reversed the order of the superior court, and remanded the cause for further proceedings in conformity with that opinion. It also awarded costs against Cichowicz, Wenham, and Tone. This appeal is prosecuted by the two last-named persons to present for review the judgment of the Appellate Court.

It is here insisted that the Appellate Court erred in reversing the order of the superior court and remanding the cause, because the order of July 14, 1900, stayed execution until the entry of the judgment of February 14, 1902, and the execution, excluding the time between those dates, was issued within a year from the rendition of the judgment.

In the superior court the parties submitted propositions of law, and the action of that court in passing upon such propositions properly presents the question arising on the merits, which is discussed in the following opinion.

A preliminary question is brought to our attention by a motion made in this court by the appellee to dismiss this appeal on the ground that the judgment of the Appellate Court is not one from which an appeal lies.

David K. Tone, pro se. Thomas J. Sutherland, for appellant Charles F. Wenham. F. J. Canty and A. B. Melville, for appellee.

SCOTT, J. (after stating the facts). The order of the superior court was reversed by the Appellate Court, and the cause was remanded. An appeal is prosecuted from the Appellate Court to this court on the theory that the judgment of that court is "such that no further proceedings can be had in the court below except to carry into effect the mandate of the Appellate Court." The appellee moves to dismiss the appeal, and argues that the judgment of the Appellate Court does not fall within the language above quoted, which is from section 91, c. 110, Hurd's Rev. St. 1903. The judgment of the Appellate Court is that the order of the superior court be reversed, "and that this cause be remanded to the superior court of Cook county for further proceedings in accordance with the views expressed in the opinion of this court." The opinion of that court contains these words: "Appellee Wenham took nothing by his purchase at the sheriff's sale, and the motion of the appellant should have been allowed." Any further proceedings in the superior court must have been in accord with that language had no appeal been prosecuted to this court.

Where a court of appellate jurisdiction, in considering a cause, determines the issues and decides the questions involved upon their merits, and the case is reversed and

remanded with directions to proceed in conformity with the views expressed in the opinion, there is no power in the court below except to enter a final order or judgment without a retrial; and, for the purpose of ascertaining whether the appellate tribunal has determined the issues and decided the questions involved upon their merits, it is necessary to ascertain what the issues are, and to examine the opinion of the court which deals therewith. In re Estate of Maher, 210 Ill. 160, 71 N. E. 438.

In this case the sole question is whether Wenham took anything by his purchase at the sheriff's sale. The Appellate Court determined that question on its merits adversely to appellant, holding that the motion made in the superior court by the International Packing Company, which is appellee here, should have been allowed. Had the case gone back to the superior court in accordance with the judgment of the Appellate Court, it is manifest that the superior court could have done nothing but carry into effect the mandate of the Appellate Court by allowing the motion of the packing company, appellee here.

The motion to dismiss the appeal will be denied.

Section 1, c. 77, Hurd's Rev. St. 1903, provides that a judgment of a court of record shall be a lien on the real estate of the defendant within the county for a period of seven years, but that, if execution is not issued thereon within one year from the time the same becomes a lien, it shall cease to be a lien after the expiration of that year. Section 2 of the same chapter is in words and figures following:

"When the party in whose favor a judgment is rendered is restrained, by injunction out of chancery, or by appeal, or by the order of a judge or court, or is delayed, on account of the death of the defendant, either from issuing execution or selling thereon, the time he is so restrained or delayed shall not be considered as any part of the time mentioned in sections 1 or 6 of this act."

The question here is whether Cichowicz was restrained by the order of the court by which appellee was permitted to plead. That order was entered on July 14, 1900, and, so far as material, was as follows: "Now, on this day it is ordered that leave be and is hereby given the defendant to plead herein instanten, and the judgment heretofore entered herein of record to stand as security."

In Hier v. Kaufman, 184 Ill. 215, 25 N. E. 517, a similar order had evidently been made in reference to a judgment by confession, and this court there said that a court of law exercises an equitable jurisdiction over a judgment by confession, and may open the judgment and allow the debtor to present his defense, but will protect the creditor "by

permitting the judgment to stand as security. In such cases the proceedings on the judgment are merely stayed; the enforcement of the plaintiff's lien is suspended, but the lien is fully preserved; if the defense is successful, the judgment falls; if otherwise, the judgment is to be enforced." While the question involved in that case was not the same as the one now before us, we are of the opinion that the language quoted is an accurate statement of the law applicable here.

The order is that the judgment is to stand as security, which, we think, means that it is to stand or exist for no other purpose. The object of the entire order is to permit the defendant to present his defense, saving, however, to the plaintiff all rights acquired by the judgment in case the defense is without merit. If, after the making of this order, the plaintiff could have proceeded to enforce the judgment by execution, it is manifest that the right of the defendant to plead might be of no avail whatever, because, even if it were successful on the trial of the issue formed by its plea, the plaintiff might have collected the original judgment and put the proceeds beyond the reach of the defendant long before the determination of the issue raised by the plea.

The order under consideration operated to restrain the plaintiff from the date of its entry, July 14, 1900, until the date of the judgment entered in pursuance of the verdict, which was February 14, 1902. Excluding this period, the execution was issued within a year from the time the original judgment became a lien.

Our view of this matter is supported by the following authorities: 6 Ency. of Pl. & Pr. 221, 222; Ford v. Whitridge, 9 Abb. Prac. 416; Rodbourn v. U., I. & E. R. R. Co., 28 Hun, 369; MacDougall v. Hoes (Sup.) 58 N. Y. Supp. 209.

It is urged that the sale under the execution should be set aside because the real estate was sold en masse for a sum so much less than the value of the property as to be grossly inadequate. The property consisted of two lots. It appears by the sheriff's return that they were offered separately, and, no bids being received on either, they were then offered together and sold to Wenham; but it is said that Wenham's bid upon which the sale was made was not a reasonable one in amount, because it was very much less than the value of the property, and that the sheriff should have refused to accept the bid and continued the sale. There is in this record no evidence whatever of the value of the property on the day of the sale under execution, and this question, for this reason, does not arise on this record. The judgment of the Appellate Court will be reversed, and the order of the superior court will be affirmed.

Judgment reversed.

(213 Ill. 404)

EVANS v. WOODSWORTH et al.*

(Supreme Court of Illinois. Dec. 22, 1904.)

JUDGMENTS—ATTACK FOR FRAUD—LACHES—PLEADING—DISCRETION OF COURT—RES JUDICATA.

1. Courts of equity will not set aside a decree as obtained by false evidence, but only for fraud which gives the court colorable jurisdiction.

2. In a suit to set aside a decree for fraud, the proof must be clear and satisfactory.

3. The findings of the chancellor, made after he has heard the witnesses in open court, will not be disturbed on appeal, unless they are clearly against the weight of the testimony.

4. Where complainant in a suit attacking a decree of divorce obtained by his wife knew that she had instituted the suit, but took no steps to prevent her from obtaining a decree, and, after knowing that she had obtained a decree, waited almost 2½ years, until she was dead and rights of third parties had intervened, before bringing the suit, his right to obtain relief on the ground of fraud of his wife in the procurement of the divorce decree was barred by laches.

5. Laches need not be set up by way of answer to a bill in equity, where its existence is apparent on the face of the bill.

6. What will constitute laches in a given case depends upon the discretion of the court, and, unless that discretion is abused, it will not be interfered with.

7. A former adjudication can only be availed of in equity by being alleged in the bill or set up by way of plea or answer.

Appeal from Appellate Court, First District.

Suit by James G. Evans against Effie W. Woodsworth and others. From a judgment of the Appellate Court affirming a decree dismissing the bill, complainant appeals. Affirmed.

D. H. Stapp and John M. Hess (A. N. Watterman, of counsel), for appellant. Wharton Plummer and George W. Plummer, for appellees.

WILKIN, J. On March 20, 1893, Isabella G. Evans filed her bill for divorce in the superior court of Cook county against her husband, James G. Evans, on the ground of desertion and extreme and repeated cruelty. She also then filed her affidavit that the defendant was a nonresident of this state and that his place of residence was unknown to her and upon diligent inquiry could not be ascertained. Service was obtained by publication, and on May 13, 1893, upon a hearing, as is claimed by the appellant, that bill was dismissed, without costs. On September 27, 1893, she filed a second bill for divorce in the circuit court of that county, which was substantially, if not literally, a copy of the bill previously filed, except as to the title of the court, and she then filed her affidavit of his nonresidence substantially as in the former case, except that it stated that his last known place of residence was San Francisco, Cal., and upon that affidavit notice of publication was duly made. On December 11, 1893, upon the defendant's default and

a hearing, she obtained a decree as prayed. On August 10, 1894, she died seized of certain real estate, which by her last will she devised to her sister, Effie W. Woodsworth, for life, with remainder to the two infant daughters of said sister. Her will was duly admitted to probate February 13, 1895, and Mrs. Woodsworth appointed administratrix with the will annexed. On June 4, 1896, more than 2½ years after the decree of divorce had been rendered, the husband, James G. Evans, filed this bill, making the appellees defendants, in which he alleged that the affidavits of nonresidence filed by his wife in the superior court, and also in the circuit court, were falsely and fraudulently made, for the purpose of imposing upon the court and to give it apparent and colorable jurisdiction; that the decree of divorce was fraudulent and void, being procured by the deception practiced upon said court, and that the same is a cloud upon his interest in any estate left by his said wife; that the desertion and cruelty charged in the bill for divorce were false. The prayer of the bill was that the decree of divorce be set aside and annulled. The adult defendants filed their joint and several answer, denying each material allegation of the bill, and in effect pleading laches on the part of the complainant. The guardian ad litem appointed for the infant defendants filed his answer, denying generally the averments of the bill. The cause was heard in open court on oral and documentary evidence, and decided against the complainant. He thereupon asked leave to amend his bill, so as to make it conform to his proofs. That motion was not then disposed of, but the cause was referred to a master to examine the testimony and report to the court whether the amendment conformed thereto. The master subsequently made his report, in which he found that the allegations of complainant's amended bill were not supported by the evidence; reporting upon the whole cause adversely to the complainant. To his report objections were filed and overruled. Exceptions were then heard by a judge other than the one who first heard the cause, and overruled, the report approved, and the motion to amend the bill so as to conform to the testimony denied. On June 15, 1903, the case came on for final hearing before the chancellor who first heard the testimony, and he dismissed the amended bill for want of equity. After the filing of the record in the Appellate Court a third chancellor ordered the record to be so amended as to show that the proposed amendment was presented November 2, 1903, nunc pro tunc as of November 8, 1897. The Appellate Court for the First District having affirmed the decree of the circuit court, this appeal is prosecuted.

It is insisted by the appellant that his wife was guilty of fraud in making the affidavit of his nonresidence on each of the bills for divorce, which she knew to be false, and in

*Rehearing denied February 9, 1906.

against him for desertion, when she knew there was no basis for such charge; also, that the decree of the superior court, under the bill there filed, is *res judicata*, and therefore the decree of the circuit court sought to be set aside by this bill should be held absolutely void. The evidence introduced upon the hearing upon the allegations of fraud as to the affidavits of nonresidence was in irreconcilable conflict. There is evidence in the record tending to prove that the wife knew that her husband was not a nonresident of Illinois, but there is also much testimony to the contrary. As to the desertion, it does clearly appear that for a long time prior to the filing of the first bill, and continuing up to the time the decree was rendered in the circuit court, the complainant lived separate and apart from his wife, coming and going from the city of Chicago, where she lived, from time to time, without going to her place of residence, and without having any communication with her whatever. Courts of equity will not, however, set aside a decree upon the ground that it was obtained by false evidence, but only for fraud which gives a court colorable jurisdiction over the defense presented. *Burton v. Perry*, 146 Ill. 71, 34 N. E. 60, citing *Caswell v. Caswell*, 120 Ill. 377, 11 N. E. 342. As in all other cases where fraud is alleged, the proof must be clear and satisfactory. From our consideration of all the testimony in this record we cannot say that the conclusion of the master and chancellor, that the allegations of the bill as to fraud in obtaining jurisdiction of the court in which the decree of divorce was rendered were not sustained by the proofs, was erroneous. Moreover, this case falls within the rule that, where the chancellor has heard the witnesses in open court, we will not disturb his findings, unless they are clearly and manifestly against the weight of the testimony.

There is, however, a further consideration which must lead to an affirmance of the decree of the circuit court and the judgment of the Appellate Court. The complainant's conduct toward his wife from the time he married her, on May 31, 1884, until their separation, as shown by the uncontradicted testimony, seems to have been wholly without excuse or justification. As early as October, 1893, he knew that she was taking steps to secure a divorce from him on the ground of desertion, and had actual notice of the bringing of the suit in the circuit court, but took no steps whatever to prevent her from obtaining the decree. He admits that in February, 1894, he knew that the decree had been rendered, and if it had been procured by fraud, as he now claims, he then knew of such fraudulent conduct; at least, knowledge as to the affidavits of nonresidence and the grounds upon which the divorce was claimed was open to him through the rec-

der these circumstances it was manifestly his duty, if he intended to seek to have the decree vacated and set aside, to act promptly. Instead of doing so, he took no steps in that direction until after the lips of his wife had been closed by her death, and the rights of third parties had intervened. No sufficient explanation is shown for this delay. The contention that the defense was not available under the answers is without force. Certainly this position could not be maintained as against the infants, who answer by their guardian *ad litem*. We think the answer of the adults also substantially set up the defense of laches. But it is not necessary to set up that defense by way of an answer to a bill in equity, where the laches is apparent on the face of the bill, as we think it is here. *Lloyd v. Kirkwood*, 112 Ill. 329. "Where a party has slept upon his rights and acquiesced in what has been done, equity will not afford its aid in enforcing his demands." *Vermillion County Children's Home v. Varner*, 192 Ill. 594, 61 N. E. 830. What will constitute laches in a given case depends upon the discretion of the court, and unless that discretion is abused it will not be interfered with. Here we think the chancellor might very properly have placed his decision upon that ground alone.

We do not regard the question of *res judicata* as presented by this record for our decision. It is a familiar rule that former adjudication can only be availed of by being alleged in the bill or set up by way of plea or answer, and in the present case no such defense was interposed. It is true, the complainant attempted to set it up in his amended bill, which he claimed was necessary in order to conform to the testimony; but leave to file that amendment was denied, and no error has been assigned upon the ruling of the court in that regard. If, however, the question were here open to discussion, it is too clear for argument that, in the absence of the testimony upon which the bill in the superior court was dismissed and that upon which the decree in the circuit court was rendered, it is impossible to tell whether the one was a bar to the other or not. The bill in the superior court, as suggested by the Appellate Court, may have been dismissed because the proof of desertion was not sufficient because of the lapse of time between the abandonment and the filing of the bill. We think, also, that the order of dismissal without costs in that court is perfectly consistent with the suggestion that the complainant may have dismissed the bill of her own motion. At all events, there is nothing here to show that that bill and decree were a bar to the decree rendered by the circuit court.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

(213 Ill. 430)

GAGE v. PEOPLE ex rel. **HANBERG**, County Collector.*

(Supreme Court of Illinois. Dec. 22, 1904.)

SPECIAL ASSESSMENTS—APPLICATION FOR SALE FOR INSTALLMENT—ATTACKING JUDGMENT FOR PRIOR INSTALLMENTS—CERTIFICATE OF PUBLICATION OF NOTICE.

1. On application for judgment of sale for the fourth installment of an assessment, the validity of the judgment for the earlier installments may not be questioned; the proceedings being independent.

2. The certificate of publication of the notice of application for judgment of sale for an assessment, reciting that the foregoing "is a list of delinquent * * * lots" on which taxes remain due and unpaid, "and also a list of delinquent * * * lots" on which special assessments and special taxes remain due and unpaid, "with notices hereto attached, and that the same were duly published and advertised," is not ambiguous; the words "the same" applying to and including all the lists and notices thereinbefore mentioned.

Error to Cook County Court; O. N. Carter, Judge.

Application by the people, on the relation of John J. Hanberg, county collector of Cook county, for a judgment and order of sale on a warrant for collection of the fourth installment of an assessment for paying. There was judgment and order as prayed, and Henry H. Gage, owner of the land, brings error. Reversed.

On July 11, 1904, the county collector of Cook county applied to the county court of that county for judgment for the delinquent fourth installment of a special assessment levied against certain lots in the city of Chicago belonging to Henry H. Gage. On July 13, 1904, Gage filed a written special appearance, questioning the jurisdiction of the court to entertain the application, or to enter judgment or order of sale, or to permit the sale of said lots, and objected to the consideration of the application by the court for the following alleged reasons: First, because the notice for the sale of said lots to pay the first, second, and third installments of said assessment, upon which installments judgment and order of sale had been entered by said county court at a previous term, was defective; second, because there is a variance between the warrant for the collection of the assessment and the said notice of sale as to the subject-matter of the delinquency; and, third, because the certificate of publication of the notice of application for judgment for the said fourth installment, and the notice of sale for the first three installments, does not conform to the statute, and is ambiguous and informal. The court ordered that the special appearance of Gage, in so far as it affected the first three installments, be stricken from the files, and overruled all objections as to the fourth installment, and entered judgment against the property. Gage sued out a writ of error from this court to review the judgment of the county court, and assigns

as error that the judgment is defective, in failing to show the amount or amounts for which rendered. He also urges that the court erred in ordering the objections relating to the first three installments stricken from the files, and in holding the certificate of publication of the notice of application for judgment to be sufficient.

F. W. Becker, for plaintiff in error. William M. Pindell (Edgar Bronson Tolman, Corp. Counsel, and Robert Redfield, of counsel), for defendant in error

SCOTT, J. (after stating the facts). This was an application for a judgment and order of sale for the payment of a delinquent fourth installment of a special assessment. At a former term of the same court, judgment and order of sale had been entered for the first three installments of the same special assessment. In this proceeding plaintiff in error sought to question the validity of the judgment for the earlier installments. That this is an independent proceeding, in which the court could not consider any question affecting the legality of the earlier judgment, is too plain to require argument or the citation of authorities.

The appearance entered by plaintiff in error was special in character, and it was urged that the certificate of publication was defective. That certificate recites that the foregoing lists of lands and lots "is a list of delinquent lands and lots upon which" taxes remain due and unpaid, "and also a list of delinquent lands and lots" upon which special assessments and special taxes remain due and unpaid, "with notices hereto attached, and that the same were duly published and advertised," etc. It is said that this certificate is unintelligible, because it is impossible to say what is the antecedent of the words "the same," where they appear before "were duly published and advertised." We think the objection without merit. The words "the same" plainly apply to and include all the lists and the notices which had been mentioned in the preceding portion of the certificate. This case is distinguishable from the case of *McChesney v. People*, 174 Ill. 48, 50 N. E. 1110, in that the words "and that the same," which appear between the word "attached" and the word "were," did not appear in the certificate in that case at all.

The judgment in this cause reads as follows: "It is thereupon ordered by the court that judgment be, and is hereby, entered against the tract or tracts or lots of land, or parts of tract or tracts or lots, as described in the objections filed herein, and as set forth in the attached schedule, which is made a part of this order, in favor of the people of the state of Illinois, for the sums annexed to each; being the amount of the said special assessment and costs due severally thereon. And it is ordered by the court that said several tract or tracts or lots

*Rehearing denied February 9, 1905.

of land be sold as the law directs to satisfy the amount of said assessment and costs annexed to them severally." It appears from the abstract that this judgment is followed by a schedule giving a description of the lots against which the judgment was to be rendered, but in that schedule there is no statement showing the amount of the assessment and costs. It cannot be ascertained what amounts are adjudged against the property. The judgment, therefore, is fatally defective. As pointed out in *Gage v. People*, 207 Ill. 61, 69 N. E. 635, the form prescribed by section 191 of chapter 120 of Hurd's Revised Statutes of 1903, for this judgment, must be substantially followed, and in that case we indicated the precise method to be pursued in entering such a judgment. That form contemplates a reference in this judgment to a list which precedes it in the "judgment, sale, and redemption record" of the county court, and that list shows or should show the amount of the judgment against each tract. It appears in this case that this judgment follows such a list, but, instead of referring to that list by the use of word "aforesaid," as contemplated by the form used in the statute, reference is made, as appears from the abstract, to a schedule attached to and following the judgment; and that schedule, as we have above pointed out, does not show the amount for which the judgment was entered. Had it shown that amount, there would have been a substantial compliance with the statute in that regard. A comparison of the judgment with the statute shows that it does not follow that enactment in other respects. As this judgment must be reversed, the difficulties attendant upon such other variances may be obviated when the application is again brought to the attention of the court below.

No error intervened in this proceeding prior to the entry of the judgment. It is therefore unnecessary to award a new trial. The judgment of the county court, however, will be reversed, and the cause remanded, with directions to that court, upon motion of defendant in error, to enter a judgment in compliance with section 191 of chapter 120, Hurd's Rev. St. 1903.

Reversed and remanded, with directions.

(213 Ill. 414)

STRAYER et al. v. DICKERSON.*

(Supreme Court of Illinois. Dec. 22, 1904.)

DEED—MISTAKE—REFORMATION—FINDINGS—SUFFICIENCY—APPEAL—QUESTIONS FOR REVIEW.

1. Questions depending on the weight of the evidence cannot be considered on appeal, in the absence of objection and exception taken to the master's report, on which the decree was based.

2. Where, in a suit to reform a deed from a husband to his wife, the findings of the master, to which no objection or exception was filed, show that there was a valuable consideration for the conveyance, and that the wife took ac-

tual possession of the tract alleged by her to have been intended by the grantor to be conveyed, and made valuable and permanent improvements thereon, and had continuously held the land from the time of the conveyance, and a decree was rendered for complainant on the finding, any error in holding a former decree to be an estoppel as against one of the defendants is immaterial.

Appeal from Circuit Court, McLean County; C. D. Meyers, Judge.

Suit by Leodicy Dickerson against Adelaide Strayer and others. From a decree for complainant, defendants appeal. Affirmed.

Owen & Owen, Thomas W. Tipton, and Barry & Morrissey, for appellants. Chas. L. Capen, for appellee.

RICKS, C. J. This is an appeal from a decree of the circuit court of McLean county correcting the description of land in a deed to appellee from her late husband, Henry C. Dickerson. In 1892 the husband was seized in fee of the west half of the northeast quarter of section 29, the west half of the southeast quarter of section 20, and the southwest quarter of the northeast quarter of section 20, all in town 22, range 4 east. The land constituted one farm, and was one and a quarter miles in length from south to north. The south 80, lying in section 29, was for many years the family homestead, and had upon it the buildings and principal improvements. Dickerson also had another tract of land in section 31 of the same town, and some town lots in Le Roy. He made the deed in question on July 20, 1892, placed it of record, and delivered it to the appellee. It is alleged that by mutual mistake the deed describes the west half of the southeast quarter of section 20 aforesaid, when the intention was to convey and receive the west half of the northeast quarter of section 29, called the "homestead tract."

The case was before us on a former decree granting the same relief, and was reversed upon the facts then in the record upon the grounds that the conveyance was without consideration, and was merely a voluntary one—a gift inter vivos; that it was not executed because of the mistake in description, and was a mere contract to convey, and that a court of equity would not decree specific performance of such contract; that it also appeared from the evidence that the property was the homestead at the time of the conveyance, and, as the wife did not join in the conveyance and release the homestead estate, the evidence should show, but failed to do so, that the homestead had been abandoned by the husband for the express purpose of giving effect to the conveyance. 205 Ill. 257, 68 N. E. 767. The cause was remanded generally, and the bill was amended, alleging more specifically the passing of a valuable consideration from appellee to her husband for the conveyance; that the place had not been occupied as a homestead since 1885;

*Rehearing denied February 9, 1905.

that appellee took possession immediately upon the conveyance being made, has ever since had possession; and on the faith of the conveyance made valuable and permanent improvements.

Henry C. Dickerson, the grantor, at the time of the conveyance had five daughters, who were his only living children and only prospective heirs. Three of the daughters were Elizabeth Hobart, Adelaide Strayer, and Cordelia Patterson, who were married at the time of the conveyance, and to the first two of whom he had advanced property, which he regarded equivalent to their share of his estate, as he so states in his will executed near that time. In 1898 he conveyed by deed, in which his wife joined, to his daughters Georgia Belle and Rosaline, the land above described, in sections 20 and 31. In this conveyance was the same land described in the deed to appellee. He died on May 20, 1899, and by his will made what purported to be a general disposition of his property; but the only real estate mentioned in his will was a tract not in question, which he charged with certain expenditures, and his town property in Leroy. The tract in question was not mentioned or in any manner referred to, and we are satisfied from the evidence that up to the time of his death he thought he had conveyed to the appellee the land she claims. The five daughters named were made defendants to the original bill, and pending the suit the daughter Rosaline died intestate, and left a daughter, Fannie Dickerson, her only heir, who has been substituted as a defendant. All the defendants are adults.

At the first hearing all of the defendants but Adelaide Strayer defaulted, and she alone prosecuted the first appeal. At the term that the first decree was entered, appellant Cordelia Patterson entered her appearance in writing, sworn to by her husband, which was as follows: "I, Cordelia Patterson, hereby enter my appearance in the above cause, to have the same force and effect as if served with process more than ten days before the first day of the present term, and I hereby consent that a decree may be taken at any time, at this or any succeeding term, as prayed for in said bill." When the cause was remanded the bill was amended, but the prayer was not changed. The amendments made the allegations of the former bill more clear and specific. Mrs. Patterson answered substantially the same as Mrs. Strayer, both denying the allegations of the bill and the right to relief. The other defendants defaulted. Replication was filed, and the cause was referred to the master to report evidence and conclusions. The record states that objections were filed to the report by the master, and by him overruled, and were refiled in the court as exceptions to said report, and overruled by the court, but no objections or exceptions are found in the record or abstract.

After finding the jurisdictional facts, and that the court has jurisdiction of the parties and the subject-matter of the suit, the master finds that appellant Cordelia Patterson was a party defendant to the original decree from which the former appeal was prosecuted by appellant Strayer; that the interests of Cordelia Patterson and appellant Strayer are separable; and that appellant Patterson is concluded by the former decree, to which she was a party, granting the same relief now prayed for, and granted in this decree, and from which she did not appeal. The master further found that the appellant Adelaide Strayer after the death of her father entered into a written contract with appellee, upon a sufficient consideration, to not interfere with the estate of Henry C. Dickerson, nor with any of the transfers, or any part thereof, in any manner or form, or make any objections or question to the deed of appellee to the home place, which agreement was set up in the bill; and the master finds was established by the proof, and that the appellant Strayer is estopped and bound thereby. After passing upon the competency of certain witnesses, the master proceeds to the consideration of the case upon its general merits, and finds that there was a good and valuable consideration for the conveyance to the appellee from her husband, which consisted of moneys received by him from her from the year 1861 down to the time of making the deed, in 1892. He finds further that her said husband recognized such indebtedness, and promised to repay the same by conveying to appellee any 80 acres of land which he had that she might select, and specifically finds that, from July of the year 1874 to the making of the deed, appellee advanced and loaned to her husband, each year, money in various amounts; that the moneys so advanced to him were loans, and not gifts, and were so recognized by him; that, in payment of the sums so due her, appellee elected to have conveyed to her the home place, and that in attempting to do so an error was made in the description; that appellee at the time of the conveyance assumed control and possession of the premises intended to be conveyed, and made thereon valuable improvements, and paid the taxes and insurance; and that she is entitled to have the tract so purchased conveyed to her. He further finds that the property in question was not at the time of the conveyance the homestead of the grantor and his family, but that the same had been abandoned as a homestead 20 years prior to the making of the conveyance, and a new homestead was acquired prior to said conveyance, and recommends a decree in accordance with the prayer of the bill. The decree is based upon and follows the report of the master, finding each of the material facts specifically, and setting the same forth in the decree.

Appellants, in their brief and argument,

and by the errors assigned, urge that the master admitted improper evidence, and particularly that he permitted appellee (the complainant below) to testify in her own behalf, and permitted her daughter Georgina Belle Dickerson and her granddaughter, Fannie Dickerson, who were defendants to the bill, to testify in behalf of appellee; that the court erred in holding that appellant Patterson was concluded or estopped by the former decree, that appellant Strayer was bound by her contract in such a manner as affected the rights of the parties in this litigation; and that the decree was contrary to the evidence.

It is not contended that the bill does not state a cause of action, nor is it contended that there is not competent evidence in the record tending to support the allegations of the bill, the former of which questions could probably be raised in this court without the record containing the objections to the master's report and the exceptions heard by the chancellor; but, as to questions depending upon the weight of the evidence, we are unable to see how we can consider them, in the absence of the objections and exceptions to the master's report. It is held that the objections as to the conclusions of the master upon questions of fact are in the nature of special demurrers to the evidence, and that they must be presented to the master, and should point out the grounds of objection with reasonable certainty, and that the exceptions filed in the court upon the coming in of the report should correspond with the objections made before the master, and be confined to such objections as were allowed or overruled by the master. *Springer v. Kroeschell*, 161 Ill. 358, 43 N. E. 1084; *Hurd v. Goodrich*, 59 Ill. 450; *Moffett v. Hanner*, 154 Ill. 649, 39 N. E. 474. When this is done, the errors assigned on appeal that relate to matters that were considered by the master—and particularly so as to matters of fact and matters relating to the admission and exclusion of evidence—are predicated upon the action of the court in overruling or sustaining the exceptions to the report of the master. *Whalen v. Stephens*, 193 Ill. 121, 61 N. E. 921. And unless the questions are made by the objections and exceptions to the master's report, they cannot be considered by this court, though error be assigned. *Prince v. Cutler*, 69 Ill. 267; *Pennell v. Lamar Ins. Co.*, 73 Ill. 303; *Jewell v. Rock River Paper Co.*, 101 Ill. 57; 14 Am. & Eng. Ency. of Law (2d Ed.) 944. To this rule there is the exception that where, on appeal, the findings by the master of the facts are not questioned, but the conclusion of the master upon the facts so found is questioned, that may be done without making or preserving in the record the objections and exceptions to his report. It is equivalent to a general demurrer to the evidence. *Von Tobel v. Ostrander*, 158 Ill. 499, 42 N. E. 152; *Hurd v. Goodrich*, 59 Ill. 450. The

case at bar does not come within this exception, as the contention is that the master found the facts contrary to the weight of the evidence.

It may be that the question as to the effect of the former decree upon the appellant Patterson, as a matter of estoppel, would fall within the exception last stated, but the finding of the master as to the contract between Strayer and appellee, by which it is found that Strayer had agreed not to interfere with the conveyance to appellee of the home place, could not fall within this exception, because the evidence showed that the original writing was lost or destroyed by fire; and whether the writing containing the writing, or the supposed copy thereof which was introduced in evidence, was the same as the original writing between the parties, was a controverted question of fact, and, as the record stands, it is not so presented that we are authorized to enter upon a consideration of it. In our view of the finding of the master that there was a valuable consideration for the conveyance, and that appellee took actual possession of the premises, and made valuable and permanent improvements upon the same, and held the same from the time of the conveyance hitherto, the consideration of the effect of the former decree upon appellant Patterson could have no effect upon the final action of this court, as, if we should find that the master and court erred in that conclusion, we would still be bound to hold that the decree, upon the general facts, could not be disturbed. The absence from the record of the objections and exceptions to the master's report must have the same effect as though neither had been made. Under the findings here, and where the rights of creditors are not involved, we feel impelled to hold them sufficient to support the decree, and it will accordingly be affirmed.

Decree affirmed.

(213 Ill. 421)

PEOPLE v. WAITE et al.

(Supreme Court of Illinois. Feb. 8, 1904.)

DRAINAGE DISTRICT—ORGANIZATION—VALIDITY—LEVEE ACT—CONSTRUCTION—COUNTY COURTS—JURISDICTION—JUDGMENT—PRESUMPTION—QUO WARRANTO.

1. Under the direct provisions of the levee act (Starr & C. Ann. St. 1896, p. 1500, c. 42), the county courts are given jurisdiction to organize into drainage districts lands situated in Coles and Edgar counties, and hence a judgment of the county court of Coles county, organizing a drainage district in those counties, carries the presumption of validity.

2. The effect of the failure of a county court, having jurisdiction to organize a drainage district under the levee act (Starr & C. Ann. St. 1896, p. 1500, c. 42), to specifically find that the petition for the organization of the district was signed by the requisite number of adult landowners, and that the district was duly organized, as provided by law, is a question which cannot be raised in a quo warranto proceeding with the view of ultimately overturning the judgment.

Error to Circuit Court, Edgar County; E. B. Kimbrough, Judge.

Petition by the people, in the nature of a quo warranto, against William E. Waite and others. From a judgment for the defendants, plaintiff appeals. Affirmed.

This was a petition filed in the circuit court of Edgar county by the state's attorney of that county, asking leave to file an information in the nature of a quo warranto to test the legality of the organization of the Polecat drainage district, composed of lands situated in Coles and Edgar counties, and organized under the provisions of the levee act (Starr & C. Ann. St. 1898, p. 1500, c. 42), in the county court of Coles county. The court declined to permit the information to be filed, and a writ of error has been sued out from this court to review the action of the court in that regard.

Three reasons are assigned why said information should have been allowed to be filed: First, that the record of the county court of Coles county does not show that the petition upon which the county court acted at the time the district was organized was signed by a majority of the adult landowners of the district; second, that no final judgment was entered by the county court finding said drainage district duly established, as provided by law; and, thirdly, that the petition upon which the county court acted at the time the district was organized was not signed by a majority of the adult landowners of the drainage district.

John W. Murphy, State's Atty. (J. E. Dyas, H. A. Neal, and F. K. Dunn, of counsel), for the People. A. C. Anderson and Edward C. & James W. Craig, Jr., for defendants in error.

HAND, J. (after stating the facts). The Legislature, by the act under which said drainage district was organized, committed to the county courts of this state jurisdiction to organize into drainage districts lands similarly situated to the lands lying within the territory comprising that organized into the Polecat district.

If the judgment of the county court of Coles county organizing said district was valid—in other words, if the court had jurisdiction of the subject-matter and of the parties at the time it rendered the judgment whereby said district was organized—its judgment organizing the district could only be attacked by a direct proceeding (that is, by appeal or writ of error), and could not be set aside and annulled by a proceeding in the nature of a quo warranto, as it is not the office of that proceeding to operate as a writ of error or by way of an appeal to review the final judgment of a court of record in a case wherein that court had jurisdiction of the parties and the subject-matter of the litigation, and has rendered a judgment disposing of the matter pending before it upon the merits, although error may have intervened in the entering of the judgment.

In *People v. Commissioners of Mineral Marsh Drainage District*, 193 Ill. 428, 62 N. E. 225, the state's attorney of Bureau county sought leave to file an information in the nature of a quo warranto to test the legality of the organization of a drainage district by the county court of that county, on the ground that certain lands had been improperly included within the boundaries of the district, and which would derive no benefit from the system of drainage provided for by the drainage district. It was there held that it was within the province of the county court to determine what lands would be benefited by the proposed system of drainage, and therefore might properly be included within the boundaries of the district, and that, the county court having determined that question, its judgment could not be reviewed by a proceeding in the nature of a quo warranto. In the case at bar the petition provided by the statute was filed in the county court of Coles county, and the statutory notice to all persons interested was given. That county court, then, had jurisdiction of the subject-matter and of the parties, and was authorized to act. If it erred in holding that the petition was signed by the requisite number of adult landowners of the district, or in refusing to permit persons who had signed the petition for the organization of the district to withdraw their names from the petition, the remedy of the parties in interest who deemed themselves aggrieved by the decision of the court was to have the case reviewed upon appeal or by writ of error, and not by a quo warranto proceeding.

The contention is made that the judgment of the county court does not find that the petition for the organization of the drainage district was signed by the requisite number of adult landowners and that the district was duly organized as provided by law. While the record is somewhat indefinite, when taken as a whole, we think the county court of Coles county found that the requisite number of adult landowners did sign the petition and that the district was duly organized. While in a court of review the contention of the plaintiff in error as to the invalidity of the judgment by reason of its indefiniteness might perhaps merit some consideration, such contention cannot be made here as a basis upon which to predicate quo warranto proceedings with a view to ultimately overturn the judgment of the said county court.

We have disposed of this case upon its merits, as the question of a want of jurisdiction to review this record in this court has not been raised, and a like record was reviewed by this court without objection in *People v. Commissioners of Mineral Marsh Drainage District*, supra. It may, however, be argued with much force that this record involves only a question of practice—that is, the right to file an information in the nature of a quo warranto—and not a fran-

chise, which would have been involved in a hearing upon the information if filed, and that the case should have gone to the Appellate Court in the first instance instead of to this court. The judgment of the circuit court will be affirmed.

Judgment affirmed.

(218 Ill. 424)

EUSTACE et al. v. PEOPLE ex rel. HANBERG, County Treasurer.

(Supreme Court of Illinois, Dec. 22, 1904. On Rehearing, Feb. 9, 1905.)

STREET IMPROVEMENTS—DEPARTURE FROM PROVISIONS OF ORDINANCE—ENFORCEMENT OF ASSESSMENTS—REHEARING—ADDITIONAL RECORD.

1. Assessments for a street improvement cannot be enforced, the improvement as completed being substantially different from that authorized by the ordinance, the departure increasing the grade of the streets in some places to the extent of several feet, and the changes materially increasing the cost.

On Rehearing.

2. A rehearing will not be granted for points not presented for decision by the submission of the cause, but based on an additional record filed by appellee by permission, but not till after appellant had filed his abstract and brief, and which was not abstracted, and did not come to the notice or knowledge of the court, and was not referred to in appellant's briefs.

Appeal from Cook County Court; O. N. Carter, Judge.

Application by the people, on the relation of John J. Hanberg, county treasurer and ex officio county collector of Cook county, for judgment and order of sale for a special assessment. From a judgment and order of sale, A. J. Eustace and others, the property owners, appeal. Reversed.

George W. Wilbur, for appellants. William M. Findell (Edgar Bronson Tolman, Corp.' Counsel, and Robert Redfield, of counsel), for appellee.

BOGGS, J. This was an application by the appellee treasurer for judgment and order of sale of certain lots and tracts of real estate belonging to the appellants, for an alleged unpaid first installment of a special assessment levied under an ordinance of the city of Chicago providing for the curbing, grading, and paving of South Canal street from the south line of West Harrison street to Lumber street, in said city. The appellants interposed a number of objections to the application, but the only objection necessary to be considered is that the improvement, as constructed, is other and different than the improvement provided to be constructed by the ordinance.

The ordinance provided that South Canal street should be so graded that the surface

of the pavement of the finished roadway should coincide with the grade of said Canal street, which grade the ordinance established at the various street intersections—among others, as follows: At the south line of West Harrison street, 14.0 feet above city datum; at the intersection of said South Canal street and West Polk street, 14.6 feet above city datum. The surface of the roadway as constructed is 20.32 feet above city datum at the south line of West Harrison street, being 6.32 feet above the grade as fixed by the ordinance; and the surface of the roadway of the street as constructed at the intersection of West Polk street is 22.67 feet above city datum, being 9.07 feet higher than provided in the ordinance. There is a viaduct at West Harrison street, and also a like structure at West Polk street; and it appears from the testimony that the roadway was constructed at a greater height at each of the points, and along the approaches thereto, than provided in the ordinance, because of these viaducts. The total of the assessments for which judgment of confirmation was entered was \$55,500, but the total cost of the work, as completed, was shown to be \$71,509.29; being \$16,009.29 in excess of the total amount for which judgments of confirmation were entered. This large increase in the cost of the improvement was occasioned in the greater part by the construction of the grading of the street in an entirely different manner from that authorized by the ordinance.

Counsel for the city say that, when the ordinance was adopted, the existence of the viaducts at West Harrison and West Polk streets was overlooked and not taken into consideration by the city council, and say the presumption must unquestionably be indulged that a clerical error was made in establishing the grades at these points several feet below the grade of the viaducts. The position that the city council overlooked and did not take into consideration the viaducts is entirely inconsistent with the suggestion that the heights named in the ordinance at the points where the viaducts are situate were merely clerical errors. But however this may be, the improvement which has been constructed is materially and substantially different from that which the ordinance authorized to be made. The departure from the ordinance is material and substantial in two respects: It increases the grade of the streets at the south line of West Harrison street 6.32 feet, and also increases the grade of that street from that point southward to the point of the beginning of the approach to that viaduct. It increases the grade at the center of the intersection of South Canal street and West Polk street 9.07 feet, and also increases the grade from that point to the north and south to the beginning of the approaches from each direction. The improvement as completed is substantially different from that authorized by

¶ 1. See Municipal Corporations, vol. 36, Cent. Dig. § 1083.

the ordinance, and the changes materially increased the cost of the improvement. The fact that, if the improvement had been constructed in accordance with the provisions of the ordinance, the finished surface of the street would have been several feet below the grade of the viaducts, and would have destroyed the usefulness of the street, would not justify the city authorities in making an improvement not authorized by the legislative body of the city to be made. The power rested in the city council to repeal the ordinance, if it was found to be defective and insufficient, and to adopt another ordinance providing for such other character of improvement as the judgment and discretion of the city council should dictate. The city cannot let contracts for an improvement not authorized to be made by an ordinance, and require the property owners to pay special assessments therefor on the ground that the work, as done, is more beneficial to the property owners than the improvement that was authorized by the ordinance to be made. The judgment must be, reversed and remanded.

Judgment reversed and remanded.

On Petition for Rehearing.

PER CURIAM. Under a petition for rehearing we have again investigated this record. The appellee obtained leave to file an additional record, and it seems did place an additional record on file, but not, however, until after appellants had filed their abstract and brief. The additional record was not, however, abstracted, and did not come to the notice or knowledge of the court, nor is it referred to in the briefs of the appellants. The principal grounds for a rehearing are based on this additional record, and hence on points not presented for decision by the submission of the cause. These points cannot, therefore, be considered for the first time on petition for rehearing. All matters presented and considered by the submission have been correctly decided.

A rehearing is therefore denied.

(213 Ill. 428)

O'BRIEN v. BONFIELD et al.*

(Supreme Court of Illinois. Dec. 22, 1904.)

WILLS—TESTAMENTARY CAPACITY—WITNESSES—COMPETENCY—STATUTES—CONSTITUTIONAL LAW—DUE PROCESS OF LAW—PROBATE—EVIDENCE—REVIEW.

1. The statute of wills, requiring a will to be attested by two or more credible witnesses, etc., only requires that such witnesses should be such as would be legally competent to testify in a court of justice to the facts which they attest by subscribing their names to the will.

2. Where a witness to a will was otherwise competent, he was not disqualified, by reason of the fact that his grandson was pecuniarily interested in sustaining the will.

3. Attesting witnesses to a will are not given judicial power to determine the testator's testamentary capacity by the statute of wills, limiting the evidence admissible on such issue in the first instance to the evidence of such attesting witnesses.

4. Since the statute of wills, limiting the evidence as to testamentary capacity in the first instance to that of the attesting witnesses, does not vest such witnesses with judicial functions, the statute is not in violation of Const. art. 6, § 1, vesting judicial powers in specified courts.

5. Where testatrix's attorney drew her will, the fact that he was named as executor, with a provision that, if he should be dead or unable to act, or should refuse to do so, B. should be executor, did not invalidate the will, the attorney having had no intention of acting as executor, and having refused to do so before the will was offered for probate.

6. The statute of wills, limiting the evidence as to mental capacity on an application for probate to that of the attesting witnesses, is not unconstitutional as depriving contesting heirs of the testatrix of their property without due process of law, such proceeding being merely for the purpose of establishing prima facie testamentary capacity, and not affecting contestant's right to contest the same on a bill filed for that purpose.

7. Where certain testimony as to testatrix's mental capacity was heard by the court, subject to objection, and was never stricken out, and there was no subsequent ruling concerning it; an objection that the court erroneously refused to consider the testimony could not be considered on appeal.

Appeal from Circuit Court, Iroquois County; R. W. Hilscher, Judge.

Application by Thomas P. Bonfield and others for the probate of the will of Mary A. Williams, deceased. From an order of the circuit court affirming a judgment of the probate court admitting the will to probate, Michael G. O'Brien, contestant, appeals. Affirmed.

Otto Gresham and A. F. Goodyear, for appellant. Freeman P. Morris and Frank L. Hooper, for appellee Bonfield.

CARTWRIGHT, J. The county court of Iroquois county admitted to probate the will of Mary A. Williams, deceased, a widow, who left no children or lineal descendant and no brother or sister. Appellant, a nephew, prosecuted an appeal to the circuit court of said county, where there was a trial de novo before the court, and the will was again admitted to probate. Appellant then prosecuted this further appeal.

The execution of the will by Mary A. Williams was proved, and was admitted by the appellant, and there was a formal attestation clause attached thereto, signed by R. J. Hanna and William Fraser as witnesses. R. J. Hanna, one of the subscribing witnesses, died before the will was probated, and proof of his handwriting was made, and not disputed. The other subscribing witness, William Fraser, testified to all the facts required by the statute, and the will was fully proved if the attesting witnesses were competent to act as such. The claim of appellant is that R. J. Hanna was not competent to act as a subscribing witness, for the rea-

*Rehearing denied February 8, 1905.

† 1. See Wills, vol. 49, Cent. Dig. § 284.

son that his grandson, Thomas W. Hanna, was a legatee under the will, to whom \$1,000 was bequeathed. The statute of wills requires a will to be attested by two or more credible witnesses, and in case of the death of a witness proof of his handwriting is admissible with the same effect as if he had appeared and testified in his own person. The word "credible," as used in the statute, means "competent." In the Matter of the Will of Noble, 124 Ill. 266, 15 N. E. 850. It means a witness who, at the time of attesting a will, would be legally competent to testify in a court of justice to the facts which he attests by subscribing his name to the will. There can be no doubt that a witness would be competent to testify against an heir on an issue involving the execution of a will and the mental capacity of the testator, although his grandson might be interested in the result of the litigation. The interest which disqualifies a witness in such a case must be a present, certain, legal interest of a pecuniary nature. The test is whether he will either gain or lose financially, as the direct result of the suit, or whether the judgment or decree will be evidence for or against him in another action. *Boyd v. McConnell*, 209 Ill. 396, 70 N. E. 649. Counsel do not deny that such is the rule to be applied to witnesses generally, but they say that by our statute the subscribing witnesses to a will are not mere witnesses; that they are made judges of the mental capacity of the testator, and exercise judicial power in determining whether the testator is mentally competent to execute a will, and that it is their finding and judgment on that question which entitle the will to probate. They insist that Mr. Hanna was incompetent as a witness for the same reason that a judge who is related to a party to a cause is incompetent to hear and determine the cause. In other words, they say that a competent subscribing witness to a will must be competent to sit as a juror or judge in a suit between the heir and the legatees or devisees under the will. We cannot agree with counsel that the attesting witness exercises judicial power or judicial functions. It is true that no man can be a judge in his own cause, or where he is related to a party in interest, and by our Constitution the judicial powers are vested in certain courts. No law can vest judicial power in attesting witnesses, and authorize them to adjudge, decide, and render a judgment in a cause, and the statute of wills does not purport to do so. Proof of the mental capacity of the testator is one of the steps necessary to the probate of a will; and in the county court, or upon appeal from an order allowing probate, the parties are confined to the testimony of the subscribing witnesses on that question. *Walker v. Walker*, 2 Scam. 291; *Andrews v. Black*, 43 Ill. 256. But the attesting witnesses, on the application for probate, do not exercise different powers or

functions from any other witness testifying to a fact. They neither construe nor apply the law nor render a judgment.

Counsel also argue that if Mr. Hanna is held to be a competent witness the statute is unconstitutional, as against the natural right of the appellant to have his cause heard by an impartial judge, and in violation of section 1 of article 6 of the Constitution, by taking from the judgment and consideration of the court the question of mental capacity of the testatrix, and vesting it in the attesting witnesses. As we think that the witnesses, in testifying to the facts observed by them, and in giving their opinion as to mental capacity based on such facts, are not exercising judicial power, it follows that we do not regard the statute as unconstitutional.

It is next contended that the will is void because it was written by an attorney who was named in it as executor. The will was prepared at the direction of the testatrix by Harrison Loring, who had been her attorney for many years. She was desirous of having Mr. Loring act as her executor, but he declined to do so. She urged that his name should be put in, and said that, if he would not act, she wanted Mr. Bonfield, one of the appellees. Mr. Loring went to see Mr. Bonfield, who agreed to act, and the will was then prepared, naming Mr. Loring as executor, with a provision that if he should be dead, or unable to act, or should refuse to do so, Mr. Bonfield should be executor. There was no intention on the part of Mr. Loring to act, and he refused to do so before the will was offered for probate. But the fact that he was named as executor does not affect the validity of the will. The fact that the person who draws a will or assists in its preparation is named as executor may be one of the circumstances to be considered upon a different issue, but it has never been held, under our law, that a will would be invalid for that reason.

It is next argued that the statute of wills, as construed by this court to limit the evidence as to mental capacity on an application in the county court to probate a will, and on appeal from an order allowing probate to the testimony of the subscribing witnesses, is in contravention of section 2 of article 2 of our Constitution and the fifth amendment to the Constitution of the United States, in depriving appellant of a share in the property of Mary A. Williams, as her heir, without due process of law, and also of section 1 of the fourteenth amendment to the Constitution of the United States. As we understand the argument, it is that a statute is unconstitutional which limits the right of a contestant to introduce testimony, on an application to probate a will, on the subject of the mental capacity of the testator; that the heir has a constitutional right to demand that the court shall hear all the testimony he may offer to defeat a will which excludes

him from his inheritance, and that the very essence of due process of law is the right to be heard upon all the evidence he can adduce. The proceeding to probate a will and admit it to record is not designed as a final and conclusive determination of the testamentary capacity of the testator upon all the evidence that may be produced. The purpose is only to establish testamentary capacity *prima facie* in order that the will may be recorded, the estate cared for, and the administration proceed. *Claussenius v. Claussenius*, 179 Ill. 545, 53 N. E. 1006; *Moody v. Found*, 208 Ill. 78, 69 N. E. 831. The provision of the statute of wills is that, upon certain proof being made to the court, the will shall be admitted to record. That proof embraces the execution of the will and the capacity of the testator to make it, with a reservation to any party interested of the right to show fraud, compulsion, or other improper conduct sufficient to invalidate or destroy the will. The act of 1897 (Laws 1897, p. 304) provides for notice to heirs, but no issue is formed, and there is no final judgment as to the validity of the will. The law provides for a proceeding in which an issue is to be made whether the writing is the will of the testator or not, where that question is finally to be determined. The right to file a bill and have such an issue formed is in no manner affected by the fact that some or all of the contestants may have appeared in the county court and cross-examined the subscribing witnesses to the will. *Shaw v. Moderwell*, 104 Ill. 64. The right is not denied, limited, or affected in any way by the fact that the will has been admitted to record, but in that proceeding the validity of the will is presented as a new and original question, without reference to the fact of probate. *Tate v. Tate*, 89 Ill. 42. The whole question is heard anew, and the burden of proof of due execution and mental capacity is upon the proponents of the will to the same extent as it was before the probate. *Potter v. Potter*, 41 Ill. 80. The statute does not permit a will to be recorded without certain proof, but it does not deprive any party of his property without due process of law. On the contrary, it affords ample protection to the heir, who may call upon those claiming under the will to establish its validity.

It is said that the court erroneously refused to consider certain testimony introduced by appellant on the question of the mental capacity of the testatrix. The testimony was heard by the court subject to objection, and was never stricken out, and there was no subsequent ruling concerning it. There is nothing in the record to show whether it was considered or not, but, if the court refused to consider it, the refusal was right.

Errors are also assigned on many rulings of the court in refusing to admit evidence offered by appellant, but the rulings were all

in harmony with the views we have expressed. The judgment is affirmed.
Judgment affirmed.

(213 Ill. 425)

FLOTO v. FLOTO.*

(Supreme Court of Illinois. Dec. 22, 1904.)

WILLS—PROBATE PROCEEDING—NOTICE—HEIR AT LAW—KNOWLEDGE—EVIDENCE—SUFFICIENCY—JURISDICTION—ESTOPPEL.

1. In a suit by an alleged heir of a testator to set aside the probate of a will, evidence examined, and *held* sufficient to show complainant to be an heir at law of testator.

2. The evidence was also sufficient to show that defendant, who was the widow of testator, and who probated and was sole beneficiary of the will, had both knowledge and notice of the fact of complainant's relationship to testator at the time of offering the will for probate.

3. Under the statute requiring the heirs of a testator who are known to be notified of the probate of the will, a court has no jurisdiction to probate the will without notice to such heirs.

4. Where a court acts without jurisdiction, knowledge of parties interested that it is so going to act, or has so acted, confers no jurisdiction upon it.

Appeal from Circuit Court, Ogle County; O. E. Heard, Judge.

Suit by Charles Floto against Margaret Floto. From a decree for defendant, complainant appeals. Reversed.

Joseph Sears and Francis Bacon, for appellant. J. C. Seyster (J. H. Stearns and O. R. Zipf, of counsel), for appellee.

RICKS, C. J. Ernest Floto died April 17, 1900, leaving an estate worth about \$20,000, consisting of realty and personalty. He had no children or descendants of children, but left his widow and certain collateral kindred as his heirs at law. In May of that year Margaret Floto, his widow, filed a petition to probate an alleged last will and testament of the deceased. In this petition the appellee named as heirs at law and next of kin of her husband only herself and Lewis Floto, a brother of the deceased, suggesting in her petition that there might be other heirs at law in Germany, but that their identity or their whereabouts was unknown. Upon this petition, and with notice to herself and the brother, and publication of notice to the unknown heirs, the will was probated and the estate administered upon.

Appellant lived in Griswold, Iowa, and had some years previously been a resident of Forreston, where the decedent had resided for many years. On the 24th day of July, 1903, the appellant filed in the county court of Ogle county, where the will was probated, his petition to set aside the probate of the will, alleging that he was the son of a deceased brother of the decedent, Ernest Floto; that the widow, Margaret Floto, at the time

*Rehearing denied February 8, 1905.

she filed the petition for the probate of the will, knew that appellant was a nephew and heir at law of said Ernest Floto; and that she knowingly and designedly left his name out of said petition in order that he might not know of the proposed probate of the will. He further alleges that Lewis Floto, Fred Floto, and Mary Mueller were all residents of Ogle county at the time of filing said petition, and were nephews and niece and heirs at law of the decedent, and that their names were not mentioned in said petition, and that they had no notice of the filing of said petition or the probate of said will; that said Margaret Floto well knew all the said persons named were heirs at law of her said deceased husband, and knowingly and designedly left their names from the petition. He further represents, upon his knowledge, information, and belief, that the alleged will was not the true last will and testament of said Ernest Floto, and that if he had had notice of its presentation for probate he could have successfully defended against the probate thereof; that said will was admitted to probate about the 1st of June, 1900, without contest, and that appellant did not learn of the facts of such probate of said will or the death of said Ernest Floto until some time in the latter part of May, 1903, and until such time as it was too late to take an appeal from the order admitting the same to probate. He further says that the widow, Margaret Floto, was the only devisee or legatee mentioned in said alleged will.

Margaret Floto filed an answer to this petition, admitting that in her petition for the probate of said will she only mentioned the parties as alleged in the petition of appellant, and that only those parties were notified. She denies that appellant is a nephew and heir at law of her deceased husband, and also denies that the other persons mentioned in appellant's petition were heirs at law of her said husband, and denies that they did not have notice; denies that she knew of the whereabouts of appellant, and avers that the said will was the true last will and testament of the decedent, and avers that appellant had notice or knowledge of the probate of said will.

The will was admitted to probate on the 14th of June, 1900. No executor was named in the will, and the widow, Margaret Floto, was appointed administratrix with the will annexed, and administered and settled the estate before the filing of this petition. The cause was heard in the county court, and the prayer of the petition was denied. The cause was appealed to the circuit court, and upon the hearing in that court it was again denied, and this appeal is prosecuted.

The evidence discloses that Ernest Floto, the decedent, was born in Germany in 1820, and that he had two brothers, Charles, sometimes called Carl, and Lewis, all of whom came to this country, Carl and Ernest coming about the same time, and settling in

Ogle county more than 50 years ago. Carl married first, and Ernest lived with him part of the time. Carl died about 37 years ago, leaving four boys and a girl, the boys being named, respectively, Charles, Fred, William, and Lewis, and the daughter was named Mary, and has intermarried with one Fred Mueller. The widow and children of Charles, except appellant, continued to live in Ogle county from the time of his death to the present time. About 15 years ago appellant went to Iowa, and has ever since made that his home. The time of the marriage of Ernest to appellee is not shown, but she states that she came to Forreston to reside in 1891. Appellant's mother and his brothers and sister lived in that vicinity from that time to the death of Ernest. Appellee knew the widow of Charles, whose name was Christina, and knew other members of the family, and that they claimed to be the children of Charles, the brother of Ernest. The evidence shows that shortly before the will was probated, during the month of May, 1900, appellee went to the home of Fred Floto, one of the nephews, and asked for a list of the heirs of her deceased husband, and that Fred there gave her a list of the heirs, with their places of residence. The evidence also shows that in the matter of probating the will appellee had an attorney, and that on the 28th of April, 1900, this attorney wrote Fred Mueller, the husband of Mary, stating that it was proposed to probate a will purporting to be the will of Ernest, and that it was necessary that the names of the heirs be known, so that they could be stated in the petition. In response to this letter Fred Mueller and Fred Floto went to the office of appellee's attorney prior to the time the will was probated, but possibly after the petition was filed, and gave to him a list of the children of Charles Floto and heirs of Ernest Floto. The evidence also discloses that when appellee went to settle the estate she filed a petition, in which she stated that Lewis Floto, of Dixon, who was the brother, Fred Floto, of Forreston, the nephew, Lewis Floto, of Mt. Morris, Ill., and Charles Floto, appellant, whose address she put as Canby, Minn., and Mary Mueller, were heirs at law of Ernest Floto.

We have examined the evidence carefully, and from it there cannot remain the slightest doubt but that petitioner and his brothers and sister were nephews and niece and heirs at law of Ernest Floto. Nor is there any doubt but that appellee knew and understood such to be the fact, and that she was advised of their whereabouts, and of their kinship, prior to filing the petition. The appellee denies that she went to Fred Floto's to get the information, or did get the information, in regard to the heirs. That she did do so is established by three witnesses, the testimony of all of whom seems fair, and is only contradicted by hers, and her credibility was

directly attacked and put in such question that it can be given little weight. Notice to her attorney concerning this matter, in which he was acting for her and about which he was making special inquiry, was notice to her. *Webber v. Clark*, 136 Ill. 253, 26 N. E. 360, 32 N. E. 748.

We do not regard the fact of knowledge and notice on the part of appellee as controlling in this matter, although we do find that she had both, and, if it required fraud on the part of appellee to authorize the setting aside of this probate, we would not hesitate to find it established by the evidence in this case. We think, however, the court did not have jurisdiction to probate the will. Here were heirs that were known and could not be placed in the designation of unknown heirs. Their whereabouts was known. They were entitled by the statute to have notice of this probate. They did not have it, and the court did not have jurisdiction to enter probate without it. This question has been so thoroughly discussed and settled and placed upon the ground of want of jurisdiction in the case of *Wright v. Simpson*, 200 Ill. 56, 65 N. E. 623, it does not seem necessary to extend the discussion of it. Courts of other states have taken the same view. *Estate of Charlebois*, 6 Mont. 373, 12 Pac. 775; *In re Lyon's Will* (Sup.) 26 N. Y. Supp. 469; *Sowell v. Sowell's Adm'r*, 40 Ala. 243; *In re Bartel's Estate*, Myr. Prob. 130; *In re Cobb's Estate*, 49 Cal. 599; *In re Odell's Estate* (Sur.) 23 N. Y. Supp. 144; *In re Lawrence's Will*, 7 N. J. Eq. 215; *Roy v. Segrist*, 19 Ala. 810; *Boyles v. Boyles*, 37 Iowa, 592; *Gregg v. Myatt*, 78 Iowa, 703, 42 N. W. 461, 43 N. W. 760.

It is said that some of these heirs had notice that the will was going to be probated, by their conversations with the attorney and with appellee, and that the record shows that appellant had notice of the death of Ernest within a short time after the probate of the will and before the settlement of the estate, and that therefore they cannot insist upon the want of jurisdiction of the court. Such is not the law. Where a court acts without jurisdiction, knowledge of parties interested that it is so going to act or has so acted cannot confer jurisdiction upon it. *Canfield v. Wooster*, 26 Conn. 384; *Gray v. Gray*, 60 N. H. 28. Nor does the fact that appellee has settled the estate furnish a bar to this proceeding. *In re Odell's Estate*, *supra*.

The judgments of the circuit court and the county court of Ogle county are reversed and the cause is remanded to the county court of Ogle county with directions to grant the prayer of the petition to set aside the order probating the will, and all subsequent orders that can affect the rights of appellant, when such proceeding may be had in reference to the probate, upon due notice, as the law requires.

Reversed and remanded.

(113 Ill. 443.)
CUMMINGS et al. v. PEOPLE ex rel. HANBERG, Treasurer.*

(Supreme Court of Illinois. Dec. 22, 1904.)

PARK COMMISSIONERS—ASSESSMENTS—RETURN AND COLLECTION—"INSTALLMENTS"—LIMITATIONS—TWO JUDGMENTS OF SALE—VARIANCE.

1. The West Chicago Park Commissioners, being under Park Act (Hurd's Rev. St. 1899, c. 105) §§ 1, 2, a corporation authorized to levy special assessments for park purposes, is by Local Improvement Act 1897 (Hurd's Rev. St. 1899, c. 24, para. 507, 604) §§ 1, 98, authorized to use the provisions of the latter act for return and collection of assessments.

2. An assessment payable in one payment is within Local Improvement Act 1897, p. 135, § 99, as amended by Laws 1901, p. 118, providing that when an "installment" of an assessment confirmed under prior acts shall mature, proceedings to return delinquent and collect it shall conform to the provisions of such act.

3. The provision of Revenue Act (Hurd's Rev. St. 1899, p. 1441) § 279, barring by limitations a special assessment not returned as there provided, has no application to an assessment confirmed under an act prior to Local Improvement Act 1897, p. 135, and, as provided in section 99 thereof, returned according to the proceedings thereby provided.

4. Where two judgments of sale of certain land are entered on an assessment, the one signed by the judge, as required by Revenue Act (Hurd's Rev. St. 1899, p. 1428) § 191, and giving the number of the warrant and the number of the assessment, is not rendered void or reversible by reason of the other, which is not signed.

5. The judgment of sale in the name of the county treasurer and ex officio collector on an assessment made by the Board of West Chicago Park Commissioners is not reversible because describing it as made by the Board of West Park Commissioners.

Appeal from Cook County Court; O. N. Carter, Judge.

Application by the people, on the relation of John J. Hanberg, county treasurer and ex officio county collector of Cook county, for a judgment and order of sale on a special assessment. From such a judgment and order E. A. Cummings and others, owners of the property, appeal. Affirmed.

George W. Wilbur and F. W. Becker, for appellants. Delavan B. Cole, for appellee.

RICKS, C. J. This is an appeal from a judgment of sale for a special assessment made by the West Chicago Park Commissioners, who are by statute invested with the power to make local improvements by special assessment. The original proceedings out of which this controversy arises were begun in 1893. The park act of 1873 (Starr & C. Ann. St. 1896, pp. 2862-2870, c. 105) at that time provided that the proceedings for the levy and collection of special assessments for park purposes should in all things, as near as may be, conform to the provisions of article 9 of the city and village act (Laws 1871-72, p. 247). At the time the levy of the original assessment was made the city and village act authorized special assessments

*Rehearing denied February 2, 1905.

to be collected in installments, the right so conferred being by an amendment of article 9 of the city and village act approved April 29, 1887 (Laws 1887, p. 104). When the first installment became due, judgment and order of sale were entered against certain property, and on appeal to this court the judgment was reversed on the ground that the provision of the park act authorizing the commissioners to pursue the provisions of article 9 of the city and village act was not broad enough to include the amendments that might be adopted to the latter act. *Culver v. People*, 161 Ill. 89, 43 N. E. 812. Following this decision several writs of error were prosecuted by other property owners, and in each case the judgment of the county court was reversed. Pending these appeals and writs of error, the Legislature, in 1895, passed a new act concerning park improvements, under the title of "An act to enable park commissioners or park authorities to make local improvements and provide for the payment therefor." *Hurd's Rev. St. 1899*, c. 105, p. 1242. This act conferred upon park commissioners authority to levy and collect special assessments to pay for an improvement that had been authorized and partly or wholly completed and the assessment therefor had been set aside by the courts. Pending the various writs of error relative to the original assessment, the improvement of Douglas Boulevard, for which the present assessment is levied, was completed, and in 1896 an ordinance was passed for the special assessment now in controversy to pay for that improvement. Upon the return of the assessment roll to the county court in April, 1897, the court refused confirmation of the assessment and dismissed the petition. From that decision an appeal was prosecuted to this court, and the judgment of the county court was reversed. *West Chicago Park Com'rs v. Farber*, 171 Ill. 148, 49 N. E. 427. When the cause was remanded and redocketed the assessment roll was confirmed, and from that judgment of confirmation these appellants prosecuted an appeal to this court, and the judgment of confirmation was affirmed. *Cummings v. West Chicago Park Com'rs*, 181 Ill. 136, 54 N. E. 941. Writs of error were then sued out in the Supreme Court of the United States to review the judgment of this court, and those writs were dismissed. The judgment of confirmation of this assessment was made in 1898, under proceedings begun prior to the passage of the local improvement act of 1897 (Laws 1897, p. 102). In April, 1902, the mandate of this court finally establishing the confirmation was filed in the county court. The warrant for the assessment was returned to the county collector on the 30th day of January, 1903, but for some irregularity in that proceeding judgment was refused, and on the 14th day of March, 1904, the special collector of the West Chicago Park Commissioners again returned the property delinquent for special

assessment to the county collector, and judgment of sale was entered at the July term, 1904, from which this appeal is prosecuted.

The objection filed below by appellants that is relied upon in this court is that the assessment was barred by the limitation as found in section 279 of chapter 120 entitled "Revenue," which reads: "When any special assessment is not returned to the county collector on or before the first day of March next after it is due, the same may be returned on or before the first day of March in the succeeding year; and, if not then returned, it shall be considered barred, unless return is prevented by an injunction or order of court; and the time such return is thus prevented shall be excluded from the computation of such time." *Hurd's Rev. St. 1899*, p. 1441. And it is also contended by appellants that the return in this case is controlled and must be made according to sections 178 and 179 of the revenue act. To this contention it is replied by appellee that the revenue act and these provisions have no application, and that the lien of the assessment and the method of procedure for its collection are governed by the provisions of article 9 of the city and village act of April 10, 1872 (Laws 1871-72, p. 247), and thus is presented the main question for our consideration.

By sections 11, 12, 13, 14, and 15 of chapter 105 of the park act (*Hurd's Rev. St. 1899*, pp. 1210, 1211), which relate to the proceedings after the filing of the assessment roll, it is provided that the proceedings shall be according to article 9 of the city and village act and all acts amendatory thereof. It is contended by appellants that the local improvement act of 1897 is not an amendment of article 9 of the city and village act, but is an independent act, and that the provisions of the park act that the proceedings may be had under said article 9, and the acts amendatory thereof do not bring the case within the provisions of the local improvement act. In *Gorton v. City of Chicago*, 201 Ill. 534, 66 N. E. 541, where a somewhat similar question arose, we said (page 535, 201 Ill., page 541, 66 N. E.): "By the act in force July 1, 1897, the law respecting special assessments for local improvements was revised and materially changed, and all prior laws in conflict therewith were expressly repealed." And on page 538, 201 Ill., page 542, 66 N. E., it is said: "The object and purpose of the new law are the same as the old. It imposes no new liability upon appellants, but merely affects the procedure against them in the collection of the special assessment." We think, if this case depended upon it, and it were necessary to sustain the judgment, we would be warranted in holding that, within the meaning of the expression in the park act that article 9 of the city and village act and all acts amendatory thereof should be applicable to the proceedings relating to park assessments, the local improvement act of 1897 is an amendment to article 9, for there

can be little difference between a revision of an act and an amendment to it. The main difference would be in testing the constitutionality of the act as amended by the title of the act. But we do not deem it necessary to so hold in this case. The proviso to section 1 of the local improvement act of 1897 (Hurd's Rev. St. 1899, p. 362, c. 24) is as follows: "This act shall apply only to such cities and villages as are now, or shall hereafter become, incorporated under an act entitled 'An act to provide for the incorporation of cities and villages,' approved April 10, 1872, in force July 1, 1872, and to all cities, villages and incorporated towns which have heretofore adopted article 9 of the act above mentioned, in the manner therein provided, or shall hereafter adopt this act, as herein provided; but all other corporate authorities, having power to levy special assessments or special taxes for local improvements, may make use of the provisions of this act for that purpose in the manner hereinafter provided." By the last clause of the above proviso the provisions of the act are extended to all corporate authorities, other than cities and villages, having power to levy special assessments or special taxes for local improvements, and they are not required, as are cities and villages that were incorporated by special charters, to adopt article 9 of this act in any formal way to avail of it. Section 98 of the same act (Laws 1897, p. 135) also provides: "Wherever authority of law now exists in corporate authorities in this state to levy special assessments or special taxes for local improvements, and for that purpose to use the proceedings or methods provided by article 9 of an act entitled 'An act to provide for the incorporation of cities and villages,' approved April 10, 1872, in force July 1, 1872, such corporate authorities are hereby authorized to make use of the provisions of this act for such purpose, with the same effect and to the same extent as heretofore authorized to use the provisions of said article 9; and any such corporate authorities as may be hereafter authorized by law to levy such special assessments or special taxes, may, whether otherwise expressly authorized thereto or not, make use of the provisions of this act in like manner." With these broad, sweeping provisions it would seem unnecessary to go into any lengthy consideration of the question whether the park commissioners could avail themselves of the provisions of the local improvement act of 1897 by virtue of the authority given them in the park act, when the act of 1897 itself confers such unlimited power and authority upon them. Appellee is a corporation, and has express power to levy the particular assessment here in question (Park Act, § 2 [Hurd's Rev. St. 1899, p. 1203]), and, being such, is invested with full power, under sections 1 and 98 of the local improvement act, to avail itself of the provisions of the latter.

It is contended by appellants that the local

improvement act cannot apply to this proceeding because of the provisions of section 99 of the latter act. The section referred to contains the repealing and saving provisions of the act. The section provides that laws subsisting at the time the act takes effect "shall continue to apply to all proceedings [1] for the condemnation of lands, [2] or the confirmation of special assessments * * * which were pending in any court, * * * [3] to all proceedings for the collection of any deficiency under past levies, already made under any laws existing; * * * [4] and also to all proceedings for new assessments made in lieu of others annulled before the act concerning local improvements of June 14, 1897, took effect by order of some court. [5] When any installment of an assessment confirmed under prior acts shall mature, proceedings to return the same delinquent and to collect the same shall conform to the provisions of this act." Appellants direct our attention to the fourth provision above quoted, and say that the assessment now sought to be collected falls within its terms; that it is a new assessment in lieu of another assessment annulled by order of court, and that the proceedings for the collection as well as for making the new assessment must be carried on, if at all, under some law existing prior to the act of 1897. They further urge that the fifth provision above quoted has no application to this case, as it is confined to "installments," and that the assessment in question was not by installments, but is for the whole cost in one payment. With this contention of appellants we do not agree. The rule that all parts of an act must be construed together to determine the true meaning is familiar, and will not be questioned. The fourth proviso above was contained in the original repealing clause of the act of 1897, but the fifth proviso was not enacted until 1901. Laws of 1901, p. 118. It may be well doubted whether, under the language of proviso 4, and without proviso 5, this court would feel warranted in holding that proviso 4 referred not only the making of the assessment, but the collection of it as well, to prior existing laws. There is a well-defined distinction between the proceedings for an assessment and the proceedings for the collection of it by judgment and sale of the property. But proviso 5 must, if it be given effect, be held to be a limitation on or qualification of proviso 4 so far as it applies to it or the assessment that may be made for the purpose it refers to. The terms of the language used in the fifth proviso do not restrict its application to the proceedings referred to in any one of the previous provisions, and if it has application to one there is nothing appearing in the act itself to prevent its having application to all.

The contention that the word "installment" has a special and restricted meaning, and cannot be applied to an assessment confirmed under a prior act, but must be applied to

an installment of an assessment, we think too narrow, and, in view of the proviso, unsound. Under the local improvement act of 1897 judgment of sale of delinquent lands for special assessments is to be at the same time, and controlled the same, as an application for judgment for state, county and general taxes. Section 67. The delinquent list must be filed with the county collector on or before April 1st, and the county collector is required to give the same notice that is given in the case of other taxes. Section 67. If special circumstances do not require otherwise, one judgment can be entered covering the taxes, general, local, and special, and special assessment. Revenue Act, § 191. And the evident purpose of the fifth proviso was to have some uniformity in the making up of the "tax, judgment, sale, redemption, and forfeiture record" (Revenue Act, § 200), and the advertisement and judgment; in other words, the whole proceeding for the collection of taxes by the general tax officer. No one can conjure the remotest reason why an installment, which is, as strictly understood, a part of the whole, should pursue one course that payment might be enforced, and an assessment payable in one payment or installment must pursue another. Such a construction would both seem absurd and work absurd results, not in keeping with the purpose of the proviso, and should, if possible, be avoided. *People v. City of Chicago*, 152 Ill. 546, 38 N. E. 744. The proviso does not say its effect is confined to assessments payable in installments, but is, "when any installment of any assessment confirmed under prior acts," etc. This assessment was confirmed under a prior act, and, instead of being payable in several installments, is payable in one payment. It is common to inquire of an assessment whether it is payable in one or several installments, and, while it cannot be a strictly accurate expression according to the definition of "installment," still we think such was the sense in which the word was used in the proviso under discussion, and that the word, in the connection used, might properly be held to cover the whole or any part of an assessment confirmed under prior acts. As we think, the park commissioners were authorized by both the park act of 1871 (*Hurd's St. 1899*, p. 1203, c. 105) and the local improvement act of 1897 to adopt and follow the provisions of the latter act.

We have examined the record, and also find that in the proceeding before us the park commissioners did adopt and follow literally the provisions of sections 61 to 67, inclusive, of the act of 1897, and that the provision as to returns found in section 178 of the revenue act, and the provision of section 279 of the same act prescribing a time or limitation, have no application to this assessment, and that the proceeding and lien are not controlled by them. *People v. Pierce*, 90 Ill. 85;

Potwin v. Johnson, 108 Ill. 70; *Gross v. People*, 193 Ill. 260, 61 N. E. 1012.

Appellants direct our attention to two judgments of sale which they say were entered on this assessment. They say that one of the judgments was signed by the judge and one of them was not signed by him, and that that, at least, is error. Section 191 of the revenue act requires that the judgment shall be signed by the judge. The judgment that is signed by him gives the number of the warrant and the number of the assessment. The other is not signed, and is mere surplusage, and does not render the judgment entered and signed and relating to the same assessment void, nor is it such error as should work a reversal of the signed judgment. To the one that is signed it is only objected that the name of the park commissioners is not correctly stated. It is there designated as "The Board of West Park Commissioners," while appellants point out that the name is "The Board of West Chicago Park Commissioners." We do not think this variance so material as to call for a reversal of the judgment. The judgment is in the name of the county treasurer and ex officio collector, and the other matters are descriptive of what the judgment is for, and we think are sufficiently certain that there is no likelihood of a double sale for the satisfaction of the assessment. The judgment is affirmed.

Judgment affirmed.

(213 Ill. 452)

HULBERT v. CITY OF CHICAGO.*

(Supreme Court of Illinois. Dec. 22, 1904.)

MUNICIPAL IMPROVEMENTS—ESTIMATES—RESOLUTION—DUE PROCESS OF LAW—CONFLICTING EVIDENCE—REVIEW.

1. An estimate of the cost under a paving resolution as follows: "Granite concrete combined curb and gutter on cinders, 7,126 lineal feet at 70 cents, \$4,988.20; paving with asphalt on six inches of Portland cement concrete swept with natural hydraulic cement, 11,349 square yds. at \$2.50, \$28,372.50; adjustment of sewers, catch-basins and man-holes, \$1,139.30; total, \$34,500.00"—is sufficiently itemized under Local Improvement Act, § 7 (*Hurd's Rev. St. 1903*, p. 392), providing that, when the board of local improvements shall originate an improvement to be paid for by special assessment, it shall adopt a resolution describing the improvement, and shall cause an estimate of the cost thereof to be made in writing by the engineer of the board, "which shall be itemized to the satisfaction of said board."

2. Local Improvement Act, § 8 (*Hurd's Rev. St. 1903*, p. 392), provides that, in case any person shall object to the proposed improvement or any of the elements thereof, said board shall adopt a new resolution, abandoning the proposed scheme, or adhering thereto, or changing, altering, or modifying the extent, nature, kind, character, and estimated cost. *Held*, that where the improvement was not abandoned or modified, but it was determined at the hearing to construct the improvement in accordance with the original resolution, all that was required of

*Rehearing denied February 3, 1905.

the board was to pass a resolution adhering to the prior resolution.

3. Local Improvement Act, §§ 42, 86 (Hurd's Rev. St. 1903, pp. 400, 412), providing for a division of assessments for local improvements into installments, and the issue of bonds to anticipate the payment of deferred installments, are not void as depriving the owner of his property without due process of law, in fixing the rate of interest on such installments and bonds at not less than 5 per cent.

4. Where the evidence on the assessment of benefits by street improvements was heard in open court and was conflicting, the finding of the court will be affirmed unless it is manifest that error was committed.

Appeal from Cook County Court; L. C. Ruth, Judge.

Proceedings by the city of Chicago against Thomas H. Hulbert for the confirmation of an assessment for local improvements. From a judgment of confirmation, defendant appeals. Affirmed.

George W. Wilbur, for appellant. Robert Redfield and Frank Johnston, Jr. (Edgar Bronson Tolman, Corp. Counsel, of counsel), for appellee.

HAND, J. This is an appeal from a judgment of the county court of Cook county confirming an assessment to defray the cost of paving Drake avenue from Milwaukee avenue to West Fullerton avenue, in the city of Chicago.

It is first objected that the estimate of the cost of the improvement by the engineer is not sufficiently itemized. The estimate of the engineer, omitting the preamble and the engineer's certificate and signature, is as follows:

Estimate.	
Granite concrete combined curb and gutter on cinders, 7126 lineal feet at 70 cents	\$ 4,988 20
Paving with asphalt on six inches of Portland cement concrete swept with natural hydraulic cement, 11,349 square yds. at \$2.50	28,372 50
Adjustment of sewers, catch-basins and man-holes	1,139 30
Total	\$34,500 00

Section 7 of the local improvement act (Hurd's Rev. St. 1903, p. 392) provides—that when the board of local improvements shall originate a local improvement, to be paid for by special assessment or special taxation, it shall adopt a resolution describing the proposed improvement, which resolution shall be at once transcribed into the records of the board, and shall fix a time and place for the public consideration thereof, which shall not be less than 10 days after the adoption of said resolution, and “shall also cause an estimate of the cost of such improvement * * * to be made in writing by the engineer of the board * * * over his signature, which shall be itemized to the satisfaction of said board, and which shall be

made a part of the record of such resolution”; and a five-days notice, by mail, of the public hearing, is required to be given to the person who paid the general taxes for the last preceding year on each lot, block, tract, or parcel of land fronting on the proposed improvement.

In *Bickerdike v. City of Chicago*, 203 Ill. 636, 68 N. E. 161, and *Kilgallen v. City of Chicago*, 206 Ill. 557, 69 N. E. 536, the proceedings required by said section of the statute are held to be jurisdictional, and that a valid ordinance cannot be passed for a local improvement to be paid for by special assessment or special taxation without a compliance therewith; and in *City of Peoria v. Ohl*, 209 Ill. 52, 70 N. E. 632, that the engineer's estimate must be itemized, and that the statement by the engineer of the cost of the sidewalk, to be built by special taxation, in gross, was not a compliance with the statute. It was, however, said in *Lanphere v. City of Chicago* (Ill.) 72 N. E. 426, that a substantial compliance with the provisions of the statute is all that is required; and in *Gage v. City of Chicago*, 207 Ill. 56, 69 N. E. 588, that it is not necessary that the resolution describe the improvement with the same particularity as it is required to be described in the ordinance. We think the estimate of the engineer above set forth as itemized was sufficiently specific to give the property owner a general idea of what it was estimated the substantial component elements of the improvement would cost, and that it is in substantial compliance with the requirements of the statute.

It is next contended that the resolution of the board of local improvements adhering to the proposed improvement was insufficient, which resolution was in the following form:

“January 14, 1904.

“Board of Local Improvements.

“ * * * A meeting of the board of local improvements was held in room 203 for the purpose of giving public hearing to the property owners interested in sundry proposed improvements, as above set forth, pursuant to resolution heretofore adopted by said board, and in accordance with notices which, on evidence submitted, the board finds have been mailed pursuant to statute, at which hearing for public consideration the following resolutions were adopted, to-wit:

“Proceeded with:

“Resolved by the Board of Local Improvements of the City of Chicago, That the following local improvements be made and adhered to pursuant to prior resolutions heretofore adopted for the same, to-wit: * * * Paving, asphalt, Drake avenue, from West Fullerton avenue to Milwaukee avenue. * * *

Section 8 of the local improvement act provides: “In case any person shall appear

† 4. See *Municipal Corporations*, vol. 36, Cent. Dig. § 1181.

to object to the proposed improvement or any of the elements thereof, said board shall adopt a new resolution abandoning the said proposed scheme or adhering thereto, or changing, altering or modifying the extent, nature, kind, character and estimated cost." In this case the improvement was not abandoned, changed, altered, or modified, but it was determined at the public hearing to construct the improvement in accordance with the original resolution. Therefore all that was required of the board was to pass a resolution adhering to the prior resolution. This was done, and the resolution, we are of the opinion, as adopted by the board, was sufficient. Had the board at the public hearing altered, changed, or modified the extent, nature, kind, character, or estimated cost of the improvement, such modification or alteration should have been described with reasonable certainty in a new resolution.

It is next contended that sections 42 and 86 of the local improvement act (Hurd's Rev. St. 1903, pp. 400, 412), in accordance with the terms of which, by the ordinance, the assessment was divided into installments, and bonds to anticipate the payment of the deferred installments were provided for to be issued, is unconstitutional, on the ground that the Legislature had no authority to fix the rate of interest which said installments and bonds should bear at 5 per cent. No authority has been cited to sustain that position. It is, however, urged that the effect of said sections is to deprive the property owner of his property without due process of law, in this: that the rate of interest on the deferred installments and bonds cannot be fixed at a lower rate by the city than 5 per cent., and it is said that the city, if untrammelled by the statute, might be able to issue and negotiate the same at a lower rate than that fixed by the statute. We cannot agree with the view of appellant, but are of the opinion the Legislature had the right to fix the rate of interest which said deferred installments and bonds, when issued, should bear, and that those sections of the statute are not in conflict with the Constitution.

The question of benefits to the property of appellant was submitted to the court, a jury having been waived, and it is urged the property of appellant is assessed too high, and for an amount greater than it will be benefited by the improvement. The evidence upon that question was conflicting. The judge before whom the case was tried heard and saw

the witnesses, and we are unable to point out wherein his finding of fact was wrong. The rule is, where the evidence was heard in open court and is conflicting, the judgment of the lower court will be affirmed unless it is manifest that error has been committed. *Topliff v. City of Chicago*, 196 Ill. 215, 63 N. E. 692. Finding no reversible error in this record, the judgment of the county court will be affirmed.

Judgment affirmed.

(213 Ill. 457)

GAGE v. PEOPLE ex rel. **HANBERG**, County Collector.*

(Supreme Court of Illinois. Dec. 22, 1904.)

APPEAL—REVERSAL AND REMAND.

1. Where the error is only on the entry of the judgment, in failing to show the amount for which it is rendered, and in ordering sale for costs only, reversal will be merely with directions to properly enter the judgment.

Error to Cook County Court; O. N. Carter, Judge.

Application by the people, on the relation of the Cook county collector, for a judgment and order of sale for an assessment for a sewer. There was a judgment and order, and Henry H. Gage, owner of the property, brings error. Reversed.

F. W. Becker, for plaintiff in error. William M. Pindell (Edgar Bronson Tolman, Corp. Counsel, and Robert Redfield, of counsel), for defendant in error.

PER CURIAM. This case is in all respects like the case of *Gage v. People* (Ill.) 72 N. E. 1084, except an additional error is assigned, in that the court entered judgment for costs only. The opinion in the case of *Gage v. People*, supra, will accordingly govern, except that the court will also be ordered to enter a judgment for the special assessment applied for, together with costs, etc. Both the errors being upon the entry of the judgment, it will not be necessary to award a new trial. The judgment of the county court will accordingly be reversed, and the cause remanded, with directions to that court, upon motion of defendant in error, to enter a judgment in compliance with section 191 of chapter 120, Hurd's Rev. St.

Reversed and remanded, with directions.

*Rehearing denied February 9, 1905.

(Supreme Court of Indiana. Jan. 10, 1905.)

SCHOOL TOWNSHIPS—CONTRACT WITH OFFICERS
—ACTION ON CONTRACT—PLEADING—SUFFI-
CIENCY OF COMPLAINT—TOWNSHIP ORDERS—
DEFENSES—NOTICE TO ASSIGNEE.

1. The officers of a school township cannot be held personally liable on a contract made on their part as such officers, and solely for the benefit of the township.

2. Where a school township order declared that it was given in payment for a heater for a schoolhouse, and was payable out of the special school fund, a purchaser of the order was charged with notice that it had been executed on account of the public schools, that it was open to defenses against an assignee, that the trustee of a school township has no power except that specially conferred by statute, or necessarily implied, and that the powers can be exercised only in accordance with the statute.

3. While it is the duty of a school township trustee under Burns' Ann. St. 1901, § 5920, to take charge of the township's educational affairs and provide proper equipment, he has no power to charge the township with anything but needful and proper articles.

4. In an action against a school township on a contract for the purchase of a heater for a school the complaint was insufficient for failing to allege that there existed at the time of the purchase any necessity for procuring a heater.

5. Where, in an action against a school township on a contract, the complaint did not show the contract made in accordance with Acts 1899, p. 150, c. 105, "concerning township business" (Burns' Ann. St. 1901, § 8085 et seq.), it is to be presumed against the pleader that the contract was absolutely void; section 8085k making such contracts void where made in violation of the statute.

6. The sustaining of a demurrer to a paragraph of the complaint, if erroneous, was harmless where the facts pleaded in the paragraph were in all respects the same as in another paragraph, and the evidence admissible under one was admissible under the other, and the case was tried on the latter paragraph.

Appeal from Circuit Court, Putnam County; P. O. Colliver, Judge.

Action by Anna Oppenheimer against the Greencastle school township of Putnam county and others. From a judgment in favor of defendants, plaintiff appeals. Transferred from Appellate Court under Burns' Ann. St. 1901, § 1337u. Affirmed.

Jackson Boyd and W. El. Mowbray, for appellant. Moore Bros., for appellees.

HADLEY, C. J. On March 16, 1901, appellant's assignor, Manson U. Johnson, sold to John A. Keller, trustee of appellee township, for the use of his township in schools numbered 1 and 9, one single and one double Ideal heater and ventilator. In Johnson's proposal for the sale appears the following provision:

"Guaranty: When the party of the second part has complied with the terms and conditions of the contract first party guarantees that this furnace has the capacity to, and

attention to fires, heat this building to a temperature of seventy (70) degrees Fahrenheit in the coldest winter weather. Also that the material furnished and the labor performed are the best of their respective kinds and fully up to the highest standard of first class work. Party of the first part to complete the above contract in the best, most substantial and thorough workmanlike manner, for the sum of three hundred seventy-five and no hundredths dollars (\$375) interest at six per cent. from date.

"Terms: When above guaranty is fulfilled the owner may be paid after zero weather, at option of trustee.

"Done at Greencastle this 16th day of March, 1901. Manson U. Johnson."

"The acceptance was in these words:

"The undersigned party of the second part accepts the foregoing proposition of Manson U. Johnson, Anderson, Indiana, for the Ideal Heater and Ventilator above specified, and agrees to pay for the same the sum of Three Hundred and Seventy-five Dollars upon the terms and conditions above expressed.

"In witness whereof, we have hereunto set our hands at Greencastle, Ind., this 16th day of March, 1901.

"[Seal.] John A. Keller, Trustee,

"John L. Hillis,

"R. S. Graham, Secretary."

And on the same day there was executed to Johnson for the heaters what is termed a "township order," as follows:

"No. ———, \$375. State of Indiana, Putnam County. Greencastle township, in county and state aforesaid, will pay to the order of Manson U. Johnson, three hundred seventy-five and no hundredths dollars out of special school fund for one Single Ideal Heater and one Double Ideal Heater and Ventilator, payable at the First National Bank of Greencastle, Indiana, on or before the twenty-fifth day of January, 1902. Value received, waiving valuation and appraisal laws, with interest thereon at the rate of six per cent. per annum, payable semi-annually from the 16th day of March, 1901, until paid and attorney's fees. Date, Greencastle, March 16, 1901. John A. Keller, Trustee Greencastle Township, Putnam County. John L. Hillis, R. S. Graham."

Indorsed: "Pay to the order of Anna Oppenheimer. Manson U. Johnson."

The evidence shows that Hillis and Graham at the time of the transaction were members of the township advisory board. Default in payment of the order having been made, appellant, Manson U. Johnson's assignee by indorsement, instituted this suit. She made Greencastle school township, John A. Keller, trustee, John L. Hillis, and Robert S. Graham, of the advisory board, parties defendant. The complaint is in six paragraphs. The first declares upon the order; alleges that it was executed by Greencastle school township to Manson U. Johnson, and

¶ 4. See Schools and School Districts, vol. 43, Cent. Dig. § 377.

signed by John A. Keller, the duly elected, qualified, and acting trustee of said township; John L. Hillis and Robert S. Graham, members of the advisory board of said township; and that the same was sold and assigned by Johnson to appellant for value, before maturity, and without notice of any defense thereto. The second, third, fourth, fifth, and sixth paragraphs set up the same facts in different forms, the substance being the needs of the township for heating apparatus, the suitability and efficiency of the Ideal heaters, their purchase, acceptance, and continued use by Greencastle school township, the execution by said township of the township order therefor, and its assignment to appellant. Some of them counted upon the quantum meruit for the sale of necessities to the township, and some upon the township order. The separate demurrer of Keller, Hillis, and Graham to each paragraph of the complaint was sustained. The separate demurrer of Greencastle school township to each the first and fifth paragraphs was also sustained.

1. With respect to the separate demurrers of Keller, Hillis, and Graham, it is alleged in each paragraph of the complaint that Greencastle school township purchased the goods, and executed to Johnson the order in suit. It is not charged in either paragraph that Keller, Hillis, or Graham promised to pay the debt, or in any way obligated themselves to pay it. It is clearly shown in each that these parties in the transaction were acting as public officers, and solely for the township, and they cannot, under the facts alleged, be held personally liable. *Township v. Huber Co.*, 83 Ind. 121; *State v. Helms*, 136 Ind. 122, 35 N. E. 898; *Bank v. Osborne*, 18 Ind. App. 442, 48 N. E. 256. Their separate demurrers were therefore properly sustained.

2. The demurrer of Greencastle school township to the first paragraph of the complaint was also correctly sustained. As we have seen, this paragraph rests solely upon the township order. As exhibited with the complaint, the order declares upon its face that it was given for one single and one double Ideal heater and ventilator, and is payable out of the special school fund of the township. This was sufficient to charge the plaintiff, when purchasing the order, with notice that it had been executed by the trustee on behalf of his township, on account of the public schools, and that the same was open to defenses in the hands of an assignee. As regards possible defenses, she was also bound to take notice that the trustee of a school township is a public officer; that he is created, and the extent of his power and authority defined, by legislative enactment; that he only has such powers as are expressly conferred or necessarily implied, and that the powers possessed can be exercised only as pointed out by the statute. Being thus invested and limited in authority by statute,

appellant was bound to know that the trustee could only bind his township when he acts within the conditions and in the manner prescribed by the statute. *State v. Board of Com'rs*, 147 Ind. 285, 46 N. E. 525. While it is the duty of township trustees, under section 5920, Burns' Ann. St. 1901, to take charge of the educational affairs of their respective townships, and to provide suitable houses and equipment for schools, the duty must be discharged with discretion and economy. It has been many times decided in this state that they have no power to charge their townships with anything but needful and appropriate articles. *State v. Hawes*, 112 Ind. 323, 14 N. E. 87, and cases cited; *National Bank v. Osborne*, 18 Ind. App. 442, 48 N. E. 256. Therefore, in a suit against a township on a contract made with its trustee it must affirmatively appear from the complaint that the contract was one the trustee had authority to make. *Reeves Sch. Tp. v. Dodson*, 98 Ind. 479; *Bloomington Sch. Tp. v. Furnishing Co.*, 107 Ind. 43, 7 N. E. 760; *Honey Creek Tp. v. Barnes*, 119 Ind. 213, 215, 21 N. E. 747. In the first place, it is not shown in the first paragraph of the complaint that there existed at the time any necessity for procuring the Ideal or any other kind of heaters for the use of the schools, and without such necessity the trustee had no power to bind the township by their purchase. In the second place, it is not shown that the debt was contracted in accordance with the requirements of the act of 1899 "concerning township business" (Acts 1899, p. 150, c. 105; section 9085 et seq., Burns' Ann. St. 1901). If not in compliance with said act, as must be presumed against the pleader, the contract was absolutely void. Section 11, Acts 1899, p. 157, c. 105 (section 9085k, Burns' Ann. St. 1901).

3. Whether good or bad, the sustaining of the demurrer to the fifth paragraph of the complaint did the plaintiff no harm. The facts pleaded in the fifth and sixth paragraphs were in all material respects the same, and no evidence would have been admissible under the fifth that was not admissible under the sixth. If, therefore, erroneous, it was not reversible error.

The second, third, fourth, and sixth paragraphs of complaint were held good and were answered by a general denial, and two affirmative paragraphs setting up a breach of the warranty contained in the contract under which the heaters were purchased. Appellant's separate demurrers to these two latter answers were overruled. There was a special finding of facts and conclusions of law thereon in favor of appellee. Appellant's motion for a new trial for insufficiency of the evidence to sustain the finding was overruled. There was no exception taken to the conclusions of law. There was a sharp conflict in the evidence, which we cannot weigh. We have given due consideration to the record, and find that the evidence supports the

the answers, and the answers were clearly good. There was no error.
Judgment affirmed.

(34 Ind. App. 418)

JOHNSTON GLASS CO. v. LUCAS. (No. 4,831.)

(Appellate Court of Indiana, Division No. 1.
Jan. 10, 1905.)

APPEAL—ASSIGNMENTS OF ERROR—QUESTIONS FOR REVIEW—STATUTE.

1. The sufficiency of a single paragraph of complaint for want of facts cannot be challenged by an assignment of error.

2. Where separate demurrers to two paragraphs of complaint are filed, but a joint exception is taken to the overruling thereof, separate assignments of error based on the exception raise no question as to the sufficiency of either paragraph.

3. Where defendant in a suit for injunction on the overruling of its demurrers to the complaint refused to plead further, and the court entered judgment making permanent the temporary restraining order theretofore issued, to which ruling the defendant at the time excepted, and on appeal assigned as error "that the court erred in rendering judgment for appellee on demurrer," the assignment presented no question on appeal under Burns' Ann. St. 1901, § 667, requiring assignments of error to be specific.

4. An assignment of error not discussed by appellant is waived.

Appeal from Circuit Court, Blackford County; Edwin C. Vaughn, Judge.

Action by Noah Lucas against the Johnston Glass Company. From a judgment for plaintiff, defendant appeals. Affirmed.

A. M. Waltz and E. W. Secrest, for appellant. Cantwell & Simmons and J. A. Hindman, for appellee.

MYERS, J. This action was commenced by appellee to enjoin appellant from sinking a natural gas or oil well on fifteen-sixteenths of an acre of real estate theretofore conveyed by appellee to Licking township, in Blackford county, Ind. The complaint is in two paragraphs; the first paragraph, filed December 5, 1901, and the second January 14, 1902. January 1, 1902, appellant filed its demurrer to the first paragraph, and on January 17, 1902, it filed a demurrer to the second paragraph of complaint. The ruling of the court on the several demurrers, and the exception taken, is set forth in the following entry: "Come now the parties by counsel, and the separate demurrers hereto filed by the defendant to each paragraph of plaintiff's complaint are now overruled by the court, to which ruling of the court the defendant at the time excepted."

The first and third assignments of error challenge the sufficiency of each paragraph of the complaint separately for want of facts, and present no question for our decision. It has been repeatedly held by the Supreme Court as well as by this court that, where a defendant desires to test the sufficiency of a particular paragraph of complaint, the proper

ton v. Shepherd, 120 Ind. 69, 22 N. E. 98, and cases cited; Hutchings et al. v. Hay, 132 Ind. 369, 31 N. E. 938; De Vay v. Dunlap, 7 Ind. App. 690, 35 N. E. 195.

The second and fourth assignments of error are based upon the exception taken by appellant to the ruling of the court on the two demurrers of the complaint, as above stated, and present no question for decision. Southern Ind. Ry. Co. v. Harrell, 161 Ind. 689, 68 N. E. 262, 63 L. R. A. 460.

The defendant in the lower court, appellant here, refusing to plead further, the court rendered judgment, and the temporary restraining order theretofore issued was made permanent, "to which ruling of the court the defendant at the time excepts." On this ruling the appellant in this court makes the following assignment of error: "Fifth. The court erred in rendering judgment for appellee upon demurrer." This assignment is held not to be such a specific assignment as required by section 667, Burns' Ann. St. 1901, as to present to this court a question for consideration. Seisler v. Smith, 150 Ind. 88, 48 N. E. 993, and cases cited; Hill v. Indianapolis & V. R. Co., 31 Ind. App. 98, 67 N. E. 278. The fifth assignment of error is not discussed by appellant, and therefore may be considered as waived.

Having disposed of all the errors assigned, and there appearing no reason for reversing the judgment, the same is in all things affirmed.

(34 Ind. App. 433)

HARRIS v. CURTIS et al. (No. 4,731.)
(Appellate Court of Indiana, Division No. 2.
Jan. 11, 1905.)

HIGHWAYS—JURISDICTION—SUFFICIENCY OF PETITION—MOTION TO DISMISS.

1. Under Burns' Ann. St. 1901, § 6742, authorizing the county board to locate, vacate, or change any highway on the petition of 12 freeholders, a petition for a highway is sufficient to confer jurisdiction of the subject-matter, though it also contains a prayer for relief partially beyond the power of the board to grant.

2. A motion to dismiss a petition to locate and change a highway on the ground that it does not ask for a change in an existing highway, but seeks to establish a new highway and vacate a different one, which is not supported by any evidence, should be overruled.

Appeal from Circuit Court, Greene County; O. B. Harris, Judge.

Petition by Sarah E. Curtis and others to establish a highway, to which Josiah C. Harris filed a remonstrance. From a judgment establishing the highway, Harris appeals. Affirmed.

J. W. Lindley, for appellant. C. D. Hunt, for appellees.

ROBY, J. Appellees filed a petition before the board of commissioners of Sullivan county, praying the location of a highway from "a point about thirty-five feet north of the

northeast corner of section twelve, township eight north, range ten west, where a public highway intersects the township line between said townships of Turman and Hamilton," thence due west on the section line, to intersect with a public highway called the "Bridge Road," and the vacation of an old highway commencing at the point above described and ending one-quarter mile west in "another public highway." Viewers were appointed, who reported in favor of the proposed improvement. The appellant filed a remonstrance for damages. Reviewers were appointed, who awarded damages to him. On motion of the petitioners the report was set aside, and another set of reviewers was appointed, who also reported an award of damages to them. An order was thereupon entered by the board establishing and vacating the highway as prayed, and fixing the width of the new road at 30 feet. From this judgment an appeal was taken to the circuit court, trial had, finding and judgment for the petitioners, from which this appeal is taken.

Appellant, jointly with others, filed a motion before the board to dismiss the petition for the alleged reason that it does not ask for a change in an existing highway, but seeks to establish a new highway and to vacate a different one. The motion was overruled by the board. The point made on this appeal is that the proceeding should have been dismissed "for the reason that the statute of Indiana does not authorize the establishment of a new highway and the vacation of a different one in the same petition." The statute is that "whenever twelve freeholders * * * shall petition the board of commissioners * * * for the location, vacation or change of any highway, such board, if it be satisfied," etc. Section 6742, Burns' Ann. St. 1901. The board of county commissioners has exclusive jurisdiction of the location, vacation, and change of public highways. "Jurisdiction does not depend upon the sufficiency or correctness of the averments of the petition, but upon the subject-matter to which it relates. As we have already seen, the subject-matter was within the jurisdiction of the board. A defective petition for a highway, or a petition for a highway which also contains a prayer for relief partially beyond the power of the board to grant, will nevertheless as effectually invoke its jurisdiction, and clothe it with power to adjudicate upon the matter presented, as a defective complaint in the circuit court to foreclose a mortgage. * * * The jurisdiction of the circuit court in the matter of the foreclosure of mortgages is no more complete than is the jurisdiction of the board of county commissioners in the matter of establishing highways." Chicago, etc., R. R. Co. v. Sutton, 180 Ind. 405, 412, 30 N. E. 291, 293; Patton v. Creswell, 120 Ind. 147-150, 21 N. E. 663; Gold v. Pittsburg, 153 Ind. 232, 53 N. E. 285. It does not appear

upon the face of the petition that the board of commissioners did not have jurisdiction of the subject-matter; neither can it be thus determined that the relief sought amounts to more than the change of an existing highway, "since the change of a highway necessarily requires the vacation of a portion of a highway and the location of such portion upon a different line; and in this sense a vacation and location are authorized in the same proceeding." Bowers v. Snyder, 88 Ind. 302. The motion to dismiss was not supported by any showing of fact, and no error was committed in overruling it. It is not, therefore, necessary to determine whether the vacation and establishment of highways can be had in the same proceeding.

A number of questions relative to appellate practice are urged by appellees. They do not go to the substance of the controversy between the parties, and will not, therefore, be discussed.

Appellees file a motion asking this court to direct the circuit court to correct its judgment by inserting therein the width of the proposed highway as fixed by the board. Upon the authority of Merom Gravel Co. v. Pearson (Ind. App.) 71 N. E. 54, the trial court is directed to amend its judgment by inserting therein the width of the proposed highway so fixed by the order of the board of commissioners, and the judgment is affirmed.

(35 Ind. App. 118)

SMITH v. PETERS et al. (No. 4,284.)¹
(Appellate Court of Indiana, Division No. 1.
Jan. 5, 1905.)

**APPEAL—ASSIGNMENTS OF ERROR—PARTIES—
DESIGNATION—DISMISSAL.**

1. Burns' Ann. St. 1901, § 647a, provides that a part of any number of co-parties against whom a judgment has been taken may have a term-time appeal, wherein it is not necessary to make parties to the appeal the other co-parties not appealing from the judgment against them, or to name them either as appellants or appellees in the assignment of errors, and, after such an appeal has been perfected, any co-party not joining therein originally may assign errors for himself, etc. *Held*, that under such section all parties assigning errors, whether originally or while the appeal is pending, should make their co-parties, so far as any of them are named in the assignment of errors, and against whom no relief on appeal was sought, appellants, and not appellees, and where such parties are improperly made appellees, and the assignment cannot be sustained as to them, the appeal will be dismissed.

Appeal from Circuit Court, Madison County; John F. McClure, Judge.

Petition by Edmon H. Peters as to a certain ditch, against which Micajah Smith and others file remonstrances. From a judgment in favor of petitioner, certain remonstrants appealed, and certain others also filed cross-assignments of error. Dismissed.

Byron McMahan, William S. Diven, and James A. Van Osdol, for appellant. Bagot & Bagot, for appellees.

¹ Rehearing denied.

(213 Ill. 453)

CHICAGO, B. & Q. R. CO. v. PEOPLE ex rel.
SONNET, County Collector.

(Supreme Court of Illinois. Feb. 9, 1905.)

**TAXATION — COUNTY TAXES — MAXIMUM RATE—
DETERMINATION OF VALUATION—
LEVIES IN GROSS.**

1. Const. art. 9, § 8, provides that county authorities shall never assess taxes, the aggregate of which shall exceed 75 cents per \$100 valuation, unless authorized by vote of the people of the county. Hurd's Rev. St. 1903, c. 120, § 121, contains a further provision to the same effect. Act May 10, 1901, §§ 117, 128 (Laws 1901, p. 271), provide for two different valuations of property—one for state purposes, determined by the State Board of Equalization, and the other for all other purposes, fixed by the county board of review. Act May 9, 1901 (Laws 1901, p. 272) §§ 1, 2, provide that, in determining the amount of the maximum tax authorized to be levied, the assessed valuation, as equalized by the State Board of Equalization, shall be used. *Held*, that the cited sections of the Acts of 1901 are constitutional; and, where the maximum tax is authorized to be levied for county purposes, such tax is to be extended upon the equalized valuation as made by the state board, and not upon the valuation as made by the board of review.

2. A grant of power to levy taxes must be strictly construed, and the method prescribed by the Legislature must be substantially followed; and a failure to comply with the statutory requirements is not a mere irregularity, but a fatal omission, vitiating the tax.

3. Under Hurd's Rev. St. 1903, c. 120, § 121, providing for the annual determination of the amount of all taxes to be raised for county purposes by the county boards of the respective counties, and further providing that when the taxes are to be raised for several purposes the amount for each purpose shall be stated separately, the levy must be in separate items, and a levy in a gross amount for all county purposes is void.

Appeal from Adams County Court; C. B. McCrory, Judge.

Application by the people, on the relation of Frank Sonnet, county collector of Adams county, for judgment and order of sale against the property of the Chicago, Burlington & Quincy Railroad Company for delinquent taxes. From a judgment overruling objections to the tax, defendant appeals. Reversed.

At the June term, 1904, of the county court of Adams county, the county collector made application for judgment and order of sale against appellant's property for delinquent tax for the year 1903. Appellant filed 17 objections, covering \$473.55 of the county tax, \$21.99 of the district school tax, \$8.62 of the tax of the village of Golden, and \$277.90 of the road and bridge tax of the various townships. The objections to these various amounts are that they are in excess of the maximum amount allowed by law; that the statutes under which the valuations were made and equalized are unconstitutional and void; and because the county board at its September session in 1903, did not determine the amounts of all taxes to be raised for county purposes, nor any or either of them,

and did not state separately the amounts to be raised for each purpose. The objections were submitted to the court upon an agreed state of facts, the material parts of which are as follows: (1) That appellant is the owner of certain railroad property in said county, all of which was listed for taxation for the year 1903; (2) that the county tax levy was made at the rate of 75 cents on each \$100 of valuation, upon a total valuation of \$12,445,418; (3) that this valuation is the sum of the total valuation as fixed by the county board of review, together with the total valuation of all railroad property and capital stock as fixed by the State Board of Equalization; (4) that the total value of all of appellant's property assessed for the year 1903 in the county, as fixed by the State Board of Equalization, was \$631,165; (5) that the total county tax levied and assessed against appellant's property, and for which judgment was asked, was the sum of \$4,733.91, and that the assessment was levied at the rate of 75 cents on each \$100 of the said \$631,165; (6) that the total valuation of all property in said county as equalized by the State Board of Equalization was \$11,184,628, and that a tax of 75 cents on each \$100 of this valuation would produce the sum of \$83,884.71; (7) that in order to produce a tax aggregating the sum of \$83,884.71 on the valuation aforesaid, of \$12,445,418, as fixed by the board of review, required a tax rate of 67½ cents on each \$100 of the aforesaid total valuation of \$12,445,418; (8) that the county tax of \$4,733.91 assessed against appellant's property exceeded the rate of 67½ cents on each \$100 of valuation of the aforesaid total of \$12,445,418, and that the amount of such excess is \$473.55; (9) that the total amount of taxes for all purposes levied and assessed against appellant's property, and for which judgment was asked, was the sum of \$22,970.37, and that the sum last aforesaid included the county taxes, amounting to \$4,733.91; (10) that on April 29, 1904, appellant tendered to the county collector the sum of \$22,188.81, which was all the tax levied or assessed against its property, except the sum of \$473.55 of county tax, and except, also, the several amounts assessed for road and bridge taxes, district school taxes, and village tax, above enumerated, which tender was then and there refused by the county collector for the reason that it did not include all of the taxes assessed against the appellant, and that appellant has duly brought this sum into court as a tender. In addition to this agreed state of facts, the county clerk identified the order of the board of supervisors made at its September meeting, 1903, levying the tax for county purposes, and he also testified to various facts not necessary to be here recited. All of the objections were overruled, and judgment and order of sale entered. From this judgment an appeal has been prosecuted to this court.

(Chester M. Dawes, of counsel), for appellant. James N. Sprigg, Co. Atty., for appellee.

WILKIN, J. (after stating the facts). It is first insisted that the county tax as levied by the board of supervisors at its September meeting, 1903, was to the extent of \$473.55—the amount objected to—in excess of the maximum allowed by law, and was to this extent illegal and void; that the same error was committed in regard to the road and bridge taxes, the school tax, and the corporation tax of the village of Golden.

The levy for county purposes, as made by the supervisors, is as follows:

"By the Finance Committee.

"To the Board of Supervisors—Gentlemen: We, your finance committee, in the exercise of the powers conferred by law on county boards for that purpose, find that the necessary expenditures of the county of Adams for the current year, in the discharge of the obligations imposed upon said county by law, will require a sum of money to be collected by general taxation equal to seventy-five cents on the \$100 valuation of the taxable property of this county, and recommend the adoption of the following order: That there be and is hereby levied for the expenditures of the current year for county purposes, a tax of seventy-five cents on the \$100 valuation, and at that rate upon all property within the county of Adams as shown by the assessed and equalized valuation thereof as assessed by the Adams county board of review, and upon all property within said county as originally valued and assessed by the State Board of Equalization for the year 1903 for the purpose of taxation, and that the county clerk be and is hereby instructed to extend the said rate of seventy-five cents on each \$100 valuation in accordance with this order. Adopted."

This order of the county board directed the clerk to levy 75 cents, the highest rate allowed by law, on each \$100 of the valuation made by the county board of review. It is insisted by the appellant that by extending 75 cents on \$12,445,418, the valuation fixed by the board of review, a county tax of \$93,340.63 was produced, and that by levying such tax of 75 cents on the valuation of the state board, which amounted to \$11,184,628, a county tax of only \$83,884.71 would have been produced, and that this is the maximum amount of taxes for county purposes which could have been lawfully assessed, and was, to the extent of \$9,455.98, in violation of the statute, and of this amount \$473.55 was assessed against appellant's property. Each objection as to the road and bridge tax, district, school tax, and village tax is based upon the same limitation. The question for determination, therefore, is whether these tax-

should be extended upon the basis of assessment as made by the board of review or by the State Board of Equalization.

Section 8 of article 9 of the Constitution provides: "County authorities shall never assess taxes, the aggregate of which shall exceed seventy-five cents per \$100 valuation, except for the payment of indebtedness existing at the adoption of this Constitution, unless authorized by a vote of the people of the county." It is not contended that there was any indebtedness in Adams county at the date of this levy which had existed at the adoption of the Constitution, and therefore, under this provision, it is conceded that for county purposes the rate of taxation should not exceed 75 cents on the \$100. Under this constitutional provision, section 121 of chapter 120 of Hurd's Revised Statutes of 1903 was enacted, authorizing the county board, at its September session, to determine the amounts of all taxes to be raised for county purposes, the aggregate amount of which shall not exceed the rate of 75 cents on the \$100 valuation of property, and order a levy made for that amount. There is nothing in the Constitution which provides the method by which the assessment shall be made, and this is therefore left to the General Assembly to govern by proper laws.

On May 10, 1901, an act of the General Assembly was approved, amending sections 117 and 128 of the general revenue law (Laws 1901, p. 271) as follows:

"Sec. 117. All rates for taxes, hereinafter provided for, shall be computed by the county clerk on the assessed valuation of property, as equalized and assessed by the State Board of Equalization for state purposes, and on the assessed valuation of property, as equalized and assessed by the county board of review, and all property assessed by the State Board of Equalization for other taxes."

"Sec. 128. State, County, Town, Road and Bridge, Village, City, District, School and All Other Taxes. All state taxes shall be extended by the respective county clerks upon the property in their counties upon the valuation produced by the equalization and assessment of property by the State Board of Equalization. All other taxes shall be extended upon the valuation produced by the equalization and assessment of property by the county board of review, and all property originally assessed by the State Board of Equalization. In the extension of taxes the fraction of a cent shall be extended as one cent."

There is nothing in either one of these sections which attempts to prescribe a limitation upon taxation. The limitations are provided by other sections of the statute and by the Constitution. In view of the fact that there were two valuations established, it was necessary to fix a maximum amount which should not be exceeded.

On May 9, 1901, an act concerning the levy

"Section 1. Be it enacted by the people of the state of Illinois, represented in the General Assembly: That in determining the amount of the maximum tax authorized to be levied by any statute of this state, the assessed valuation of the current year of the property in each taxing district, as equalized by the State Board of Equalization, shall be used. And if the amount of any tax certified to the county clerk for extension shall exceed the maximum allowed by law, determined as above provided, such excess shall be disregarded, and the residue only treated as the amount certified for extension.

"Sec. 2. The county clerk in each county shall ascertain the rates per cent. required to be extended upon the assessed valuation of the taxable property in the respective towns, townships, districts, incorporated cities and villages in his county, as equalized by the State Board of Equalization for the current year, to produce the several amounts certified for extension by the taxing authorities in said county (as the same shall have been reduced as hereinbefore provided in all cases where the original amounts exceed the amount authorized by law). * * *

By the above enactment it was evidently the intention of the General Assembly to designate which of the valuations should be the one upon which the 75-cent limit should be estimated.

All of the taxes in question being up to the limit provided by law, it was the duty of the county clerk to extend them upon the equalized valuation made by the state board, and not upon the valuation as made by the board of review. The amount of tax in each case in excess of the limit provided by law for county, road and bridge, district, school, and village taxes estimated on the equalization of the state board was illegal and void, and the court should have sustained the objections of appellant.

We have in this connection given due consideration to the argument of counsel for appellee to the effect that the law referred to by counsel as the "Juhl law," approved May 9, 1901, is unconstitutional and void; and we are clearly of the opinion that the sections above quoted are not, in any view of the case, subject to the objection. Whether or not the other parts of the act are unconstitutional, we need not now determine, further than to hold that they are not so connected with sections 1 and 2, supra, as that the latter could not be maintained, even though other parts of the act were held void.

It is next insisted that the entire levy for county purposes, as made by the board of supervisors at its September meeting, 1903, was illegal and void, first, because it undertook to prescribe a rate—and that, too, on the wrong valuation—and did not certify any amount to the county clerk for extension; and, second, because the board of supervisors

required for each county purpose.

Section 121, c. 120, of the revenue act, is as follows: "The county board of the respective counties shall, annually, at the September session, determine the amounts of all taxes to be raised for county purposes, the aggregate amount of which shall not exceed the rate of seventy-five cents on the \$100 valuation of property, except for payment of indebtedness existing at the adoption of the present state Constitution, unless authorized by a vote of the people of the county. When for several purposes, the amount for each purpose shall be stated separately." Hurd's Rev. St. 1903, p. 1529.

The order of the county board levying this tax has been set out in full in the fore part of this opinion. The levy is made for the full limit as provided by law—75 cents on the \$100 valuation—and orders the county clerk to extend the taxes on the equalized assessment as made by the board of review. We have held in many cases that a grant of power to levy taxes must be strictly construed, and that the methods prescribed by the Legislature must be substantially followed, and that a failure to comply with statutory requirements is not a mere irregularity, but is a fatal omission, which vitiates the tax. *People v. Atchison, Topeka & Santa Fé Railway Co.*, 201 Ill. 365, 66 N. E. 232; *Chicago & Alton Railroad Co. v. People*, 190 Ill. 20, 60 N. E. 69; *Cleveland, Cincinnati, Chicago & St. Louis Railway Co. v. People*, 205 Ill. 582, 69 N. E. 89; *People v. Glenn*, 207 Ill. 50, 69 N. E. 568.

The section of the statute under which this tax was levied has never been before us for consideration, but many other statutes of similar import have been passed upon with reference to city and village taxes, school taxes, road and bridge taxes, and township taxes; and we have uniformly held that where there were provisions of the statute requiring the specific items for which a tax was levied to be stated in the levy, together with the amount of each, such provisions were mandatory, and were necessary to a valid levy. *Cincinnati, Indianapolis & Western Railway v. People*, 207 Ill. 566, 69 N. E. 938; *People v. Chicago & Alton Railroad Co.*, 194 Ill. 51, 61 N. E. 1064; *Cleveland, Cincinnati, Chicago & St. Louis Railway Co. v. People*, supra; *People v. Glenn*, supra; *People v. Chicago & Alton Railroad Co.*, 193 Ill. 364, 61 N. E. 1063. The provisions of the statute in question are substantially the same as similar statutes which have been construed, and to say that a levy made in gross amount for all county purposes was valid would be equivalent to giving no effect to that provision of the statute requiring the amount for each purpose to be stated separately. It is not a sufficient answer to say that the provision is useless and unwise. We have nothing to do with these questions. It is only for us to say whether the sections of

items. This requirement gives the taxpayer an opportunity to know for what purpose taxes are being levied and collected, and gives him an opportunity, if necessary, to prevent unjust levy and assessment. Taxes raised for county purposes include many different things, and these various amounts and purposes can be ascertained by the county board the same as they are ascertained by other taxing bodies.

We do not think the levy as made for county purposes was in compliance with the statute, and the court committed error in refusing to sustain the objection. *C. I. & W. Ry. Co. v. People*, 213 Ill. 197, 72 N. E. 774. The judgment of the county court will be reversed, and the case remanded for further proceedings in accordance with the views herein expressed.

Reversed and remanded.

(213 Ill. 468)

GAGE v. PEOPLE ex rel. **HANBERG**, County Collector.*

(Supreme Court of Illinois. Dec. 22, 1904.)

STREET IMPROVEMENTS—TIME OF LETTING CONTRACT—PRESUMPTION—OBJECTIONS.

1. On appeal from a judgment of sale for an assessment for street improvements, it will be presumed, in the absence of evidence to the contrary, that the first step to let the contract for the work was taken, as provided by the local improvement act (Laws 1897, p. 127), as amended by Laws 1901, p. 113, § 75, within 90 days after expiration of the term at which the judgment of confirmation was entered; the date of such step appearing to have been within 90 days from the day to which such term might have continued.

2. Objection that a contract for street improvement was not let within the time authorized by statute cannot be made for the first time against application for judgment of sale for the assessment therefor, in the absence of proof of injury.

Appeal from Cook County Court; *O. N. Carter, Judge.*

Application by the people, on the relation of *J. J. Hanberg*, county collector of Cook county, for judgment and order of sale on a warrant for collection of a special assessment for a sewer. From such a judgment and order, *Henry H. Gage*, who filed objections, appeals. Reversed.

F. W. Becker, for appellant. *William M. Pindell* (*Edgar Bronson Tolman, Corp. Counsel*, and *Robert Redfield*, of counsel), for appellee.

WILKIN, J. The county collector of Cook county made application to the county court for judgment and order of sale against the appellant's property for a delinquent installment of a special assessment for a sewer in Ravenswood Park avenue, in the city of Chicago. Appellant filed objections, which were overruled, and judgment and order of sale rendered.

*Rehearing denied February 9, 1905.

Improvement was not let within the time provided in sections 74, 75, 76, and 77 of the local improvement act of 1897 (Laws 1897, p. 127), as amended in 1901 (Laws 1901, p. 113). These several sections provide, in substance, that all contracts for the making of any public improvement, when the expense thereof shall exceed \$500, shall be let to the lowest responsible bidder, in the following manner: Within 90 days after the term of court at which the judgment of confirmation has been made, if there be no appeal, steps shall be taken to let the contract for the work as follows: First, an order to advertise for bids shall be entered by the board of local improvements in their records; second, a public notice shall be published that bids will be received; third, there shall be an examination and public declaration of the bids; fourth, the awarding the contract shall be made within 20 days after the time fixed for receiving the bids, and, if no award be made within that time, another advertisement for bids shall be made as in the first instance. This record does not show the date of the last day of the February term, 1902, of the county court of Cook county, at which the roll was confirmed. That term might have continued until the 8th day of March. The order to advertise for bids was entered by the board of local improvements on June 4th. The advertisement calling for the bids was first published June 6, 1902. In the absence of evidence to the contrary, we will presume that the first step to let the contract was taken within 90 days after the expiration of the March term at which the judgment of confirmation was entered.

The bids were opened on June 19th, which was within 20 days prescribed by section 77. All bids were rejected on that day, and an advertisement for new bids was published October 24, 1902. The bids were opened November 6th, and the contract awarded on November 10th. It is insisted by appellant that the contract is illegal because more than 90 days elapsed between the time the first bids were rejected and the time when the advertisement for bids was again published. Even if the contract was not awarded within the time provided by statute, that fact would not affect the jurisdiction of the county court to hear and determine the application of the county collector for judgment and order of sale. The county collector applied for a judgment and order of sale upon this assessment, which had been duly returned to him as delinquent by the city collector. No acts done by the board of local improvements would deprive the court of the power to enter a judgment and order of sale. This is a proceeding to determine whether the lands should be sold which were duly returned delinquent, and not to determine the legality of the acts of the board of local improvements in letting the contract. If appellant had reason to believe that the board of local

law, he should have availed himself of the proper remedy in apt time to compel the board to do its duty. *Hamilton v. Lubukee*, 51 Ill. 415, 99 Am. Dec. 562; *Bush v. Sherman*, 80 Ill. 160; *Givins v. People*, 194 Ill. 150, 62 N. E. 534, 88 Am. St. Rep. 143. In the latter cause, objection was filed to the application for sale, and the point was raised that the contract was not regularly and legally let, and we there said (page 153, 194 Ill., page 536, 62 N. E., 88 Am. St. Rep. 143): "It must be remembered the ordinance providing for the making of the improvement, and all of the proceedings under the ordinance save the letting of the contract to do the work, are regular and valid. The ground of objection to the payment of the benefits * * * is that the acts and conduct of the bidder previous to * * * the letting of the contract * * * was such as to limit the number of bids, * * * and enable the successful bidder to receive a better contract than he otherwise might have been able to obtain. The proffered testimony did not tend to show that the amount to be paid for the work under the letting * * * was more than a fair contract price therefor. * * * If a bid is accepted by the board of local improvements, still, if the causes stated authorizing its rejection existed, it may be avoided by the property holder whose interests are prejudiced thereby, if such property holder seasonably takes action to have the bid declared invalid. * * * The bid and contract are not void, but voidable, and may be enforced against the bidder. The option to have the bid and contract rejected or avoided is with the property owner, and he cannot be permitted to withhold his objection until he shall have secured the benefit of the work, labor, and materials of the contractor, and then ask to be relieved of all liability to pay therefor." There is nothing in the record to show that appellant was in any way injured by the contract, and, if he had been, he had adequate remedy under the statute, and it was his duty to act promptly. Section 80, c. 24, *Hurd's Rev. St. 1903*, p. 409, provides that the owners of a majority of the frontage may take the contract from the successful bidder if they think they can profit by so doing. The appellant could have availed himself of this provision, or he could have objected to the board of local improvements on the ground that the contract was not let within the time authorized by law, or he could have made the objection in the county court at the time the board of local improvements filed their petition for a hearing, after the completion of the work. Having failed to take advantage of any of these opportunities, and having received the benefit of the work, and in the absence of any proof of injury, the county court committed no error in overruling the objection.

It is next insisted that the judgment and order of sale is defective, in that it fails to

rendered, and orders a sale of the property en masse, and omits the jurisdictional clause as provided in the statute. The recital of the judgment as to the amount is as follows: "Judgment is entered against the lots as described in the objections filed herein, and as set forth in the attached schedule, which is made a part of this order, * * * for the sum annexed to each; being the amount of the special assessment and cost due and unpaid severally thereon." In the schedule attached appears the proper description of appellant's lots, with the figures "89.35" opposite it. The objection is that the dollar mark does not precede these figures, and it is therefore impossible to tell from the judgment what the figures mean. We have held in another case between the same parties at the present term (*Gage v. People*, 72 N. E. 1062) that the judgment is defective in that regard.

As to the objections that the judgment orders a sale of the property en masse, and omits the jurisdictional clause, as provided in the statute, it is sufficient to say the objections are not sustained by the evidence. The property is ordered sold as provided by law, and the jurisdictional clause was omitted, no doubt, for the reason that the objectors personally appeared in court, and therefore the recital of service was unnecessary. For the reason indicated, the judgment of the county court will be reversed, and the cause will be remanded to that court, with directions to correct its judgment.

Reversed and remanded.

(213 Ill. 472)

MORRISON v. AUSTIN STATE BANK.

(Supreme Court of Illinois, Dec. 22, 1904. On Rehearing, Feb. 8, 1905.)

PARTNERSHIP—FRAUD—MUNICIPAL CORPORATIONS—WARRANTS—NEGOTIABILITY—STATUTES—CONSTRUCTION—APPEAL—QUESTIONS FOR REVIEW—STIPULATIONS.

1. Where the right of appellant to prosecute an appeal is not assigned as error, and no motion is made to dismiss the appeal on that ground, the mere fact that the parties stipulated that the objection should be submitted to the consideration of the Appellate Court does not render the question reviewable.

2. Whether appellant has an interest in the subject-matter is a question that might have appeared by the proof in the record, if it did not sufficiently appear from the decree's recital, stipulated by the parties to be true, and on which appellee cannot be heard to urge error, where the parties stipulated that the proof was waived, and that no exception, benefit, or advantage should be taken by either party to the same.

3. A transaction whereby partnership property is received from one partner for a past-due debt from him to the recipient is, in the absence of ratification by the other partners, a fraud on the partnership, which renders the transaction void.

4. In the absence of express legislation, municipal warrants, though negotiable in form, are

¶ 4. See *Counties*, vol. 13, Cent. Dig. § 249; *Municipal Corporations*, vol. 36, Cent. Dig. § 1837.

mercial paper in the hands of innocent purchasers.

5. Under Local Improvement Act (Laws 1897, pp. 127, 133) §§ 73, 90, providing that the contractor or other holder of warrants issued for work done thereunder has no claim against the municipality issuing them, other than the fund arising from the assessments that may be collected, such warrants, when stating on their face that they are payable out of special assessments, are nonnegotiable.

Appeal from Appellate Court, First District.

Suit by John J. Morrison and others against George I. O'Brien. The Austin State Bank intervened. From a decree of the Appellate Court (113 Ill. App. 651) affirming a decree for the intervener, John J. Morrison appeals. Reversed.

This is an appeal from a judgment of the Appellate Court for the First District, affirming a decree rendered by the superior court of Cook county on an intervening petition filed by the appellee in an equitable action brought by the appellant, John J. Morrison, and James D. Morrison and William Sullivan, against one George I. O'Brien. The original bill was brought by the appellant, John J. Morrison, and James D. Morrison and William Sullivan, against George I. O'Brien, setting up that said four parties had constituted a partnership under the firm name of John J. Morrison & Co. & O'Brien, and that said O'Brien had collected and converted to his own use certain assets of the partnership, viz., certain warrants issued to the partnership by the town of Cicero, and praying for an accounting and the appointment of a receiver. A receiver was appointed, and served notice upon the town of Cicero that said warrants belonged to said receiver and should be paid to none other. Thereupon the appellee herein, which had in the meantime acquired possession of said warrants in the manner hereinafter described, filed its said petition for an order commanding said receiver to withdraw said notice. A hearing was had on said petition, and a decree rendered in favor of the appellee. The question as to the ownership of these warrants was the only one to be determined, so that the decree rendered on said petition practically decided the entire cause. After the rendition of said decree an order was made by the superior court finding that the appellant and James D. Morrison and William Sullivan were interested in said decree, so as to be entitled to appeal therefrom, either jointly or severally, and authorizing such joint or several appeal. Thereafter the appellant herein duly perfected his separate appeal to the Appellate Court, from which he has also duly perfected his separate appeal to this court. Neither of the other parties has appealed. The appellant and appellee thereafter stipulated that the record in the cause on appeal to the Appellate Court and the Supreme Court

concerning the appeal by the appellant, and the stipulation, and that the facts stated by the recitals in the decree were true. It was agreed by the stipulation that the case should be submitted to the upper courts on the objection of the appellee to the appellant's right of appeal, and upon the objection of appellant to the correctness of the decree on the facts as therein recited.

The admitted facts presented by the decree are that George I. O'Brien, a partner of the firm of John J. Morrison & Co. & O'Brien, did on the 27th day of February, 1901, on behalf of and as a partner in said firm, receive from the town of Cicero, a municipal corporation, certain vouchers or warrants, amounting to the sum of \$2,208.10, and being in the form following:

This warrant is payable only from the special assessment named when collected.

Cook County, Illinois,
Town of Cicero.
No. Clerk's Office, Austin, Feb. 21, 1901.
Treasurer Town of Cicero:
Pay to John J. Morrison Co. & O'Brien the sum ofdollars for bal. on cement walksout of the appropriation for the special No. fund only. And charge same to the appropriation for said fund. (\$.....)
I hereby certify that the above bill was ordered paid by the board of trustees of the town of Cicero.
Signed, J. E. Tristram,
Town Clerk.
Countersigned,
John I. Jones,
Pres't Town of Cicero.

It is also admitted that these vouchers were executed and issued by said town of Cicero for work done and material furnished by said firm of John J. Morrison & Co. & O'Brien under written contracts made by said firm and its assignors with the town of Cicero for the laying of cement sidewalks; that after receiving said vouchers or warrants aforesaid the said George I. O'Brien indorsed them and delivered them to his father, Thomas O'Brien; that such indorsement and delivery were without any express authority from his co-partners, and that his copartners, and the receiver thereafter appointed of such copartnership assets, repudiated the action of said George I. O'Brien in making such indorsement and delivery when the same became known to them; that the sole consideration for the said indorsement and delivery was a past-due indebtedness of George I. O'Brien to his said father, Thomas O'Brien, and that the said Thomas O'Brien was acquainted with the affairs of the said copartnership of said John J. Morrison & Co. & O'Brien, and was chargeable with knowledge that the said warrants were the property of said John J. Morrison & Co. & O'Brien; that Thomas O'Brien indorsed the said warrants and delivered them to the Austin State Bank, the appellee herein, and received in payment therefor the sum of \$2,053.90, which he kept and applied to his own use, and that neither the said firm nor its receiver has ever received any part thereof, or derived any benefit from said payment; that the Austin State Bank received the warrants in the usual and ordinary course

of the case, for the valuable consideration aforesaid; that it had no notice, information, or knowledge, except as derived from the face of the said warrants, of any claim of any nature of any other person to said warrants, or that the said firm of John J. Morrison & Co. & O'Brien was in the hands of a receiver, or that Edwin J. Zimmer had been appointed such receiver, or that litigation was then pending; that on the 11th day of October, 1901, the receiver, Zimmer, served notice on the treasurer of the town of Cicero claiming the moneys represented by the warrants above described; and that on December 20, 1901, the Austin State Bank, appellee herein, presented the warrants to the said treasurer for payment and payment was refused.

Appellant has assigned a number of errors, but the principal one is that the court erred in holding that the vouchers and warrants in question, and the moneys represented thereby, were not the property of the partnership, and should be delivered to the receiver.

James A. Brady, for appellant. Castle, Williams & Smith (Ben M. Smith, of counsel), for appellee.

RICKS, C. J. (after stating the facts). Appellee by its brief questions the right of John J. Morrison, the appellant, to prosecute this appeal, and that question will first receive our consideration. The record was made up by a stipulation of the parties, in which it was agreed that the record should consist of the decree of the superior court, the order of court granting the appeal, and the stipulation. It is also agreed "that the record, pleadings, and proof in such case is hereby waived, and no exception, benefit, or advantage shall be taken by either party hereto to the same." It is also agreed that the objection of appellee that appellant has not the right of appeal, and the objection of the appellant to the correctness of the decree on the facts, are submitted to the consideration of the Appellate Court, and in case of an appeal to this court the same questions shall be presented. We think appellee's contention should be denied for two reasons. Appellee did not assign cross-error in the Appellate Court or in this court, nor did it make a motion in this court to dismiss the appeal upon the ground stated. Parties may agree upon the questions they will present to the court upon the record, and they will be confined to them; but the court does not consider error upon the mere agreement of the parties. Notwithstanding the agreement, the errors relied on must be assigned. The Appellate court took jurisdiction of the cause and disposed of it upon its merits.

The decree is not predicated upon the ground that John J. Morrison, the appellant, had no interest in the subject-matter, but that the better right to the property in question was in the appellee; so that there

is nothing appearing in the face of the decree which tends to show that Morrison was not interested, but, on the contrary, the facts and recitals in the decree tend to show that he was interested, in the subject-matter. Appellee recites and relies upon *Gogan v. Burdick*, 182 Ill. 126, 55 N. E. 126, from which it quotes: "The settled rule is that a party in whose favor a decree granting relief is rendered must sustain it by specific facts which justify it, either recited in the decree as proved on the hearing and found by the court, or by preserving the evidence establishing such facts." It may be first noted that the rule there cited is applicable only to the person in whose favor the decree is granted; but, if it be held applicable to both of the parties, then it is further seen that the fact may appear by recitals in the decree or the proof at the hearing. In this case it is expressly stipulated that upon any matter of proof no exception, benefit, or advantage shall be taken by either party. Under the authority cited, the question here presented was one that might have appeared by the proof in the record if it did not sufficiently appear from the recitals in the decree; and, as appellee agreed that it is to have no advantage because of the absence from the record of the proof, it cannot now be heard to urge error upon a matter that might have rested in proof.

The questions upon the merits of this case that are presented for our consideration, as we conceive them, are as to the rights and powers of a partner in reference to the partnership property and the character of the instruments here in question. The latter question involves the determination of whether those instruments are negotiable within the meaning of the law merchant, so that the purchaser thereof may take the same unaffected by the rights of the maker or intermediate holders. The legal characteristics of partnership property, and the interests, powers, and rights of the partners relative to the same, are peculiar, and cannot be well assimilated to any other class of property when viewed in its relation to its ownership. While it has many characteristics of estates in common and in joint tenancy, yet the interest of partners in the firm property is neither that of joint tenants nor that of tenants in common, but is *sui generis*. In *Taft v. Schwamb*, 80 Ill. 289, it is said (page 300): "Each partner is possessed per my et per tout—that is, by the half or moiety and by all—or, in other words, each has a joint interest in the whole, but not a separate interest in any particular part, of the partnership property; and being so possessed, and because the title of partners is undivided, it follows that all have a moiety or the same species of interest in the stock in trade, whether each individual partner contributes exactly in the same proportion or not. But their several degrees of interest must be regulated according to the stipu-

lated proportions and the different conditions of the partnership. To whatever share a partner may be entitled, in whatever sum the firm may be indebted to him, he has no exclusive right to any part of the joint effects until a balance of accounts be struck between him and his copartners, and it be ascertained precisely what is the actual amount of his interest." If he sell his interest in the partnership without the consent of his partner that the purchaser shall become a partner and succeed him in the partnership, the purchaser does not by his purchase become a partner, but simply becomes the owner of the proportion his vendor held in the partnership after the closing up of the partnership and the payment of the partnership debts. If a partner die, his heirs do not succeed to his rights as a partner, nor to the partnership property, and particularly so where it is personal property; but the surviving partners hold all the property until the closing up and settlement of the partnership, when the heirs succeed merely to the proportionate share of the remaining assets. These attributes of such property arise in a large degree from the existence of the situation of two or more persons having interests in the business, being clothed with power to conduct it. They owe fidelity to each other, and the firm, as such, owes good faith to the public, and it is in the adjustment of the respective rights and duties between the partners and the public that the qualities peculiar to this property are given it. Where a business is being conducted by a number of persons who are owners of that business, it is necessary that each of the persons so owning shall be invested with power to do all things in the regular, necessary, and usual course of business, and when they do so it is necessary and proper that those who deal with them shall be protected. These considerations have led the courts to require of persons who deal with partnerships to take notice of the partnership, the identity of its members, the character of the partnership, its business, and the general course of that business, as the public owes to the partnership the same fidelity, when dealing with its individual members, that the partnership owes to the public in such cases.

Ordinarily partnerships are conducted for profit. The property of the partnership is usually sold for money, and the money reinvested, and through these means the business is kept up. The return of sales received by each partner is for the partnership—the result and representative of the partnership goods—and is to be accounted for to the partnership or turned into it by the person who makes the sale. These matters are, and must be, known to all persons who deal with them. The partner who makes disposition of partnership goods that the benefit may come to him alone perpetrates a fraud upon the partnership, and the person who

deals with him, knowing that such is to be the result, is a party to that fraud, and can receive no benefit from it. When Thomas O'Brien, the father of George I. O'Brien, received from him the warrants or vouchers in question for the payment of money that belonged to the partnership, of which appellant was one, in payment of a past-due debt to himself from his son, and not from the partnership, he knew that his son was making a fraudulent use of the partnership property, and, being a party to that fraud, he did not and could not take anything by it. As between him and the partnership it was as though the transaction had not been made at all, or as though he had found or stolen the property acquired by him through such means. True it is that the public, in dealing with a partner in the regular course of business, is not required to see that the partner accounts for the funds received by him for the partnership property. If a purchase be made in good faith, or an assignment of paper belonging to the partnership shall be made by one of the partners in the firm name for a cash consideration that is a fair equivalent for the property, or under such circumstances that the purchaser is not chargeable with notice of the fraudulent purpose of the partner who is making the disposition, then the purchaser is not required to see that the partner does account to the partnership for the proceeds thus obtained by him; but when a partner disposes of the property of the partnership, and obtains nothing, he can return nothing to the partnership, and one so dealing with a partner cannot shut his eyes to the transaction and say that he is innocent of any wrongful intention toward the partnership, and one who receives the partnership property from one partner for a past-due debt to himself from that partner knows that the partner is not receiving anything that can be shared with the partnership, and knows that he is thereby working a fraud upon the partnership. Such a transaction is not merely voidable. It is void. Fraud vitiates and so poisons a transaction that it has no vitality. Property contracted for or obtained through fraud is like Dead Sea fruit, that can neither be gathered nor enjoyed when possessed. The transaction may be ratified by the partnership, and may be validated, as one may elect to waive a tort and proceed in assumpsit as for goods sold; but until, with a full knowledge of all the facts, the partnership has ratified the transaction, it is void. When Thomas O'Brien received the orders from his son, he knew the partnership was to receive nothing for them, and the transaction was fraudulent and void. If, however, the instruments so obtained by him are negotiable, in the sense that promissory notes and bills of exchange are under the law merchant, he might sell or dispose of them to an innocent purchaser for value, who would obtain a good title to them as against all the world.

issuance of these warrants or vouchers, and there is no provision found in it giving them the required characteristics of negotiability. We have looked to the statute in relation to negotiable instruments, and find that by sections 3 and 4, c. 98, Hurd's Rev. St. 1890, certain instruments are mentioned and are given the quality of assignability by indorsement, so that they may be passed by assignment in writing in the same manner as bills of exchange are, "so as absolutely to transfer and vest the property thereof in each and every assignee successively." By section 5 it is provided that the assignee may sue in his own name and maintain the same kind of action that the original obligee or payee could have done; and section 7, which was section 1 of an act approved June 4, 1895, in relation to promissory notes, etc. (Laws 1895, p. 262), states just what instruments, among all the instruments referred to in the act, shall be clothed with the attributes of negotiability according to the custom of merchants, and by it those qualities are only extended to promissory notes payable in money, and it contains the further provision that the holder or owner of any other evidence of indebtedness mentioned in the act may sue the assignor when he has shown due diligence to collect from the maker. So it will be seen that neither by the act authorizing the issuance of the vouchers in question nor by our statute in regard to negotiable instruments are the instruments in question given the qualities necessary to protect appellee as an innocent purchaser, unless such instruments can be held to be promissory notes within the meaning of our act.

It seems to have been generally held that municipal corporations have no power, in the absence of an express grant, to issue unimpeachable evidence of indebtedness; and so it was held in *Police Jury v. Britton*, 15 Wall. 566, 21 L. Ed. 251: "It is one thing for county or parish trustees to have the power to incur obligations for work actually done in behalf of the county or parish, and to give proper vouchers therefor, and a totally different thing to have the power of issuing unimpeachable obligations, which may be multiplied to an indefinite extent." And in *Mayor v. Ray*, 19 Wall. 468, 22 L. Ed. 164, it is said: "Vouchers for money due, certificates of indebtedness for services rendered or for property furnished for the uses of the city, orders or drafts drawn by one city officer upon another, or any other device of the kind used for liquidating the amounts legitimately due to public creditors, are, of course, necessary instruments for carrying on the machinery of municipal administration and for anticipating the collection of taxes; but to invest such documents with the character and the incidents of commercial paper, so as to render them in the hands of bona fide holders absolute obligations to pay, however irregular or fraudulently issued, is an abuse of their

of converting a municipal organization into a trading company, and puts it in the power of corrupt officials to involve a political community in irretrievable bankruptcy. No such power ought to exist, and in our opinion no such power does legally exist, unless conferred by legislative enactment, either express or clearly implied." The above cases are quoted and the subject ably discussed in the case of *State ex rel. v. Cook* (Neb.) 61 N. W. 693.

In *Miner v. Vedder*, 66 Mich. 101, 33 N. W. 47, a suit was brought against the treasurer of a village upon a warrant by the assignee thereof. The treasurer answered, among other things, that he had received notice from one Boles that the orders originally belonged to him and that the relator was not entitled to them. The court found that the relator was not the lawful holder and was not entitled to recover. Upon appeal, in discussing that phase of the case, the court said (page 103, 66 Mich., and page 48, 33 N. W.): "It was claimed upon the trial, and is argued here, that relator purchased the orders in good faith, for a valuable consideration, without notice of the mistake or lien claimed, and that therefore, being a bona fide holder of said orders, neither such mistake nor lien could be allowed or enforced as against him. It is sufficient to say, in answer to this argument, that these warrants or orders issued by the village of Hudson are not negotiable instruments, and while in the hands of the relator are subject to all the equities existing between the payee and the village, or between the payee and any other person, without reference to the good faith of the relator in his purchase."

This court, in *People ex rel. v. Johnson*, 100 Ill. 537, 39 Am. Rep. 63, speaking of a county order, said (page 546, 100 Ill., 39 Am. Rep. 63): "We regard the rule well settled, by considerations of public policy as well as by a decided preponderance of authority, that warrants or orders drawn by one municipal officer upon another, in the disbursement of the funds of the municipality and payment of its indebtedness, are not to be regarded as negotiable or commercial paper, cutting off equities against the corporation. As we have already seen, the official agents of these municipalities have no implied power to execute such paper, and to clothe these warrants or orders with the qualities and attributes of commercial securities would be to give them a character foreign to the object and purposes of their creation." In that case the case of *Garvin v. Wiswell*, 83 Ill. 215, in which a bond issued by a county to meet an appropriation to pay bounties for volunteers was held to be a negotiable instrument, is reviewed and distinguished, and attention is directed to the fact that the special act authorizing the issuance of bonds gave them the character of negotiable in-

struments. The court, in discussing it, said (page 547, 100 Ill., 39 Am. Rep. 63): "The effect of this act was equivalent to a previous authority to issue the instrument, and gave to it, as was originally intended, all the attributes of commercial paper. That the Legislature has ample power to authorize counties or other municipalities to issue negotiable securities is not to be questioned, yet without such special legislative authority they have no power to do so, and there is no pretense that the order in this case was issued for any such purpose or was authorized by any special act of the Legislature."

The case of *First Nat. Bank v. Gates*, 60 Kan. 505, 72 Pac. 207, 97 Am. St. Rep. 383, is very similar in principle to the case at bar. There *Gates* gave to *Blanchard* a sum of money with which to purchase for him county warrants. *Blanchard* was cashier of the bank, and *Vawter* was its president. *Blanchard* purchased the warrants and placed them in the bank for *Gates*. *Vawter* took the warrants and pledged them as security for a loan from the appellant, the First National Bank. *Gates* demanded the warrants, and their delivery was refused, and he sued for conversion. The court says: "The bank, however, claims that, having taken this warrant in the usual course of business for a sufficient consideration without knowledge of *Vawter's* wrong, it is entitled to be protected by the law merchant. The question is, therefore, is a county warrant, which is negotiable in form, but non-negotiable in the sense that the county issuing it may defend against it, nevertheless negotiable as between successive holders, so that a thief may vest title to it in a bona fide taker of it? That one so acquiring ordinary commercial paper would be protected is not questioned. An innocent purchaser in good faith of commercial paper gets a good title, even though he purchase from a thief [citing authorities]. This is so because of the law merchant. * * * But paper non-negotiable for any reason is not thus protected. The very fact of its being nonnegotiable is a sign of warning to the prospective purchaser and places him on his guard. Municipal warrants, though negotiable in form, are nonnegotiable in fact; hence they are not within the protection of the rule which guards commercial paper." To the same effect is *Keller v. Hicks*, 22 Cal. 457, 83 Am. Dec. 78.

We think the above cases state a sound rule, and one which sound public policy and the greater weight of authority alike demand shall be adhered to.

There is another insuperable reason why the warrants here in question cannot be deemed or held to be commercial paper. They were given for work done under the local improvement act of 1897, and payable out of special assessments, and so state upon their face. By sections 73 and 90 of that act (Laws 1897, pp. 127, 133) the con-

tractor or other person holding such warrants has no claim against the municipality issuing them, other than the fund arising from the assessments that may be collected. "Instruments drawn upon a particular fund, whether the fund has already accrued or is to accrue in the future, are not negotiable bills or notes, since they do not carry the general personal credit of the maker, and since they are contingent upon the sufficiency of the fund upon which they are drawn." 4 Am. & Eng. Ency. of Law (2d Ed.) 87, and authorities there cited. It is needless to extend this opinion, or to further cite authorities upon this last proposition, as they are very numerous and entirely uniform.

The judgment of the Appellate Court and the decree of the superior court are reversed, and the cause remanded to the superior court, with directions to that court to dismiss the intervening petition of appellee, and to make such order with reference to the ownership of said warrants as shall conform to this opinion, and as justice and equity may require.

Reversed and remanded, with directions.

On Rehearing.

PER CURIAM. Rehearing denied.

HAND, J. (dissenting). I think the warrants in question were so far negotiable as to vest title in the Austin State Bank against all persons except the town of Cicero. To hold otherwise would be to impair the commercial value of such warrants, and increase the cost to the property owner of all local improvements in municipalities in this state.

(213 Ill. 488)

JESPERSEN v. MECH et al.*

(Supreme Court of Illinois. Dec. 22, 1904.)

HOMESTEADS—CONVEYANCE—VALUE—PARTITION—HUSBAND AND WIFE—WIDOW'S AWARD—LACHES—RIGHTS OF CREDITORS OF WIDOW—PARTIES.

1. Under Homestead Exemption Act, § 4 (Hurd's Rev. St. 1903, p. 944, c. 52), providing that a conveyance of the homestead, not joined in by the wife, shall convey the homestead only to the extent that its value exceeds \$1,000, a deed by the husband alone conveys no definite fraction of the homestead, but only so much as exceeds \$1,000 in value, and hence, on abandonment of the homestead by the widow and children some time after the husband's death, the heirs, on suit for partition, are entitled to such proportion of the premises as \$1,000 bears to the value of the premises at the time of partition, and not to such proportion as \$1,000 bore to the whole value at the time of the conveyance.

2. A widow, who makes no effort to administer on her husband's estate for 10 years after his death, is barred by laches from administering on the estate solely to have her widow's award set off and the homestead sold for its payment.

3. Where a widow is barred by laches from administering on her husband's estate to pro-

*Rehearing denied February 3, 1905.

cure the setting off of her award, her creditors cannot procure administration for this purpose, in order that the award may be subjected to their claims.

4. The incompetency of testimony as against infant parties cannot be waived by their counsel.

5. Under the express provisions of Hurd's Rev. St. 1903, c. 106, § 40, solicitors' fees may be allowed to the counsel of complainants in partition when the interests of the parties are correctly set out in the bill, and no substantial defense is interposed.

6. A defendant to a bill for partition, who became an administrator after the suit was commenced, and made no application to be made a party as administrator, cannot complain because this was not done.

Appeal from Circuit Court, Cook County; R. S. Tuthill, Judge.

Action by John Mech and others against William Jespersen, as executor of Friedericka Hellmig, deceased. From a decree for complainants, defendant appeals. **Affirmed.**

On August 5, 1903, appellees, as children and heirs of Johann Mech, filed their bill in the circuit court of Cook county to partition certain real estate in the city of Chicago, known as No. 804 Wolfram street. The facts upon which the bill is based are substantially as follows: Johann Mech was the owner of the real estate sought to be partitioned, on which he resided, with his family, as a homestead, and on March 20, 1893, he executed a quitclaim deed to the same to his wife, Marie Mech; but that deed was not signed by the wife. At the time of the conveyance the premises are now estimated to have been of the value of about \$3,500. Johann Mech and his family continued to reside upon the premises until April 29th of the same year, when he died intestate, leaving surviving him his widow, Marie, and Arthur, John, Charles, and Mary Mech and Emma Brischke, his children, and only heirs at law, all being then minors. The widow and children continued to reside upon the lot until some time during the year 1902 (about 10 months before the filing of the bill), when they abandoned the homestead permanently. On July 22, 1893, Arthur Mech, one of the children, died testate, leaving as his only heirs at law his said mother and brothers and sisters. In April, 1895, the widow was married to Herman Strelow, but she continued to reside in said homestead, and on December 19, 1895, she and her said husband conveyed all her interest in the property by a trust deed to Henry P. Kransz, as trustee, to secure an indebtedness of \$1,600. On May 1, 1902, one Friedericka Hellmig, who was the owner of the indebtedness so secured, died, leaving a will, in which she appointed the appellant herein as her executor. On June 15, 1903, prior to the bringing of this suit, he and the trustee, Kransz, filed a bill in the superior court of Cook county to foreclose said trust deed.

The bill for partition, in addition to the above-stated facts, alleged that Emma Brischke, John Mech, Charles Mech, and Mary Mech were each entitled to an undivided seven-thirtieths interest in fee in said

estate of homestead of the value of \$1,000; that Marie Strelow was entitled to the undivided two-thirtieths interest in said estate of homestead, and, in addition thereto, was entitled to the full excess in value of said premises over and above the sum of \$1,000, and she was also entitled to dower in the interests of Emma, John, Charles, and Mary; that the trust deed was a lien on the entire interest of Marie Strelow and Herman Strelow, except the dower interest of said Marie, and the bill prayed for the assignment of dower and the making of partition.

Appellant, as executor of the last will and testament of Friedericka Hellmig, filed his answer, in which he admitted the allegations as to the ownership of the \$1,600 note and trust deed, and alleged that at the date of the death of said Johann Mech said premises were worth \$3,500, but had now depreciated in value, and are not worth more than \$1,500; alleged that on August 10, 1903, Henry P. Kransz was duly appointed administrator of the estate of Johann Mech, deceased; that on April 24, 1903, a widow's award for the sum of \$955 was duly allowed by the probate court of Cook county against the estate of Johann Mech, deceased, and in favor of his widow, Marie; that on the 25th day of August, 1903, the said Marie duly filed in the probate court her widow's election, electing to take the whole of said widow's award in money; that on August 27, 1903, appellant recovered a judgment by confession for \$1,659.30 against the said Marie and Herman Strelow, and that on September 2, 1903, he filed in the superior court of Cook county a creditors' bill based on the aforesaid judgment, and on the same day caused service of process in said last-mentioned proceeding to be had upon H. P. Kransz, as administrator of the estate of Johann Mech; that on September 4, 1903, Marie Strelow filed in the probate court of Cook county a release and waiver of her widow's award against the estate of said Johann Mech; that there was no consideration for said release, and that the same was executed with the sole design to defraud appellant; denied that the said Marie Strelow and Mary, Charles, John, and Emma Mech were seised of any part of the estate of homestead in said premises, and also that Henry P. Kransz was a necessary party to said partition proceedings. Upon issue being joined, the case was referred to a master, and upon hearing he made his report finding the facts substantially as alleged in the bill. Objections to his report being overruled, they were renewed by way of exceptions and overruled by the court. Upon a hearing a decree of partition was rendered as prayed. To reverse that decree this appeal is prosecuted.

Ives, Mason & Wyman, for appellant. C. H. Sippel, for appellees.

WILKIN, J. (after stating the facts). The first ground of reversal insisted upon by

counsel for appellant is that the court erred in refusing to estimate the value of the homestead and the interest of Marie Strelow conveyed by said trust deed upon the value of the premises at the time of the execution of the quitclaim deed by Johann Mech to his then wife. They state their proposition on this point as follows: "When Mech died seised of the fee to the extent of \$1,000, which had not passed by reason of the defective deed made by him, that fee was incumbered by his homestead estate. But the homestead estate has been abandoned and become extinguished, so that it is no longer in existence. The question as to the proportionate shares of the fee owned by the several parties interested therein at the present time must be determined by ascertaining the total value of the fee at the time of the conveyance by Mech in 1893. As an interest in the fee to the extent of \$1,000 remained in him, if the property was then worth \$3,500, he was the owner of $\frac{10}{35}$ and Mrs. Mech (now Strelow) of the remainder, or $\frac{25}{35}$. Such would continue to be their respective proportionate interests, no matter whether the property subsequently increased or diminished in value. The decree appealed from, by confusing the homestead with the fee, has maintained an arbitrary value of \$1,000 on the fee left by Mech, regardless of the depreciation in the value of the property since, leaving the surplus above \$1,000, or $\frac{25}{35}$ of the whole property, to bear the whole burden of depreciation in value to \$1,500." We are of the opinion that the position is wholly untenable. It is not correct to say that the \$1,000 fee was incumbered by a homestead estate. The homestead itself was an estate in the premises "to the extent in value of \$1,000." That is, the lot and buildings thereon owned by Johann Mech and occupied by him as a householder having a family, as his residence, exceeding in value \$1,000, he was entitled to so much of said lot and buildings as would amount in value to \$1,000. The part of the lot of land exempted as a homestead might be much or little, but such part, by the terms of the statute, must have been to the extent in value of \$1,000. That exemption continued after the death of Johann Mech for the benefit of his wife and children so long as they continued to occupy the same, or until the youngest child should become 21 years of age. That homestead right could only be released in the mode provided for in section 4 of the homestead exemption act (Hurd's Rev. St. 1903, p. 944, c. 52), and whenever the premises, including the homestead, are sold or attempted to be conveyed without complying with that section, or whenever said premises are sold upon execution, the person having the homestead is entitled to an estate to be set off or allotted to him to the extent in value of \$1,000, if the premises exceed in value that amount.

An attempt by the husband to convey the

homestead without his wife joining in the execution of the deed, if the premises exceed in value \$1,000, as we have frequently held, conveys only the excess over and above the homestead of \$1,000 in value. The title to the homestead to the extent in value of \$1,000 in fee remains in him, and upon his death, and the abandonment of the same by the widow and children, descends to his heirs at law, and may be partitioned by them as in cases of any other inherited estate. The deed purporting to convey the premises being ineffectual except as to the excess does not convey any definite or ascertained amount or quantity of the premises, but simply so much, if any, as exceeds in value the sum of \$1,000, and that excess can only be ascertained when an attempt is made to set off or allot the homestead estate. The question was presented in the case of *Anderson v. Smith*, 159 Ill. 93, 42 N. E. 306. There, by the assignment of cross-errors, the appellees sought to question the correctness of the decision of the circuit court "in fixing the quantity of land which they were entitled to (i. e., the homestead), by the value then, instead of when the father died," but we held that the commissioners were properly directed to set off the homestead on an estimate of the present value. This rule can work no hardship to either party. When Johann Mech made his deed to his wife, she, or those claiming under her, had the right to have the homestead then set off to her, and, of course, the value of the respective parties would then have been determined by the value of the whole premises. *Hotchkiss v. Brooks*, 93 Ill. 386; *Cutler v. Cutler*, 183 Ill. 285, 58 N. E. 932. On the other hand, the householder, or those claiming under him, could have maintained a suit for partition at any time after the execution of that deed. *Anderson v. Smith*, supra; *Gray v. Schofield*, 175 Ill. 36, 51 N. E. 684. Both parties, however, having been contented to hold those interests in common, they could only be determined in value by the value of the whole premises at the time the partition was sought. A moment's reflection will, we think, show the impracticability of any other rule. To sustain the contention of appellant it would be necessary to hold in every case that the value of the premises at the date of the conveyance was the basis upon which the division should be made. In this case, on the estimated value by appellant's counsel, the widow would get $\frac{25}{35}$ and the heirs $\frac{10}{35}$. No matter whether the value of the property increased or diminished, under that contention the relative shares of the respective parties would remain absolutely fixed. If they increased in value, the estate of the heirs, when set off, would amount, in value, to more than \$1,000, whereas the statute is that they shall have a "homestead to the extent in value of \$1,000." If, on the other hand, as is claimed in this case, the property has decreased in value, their home-

stead estate would be less than that amount in value. The law is well settled that, where the premises do not exceed in value the sum of \$1,000, a deed to the homestead, not signed by the wife, is a nullity, and no title passes to the grantee; but where they do exceed in value that amount, the effect of the deed is to convey the excess over \$1,000, and no more. *Anderson v. Smith*, supra; *Despain v. Wagner*, 163 Ill. 598, 45 N. E. 129; *Kitterlin v. Milwaukee Mechanics' Ins. Co.*, 134 Ill. 647, 25 N. E. 772, 10 L. R. A. 220; *Barrows v. Barrows*, 138 Ill. 649, 28 N. E. 983. That excess is only so much as remains after setting off the homestead estate. The court below determined the interests of the parties on this theory, in doing which there was no error.

It is next insisted that the decree of the court below is erroneous for the following reason: "The allowance of the widow's award in favor of Marie Strelow against the estate of Mech, her former husband, constituted a lien in her favor upon the interest in said real estate left by Mech. Appellant, by obtaining judgment, filing a creditors' bill thereon, and serving the administrator of Mech's estate, equitably garnished said claim of said Marie Strelow, and the court should have so found." This position, we think, is wholly untenable. To recall the facts bearing upon the question: The quitclaim deed was executed March 20, 1893. The husband died April 29th following. This bill for partition was filed August 5, 1903—more than 10 years after the execution of the deed and the death of the householder—during all of which time no steps were taken to administer upon the estate of Johann Mech. After the bill was filed, on August 10, 1903, Henry P. Kransz was, on his own motion, appointed administrator of that estate, and on April 24, 1903, he procured a widow's award to be allowed to Marie Strelow, and her election to take the same in money, but shortly thereafter she filed a release and waiver of her award, which the court, on her showing that her election had been obtained by misrepresentations and fraud, allowed. The administrator appealed from that order, and the appeal is still pending. Manifestly, the court below could not have found that the widow's award became a lien upon the homestead estate under this state of facts. There has been no allowance of the widow's award. The question of its allowance is still pending and undetermined in the circuit court. But the real contention of appellant seems to be that the decree of partition should have been postponed until his creditors' bill could be disposed of. It must be admitted that the administration upon the estate of Johann Mech was not for the purpose of settling his estate or obtaining the widow's allowance for her benefit, but to reach the homestead estate which had descended to the heirs, for the payment of the debt due from the widow and her husband. If the widow

herself had attempted to administer upon her husband's estate more than 10 years after his death, without any explanation for the delay, and for the sole purpose of having her award set off and the homestead sold for its payment, she would clearly have been barred by her laches. Even if she had taken out letters of administration promptly upon his death, and made no effort to have her widow's allowance set off until the lapse of more than seven years, she would, under the repeated decisions of this court, by analogy of the lien of judgments and the limitations for entry upon and recovery of lands, have been barred. Certainly she, having the first right to administer upon her husband's estate, could not avoid the effect of those decisions by her unexplained delay in administering upon the estate for more than seven years. *Furlong v. Riley*, 103 Ill. 628. If the widow could not, under the facts of this case, obtain the allowance of her widow's award, manifestly her creditors cannot do so. The widow's award, under the statute, is for her benefit and that of her family; and, while it may be reached by her creditors after it has been allowed, we know of no reason or authority for holding that she can be compelled to assert her claim thereto for the benefit of her creditors, and it is equally clear that her creditors cannot assert it for her.

In addition to what we have said, the proof offered before the master of the alleged proceedings in the probate court, etc., by the administrator, is incompetent, and altogether unsatisfactory. It consisted of mere hearsay evidence, and, while some contention is made that counsel for the heirs waive the incompetency of that testimony, such contention certainly cannot be made against the infant defendants.

Further objection is made by appellant to the allowance of a solicitor's fee to appellees' counsel. The decree rendered by the circuit court was in substantial conformity to the allegations of appellees' bill. The interests of the parties were correctly set up in the bill, and were so found by the decree. No substantial defense was interposed by appellant; therefore there was no error in allowing a solicitor's fee to the appellees' solicitor. *Hurd's Rev. St. 1903*, p. 1366, c. 106, § 40.

It is also insisted that Henry P. Kransz, as administrator of the estate of Mech, was a necessary party to this partition proceeding. Kransz is made a party as trustee under the trust deed, and at the time the bill for partition was filed he was not administrator of the estate of Mech. There is nothing in the record to show that any application was made to the circuit court to make him a party after his appointment as administrator. He became administrator pending the suit, and, as he was a party defendant in another capacity, he has no grounds for complaint. The decree of the circuit court will be affirmed.

Decree affirmed.

(Supreme Court of Illinois. Dec. 22, 1904.)

Appeal from Vermillion County Court; S. Murray Clark, Judge.

Application by the people, on the relation of O. L. McCord, county collector, for judgment against the property of the Chicago & Eastern Illinois Railroad Company for delinquent taxes. From the judgment rendered, defendant appeals. Reversed.

H. M. Steely (W. H. Lyford and E. H. Seneff, of counsel), for appellant. J. W. Keeslar, State's Atty. (W. T. Gunn and Swallow & Swallow, of counsel), for appellee.

PER CURIAM. All of the questions involved in this case are fully considered in the case of Chicago, Burlington & Quincy Railroad Co. v. People (Ill.) 72 N. E. 1105, and in accordance with the views therein expressed the judgment of the county court is reversed and the cause remanded.

Reversed and remanded.

(213 Ill. 486)

LOHMEYER et al. v. DURBIN.*

(Supreme Court of Illinois. Dec. 22, 1904.)

DOWER—NATURE OF ESTATE—RIGHT TO ENFORCE—LACHES—JUDGMENTS—RES JUDICATA—EFFECT ON STRANGERS.

1. A wife has no vested estate in her husband's lands, but a mere inchoate right or expectancy, which she cannot assert during his lifetime, so that during that time she is not guilty of laches in failing to attempt to assert that right.

2. A bill to foreclose a mortgage or lien is not solely a proceeding in rem, but is for the enforcement of an obligation ex contractu against a specific person, and to foreclose his equity of redemption, and hence the decree rendered does not affect persons not parties thereto.

3. A widow is not estopped to claim dower by reason of having filed a bill, to which a demurrer was sustained, asserting title as equitable owner.

Appeal from Circuit Court, McLean County; J. H. Moffett, Judge.

Suit by Eliza A. Durbin against William Lohmeyer and others. From a decree for complainant, defendants appeal. Affirmed.

Herrick & Herrick, Kerrick & Bracken, and Barry & Morrissey, for appellants. Welty & Sterling and Ewing, Wight & Ewing, for appellee.

CARTWRIGHT, J. This case was before us on a former appeal, when we decided that, if the allegations of appellee's bill had been sustained by the proofs, she would have been entitled to a decree for the assignment of dower; but the decree was reversed for lack of sufficient proof to sustain it, and the cause was remanded to the circuit court of McLean county for further proceedings not inconsistent with this decision.

*Rehearing denied February 9, 1905.

Durbin, 206 Ill. 574, 69 N. E. 523. The cause having been reinstated in the circuit court, the answer was amended, and the cause was again referred to the master in chancery. Additional evidence was introduced, and the master reported the same, with his conclusion that the appellee was entitled to a decree in accordance with the prayer of her bill. The court overruled exceptions to the report, and entered a decree finding appellee entitled to dower, and appointing commissioners to set it off to her.

The reason for the reversal of the first decree was that proof of the fact that William L. Drybread conveyed the lands in which complainant claimed dower to her husband, Daniel M. Durbin, was not inconsistent with the allegations of the Blackford bill, and the findings of the decree thereon that Blackford sold said lands to Durbin and caused the same to be conveyed to him. All that was proved might have been true, and it might also have been true that the premises were sold by Blackford to Durbin, and that Blackford caused Drybread to make the conveyance. On the second reference to the master the necessary proof was supplied. Certified copies of two patents dated July 1, 1854, from the United States to William L. Drybread, covering the property in question, were introduced in evidence. Drybread then testified that the complainant was his sister; that he entered the land from the government; that she paid him for the land; that he knew John R. Blackford; that Blackford had no interest in the land, and had nothing to do with its conveyance to Durbin, and that he did not convey it for Blackford or at his request. He also testified that he first executed a deed to the complainant; that she and her husband afterward came to him, and wanted him to make a deed to the husband, and that he destroyed the first deed, and made one to the husband, Daniel M. Durbin. The Blackford bill alleged that the land upon which a lien was claimed was conveyed to Durbin by one Thomas Gardner, Jr., who then held the legal title to the land, although Blackford held the equitable title. A deed from Thomas Gardner, Jr., and wife to Daniel M. Durbin of 120 acres of land adjoining this land and included in the Blackford bill was also offered in evidence. The proof established the facts that Blackford did not sell the land involved in this suit to Daniel M. Durbin; that he did not cause Drybread to convey it; that he had no agreement with Durbin to execute a purchase-money mortgage on the same, as alleged in his bill; that the deed of Gardner mentioned in said bill did not include this land, which Blackford never owned, and never sold to Durbin; and that the allegations of the bill, so far as it related to this land, were untrue. The proof was satisfactory that the land in which dower is claimed was included in the bill and decree in the Blackford case through some

court on that question were correct.

The questions of law in the case were considered and decided on the former argument but are now reargued by counsel for appellants. They insist that the appellee was barred of her claim for dower by laches, estoppel, and that she was conclusively bound by the decree in the Blackford case. While her husband, Daniel M. Durbin, was living, she could not assert her right to dower against him or any other person. She had no vested estate, but a mere inchoate right or expectancy, which she could not have asserted; and if she had died before her husband the right would have been extinguished. *Kauffman v. Peacock*, 115 Ill. 3 N. E. 749; *Miller v. Pence*, 132 Ill. 1 N. E. 1030; *Goodkind v. Bartlett*, 136 Ill. 26 N. E. 387; *Kusch v. Kusch*, 143 Ill. 32 N. E. 267; *Virgin v. Virgin*, 189 Ill. 59 N. E. 586. Counsel say that there is no difference, in principle, between the partition of an estate by the curtesy and a partition of dower, and that the husband was allowed to protect his estate in the lifetime of his wife in the case of *Freeman v. Hartman*, 113 Ill. 57, 92 Am. Dec. 193. In that case a voluntary conveyance was set aside because it was in fraud of the marital rights of the husband. The interest of a husband in the estate of his wife is within the protection of the statute, which declares void all conveyances made to defraud. 14 Am. & Eng. Law (2d Ed.) 252. The deed was void by his election, and he was therefore enabled to set it aside. The right of a wife to set aside a deed under like circumstances, because of fraud of marital rights, is not doubted. It does not follow that she can assert a right in the lifetime of her husband. In the case of *Gilbert v. Reynolds*, 51 Ill. 1, the claim of dower was based on the invalidity of a decree of divorce granted years before, and the husband had remarried again the same year of the divorce, and it was held that the silence and inaction of the complainant for 15 years after she knew the decree was a fraud. She could have succeeded to have had that decree set aside any time after she knew of it. Other cases are cited by counsel where it was held that dower was barred by an election of the widow knowingly and understandingly, and by which she received a bequest or other benefit in lieu of dower, and they do not support the claim made. The complainant was barred by laches.

The ground upon which it is insisted that the complainant was conclusively bound by the decree in the Blackford case is that it is a judgment in rem, and binding upon all persons. A judgment or decree is strictly in rem when it is not rendered against a specific person, but against all whom it may concern, and binds third persons. But to foreclose a mortgage or lien is not a proceeding in rem. The object is to reach and dispose of property, but the pro-

to be raised for county purposes, the aggregate amount of which shall not exceed 75 cents on the \$100 valuation of property, and that when for several purposes the amount for each purpose shall be stated separately. A resolution of the board recited that the committee, to whom was referred the tax levy for the ensuing year, and recommended a levy of 75 cents on the \$100 for county purposes. *Held*, that the resolution was sufficient as against an objection that the resolution did not determine the amount of all taxes to be raised, but that the county board should fix the aggregate amount required, and that the clerk should then determine the rate per cent., not exceeding 75 cents on the \$100.

2. Such resolution, however, is fatally defective for failure to state separately the amounts for each purpose of the levy.

3. Under the Road and Bridge Act (Hurd's Rev. St. 1903, c. 121) § 13, giving the commissioners of highways power to levy a tax for road and bridge purposes and for the payment of outstanding orders, not to exceed 60 cents on each \$100, and section 14, providing that, if in the opinion of the commissioners a greater levy is needed from some contingency, an additional levy may be made, not exceeding 40 cents on the \$100 of the taxable property, a levy exceeding 60 cents cannot be made, in the absence of a certificate of a contingency justifying the levy.

Appeal from Douglas County Court; W. W. Reeve, Judge.

Application by the people, on the relation of O. L. Parker, county collector, for a judgment and order of sale of the property of the Cincinnati, Indianapolis & Western Railroad Company. From a judgment for the railroad, applicant appeals. Affirmed.

H. J. Hamlin, Atty. Gen., John H. Chadwick, State's Atty., Edward C. Craig, and Roy F. Hall, for appellant. George W. Fisher, for appellee.

WILKIN, J. Appellant made application to the county court of Douglas county for a judgment and order of sale for delinquent taxes for the year 1903, to which appellee filed objections: First, that the county board had not determined the amount of taxes to be raised for county purposes, and the amount of the county tax required for each of the several purposes, or stated the amount required for each purpose separately, and also to the road and bridge tax for the town of Murdock, in said county; that the commissioners of highways did not levy or obtain the consent of the board of town auditors to levy any sum in addition to the rate of 60 cents for the contingency provided by section 14 of chapter 121 of our Statutes, and no such contingency then existed. Second, that the board of auditors had no authority to consent to the levy, or the commissioners to levy, an additional 40 cents to pay orders heretofore issued or for road and bridge purposes. The court below sustained these objections, and denied judgment for appellee's delinquent county tax and 40 cents on the \$100 of the taxable property of the town of the road and bridge tax of said Murdock township.

the county tax was levied is as follows: "Your committee, to whom was referred the tax levy for the ensuing year, would beg leave to submit the following report: That we have examined the financial condition of the county, and recommend that seventy-five cents on the \$100 be extended by the county clerk for county purposes. The said resolution was unanimously adopted by the board."

Section 121 of the revenue law (Hurd's Rev. St. 1903, p. 1529) is as follows: "The county board of the respective counties shall, annually, at the September session, determine the amounts of all taxes to be raised for county purposes, the aggregate amount of which shall not exceed the rate of seventy-five cents on the \$100 valuation of property, except for payment of indebtedness existing at the adoption of the present state Constitution. * * * When for several purposes the amount for each purpose shall be stated separately."

The first objection to the county tax is that the resolution of the board did not determine the amount of all taxes to be raised for county purposes, and the argument is that fixing the rate per cent on the \$100 of all the taxable property in the county does not amount to a determination of the aggregate amount required; that is, that the county board should fix the aggregate amount as required, and the clerk is then to determine the rate per cent., not exceeding 75 cents on the \$100 valuation of property. This is doubtless the plain reading of the statute; but the effect of the resolution is to indirectly fix the amount, and, on the principle that that is certain which may be made so, we are of the opinion that the objection, standing alone, was not good. On principle, *Chicago & Alton Railroad Co. v. People*, 155 Ill. 276, 40 N. E. 602; and *Same v. Same*, 205 Ill. 625, 69 N. E. 72, are in point.

The further objection, however, to this tax is, that the resolution of the county board did not comply with that requirement of section 121, supra, which makes it the duty of the board, when the tax is for several purposes, to state separately the amounts for each purpose. We have just had occasion to consider this objection in *Chicago, Burlington & Quincy Railroad Co. v. People* (Ill.) 72 N. E. 1105, and reached the conclusion that the objection is fatal to the county tax. For the reason there stated, we think the county court properly sustained appellee's second objection to the county tax herein given.

The road and bridge tax objected to was levied under the following certificate: "We, the commissioners of highways of Murdock township, hereby certify that we require for road and bridge purposes, and for the payment of outstanding orders drawn on the township treasury for the year for which the tax should be levied, September 1, 1903, the rate of sixty cents on each \$100, and we also require the rate of forty cents on each

\$100 valuation for road and bridge purposes, and paying outstanding orders heretofore drawn on the treasurer of said board of highway commissioners." In pursuance of this certificate, a tax of 100 cents on the \$100 was levied for road and bridge purposes, and the appellee objected to the whole of the tax, but the court overruled the objection to 60 cents on the \$100, and sustained it as to the 40 cents. In the argument considerable space is devoted to a discussion of the question whether, upon the facts, the township was under the labor or money system, but in our view of the case that question is unimportant.

It will be seen that the second objection to this tax which was sustained by the court is that the board of auditors had no authority to consent to the levy, or the commissioners to levy, an additional 40 cents to pay orders heretofore issued, or for road and bridge purposes. Section 13 of the road and bridge act (Hurd's Rev. St. 1903, c. 121) gives the commissioners the power to levy a tax "for road and bridge purposes and for the payment of any outstanding orders drawn by them on their treasurer, which levy shall not exceed sixty cents on each \$100." The following section provides that "if, in the opinion of the commissioners, a greater levy is needed in view of some contingency, they may certify the same to the board of town auditors and the assessor, a majority of whom shall be a quorum, and with the consent of a majority of this entire board given in writing, an additional levy may be made of any sum not exceeding forty cents on the \$100 of the taxable property of the town." This 40 cents on the \$100 must be to meet some contingency, and not to pay the ordinary expenses, provided for in section 13, incurred in the usual manner.

It is argued by counsel for appellant that the commissioners are the judges as to the necessity or contingency which will justify the levying of the additional 40 cents, provided the town auditors and assessor consent thereto in writing. If the certificate of the commissioners had been that the necessities or contingencies existing in the township required an additional levy, the position would perhaps be tenable. But that is not what the commissioners have here certified to. They attempt by their certificate to levy one hundred cents "for road and bridge purposes and for the payment of outstanding orders drawn on the township treasury," the additional 40 cents on each \$100 being for the same purposes as the 60 cents, and without certifying or stating that any contingency has arisen or that any necessity exists for the latter levy. Section 13 is a limitation upon the power of commissioners to levy a road and bridge tax in excess of 60 cents on each \$100 for road and bridge purposes and for the payment of outstanding orders drawn by them on their treasurer, and, if the position of the appellant is sus-

tained, then that limitation is entirely abrogated, whether any contingency exists or not, provided the commissioners can obtain the consent of the auditors and assessor to increase it. We think the taxpayers of the township, when called upon to pay the additional 40 cents on each \$100, have a right to insist that the commissioners shall certify that there is a contingency justifying the levy.

Our conclusion is that the county court properly sustained the objections to the road and bridge tax of Murdock township to the extent of the 40 cents on the \$100. We find no reversible error in this record, and the judgment below will accordingly be affirmed. Judgment affirmed.

(213 Ill. 507)

RICKMAN v. MEIER et al.*

(Supreme Court of Illinois. Dec. 22, 1904.)

PARENT AND CHILD—CONVEYANCES FROM PARENT TO CHILD—UNDUE INFLUENCE—BURDEN OF PROOF—EVIDENCE—SUFFICIENCY—WILLS—CONSTRUCTION—AFTER-ACQUIRED PROPERTY—PLEADING—ANSWER AS ADMISSION.

1. Where a deed or other conveyance has been procured by undue influence, and is not ratified by the party making it after the undue influence has ceased to operate, it may be set aside after such party's death, at the suit of those succeeding to his rights.

2. While there is ordinarily no presumption against the validity of a deed made by a parent to his child on account of the affection of the former for the latter, even when it is made at the latter's solicitation, yet where the parent defers and yields to the child, and a fiduciary relation has been brought about, in which the parent is dominated by the child, and the child prepares, or causes to be prepared and executed, an instrument conveying to him the property of the parent as a gift, or upon a grossly inadequate consideration, the presumption arises that the transfer was obtained through the child's undue influence, and the burden rests upon him to show that the conveyance was the result of full and free deliberation on the part of the parent.

3. In a suit by the successors in interest of a decedent to set aside a conveyance upon a nominal consideration made by her to her son, evidence held insufficient to show that the execution of the deed by the decedent was the result of full and free deliberation on her part.

4. In a suit by the successors in interest of a decedent to set aside a transfer of money in bank from her to her son, evidence held to show that, notwithstanding the existence of a fiduciary relation by the son towards her, the gift resulted from her own uncontrolled volition.

5. Testatrix devised certain property to be sold, and directed the proceeds to be used to pay debts and certain legacies, and any balance to be divided between certain persons. The specific legacies were advanced to the legatees during testatrix's lifetime, and she, having conveyed the property, executed a codicil reciting that fact and revoking the legacies; leaving the rest of the will as drawn. Subsequently she purchased other property, but it was not shown that the proceeds of the property sold went into the purchase. Held, that the property purchased passed under a residuary clause of the will, and not under the clause directing a disposition of the proceeds subsequently conveyed.

6. Realty may pass under a residuary clause of a will using the words "give and bequeath," although the word "devise" is not used therein.

*Rehearing denied February 14, 1905.

part of the grantee, who subsequently transferred the title to his wife, where the grantee, in his answer, admitted that he claimed to be the owner of the property by reason of the conveyance to him, and said nothing about a transfer of title to his wife, and she adopted his answer as her answer, she could not object that the court was not warranted in finding that she took title pending litigation.

Appeal from Superior Court, Cook County; C. S. Cutting, Judge.

Bill by Frances Brick Meier and others against Caroline K. Rickman and others. From the decree rendered, the defendant named appeals. Reversed.

On February 24, 1890, Christiana O'Connor was the owner of three houses on Clark street and three houses on Rush street, together with the real estate on which said houses were erected, in the city of Chicago. On that date she executed a deed (her husband joining therein with her) conveying all of said property to John F. Brick, her son, in trust for the purposes of having him collect the rents, make necessary improvements, pay taxes and insurance, and turn over to her the net rents during her life. The deed further recited that, upon the written request of the grantor for that purpose, the grantee should convey said premises or any part thereof to such person and for such sum as she might designate in said request, and should also immediately turn over to her the net proceeds of said sale, and if said premises, or any part thereof, should remain undisposed of at the time of her death, that he should make such disposition of the property as she should by her will direct. On March 29, 1890, she executed a will, which recited that she thereby intended to dispose of all her property. The first clause directed the sale of the Rush street property. The next five clauses disposed of the proceeds of such sale as follows: The second clause of the will provided for the payment of her debts and funeral expenses; the third gave to Elizabeth Brick, widow of her deceased son Frank, \$1,000; the fourth to Barbara Brick, the widow of her deceased son Christian, \$1,000; the fifth to Mary Charbonnier, the daughter of her first husband, \$1,000; the sixth disposed of the balance of the proceeds arising from the sale of the Rush street property, after the payment of the above debts and bequests, as follows: To John F. Brick, one-third thereof; to Joseph Brick, her grandson, one-third thereof; and to the four children of her deceased son Frank, one-third thereof. The seventh, eighth, and ninth clauses each disposed of one of the Clark street houses to John F. Brick, Joseph Brick, and the four children of Frank Brick, her deceased son, respectively; and John F. Brick was directed to convey the same to the respective devisees. The tenth clause disposed of two pictures, and the eleventh clause gives and be-

children of her deceased son Frank Brick. By the twelfth clause, John F. Brick and Frank Spohrer were nominated executors of the will, without bond. On April 6, 1891, Christiana O'Connor directed the sale of the Rush street property by her trustee for \$26,643, and John F. Brick, in compliance with that direction, conveyed the same to the purchaser, and the proceeds were turned over to Mrs. O'Connor. On June 8th of the same year she made a codicil to her will, which, after reciting that she had sold the Rush street property, and had given to Elizabeth Brick, Barbara Brick, and Mary Charbonnier each \$1,000, proceeded as follows: "I therefore do hereby revoke the bequests made in and by paragraphs numbered third, fourth and fifth in my last will and testament * * * to the above named parties, leaving the rest of my said last will as drawn." On August 24, 1899, she purchased certain real estate on Barry avenue, in the city of Chicago, which is the real estate involved in this suit, and is referred to in this litigation as the Barry avenue property, paying therefor \$14,000, and afterwards, on July 27, 1902, together with her husband, delivered a deed for the same to John F. Brick for an expressed consideration of \$1. At the time she executed this deed she was confined to her bed, suffering from tuberculosis. She was in constant pain, and never thereafter left her bed. Her death occurred on September 12, 1902. She was then 72 years of age. John F. Brick was her only living child. He was a cripple and in poor health. He resided in one of the Clark street houses, next to that occupied by his mother; and during her illness he and his wife (now Caroline K. Rickman) spent a large portion of their time at her home. On the day the deed to the Barry avenue property was signed, John F. Brick called in the notary who prepared the deed, and who took the grantor's acknowledgment thereto, and instructed him how to draw the deed, and paid him for his services. He was also present at the execution of the instrument, and took an active part in securing her signature thereto. Mrs. O'Connor then lived separate and apart from O'Connor, her second husband, and he came to her home to join in this deed at the request of the grantee therein. On July 31, 1902, Christiana O'Connor had money on deposit with the Hibernian Banking Association and with the Illinois Trust & Savings Bank, aggregating \$2,196.30, and on that date she transferred the same to her son John F. Brick by delivering to him checks and receipts to the banks therefor; and he withdrew the money from the latter bank, and deposited all of it with the Hibernian Banking Association to his own credit.

Christiana O'Connor left, her surviving, as her only heirs at law, Frances B. Meier, Clara E. Aubert, Arthur Brick, and Viola

Brick, the children of Frank Brick, a deceased son, who were complainants below and are appellees here, and John F. Brick, her only surviving son, Joseph Brick, the only child of Christiana Brick, a deceased son, and her husband, Patrick J. O'Connor, who were defendants below. On November 8, 1902, the will and codicil above mentioned were admitted to probate by the county court of Cook county, and John F. Brick was appointed executor thereof. On January 13, 1903, the bill herein was filed by the four children of Frank Brick, deceased, above named, in the superior court of Cook county, against John F. Brick, individually and as trustee of Christiana O'Connor, and as executor of the last will and testament of Christiana O'Connor, deceased, Caroline Brick, wife of John F. Brick, Joseph Brick, Hibernian Banking Association, and Fidelity Safe Deposit Company. The bill, after setting out the above facts, charged that John F. Brick was the trustee, agent, and confidential adviser of Christiana O'Connor in all her business matters, and that a confidential relation existed between them; that John F. Brick abused the confidence reposed in him, and by fraud and undue influence obtained the conveyance of the Barry avenue property from her, and the transfer of the money on deposit with the two banks above named to him; and the bill prayed that the deed to John F. Brick for the Barry avenue property be declared null and void, and that the title to that property be adjudged in the complainants, as residuary legatees of the deceased, under the eleventh clause of her will; also that the money on deposit with the Hibernian Banking Association be adjudged to be funds belonging to the estate of said deceased, and that it be perpetually enjoined from paying the same or any part thereof out upon the order of John F. Brick. The defendants filed separate answers. John F. Brick admitted all the allegations of the bill except those charging fraud and undue influence, which he denied. Joseph Brick admitted all allegations except those claiming that the property passed to the complainants under the eleventh clause of the will, and he set up that the property was held in trust by John F. Brick to be distributed according to the provisions of the sixth clause of the will. After the bill was filed, and on June 23, 1903, John F. Brick died. A supplemental bill was filed, suggesting his death, and alleging that Arthur Brick had been appointed administrator de bonis non with the will annexed of the estate of Christiana O'Connor, and that Caroline K. Brick claims to be the purchaser of all right, title, and interest of John F. Brick in all his real and personal property, and alleging that such purchase was made with actual notice of the rights and claims of complainants, and during the pendency of this litigation. Caroline K. Brick answered the supplemental bill, admitting that she purchased all the property from her husband,

but denying that it was with actual notice of the rights and claims of complainants, or during the pendency of the suit. The evidence showed that \$2,000 of the money in the Hibernian Banking Association was transferred from the account of John F. Brick to that of his wife on November 20, 1902, and that the Barry avenue property was conveyed to her by deed dated November 19, 1902, acknowledged on the same date, and recorded July 1, 1903. On the same day the bill above mentioned was filed, Joseph Brick filed a bill in the same court, setting out the facts substantially as contained in the bill to which he was made a defendant, except that he averred that the Barry avenue property was purchased with funds derived from the sale of the Rush street property, and was conveyed to John F. Brick to hold in trust for disposition under the sixth clause of the will of Christiana O'Connor. Issues were made up on this bill, and thereafter the cause in which Joseph Brick was complainant was consolidated with the one first hereinabove mentioned.

The consolidated causes were referred to the master to take the evidence and report his conclusions to the court. After the evidence had been heard by the master, but before his report had been filed in court, the complainants in the cause first hereinabove mentioned amended their bill, and charged that there was no valid delivery of the deed to John F. Brick. The master found the allegations of the bill in which Frances B. Meier et al. were complainants to be true; also that the property and money were obtained by John F. Brick by undue influence amounting to fraud, and were transferred and conveyed to his wife pendente lite, and with knowledge on the part of the wife of the infirmity of her grantor's title; and recommended that relief be granted as prayed for in the bill. The master found the bill filed by Joseph Brick to be without equity, and recommended that it be dismissed. A decree was accordingly entered by the court declaring the deed from Christiana O'Connor to John F. Brick null and void, the deed from John F. Brick to his wife (now Caroline K. Rickman) to have been taken by the latter with knowledge of the rights and claims of the complainants therein, and during the pendency of this suit, and that the complainants in the bill first hereinabove referred to were entitled to said property under the eleventh clause of the will of Christiana O'Connor, and ordering Caroline K. Rickman to convey the same to those complainants within 20 days, and that in default thereof the master execute and deliver to them a deed for the said premises; also ordering the Hibernian Banking Association to turn over to Arthur Brick, as administrator de bonis non with the will annexed of the estate of Christiana O'Connor, deceased, the \$2,000 on deposit with it in the name of Caroline K. Rickman, which had been transferred to

which was part of the money received by him from his mother. The decree also dismissed the bill filed by Joseph Brick for want of equity.

Caroline K. Rickman appeals from that decree to this court, and here urges that the evidence for appellant is sufficient to rebut any presumption of undue influence on the part of John F. Brick in obtaining the property in question; that that property was not the subject-matter of any trust, and that, under the circumstances shown by the evidence in the case, fraud is not to be presumed between parent and child; also that, even though undue influence was proven, the conveyance was only voidable at the election of Mrs. O'Connor, and, she having failed to repudiate it during her lifetime, the same cannot now be set aside at the instance of the complainants in the bill. It is also contended that, if the decree is supported by the evidence, it is nevertheless erroneous in finding that the title to the Barry avenue property is in the complainants alone; that, in any event, it should only have found them entitled to one-third of the property, on the theory that, the deed failing, the property passes under the sixth clause of the will, and not under the eleventh or residuary clause.

Ernest Saunders, for appellant. Niles E. Olsen and Loesch Bros. & Howell, for appellees.

SCOTT, J. (after stating the facts). The gifts made by the deceased to John F. Brick are attacked principally on the ground that they were obtained through the undue influence of the donee. Appellant argues that a deed or gift obtained through undue influence is not void, but voidable at the election of the grantor or donor alone, and that, as Christiana O'Connor did not exercise her option to declare the gifts void in her lifetime, they cannot be attacked by her representatives after her death; and reliance is placed upon the case of *Burt v. Quisenberry*, 132 Ill. 385, 24 N. E. 622. In that case it is held that, though a deed be obtained by undue influence, the party executing it may elect to reaffirm it when the influence under which it was obtained has entirely ceased, and, if he do so, then it becomes valid and binding, precisely as though it had been the result of the uncontrolled volition of the grantor in the first instance; and in that case it was held that the attack made on the deeds could not avail, for the reason that the grantor had ratified them at a time when he was entirely free from the influence which it was charged had been unduly exercised to secure their execution.

The law is that where a deed or other conveyance has been procured by undue influence, if it be not ratified by the party making it after the undue influence has ceased to operate, it may be set aside after his death at the suit of those who succeed to his

268; *Walker v. Smith*, 29 Beav. 894; *Le Gendre v. Goodridge*, 46 N. J. Eq. 419, 19 Atl. 543; *Prentice v. Achorn*, 2 Paige, 30; *Lins v. Lenhardt*, 127 Mo. 271, 29 S. W. 1025; *Martin v. Bolton*, 75 Ind. 295.

Christiana O'Connor was confined to her room and bed from July 1, 1902, to September 12, 1902, when she died. During this time she grew weaker, both physically and mentally, except that she would rally at times for a day or two. John F. Brick was her only surviving child. He lived next door to her, and was without any occupation except caring for her and assisting her in her business; and during the period last mentioned she seems to have relied almost entirely upon him, both to care for her in her illness and to attend to her affairs. She had made him trustee for her by a deed which conveyed to him in trust real estate of great value, comprising by far the greater portion of her property. He was to be one of the executors of her will, without bond. She rented a box in a safety deposit vault, and had given him the key, and written authority by virtue of which he had access to that box and all her valuable papers, including her will, at all times. The relations between them—business, personal, and domestic—were exceedingly close and intimate. He was her confidant and adviser. Age and disease had seriously weakened her physical and mental powers, and, while not mentally disqualified to transact such business as conveying property, yet the weakness of her mind was such as led her to rely upon and be guided by the judgment of her son. We are satisfied that at all times after she was confined to her room a fiduciary relation existed between them, in which he was the dominant and controlling factor, and she the trusting and dependent one. The scrivener prepared the deed in question at his instance and under his direction, and he procured its execution by his mother.

A gift made by the parent to the child on account of the affection of the former for the latter, even where it is made at the solicitation of the child, is not the object of suspicion, and there is no presumption against its validity, unless the relation between them is something more than the ordinary relation of parent and child. *Burt v. Quisenberry*, supra; *Oliphant v. Liversidge*, 142 Ill. 160, 30 N. E. 334; *Francis v. Wilkinson*, 147 Ill. 370, 35 N. E. 150.

Where, however, the natural position of the parties has become reversed; where the parent defers to, trusts in, and yields to the child; where there exists between them what in law is termed a fiduciary relation, in which the parent is dominated by the child; and where the child prepares, or causes to be prepared and executed, an instrument conveying to him property of the parent as a gift, or upon a grossly inadequate consideration—the presumption arises that the trans-

fer was obtained through his undue influence, and the burden then rests upon him to show that the conveyance was the result of full and free deliberation on the part of the parent. This is not peculiar to transactions where the parties are parent and child, but is the law in any case where a fiduciary relation exists, where the conveyance is from the dependent to the dominant party, and where the donee or grantee prepares, or procures the preparation and execution of, the deed or other instrument; and the rule is applied, under such circumstances, wherever that relation exists, no matter whether the parties are related by blood or not. 1 Woerner on American Law of Administration (2d Ed.) § 32; Bigelow on the Law of Fraud, p. 361; Thomas v. Whitney, 186 Ill. 225, 57 N. E. 808; Dowle v. Driscoll, 203 Ill. 480, 68 N. E. 56; Weston v. Tenzel (Ill.) 72 N. E. 908; Richmond's Appeal, 59 Conn. 226, 22 Atl. 82, 21 Am. St. Rep. 85; Coghill v. Kennedy, 119 Ala. 641, 24 South. 459.

The deed conveying the Barry avenue property was written by Lewis A. Rheinhardt, a notary public and law clerk, who lived in the same building in which John F. Brick resided. On the day on which it was executed, Mr. Rheinhardt prepared a deed for signature in accordance with the directions of John F. Brick. It was taken by Rheinhardt to Mrs. O'Connor's room, where she was in bed. John F. was present. She attempted to sign, but was unable to do so, and blotted the instrument so that it was deemed advisable to prepare another. When the second was prepared, the same thing occurred, and the scrivener thereupon prepared a third. In the meantime a stimulant had been administered to the sick woman, and when the third document was presented to her she was able to attach her signature. The notary did not read either of these instruments to her, and says he presumed "she must have understood the purport of the execution of these deeds, as John informed me it was prearranged." Her failure to sign the first two instruments presented resulted partly from physical weakness, and partly from a confused mind, which made her uncertain about forming the characters in writing her name, or about the order in which they should be written. When the first deed was presented to her, John said: "Mother, Mr. Rheinhardt has got this deed now, ready for you to sign." After she had marred and failed to sign it, the son said that she had spoiled it, and, addressing Rheinhardt in her presence, continued: "Well, you may as well get through it while you are here. You can go upstairs and make another deed." When the notary returned, the son said to her: "Mr. Rheinhardt has that second deed made out now, and you want to try and sign this one, and don't spoil it." When she had failed to sign the second, and had so blotted it that the preparation of the third was rendered necessary, her husband, who was present, said:

"Let it go for to-day. She is in a weakened condition." John F. said to her: "Don't you think you can sign that to-day?" and the mother responded: "Well, we might just as well get through with it." The stimulant was taken by her at the instance of her son, who suggested that it would make her feel better and steady her nerves. The testimony does not satisfy us that this woman knew what she was signing. The notary says: "I did not read the deed to her. She had confidence enough in me, because I had known her for a long time, that when the deed was made out it was all right." She did not read, and there is no evidence that she was in any way made acquainted with, the description of the property contained in the deed. The proof offered by appellant fails to show that the execution of the deed was the result of full and free deliberation on the part of the grantor therein.

On the occasion of the transfer of the money in bank, Rheinhardt went to Mrs. O'Connor's room in response to a message which she sent to him by the wife of John F. Brick. When he reached there, he found that she was better and was unusually bright, and made some witty remark to him in the German language. She told him that she had sent for him, as she wanted to see him before he started down town; that she had money in the Hibernian Bank and in the Illinois Trust & Savings Bank; that she wanted John to have that money because he was a cripple and could not work, and wanted Rheinhardt to go down with John and do whatever was necessary to be done to put that money in John's name. In accordance with this request, Rheinhardt and John went to the Illinois Trust & Savings Bank, and later to the Hibernian Bank. In each instance they acquainted the bank officers with the fact that Mrs. O'Connor was sick and unable to come down, and that she wanted to transfer the money on deposit to John. The money in each bank was in the savings department, not subject to an ordinary check, and, for the purpose of making the transfer, in each instance a clerk filled up a check payable to John for the amount on deposit, and an instrument in the nature of a receipt running to the bank, which is termed a release, both to be signed by Mrs. O'Connor. They then returned. Mrs. O'Connor signed them, and said to John, "Now you can go down and get the money;" and he took the checks and releases, and had the money transferred to his own account. So far as the money thus transferred to the son is concerned, we think the evidence overthrows any presumption arising from the fiduciary relation. It seems that the mother was here the active party in making the transfer and having the papers evidencing the transaction drawn, instead of the son, as in the case of the deed; and while the gift of the money was, no doubt, induced by the affection which she had for her son, and

perhaps was made in response to his request, yet we think the circumstances surrounding the transaction, as disclosed by the evidence, show that the gift resulted from her uncontrolled volition.

The court below held that the real estate which the deed in question purported to convey passed to the complainants in the original bill under the residuary clause of the will, which reads as follows: "All the rest, residue and remainder of my estate, including household furniture, clothing," etc., "I give and bequeath to the four children of my deceased son, Frank Brick." At the time the will was drawn, the testatrix did not own this Barry avenue property, and appellant's view seems to be that this property should be held to pass under those provisions of the will which direct a disposition of the proceeds of the Rush street property, which had been sold after the execution of the will, on the theory that the Barry avenue property was purchased with the proceeds of the Rush street property, and that it does not pass under the residuary clause for the further reason that the words of gift therein do not include the word "devise." According to the will, the Rush street property was to be sold after the death of the testatrix, and the proceeds were to be used to pay her debts and funeral expenses, to pay \$1,000 to each one of three legatees, and the balance of such proceeds was by the sixth clause to be divided, one-third to John F. Brick, one-third to Joseph Brick, and one-third to the children of Frank Brick who should survive the testatrix. The three legacies of \$1,000 each she advanced to the legatees in her lifetime. After conveying the Rush street property, she executed a codicil reciting the fact that that property had been conveyed and the advancements made, and revoking the three legacies of \$1,000 each, and then providing "leaving the rest of my said will as drawn." When this codicil was executed she had not yet purchased the Barry avenue property. The proceeds of the Rush street property seem then to have been personalty, and there is no competent evidence tracing such proceeds into the Barry avenue property. There is competent evidence establishing the fact that she disposed of the one property, and some years later acquired the other, but this is not sufficient to show that the second was purchased with money arising from the first. Under these circumstances, this property passes under the residuary clause, although the word "devise" was not used therein. This court has heretofore held that while the word "devise" is usually employed to denote a gift by will of real estate, or an interest therein, the word "bequest" may mean any gift by will,

whether it consists of personal or real property. *Evans v. Price*, 118 Ill. 593, 8 N. E. 854. Following this reasoning, it would seem that the use of the word "bequeath" instead of "devise" would not necessarily lead to the conclusion that the property which the testatrix thereby intended to dispose of was personalty; but, be that as it may, the word "bequeath," in this residuary clause, is coupled with the word "give," which is of the largest possible signification, and is applicable as well to real as personal estate. *Hooper v. Hooper*, 9 Cush. 129; *Piereson v. Armstrong*, 1 Iowa, 282, 63 Am. Dec. 440.

The decree of the court below finds that the appellant received her deed from John F. Brick *pendente lite*. It is assigned as error that there is no evidence to warrant that finding. The deed bears date prior to the beginning of this proceeding. There is no evidence showing when it was delivered, save the presumption that arises from its date; and it is urged that, in the absence of other evidence showing when her deed was delivered to her, it was erroneous to find that she took title after the beginning of this suit. The answer of John F. Brick, filed January 30, 1903, admits that he claims to be the owner of the Barry avenue property by reason of the conveyance to him, and says nothing in reference to having transferred the title to his wife. After the death of John F. Brick the appellant adopted his answer as her answer, and, having adopted that answer with that averment therein showing that he claimed to be the owner of that property after the beginning of this suit by virtue of the conveyance from his mother, we think she cannot now be heard to say that the court was not warranted in finding that she took title pending this litigation.

The decree of the superior court will be reversed, and the cause will be remanded to that court, with directions to enter a decree dismissing the bill filed by the residuary legatees or devisees for want of equity in so far as that bill seeks to set aside the gift of the money in bank by Christiana O'Connor to John F. Brick, and dissolving the injunction in so far as Caroline K. Rickman (formerly Caroline Brick) is restrained from transferring, receiving, or checking out the portion of such money now in bank; and authorizing said Caroline K. Rickman to draw or check said portion out of the bank of the Hibernian Banking Association wherein it is now deposited, and authorizing said association to pay the same to Caroline K. Rickman or upon her order; the decree to be so entered to be in all other respects identical with the decree from which this appeal is prosecuted.

Reversed and remanded, with directions.

(213 Ill. 522)

WABASH R. CO. v. PEOPLE ex rel. SONNET.*

(Supreme Court of Illinois. Dec. 22, 1904.)

Appeal from Circuit Court, Adams County; C. B. McCrary, Judge.

Action by the people, on the relation of F. L. Sonnet, against the Wabash Railroad Company. From a judgment in favor of the relator, defendant appeals. Reversed.

C. N. Travous, for appellant. James N. Sprigg, Co. Atty. of Adams County, for appellee.

PER CURIAM. All of the questions involved in this case are fully considered in the case of Chicago, Burlington & Quincy Railroad Co. v. People (Ill.) 72 N. E. 1105, and in accordance with the views therein expressed the judgment of the county court is reversed, and the cause remanded.

Reversed and remanded.

(213 Ill. 523)

RUBENS v. HILL.†

(Supreme Court of Illinois. Dec. 22, 1904.)

LANDLORD AND TENANT—COVENANT TO REPAIR—CONSTRUCTION—INDEPENDENT COVENANTS—ACTION FOR RENT—ASSUMPSIT—DECLARATION—SUFFICIENCY—CONSTRUCTIVE EVICTION.

1. In a lease containing an agreement by the lessee to pay rent in consideration of the demise, and by the lessor to put the premises in a habitable condition, the latter agreement was not a condition precedent to the right to recover rent, but was an independent covenant, failure to perform which gave the lessee a right to damages, but did not relieve him of liability for rent.

2. Where the lessee in a written lease has enjoyed possession for the full term, so that nothing remains for him to do under the lease except to pay the rent, the lessor may recover this in assumpsit.

3. In assumpsit for rent, failure of the declaration to allege that defendant occupied the premises is cured by an allegation of the plea that defendant entered into possession and was evicted by plaintiff.

4. A stipulation in a written lease that the lessor should put the premises in a habitable condition before commencement of the term, "meaning and intending hereby that the boards covering the windows and doors shall be removed, the fixtures connected with the plumbing, and the house put in condition for occupancy," was an agreement to do the things specifically mentioned, and excluded any implied covenant to make general repairs.

5. A wrongful act or omission of a lessor, which tends merely to diminish the beneficial enjoyment of the premises, does not release the lessee from his liability for rent if he continues to occupy, though he may recoup from the rent such damages as he has sustained by reason of the wrongful act or omission.

6. Whether the acts of a landlord amount to an eviction is a question of fact.

Appeal from Appellate Court, Second District.

Action by Martha S. Hill against Harry Rubens. From a judgment of the Appellate Court affirming a judgment for plaintiff, defendant appeals. Affirmed.

This is an action in assumpsit, brought by appellee, Martha S. Hill, in the circuit court of Lake county, against the appellant, Harry Rubens, on September 30, 1902, to recover four months' rent at the rate of \$833.33 $\frac{1}{3}$ a month for the premises known as "Ravinoaks," at Highland Park in the said county, a country seat consisting of a mansion and about 18 acres of land, and also the furniture, carpets, hangings, and other articles of personal property on the premises at the time of the demise, and which said premises and personal property were leased to appellant by appellee for the six months during the summer of 1902 from April 15th to October 15th. A schedule of the personal property was attached to the lease. By the terms of the lease appellant covenanted that "in consideration of said demise" he would pay to the appellee \$5,000 rent for the said period of six months in six monthly installments, the first payment to be made, not at the date of the execution of the lease, which was February 1, 1902, but on April 15th, the date when the lessee was to take possession. On or about the first day of the term, to wit, April 15, 1902, appellant paid the first month's rent for the period from April 15 to May 15, 1902, and his family then took possession of the property, and continued to reside there until the end of the term, October 15, 1902. His family consisted of himself, his wife, his son, two married daughters and their husbands, two grandchildren, two nurses, and four other woman servants, all of whom lived in the dwelling house. Another grandchild was born to one of his daughters in the dwelling house about September 1, 1902. On May 19, 1902, the appellant paid the second month's rent, which had fallen due about May 15, 1902, to wit, the sum of \$833.33 $\frac{1}{3}$; but appellant paid no more rent after May 19, 1902.

The declaration consisted of the common counts, except that there was inserted in it in the ordinary form of the consolidated common counts, after the count for money due on an account stated and before the conclusion, the following: "And in the like sum (\$5,000) for money due from the defendant to the plaintiff for rent of certain premises and property of the plaintiff there situate, before that time demised and rented by the plaintiff to the defendant at his request." The declaration then concludes as follows: "And being so indebted, the defendant, in consideration thereof, then and there promised to pay the plaintiff on request the several sums of money so due to him as aforesaid. Yet defendant, though requested, has not paid the same, or either of them or any part thereof, to the plaintiff, but refuses so to do, to the damage of the plaintiff of \$5,000," etc. Attached to the declaration as

*Rehearing denied February 9, 1905.

†Rehearing denied February 15, 1905.

an exhibit was a copy of the lease between the parties.

The pleas were: (1) The general issue. (2) A special plea to the count for rent that, "after the making of the said supposed demise aforesaid, the plaintiff, with force and arms, etc., wrongfully and unlawfully withheld from possession of this defendant a portion of the said premises, and refused to let this defendant into possession thereof, although often requested so to do, etc., and continuously thereafter until, to wit, the time aforesaid, refused to let this defendant into possession thereof," concluding with the verification. (3) A special plea to the count for rent that "the said plaintiff, with force and arms, etc., entered into and upon said premises in said count of said declaration alleged to have been demised to this defendant, and into and upon the possession of this defendant, and ejected, expelled, put out, evicted, and amoved this defendant, and kept him so ejected, expelled, put out, evicted, and amoved from the possession thereof, from thence hitherto," etc., concluding with the verification. (4) Special plea that the "said plaintiff, with force and arms, etc., wrongfully and unlawfully entered into and upon the said premises in said declaration alleged to have been demised to this defendant, and into and upon the possession of this defendant, and ejected, expelled, put out, evicted, and amoved this defendant from the possession of a large part of said premises, to wit, a certain tower and certain engine house or building, and portions of a certain barn or stable, being part and parcel of said premises so alleged to have been demised to this defendant as aforesaid, and kept this defendant so ejected, expelled, put out, evicted, and amoved from the possession thereof from thence hitherto," concluding with the verification. Replication was filed by the plaintiff to these pleas on November 11, 1903, to which replication a demurrer was subsequently confessed by plaintiff, and an amendment made thereto in pursuance of leave to amend the same, given by the court. Upon the issues thus joined, the parties went to trial.

The jury returned a verdict for the plaintiff for the full amount sued for, together with interest to the time of the trial—that is to say, for the amount of rent due by the terms of the lease for the last four months of the rental period, beginning with June 15, 1902, and ending with October 15, 1902. Motions for new trial and in arrest of judgment were overruled, and judgment was entered upon the verdict, less the amount of \$2.02 remitted from the verdict by the appellee; and the amount of the judgment rendered was \$3,547.42. The judgment for this amount has been affirmed on appeal by the Appellate Court for the Second District, and the appellant now prosecutes this further appeal to reverse said judgment of affirmance.

The tract of 18 acres above referred to was divided by a ravine, running westerly from the lake shore, into two irregular halves or portions, called in the testimony the north half and the south half of the place. On the north half was a dwelling house and a stable. On the south half, which was improved as a kind of park, was a brick and stone tower with a windmill on the top of it, and there were steps leading down the bluff, which at that point was about 60 feet high, from near this tower to the beach of the lake, and at the beach there was a machine house. In the stable there were sleeping rooms on the second floor for certain of the employes upon the place.

The lease recites "that the party of the first part [appellee] for and in consideration of the covenants and agreements hereinafter mentioned to be kept and performed by the party of the second part [appellant], has demised and leased to the party of the second part the premises [as above described], together with all the buildings and improvements thereon, to be occupied as a dwelling house and country seat," together with the personal property above mentioned; "to have and to hold the same unto the party of the second part, from the 15th day of April, 1902, until the 15th day of October, 1902. And the party of the second part in consideration of said demise, does covenant and agree with the party of the first part as follows: First, to pay as rent for said demised premises the sum of \$5,000.00, payable in six equal monthly installments of \$833.33 each, the first of said installments to be paid on the 15th day of April, 1902, and the other five installments each to be paid on the 15th day of each succeeding month until the said sum of \$5,000.00 shall have been fully paid; second, the said party of the first part hereby agrees to cause said premises to be put into a habitable condition and make the same ready for occupancy by the said party of the second part, on or before the said 15th day of April, 1902; meaning and intending hereby that the boards covering the windows and doors of the dwelling house shall be removed by the said party of the first part, the fixtures connected with the plumbing, and the dwelling house put in condition for occupancy." By the terms of the lease the lessor agrees to employ a gardener on the premises, and such additional help as may be necessary to maintain the lawns, shrubbery, vegetables, etc.; and also to keep a horse and wagon in the barn to be used by the gardener in the performance of his work; also to pay the water rents and the expense of sprinkling Sheridan road in front of the premises; also to cause the garden thereon to be planted with certain vegetables for the use of the lessee, provided that the gardener employed by the lessor be allowed to have certain seeds for the planting of the crop of the next season, and enough vegetables to supply his own table; also to have the lawn

fertilized at her own expense if necessary; also to sell to the lessee the chickens on the place at the beginning of the lease, the gardener to have the privilege of supplying himself with eggs, etc. The seventh clause of the lease was as follows: "It is agreed that the wind-mill on the water tower on the premises is not in order to supply water, and is not to be operated." The lease contains further provisions to the effect that the parties will meet for the purpose of checking up the articles of personal property leased to the lessee; also to the effect that, in case the dwelling house or barn should be destroyed by fire prior to April 15, 1902, and should not be rebuilt before April 15, 1902, then the lease should, at the option of the lessee, be null and void. The eleventh clause of the lease, so far as it is necessary to quote the same, is as follows: "The said party of the second part [the lessee] hereby agrees that he will keep said premises in good repair, and will immediately replace all broken globes, glass or fixtures with those of the same size and quality as that broken, and will keep said premises and appurtenances in a clean and healthy condition, according to the city ordinances and direction of the proper public officers, during said term, and upon the termination of this lease in any way, will yield up said premises and said personal property to said party of the first part in good condition, loss by fire and ordinary wear and tear excepted." By the terms of the lease the lessee agrees that the premises shall not be used for any other purpose than as a dwelling house for himself and family, and that he will not sublet the same, nor assign the lease without the written consent of the landlord, etc., "and will not permit the same to remain vacant or unoccupied for more than ten consecutive days, and will not permit any alteration of or upon any part of said demised premises, nor allow any signs or placards posted or placed thereon." The last clause of the lease is as follows: "In case said premises shall be rendered untenable by fire or other casualty, on or after April 15, 1902, and during the term of this lease then the lessee may at his option terminate this lease."

Rubens, Dupuy & Fischer, for appellant.
Gwynn Garnett and Eugene H. Garnett (Charles Whitney, of counsel), for appellee.

MAGRUDER, J. (after stating the facts).

1. The first objection made by the appellant is that the lease was not admissible under the declaration, and that, therefore, its admission by the trial court was error. The charge is made that there was a variance between the allegations of the declaration and the terms of the lease introduced in evidence. It is said that the declaration counted upon an absolute, unconditional agreement to pay money, and that the lease offered in evidence contained conditions precedent to be per-

formed by appellee before appellant was bound to pay any money; and that, therefore, there was a fatal variance. The provision of the lease which counsel for appellant, in their objections on the trial below, pointed out as constituting a condition precedent, is the provision which requires appellee "to cause said premises to be put into a habitable condition and make the same ready for occupancy by the said party of the second part on or before the said 15th day of April, 1902," etc. If the agreement of the appellee to cause the premises to be put into a habitable condition and to make the same ready for occupancy before the commencement of the term involves or is equivalent to an agreement to repair the premises, then it constitutes an independent covenant merely. In the construction of a particular provision the intention of the grantor governs, and, where there is any doubt whether the intention of the grantor is to create a covenant or to create a condition, the courts are inclined to construe it as a covenant, and not as a condition. 6 Am. & Eng. Ency. of Law (2d Ed.) p. 502; Davis v. Wiley, 3 Scam. 234; Lunn v. Gage, 37 Ill. 19, 87 Am. Dec. 233. The provision in question, being a covenant, cannot be regarded otherwise than as an independent covenant. It is only where covenants are dependent that the performance by each party of his own covenant is a condition precedent to his right to recover on the covenant of the other party. 18 Am. & Eng. Ency. of Law (2d Ed.) p. 620. If the provision in question be regarded as a covenant to repair, then it is independent of the covenant to pay rent. The general rule is that the covenant of the landlord to repair or make improvements, and the covenant of the lessee to pay the rent, are independent. 18 Am. & Eng. Ency. of Law (2d Ed.) p. 620; Haven v. Wakefield, 39 Ill. 509. It is to be observed that, in the case at bar, appellant, as lessee, covenants to pay rent in consideration of the demise alone, and not in consideration of both the demise and of the agreement to put the premises into a habitable condition and make the same ready for occupancy before the beginning of the term. This is another circumstance going to show that the covenant as to habitability and occupancy is independent of the covenant to pay rent. In Baird v. Evans, 20 Ill. 29, where the lessor agreed to make certain improvements upon the leased premises, and the agreement was held to be a condition precedent to the payment of the rent, the consideration for the payment of the rent was not merely the leasing of the premises, but the making of the improvements. Such is not the case here, and hence the covenant here under consideration, being an independent covenant, is not a condition precedent. If such a covenant is violated, the lessee has an action against the lessor for damages, or can recoup for damages. Nelson v. Oren, 41 Ill. 18; White v. Gillman, 43 Ill. 502; Lunn

W. Lattin, 38 Ill. 293; Haven v. Wakefield, 39 Ill. 509; Palmer v. Meriden Britannia Co., 188 Ill. 508, 59 N. E. 247.

But let it be admitted that appellant agreed to pay rent, not only in consideration of the leasing of the premises to him, but also in consideration of the agreement that appellee would put them into a habitable condition and make them ready for occupancy before the beginning of the term on April 15, 1902; then, in such case, the consideration has two parts, one of which is the leasing of the premises, and the other is the making of the same habitable and fit for occupancy. It is well settled that where a covenant goes only to a part of the consideration on both sides, and the breach of such covenant may be readily compensated for in damages, it is generally considered independent. 18 Am. & Eng. Ency. of Law (2d Ed.) p. 619.

In Nelson v. Oren, supra, where in consideration of a certain sum of money, Nelson assigned a lease to Oren, and in the same instrument agreed to deliver up possession of the premises on a certain day, and the lease was assigned, but Oren failed to get possession on the day agreed upon, it was held that an important part of the consideration was executed by the transfer of the term, although the remaining part was not executed, and that, for the breach of the latter, appellee had a right to recover damages; and in that case we said (page 23, 41 Ill.): "We do not consider that delivery of possession, under a fair construction of this covenant, was a condition precedent to the right of appellant to recover for the unexpired term. That would seem to be the most important part of the contract, and where a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the defendant without averring performance in the declaration. * * * The covenant to put the appellee in possession was an independent covenant, the breach of which could be compensated in damages." So, here, the covenant as to habitability and occupancy was an independent covenant, the breach of which could be compensated in damages, and it was not necessary to aver the performance thereof in the declaration.

In Wright v. Lattin, supra, we said (page 296, 38 Ill.): "If he [the landlord] covenant to repair before the term commences, it may be the tenant might refuse to enter upon the term until the repairs were made, but, having entered upon the term and received possession, he cannot abandon the lease and refuse to pay rent for the breach of any other covenant, except for quiet enjoyment. If the landlord fail to repair according to his covenant, the tenant may recoup the amount from the rent, or may sue upon the covenant." In the case at bar the appellee cove-

nanted to do certain things before the beginning of the lease began, and, while the appellant might have refused to enter upon the term until those things were done, yet inasmuch as he did enter upon the term and took possession and kept possession until the termination of the lease on October 15, 1902, he cannot refuse to pay rent for the failure of the landlord to do the things which he agreed to do before the commencement of the term. Appellant, while refusing to pay rent, did not abandon the lease.

In White v. Gillman, 43 Ill. 502, where appellee sold to appellant, his landlord, all the crops on his land at a certain price, and agreed to leave the premises in 10 days with all his traps, and did leave the premises within the time named, but left a part of such traps, it was claimed by the appellant that removal of all the traps within the time specified was a condition precedent, and, such condition not being performed by appellee, the latter had no right of action to recover the price agreed to be paid; but the construction thus contended for was not allowed.

In Palmer v. Meriden Britannia Co., 188 Ill. 508, 59 N. E. 247, this court said (page 522, 188 Ill., page 252, 59 N. E.): "Where the plaintiff's covenant goes to only a part of the consideration, and a breach of the covenant can be compensated in damages, the defendant cannot rely upon the covenant as a condition precedent, but must perform the covenant on his part, and then rely upon his claim for damages for any breach of the covenant by the other party, either by way of recoupment or in a separate action." We are therefore of the opinion that the covenant here insisted upon by the appellant as being a condition precedent cannot be regarded as a condition precedent, and therefore the lease was not inadmissible under the common counts for the reason insisted upon.

Here, there was a performance of the contract. Possession of the premises was delivered to appellant, and he occupied the premises for the full period of six months specified in the lease, and at the expiration of the lease nothing remained for him to do on his part except to pay the amount due for the rent. The contract was fully performed on the part of the plaintiff, and, where such is the case, recovery can be had under the common counts. In Mount Hope Cemetery Ass'n v. Weldenmann, 139 Ill. 67, 23 N. E. 834, this court said (page 74, 139 Ill., page 834, 23 N. E.): "Indebitatus assumpsit lies upon a written contract, though it be under seal, when the plaintiff has performed, and nothing remains to be done under it but the payment of money, which payment it is the duty of the defendant, under the contract, to make. In such case the plaintiff need not declare specially." It is well settled that while there is no liability by implication of law upon an express contract executory in its provisions, yet where there has been full performance and nothing remains to be done but the pay-

ment of money, or where there has been only part performance and the remainder has been waived or prevented, and the work performed has been accepted, a recovery may be had under the common counts. *Catholic Bishop of Chicago v. Bauer*, 62 Ill. 188; *Fowler v. Deakman*, 84 Ill. 130; *Evans v. Howell*, 211 Ill. 85, 71 N. E. 854; *Foster v. McKeown*, 192 Ill. 330, 61 N. E. 514; 2 *Greenleaf on Evidence*, § 114.

It is claimed by counsel for appellant that the declaration is defective in not averring that appellant used or occupied the premises in question. If such a defect exists in the declaration, we think that it was cured by the pleas. The pleas, as set forth in the statement preceding this opinion, averred that, after the making of the lease, the appellee entered upon the possession of the appellant and evicted him. In *Wallace v. Curtiss*, 36 Ill. 156, where there was a material omission in the declaration, it was held that such omission was supplied by the special plea; it being there said (page 158): "The pleas cured the omission. * * * The issues were not alone on the facts stated in the declaration, but upon the agreement stated in the special pleas, and they may be taken as amendatory of the declaration, of the issue, and verdict, in order to favor the justice of the case." *Chitty*, in his work on Pleadings (marginal page 671), cites a case which illustrates this principle, and says that, in an action for trespass for taking a hook, where the plaintiff omitted to state that it was his hook and that it was in his possession, and the defendant in his plea justified the taking the hook out of the plaintiff's hand, the court held, on motion in arrest of judgment, that the omission in the declaration was supplied by the plea. We think, moreover, that such other formal defects as are alleged by the appellant to exist in the declaration were cured by the verdict, and under the statute of amendments and jeofails, which latter statute provides that "judgments shall not be arrested * * * for any mispleading, insufficient pleading," etc. 1 *Starr & C. Ann. St.* (2d Ed.) p. 390, c. 7, par. 6; *Keegan v. Kinnare*, 123 Ill. 280, 14 N. E. 14; 1 *Chitty's Pl.* pp. 682-684.

The agreement of the appellee to cause the premises to be put into a habitable condition and make the same ready for occupancy on or before April 15, 1902, was not an unrestricted agreement to make all such repairs as were necessary to make the premises habitable before the commencement of the term. The latter part of the agreement in question qualifies and explains its meaning in the following words, to wit, "meaning and intending hereby that the boards covering the windows and doors of the dwelling house shall be removed by the said party of the first part, the fixtures connected with the plumbing, and the dwelling house put in condition for occupancy." These words qualify and serve to explain both the preceding clauses—

that is to say, the clause "to cause said premises to be put into habitable condition," and also the clause, to "make the same ready for occupancy." The true intent and meaning of the parties to a contract may be determined by an examination of the surrounding circumstances under which the contract was made, and the acts of the parties themselves in reference to it. *Hadden v. Shoutz*, 15 Ill. 581; *Piper v. Connelly*, 108 Ill. 646; *Louisville & Nashville Railroad Co. v. Koelle*, 104 Ill. 455.

The evidence shows that the place rented by appellee to appellant was a country place for use and occupation in the summer time only, and that during the winter the windows and doors of the dwelling house upon the premises were inclosed with boards, and that the plumbing was disconnected from the fixtures to which it was attached, in order to prevent freezing in the winter time. The evidence also shows that the appellant visited the premises before the contract was made, and went through the house, and knew that it had been closed during the preceding winter, and that the doors and windows had been barred up, and that the plumbing had been disconnected, and that the house required airing, and that the furniture had to be dusted and arranged, and the shades and curtains hung. He was aware of these facts when he entered into the lease. The evidence also shows that appellee or her servants or agents removed the boards in question, and connected the plumbing, and aired the house, and arranged the furniture, so as to put the house in a condition to be occupied by the appellant. In other words, the proof tends to show that the covenant as to habitability and occupancy, interpreted according to the construction above given, was fully performed by the appellee before the appellant took possession.

It is claimed, however, on the part of the appellant, that the house upon these premises was a furnished house, and that, where a furnished home is leased for a short period as for a season or summer, there is an implied covenant or warranty on the part of the lessor that the premises are fit for habitation. The doctrine thus contended for is sustained by some of the authorities, and repudiated by others. We do not deem it necessary to discuss the doctrine, or to determine the question whether it should be adopted or approved by this court or not, inasmuch as the decision of the present case does not require such discussion. It is a general rule that where there is an express covenant relating to the same matter as that embraced in the implied covenant, however qualified the latter may be, the implied covenant will be excluded upon the principle embodied in the Latin maxim, "*Expressum facit cessare tacitum*." 12 *Am. & Eng. Ency. of Law* (1st Ed.) p. 1013. Express covenants abrogate the operation of implied covenants in accord-

expression of one thing in a contract is the exclusion of another. 8 Am. & Eng. Ency. of Law (2d Ed.) p. 83; *Finley v. Steele*, 23 Ill. 56. In the case at bar there is an express covenant on the subject of making the furnished house upon the premises in question habitable and ready for occupancy by the beginning of the term, and therefore there is no room for an implied covenant. Where the minds of the parties have met and made an express agreement, the law does not enlarge and qualify this express agreement by implication. *Taylor on Landlord and Tenant* (8th Ed.) § 253. It is true that, although a lease contains express covenants, covenants may at the same time be implied; but the latter will be effective only when they are consistent with the express covenants. 12 Am. & Eng. Ency. of Law (1st Ed.) p. 1012. An implied covenant that the house upon these premises was fit for habitation would certainly be inconsistent with the restricted meaning already given to the agreement or covenant as to habitability and occupancy.

2. The defense sought to be made by the appellant was twofold. It is claimed that, by the terms of the lease, appellee was bound not only to make the premises habitable and ready for occupancy at the beginning of the term on April 15, 1902, but was also obliged to keep them in repair during the running of the lease, and from the beginning to the end of the term. There is nothing to this effect in the express provisions of the lease. On the contrary, appellant agreed that he would keep said premises in good repair. Upon the assumption, however, that appellee was obliged to make repairs after the beginning of the term, appellant's first ground of defense is that the house was leaky, that the water came in through the roof and around the windows during the rains in the summer of 1902, and that the basement was not properly drained, so that the house was damp. It is also claimed that these conditions could have been obviated by making certain repairs during the running of the lease. The second ground of defense urged by the appellant is that he was evicted from a part of the premises. The alleged eviction proceeds from the contention of the appellant that he was excluded from the tower and the building on the beach, as described in the statement preceding this opinion, and from two of the rooms in the stable, connected with the dwelling house.

Appellant refused to pay any rent after the 19th of May, 1902, and some conversation took place between him and appellee and her agents, and some letters passed between them, in reference to the making of certain repairs insisted upon by appellant. There was a conflict in the testimony as to the extent of the dampness and the leaks and the absence of proper drainage, and also as to

porch around the dwelling. This was a matter for the consideration of the jury, and the jury have determined it against appellant. The court properly instructed the jury that if they should believe from the evidence that any wrongful act of the appellee, or omission to perform anything required of her by her lease, was such as tended merely to diminish the beneficial enjoyment of the premises leased by the appellant, he was still bound for the rent if he continued to occupy the same, and that, if the appellant did not abandon the leased premises, his obligation to pay the rent therefor remained, but that he might show, as a matter of defense, in what manner such beneficial enjoyment of the premises was diminished by such act or omission to act of the plaintiff, and recoup from the rent such damages, if any, he may have shown by the evidence he had sustained by reason of the wrongful act or omission to act of the plaintiff. Such is the law as has been declared by this court. *Chicago Legal News Co. v. Browne*, 103 Ill. 317; *Barrett v. Boddie*, 158 Ill. 479, 42 N. E. 143, 49 Am. St. Rep. 172; *Keating v. Springer*, 146 Ill. 481, 34 N. E. 805, 22 L. R. A. 544, 37 Am. St. Rep. 175. Appellant offered no proof whatever on the question of damages, although the instructions given to the jury told them that he might recoup his damages, and were therefore exceedingly favorable to him. Inasmuch as appellant entered upon the premises, and enjoyed the use of them during the term of the lease, he could not defeat recovery by showing that there were certain leaks in the roof, or spots in the plaster or on the walls. It is not claimed on the part of the appellant that the amount of the judgment recovered against him was too large, but it is claimed that he should not be required to pay anything at all for the use of the premises, occupied by him during the whole of the term mentioned in the lease. If the defects arising out of dampness and leakage were such as to entitle the appellant to damages, then the jury were entitled to consider the difference in rental value produced by such defects, in order to determine the amount of his damages by way of recoupment; but no evidence was produced upon the subject of rental value.

Upon the subject of eviction, the evidence is conflicting also. As to the rooms in the stable, appellant desired his coachman, with the latter's wife, to occupy certain rooms in the stable adjoining the hay loft, and, as it would be necessary to have a stove in the rooms so occupied by the coachman, some objection may have been made by the appellee or her agent to the putting of a stove in the stable. But it is not clear from the proof that there was an absolute refusal on the part of the appellee to allow the rooms to be so occupied. Appellant proposed to the appellee, or her agent, that he would himself erect a smokestack on the side of the stable

to be used by the coachman. The evidence is not clear that appellee refused to allow this to be done, although the lease expressly provides that the appellant himself was not to allow any alterations to be made in the premises. As to the tower and the machine house, the lease expressly provides that the windmill on the tower was not in order to supply water, and was not to be operated. The lease also provides that the appellee was to keep her gardner upon the premises, and a horse and wagon in the barn to be used by such gardner. There is some proof tending to show that the appellant desired to use the machine house as a bath house. The proof shows that it was not built for, nor intended to be used as, a bath house. The proof also tends to show that appellant desired to make use of some part of the tower as a bath house. Some objection may have been made to the use of the tower and machine house as a bath house because they were never intended for such a purpose, but there is evidence tending to show that appellee did not prevent appellant from using the tower or the machine house for any legitimate purpose. The testimony of the appellant tends to show that he was locked out of the tower, and that he was not allowed to use the machine house, and that some restriction was placed upon his use of the rooms in the stable, so far as such use would require the putting in of a stove, and thereby running the risk of the destruction of the stable by fire. Appellant insists most strenuously that, having been evicted from the use of the tower, the machine house, and these rooms in the stable, he was not obliged to pay any rent at all for the use of the dwelling house which he occupied, or of the balance of the premises. This court has held that the question whether the acts of the landlord amount to an eviction of the tenant is a question of fact to be determined by the jury. *Lynch v. Baldwin*, 69 Ill. 210; *Patterson v. Graham*, 140 Ill. 531, 30 N. E. 460. "Acts of a grave and permanent character, which amount to a clear indication of intention on the landlord's part to deprive the tenant of the enjoyment of the demised premises, will constitute an eviction." *Hayner v. Smith*, 63 Ill. 430, 14 Am. Rep. 124; *Keating v. Springer*, 146 Ill. 481, 34 N. E. 805, 22 L. R. A. 544, 37 Am. St. Rep. 175. "The rule is well settled that the wrongful act of the landlord does not debar him from a recovery of rent unless the tenant by such act has been deprived, in whole or in part, of the possession, either actually or constructively, or the premises rendered useless." *Chicago Legal News Co. v. Browne*, supra. The question whether or not there was an eviction was submitted to the jury under the instructions, and by the judgments of the lower courts this question of fact has been settled against the appellant. At the request of the appellant the court instructed the jury that any act of a per-

manent character done by the landlord, and which has the effect of depriving the tenant of the use of the premises leased, or of a part of them, would amount to an eviction.

After the appellant began to complain of the condition of the dwelling house upon the premises, the appellee employed certain persons, architects and carpenters, to examine the premises and see what repairs were necessary. The appellant seems also to have caused an examination to be made. The persons so employed to examine the premises made reports, but there is evidence tending to show that the appellant himself refused to permit repairs to be made, unless a lease should be given to him for the next year upon the same terms, substantially, as he was then occupying the premises, except that he was to occupy the rooms in the stable for the whole year, and to build a chimney at his expense, and to pay the water tax for the barn. In a written memorandum signed by him, after reciting the terms above stated for a lease for the coming year, appellant used these words: "If above accepted, will pay delinquent rent, and permit repairs." This tends strongly to show that, although the appellee had taken measures to ascertain whether the premises needed repairs or not, the appellant himself was unwilling to have them made, unless he should be given a lease for the coming year upon terms demanded by him.

The questions of fact whether or not appellant was entitled to damages on account of the defective condition of the premises occupied by him, and whether or not he had been evicted from any part of the premises, were submitted to the jury under proper instructions, and are not subject to review by this court. Much complaint is made in regard to instructions, and in regard to the rulings of the court upon the admission and exclusion of evidence, but after a careful examination of the whole record we are satisfied that the instructions and the rulings of the court upon the evidence conform substantially to the views heretofore expressed in this opinion, and that no errors were committed which operated to the injury of the appellant. Accordingly, the judgment of the Appellate Court affirming the judgment of the circuit court is affirmed.

Judgment affirmed.

(213 Ill. 545)

CHICAGO TERMINAL TRANSFER R. CO. v. O'DONNELL.*

(Supreme Court of Illinois. Dec. 22, 1904.)

MASTER AND SERVANT—DEATH OF SERVANT—
NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—
EVIDENCE—QUESTION FOR JURY.

1. It is the duty of a railroad company carrying a section hand to and from the place where he works to furnish him a reasonably safe place in which to ride, and, if a car is so

*Rehearing denied February 12, 1905.

se for him to take passage on the top of the car.
2. Though, in an action against a railroad company for the death of a section hand who was struck while riding on the top of a car by a viaduct over the track, it was proper to prove the existence of whiplashes suspended across the track, as bearing on the knowledge of the decedent that the train was about to pass under the viaduct, yet without proof that they were observed by decedent, or that he appreciated the fact that the train was approaching the viaduct, their existence would not, as a matter of law, preclude a recovery.

3. In an action against a railroad company for the death of a section hand who was struck while riding on the top of a car by a viaduct across the track, evidence examined, and held to require the submission to the jury of the question of the company's negligence in overcrowding the car so as to necessitate decedent's riding on the top thereof.

4. Where, in an action against a railroad company for the death of a section hand who was struck, while riding on the top of a car, by a viaduct over the track, the evidence showed the size of the car, the space therein occupied by tools, and the number of men therein, it was not error to exclude evidence that the car was not overcrowded.

Appeal from Appellate Court, First District.

Action by Patrick H. O'Donnell, administrator of Frank DiAddario, deceased, against the Chicago Terminal Transfer Railroad Company. From a judgment of the Appellate Court affirming a judgment for plaintiff, defendant appeals. Affirmed.

Jesse B. Barton, for appellant. Gemmill, Barnhart & Foell, for appellee.

HAND, J. This is an appeal from a judgment of the Appellate Court for the First District affirming a judgment of the superior court of Cook county in a personal injury case for the sum of \$5,000.

The first contention of appellant is that the court erred in declining to take the case from the jury at the close of all the evidence. The plaintiff's intestate, Frank Di Addario, on the 29th day of July, 1898, was in the employ of the defendant as a section hand, and on that day, in company with some 50 or 60 other laborers under a foreman named Michael Burke, was working upon the road of the defendant near 103d street, in the city of Chicago. On that evening, at about 6 o'clock, he, in company with the other laborers, started to return to his home, in the central part of the city, upon a box car attached to an engine. The men placed their tools in the car, and the older men entered the car. The car being overcrowded, deceased and several other young men and the brakeman climbed up on top of the car, and sat upon the running board which was located lengthwise of the car, near its center. As the car passed beneath the viaduct at Halsted street the head of the deceased came in contact with the lower edge of its roof with such violence that he was killed. The deceased had been in the employ of the defendant for 11 days, during which, with

gang of laborers with which he worked had been taken by the appellant to their work in the south part of the city each morning in a passenger car as far as Western avenue, and from there upon a flat car, and were returned in the evening to the places where they left the car for their homes, in the same manner. The home of the deceased was located near Halsted and Sixteenth streets, and he took and left the car just east of the viaduct at that point, at the Halsted Street Station. On the evening of the accident, when the engine and car arrived where the men were at work, they were directed by the foreman to place their tools in the car and to get into the car. Several of the men testified the car was soon overcrowded, and others, who were upon the top of the car, that they and the deceased were unable to get into the car, and for that reason went upon the top of the car. It was the custom of the defendant to carry the deceased from its station near his home to his work in the morning, and to return him to that station in the evening. While it may be conceded he was not a passenger, it was the duty of the defendant to furnish him a reasonably safe place in which to ride in going to and returning from his work, and, if the car was overcrowded by other workmen so that he could not ride on the inside of the car, it was not negligence per se for him to take passage to his home upon the top of the car, and it was a question for the jury to determine, from the evidence, whether the car was overcrowded, and whether the deceased was justified, by reason of that fact, in going upon the top of the car. The deceased had never ridden beneath said viaduct, prior to the time of his injury, upon the top of a car, and there is no evidence that he knew of the existence of the viaduct. At the time of the injury the train was running at a considerable rate of speed, and the smoke from the engine was blown back over the car, and the view of the viaduct was obstructed to such an extent thereby that persons upon the top of the car testified they could not see the viaduct, and did not know they had reached that point upon the road until after the deceased was struck and killed. The witnesses upon the top of the car testified the deceased stood up just as the train reached the viaduct, and that, had he remained in a sitting posture, his head would not have come in contact with the roof of the viaduct. The distance from the top of the running board, upon which the men were sitting, to the lower side of the roof of the viaduct, was four feet and five inches. The deceased was not notified by the defendant or any of its servants, or otherwise, of the existence of the viaduct or the nearness of the lower side of the roof of the viaduct to the top of the car, otherwise than by telltales or whiplashes suspended across the tracks a short distance west of the viaduct, and there was no evidence

that the deceased knew of the train's near approach to the viaduct at the time he was injured. It was proper to prove the telltales or whiplashes were located across the track, as bearing upon the knowledge of the deceased that the train was about to pass under the roof of the viaduct, but without proof that they were observed by the deceased, or that he appreciated, by reason thereof, the fact that the train was approaching the viaduct, their presence would not, as a matter of law, bar a recovery.

In view of all the evidence in the case, we are of the opinion the court did not err in declining to peremptorily instruct the jury to return a verdict in favor of the defendant, but think the questions of the negligence of the defendant, and whether the plaintiff's intestate was guilty of such contributory negligence as should bar a recovery, were properly left to the jury.

It is next contended that the court erred in refusing to permit a number of the witnesses for the defendant to state that the car was not overcrowded. The jurors were fully advised by the evidence as to the size of the car, the space therein occupied by the tools, and the number of men in the car, and from this testimony they were as well qualified to judge of the conditions inside the car as the witnesses. The question at issue was not whether more men could have been crowded into the car, but whether, owing to the crowded condition in the car, the deceased was guilty of negligence in going upon the top of the car. We do not think the refusal of the court to permit the witnesses to state whether or not the car was crowded reversible error.

It is also contended that the court improperly refused certain instructions offered upon behalf of the defendant. We have examined the instructions given upon behalf of the defendant and those refused, and think that the jury were fully and fairly instructed as to the law of the case, and that the refusal of the offered instructions does not constitute such error as should cause a reversal of the case. Finding no reversible error in this record, the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

(184 Ind. 152)

MACE v. SMITH. (No. 20,549.)

(Supreme Court of Indiana. Jan. 25, 1905.)

INTOXICATING LIQUORS—APPLICATION FOR LICENSE—SUFFICIENCY.

1. An application for a liquor license, describing the premises where the business was to be conducted as the lower floor of the front room of a building on a certain street corner, was insufficient, under Burns' Ann. St. 1901, § 7283a, requiring the application to specifically describe the room.

Appeal from Circuit Court, Jennings County; Wm. Fitzgerald, Special Judge.

Proceedings by Perry F. Smith to obtain a liquor license. From a judgment granting the license, Lambert E. Mace appeals. Transferred from the Appellate Court under section 1337u, Burns' Ann. St. 1901 (Acts 1901, p. 590, c. 260). Reversed.

T. C. Batchelor and C. A. Batchelor, for appellant. Mark Storen and Joseph H. Shea, for appellee.

MONKS, J. This proceeding was commenced before the board of commissioners of Scott county to obtain a license to sell intoxicating liquors under the provisions of the laws of this state (sections 7276-7288, Burns' Ann. St. 1901). A remonstrance was filed before said board of commissioners by appellant against the granting of said license, on the ground that appellee was not a "fit person to be intrusted with the sale of intoxicating liquors." The trial before the board resulted in a finding and judgment against appellant, from which he appealed to the circuit court of said county, after which, on account of the changes of venues taken in said cause, the same was tried in the court below, where a general verdict was returned in favor of appellee, and, over a motion for a new trial, judgment was rendered granting him a license as asked for in his application. The errors assigned call in question the sufficiency of the application for a license, and the action of the court in overruling appellant's motion for a new trial.

The objection urged against the application for a license is that said application is not sufficient, under section 7283a, Burns' Ann. St. 1901 (being section 1, Acts 1895, p. 248, c. 127), which provides "that hereafter all persons applying for license before any board of commissioners, under the existing laws of the state of Indiana, to sell spirituous, vinous, malt or other intoxicating liquors, shall, in such application, specifically describe the room in which he desires to sell such liquors, and the exact location of the same, and if there is more than one room in the building in which such liquors are intended to be sold, said applicant shall specifically describe and locate the room in which he desires to sell such liquors in such building." The part of the application in question reads as follows: "Said place of business and premises whereon said liquors are to be sold and drunk are located the lower floor of the front room of the two story brick building situated on the southwest corner of lot No. 47 on the corner of Main and Cherry streets being 22 feet front on Cherry street and 26½ feet on Main street, being a part of lot No. 47 in Lexington, in Lexington township, in Scott county, Indiana." Said description seems to have been prepared with reference to the requirements of section 7278, Burns' Ann. St. 1901 (being section 3 of the act of 1875), in regard to the de-

scription required in the notice of the application required by said act, and not under section 7283a, supra, of the act of 1895. Said section 7278, supra (being section 8 of the act of 1875; Laws 1875, p. 55, c. 18), only required that "the precise location of the premises in which he desires to sell" be stated, while section 7283a, supra (being section 1 of the act of 1895), requires not only that the exact location of the room in which he desires to sell be specifically described, but that the room itself be specifically described, and, if there is more than one room in the building, that the room in which the applicant desires to sell be specifically described and located. The building described fronts on two streets, and the words "the lower floor of the front room of the two story brick building" do not specifically describe the location of said room in the building. As the words "lower floor," in said description, apply to the room, and not to the building, any front room in the basement, or on the ground floor or any other floor in said building, on either of said streets, would satisfy the description in the application. There is no specific description of the room. It is evident that said application was insufficient, and it follows that the court erred in holding otherwise.

Other questions are argued as grounds of reversal by appellant, but what we have said renders their determination unnecessary.

Judgment reversed, with instructions to sustain the motion to dismiss appellee's application.

(34 Ind. App. 409)

ERNEST v. GRAND TRUNK WESTERN RY. CO. (No. 5,303.)

(Appellate Court of Indiana, Division No. 1. Jan. 10, 1905.)

APPEAL—FINALITY OF JUDGMENT—SUSTAINING DEMURRER.

1. Sustaining a demurrer to a complaint is not a final judgment from which an appeal lies, and such order is not within the exceptions of Burns' Ann. St. 1901, § 658, allowing appeals from certain interlocutory orders.

Appeal from Circuit Court, Porter County; H. B. Tuthill, Judge.

Action by Helen Ernest, administratrix, against the Grand Trunk Western Railway Company. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Transferred from the Supreme Court under Act March 12, 1901 (Laws 1901, p. 568, c. 247, § 12). Appeal dismissed.

N. J. Bozarth and C. G. Bozarth, for appellant. Johnston, Bartholomew & Bartholomew, for appellee.

ROBINSON, P. J. To the first, third, fourth, and fifth paragraphs of appellant's complaint a separate demurrer was overruled.

§ 1. See Appeal and Error, vol. 2, Cent. Dig. §§ 369, 1877.

ed, and to the second paragraph was sustained. An exception was reserved by appellant. The only error assigned is sustaining this demurrer. The final entry is the ruling on the demurrer. The record does not disclose that further proceedings of any kind were had in the trial court. The error assigned presents no question, for the reason that the record does not show that final judgment was rendered (Burns' Ann. St. 1901, § 644), and the ruling questioned is not within the exceptions to the general statute authorizing appeals (Burns' Ann. St. 1901, § 658). Sustaining a demurrer to a complaint is not a final judgment from which an appeal will lie. *Slagle v. Bodmer*, 58 Ind. 465; *State ex rel. v. Herod*, 21 Ind. App. 177, 51 N. E. 952, and cases cited; *James v. Lake Erie, etc., R. Co.*, 144 Ind. 630, 43 N. E. 878, and cases cited; *Ewbanks' Manual*, § 82; *Elliott's App. Proc.* § 81.

Appeal dismissed.

(35 Ind. App. 189)

DIBBLE v. ROBERTS. (No. 4,967.)
(Appellate Court of Indiana, Division No. 2. Jan. 25, 1905.)

MASTER AND SERVANT—ACTION FOR WAGES—COMPLAINT—CONSTRUCTION.

1. Plaintiff alleged that defendant was indebted to him in the sum of \$45 for salary under a contract for services as a traveling salesman for the year 1902, and that defendant was also indebted in the further sum of \$259.44, which was 6 per cent. commission on \$6,000 worth of goods sold by plaintiff over \$20,000 during the year, which defendant had agreed to pay plaintiff in addition to his salary; that plaintiff had fully performed his part of the agreement; and that the sum of \$304.44 was due and unpaid. *Held*, that such complaint stated a cause of action for salary earned during the year, and not to recover damages for a wrongful discharge.

Appeal from Circuit Court, Vanderburgh County; Louis O. Rasch, Judge.

Action by Willard R. Roberts against L. N. Dibble. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Ireland & Reister, for appellant. C. L. Wedding and C. L. Roberts, for appellee.

ROBY, J. Appellant's demurrer to appellee's amended complaint was overruled. He then filed a general denial and a plea of payment, to the latter of which a reply in denial was made. Trial by the court without a jury, and a general finding that there was due from the defendant to the plaintiff \$296.44. Appellant's motion for a new trial was overruled, and judgment was rendered on the verdict.

The parties differ as to the theory of the amended complaint. That pleading, omitting the caption, was as follows: "Said plaintiff, Willard R. Roberts, complains of the defendant, L. N. Dibble, doing business under the firm name of Dibble & Warner, and says that said defendant is indebted to the plaintiff in the sum of forty-five dollars (\$45-"

*Rehearing denied.

00), balance due plaintiff on salary under a contract entered into between plaintiff and defendant for his services as traveling salesman for the defendant during the year 1902, and that the defendant is indebted to the plaintiff in the further sum of two hundred fifty-nine dollars and forty-four cents (\$259.44), commission on goods sold over twenty thousand dollars (\$20,000) during said year under contract between plaintiff and defendant by which a commission of 6 per cent. was agreed upon to be paid plaintiff by the defendant; that under said contract plaintiff sold over \$26,000 of the defendant's goods during the year 1902, and that the plaintiff in all things fully performed his part of the agreement with the defendant, amounting in all to the sum of three hundred four dollars and forty-four cents (\$304.44); that said sum is past due and wholly unpaid. Wherefore," etc. Appellant treats the action as one to recover damages for a wrongful discharge of appellee, and the refusal by the appellant to continue his employment during the year 1902. This construction is not warranted. The evident purpose of the pleader was to recover a balance of salary earned amounting to \$45, and commission upon sales in excess of \$20,000. No bill of particulars was filed, and there was no motion to make more specific. The allegation is that the salary was earned during the year, but does not necessarily embrace services covering the entire year. The complaint was sufficient to withstand the demurrer.

The motion for a new trial requires a consideration of the evidence. There was evidence that the season of 1902 for the sale of the line of merchandise handled by the parties was ended before the action was begun; that appellant had contracted to pay appellee \$1,200 for the sale of \$20,000 worth of goods, and 6 per cent. commission on the amount sold in excess thereof. Appellant testified that he had discharged appellee for nonattendance to duty. There is no apparent controversy as to the amount due, and, were we to adopt appellant's theory, which we do not do, an affirmance of the judgment would still be required, a correct result having been reached. Section 670, Burns' Ann. St. 1901; section 401, Burns' Ann. St. 1901; Wortman v. Minich, 28 Ind. App. 81, 62 N. E. 85.

Judgment affirmed.

(35 Ind. App. 128)

HANRAHAN v. KNICKERBOCKER. (No. 5,047.)¹

(Appellate Court of Indiana, Division No. 1.
Jan. 27, 1905.)

INTOXICATING LIQUORS—ACTION FOR PRICE—APPEAL—BRIEFS—FAILURE TO FILE—REVERSAL—HARMLESS ERROR—EVIDENCE—REVIEW.

1. Appellant is not entitled to the reversal of a judgment as of right for appellee's failure to file a brief.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3110.]

72 N.E.—72

2. Where, in an action on an account for intoxicating liquors sold in Illinois, plaintiff's evidence was insufficient to show a repeal of Rev. St. Ill. 1845, c. 64, § 17, relied on as a defense, making accounts for sales of liquor to an amount exceeding 50 cents void, the erroneous admission of parol evidence on the part of defendant that such act was still in force was harmless.

3. Acts 1903, p. 338, c. 193, § 8, requires an appellate tribunal to weigh the evidence in all cases "not now or hereafter triable by a jury." Held that, an action on an account for the sale of liquor being triable by jury, the appellate court was not bound to weigh the evidence on an appeal, though the action was in fact tried to the court.

Appeal from Superior Court, Lake County; H. B. Tuthill, Judge.

Action by William Hanrahan against John J. Knickerbocker. From a judgment in favor of defendant, plaintiff appeals. Case transferred from Supreme Court, as authorized by Burns' Ann. St. 1901, § 1337. Affirmed.

A. F. Knotts and John A. Sweany, for appellant. Crumpacker & Moran, for appellee.

ROBINSON, P. J. Appellant's motion to reverse the judgment because of appellee's failure to file a brief, which was postponed until final hearing, is overruled. Counsel cite a number of cases in support of the motion, but an examination of these cases discloses that they do not purport to declare a rule applicable alike to all cases on appeal, but that it is a rule "enforced only within the discretion of the court." Sometimes the rule has not been enforced (*Berkshire v. Cabey*, 157 Ind. 1, 60 N. E. 696); at other times it has been (*Neu v. Town of Bourbon*, 157 Ind. 476, 62 N. E. 7; *People's Nat. Bank v. State ex rel.*, 159 Ind. 353, 65 N. E. 6; *Union Traction Co. v. Forst*, 162 Ind. 567, 70 N. E. 979; *Moore v. Zumbrun*, 162 Ind. 696, 70 N. E. 800; *Miller v. Julian* [Ind. Sup.] 72 N. E. 588). In none of these cases does it appear that the case was reversed upon the motion of appellant. Moreover, it cannot be said that such a rule gives to an appellant any additional right to a reversal. In *Miller v. Julian*, supra, the court said: "The rule was not declared in the interest of an appellant, but for the protection of the court, in order to relieve it of the burden of controverting the arguments and contentions advanced for reversal." As we understand these cases, they give an appellant no authority to claim as a right that the judgment be reversed because of appellee's failure to file a brief, for the reason that whether or not the case shall be reversed for such a failure is wholly within the discretion of the court. We think it manifest, therefore, that whether or not a case shall be reversed for such failure necessarily depends upon the sound judgment of the court as to the particular case then under consideration. This being true, it cannot be said that any rule, properly speaking, has been declared in the above cases. This court has not seen proper, at

¹ Rehearing denied.

of appellant, to reverse a case for appellee's failure to file a brief.

Appellant's motion asks that the case be reversed solely upon the ground that appellee has failed to file a brief, and this regardless of whether his appeal has been taken in the manner directed by the statute authorizing it, or whether the court has acquired jurisdiction over all the parties whose rights will be affected by its judgment, or whether appellant has filed any proper assignment of error or any error at all, or whether the record shows that reversible error was committed by the trial court. "All reasonable presumptions," said the court in *Aydelott v. Collings*, 144 Ind. 602, 43 N. E. 867, "are made in favor of the rulings of the trial court, and to entitle a party to reversal of a judgment he must point out and establish by the record that the trial court committed a reversible error." This has long been the rule in this state. See *Trayser v. Trustees, etc.*, 39 Ind. 556; *Lake Shore, etc., Ry. Co. v. Cincinnati, etc., Ry. Co.*, 116 Ind. 578, 19 N. E. 440; *Lime City, etc., Ass'n v. Black*, 136 Ind. 544, 35 N. E. 829, and cases cited; *Harter v. Elzroth*, 111 Ind. 159, 12 N. E. 129; *Cline v. Lindsey*, 110 Ind. 337, 11 N. E. 441; *Lake Erie, etc., Ry. Co. v. Juday*, 24 Ind. App. 469, 56 N. E. 931; *Martin v. Martin*, 74 Ind. 207; *Allen v. Gavin*, 130 Ind. 190, 29 N. E. 363; *State v. Van Clewe*, 157 Ind. 608, 62 N. E. 446; *Evansville, etc., R. Co. v. Lavender*, 7 Ind. App. 655, 34 N. E. 847; *Elliott's App. Proc.* § 710, and cases cited; *Ewbank's Manual*, § 198, and cases cited.

This was a suit by appellant for a recovery of money. Appellee was given a judgment for costs. The questions relied upon for a reversal arise under the motion for a new trial. In support of a paragraph of answer evidence was introduced to show that the claim sued on was an amount due appellant for intoxicating liquors sold at retail by appellant to appellee. The sales were made in Illinois, and appellee introduced in evidence section 17 of chapter 64 of the Illinois Revised Statutes of 1845, which provided that all accounts of retailers of spirituous liquors for a greater amount than 50 cents should be void, that no court

count. Appellant's counsel then introduced in evidence a certain page from the Revised Statutes of Illinois of 1874 (page 1012) for the purpose of showing that the above section 17 had been repealed. This repealing act, which is set out in the record, states that "the following acts and parts of acts are hereby repealed." This is followed by a number of acts, each set out by title only, with the date it was approved or was in force. One of these titles reads, "'An act for revising and consolidating the general statutes of the state of Illinois,' approved March 3, 1845, except chapter 104 entitled 'Trespass.'" Whether or not section 17 was a part of the act of which the above is the title is not made to appear. Nor does it appear from any evidence of what act this section was a part. This evidence does not show that section 17 was repealed, nor is there any evidence to overthrow the presumption that this section continued in force and was in force at the time of the trial. If, therefore, the parol evidence offered by appellee to prove that section 17 was still in force was erroneously admitted, the error was harmless, for the reason that the evidence by which that fact had already been established was uncontradicted, and the fact was proven without reference to the parol testimony of which complaint is made.

The remaining question argued is upon the sufficiency of the evidence to sustain the court's conclusion. This is not a case where the appellate tribunal is required to weigh the evidence, as provided in section 8 of the act approved March 9, 1903 (Acts 1903, p. 338, c. 193). It is true the case was tried by the court, a jury having been waived. But it is a case that was "triable by a jury," and the above section requires the appellate tribunal to review the evidence "in all cases not now or hereafter triable by a jury." The evidence is quite lengthy, and upon the material questions in the case it is not claimed that it is not conflicting. As there is evidence to support the court's finding in every material respect, we are not authorized to disturb it upon appeal.

Judgment affirmed.

MEMORANDUM DECISIONS.

APPEL, Appellant, v. AETNA LIFE INS. CO., Respondent. (Court of Appeals of New York. Dec. 16, 1904.) Appeal from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (88 App. Div. 83, 83 N. Y. Supp. 238), entered August 24, 1903, sustaining defendant's exceptions, ordered to be heard in the first instance by the Appellate Division, and granting a motion for a new trial. Charles Van Voorhis, for appellant. Charles J. Bissell and Joseph W. Taylor, for respondent.

PER CURIAM. Order affirmed, and judgment absolute ordered for defendant on the stipulation, with costs in all courts.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, MARTIN, and VANN, JJ., concur.

ASTORIA HEIGHTS LAND CO. et al., Appellants, v. CITY OF NEW YORK, Respondent. BRIDGEMAN et al. v. SAME. (Court of Appeals of New York. Oct. 25, 1904.) Appeals from judgments of the Appellate Division of the Supreme Court in the Second Judicial Department (89 App. Div. 512, 86 N. Y. Supp. 651; 89 App. Div. 627, 88 N. Y. Supp. 1093), entered February 13, 1904, affirming judgments in favor of defendant entered upon the report of a referee. Hector M. Hitchings, for appellants. John J. Delany, Corp. Counsel (Theodore Connolly and George L. Sterling, of counsel), for respondent.

PER CURIAM. Judgments affirmed, with costs.

CULLEN, C. J., and O'BRIEN, BARTLETT, MARTIN, VANN, and WERNER, JJ., concur. HAIGHT, J., absent.

In re BACKUS. (Court of Appeals of New York. Oct. 25, 1904.) Appeal by permission from an order of the Appellate Division of the Supreme Court in the First Judicial Department (91 App. Div. 200, 86 N. Y. Supp. 638), entered February 24, 1904, which reversed an order of Special Term granting a motion to punish the respondent herein for a contempt of court. The following question was certified: "Has the Supreme Court, at a Special Term held in the county of New York, jurisdiction to punish a judgment debtor as for a contempt in refusing to answer questions and to obey the direction of a referee appointed in proceedings supplementary to execution instituted before a county judge of Rensselaer county, the judgment having been docketed in such county, and an execution having been issued to the sheriff of such county and returned unsatisfied, and the referee having been appointed by the county judge before whom the special proceeding was pending and the reference proceeding in the county in which the referee was appointed; the judgment having been rendered by the Supreme Court at New York County?" Abel Merchant, Jr., and Henry D. Merchant, for appellant. Thomas O'Connor and John L. Hill, for respondent.

PER CURIAM. Order affirmed, with costs, on prevailing opinion below, and question certified answered in the negative.

CULLEN, C. J., and O'BRIEN, MARTIN, VANN, and WERNER, JJ., concur. GRAY and HAIGHT, JJ., absent.

BARRY, Respondent, v. VILLAGE OF PORT JERVIS, Appellant. (Court of Appeals

of New York. Dec. 30, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (93 App. Div. 618, 87 N. Y. Supp. 1127), entered April 20, 1904, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial. William A. Parshall, for appellant. Frank Lybolt, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, BARTLETT, HAIGHT, MARTIN, and VANN, JJ., concur. O'BRIEN, J., not voting.

BECKWITH et al., Respondents, v. NEW YORK, C. & ST. L. R. CO., Appellant. (Court of Appeals of New York. Nov. 15, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (90 App. Div. 611, 85 N. Y. Supp. 1125), entered January 13, 1904, affirming a judgment in favor of plaintiffs entered upon a verdict and an order denying a motion for a new trial. Louis L. Babcock, for appellant. Thomas H. Dowd and George W. Cole, for respondents.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, MARTIN, VANN, and WERNER, JJ., concur.

BENTE, Respondent, v. METROPOLITAN ST. RY. CO., Appellant. (Court of Appeals of New York. Dec. 30, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (90 App. Div. 213, 86 N. Y. Supp. 85), entered February 4, 1904, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial. Bayard H. Ames and Henry A. Robinson, for appellant. Abram I. Elkus, James C. McEachen, and Carlisle J. Gleason, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and O'BRIEN, BARTLETT, HAIGHT, MARTIN, and VANN, JJ., concur. GRAY, J., not sitting.

In re BODINE et al. (Court of Appeals of New York. Jan. 17, 1905.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (96 App. Div. 625, 88 N. Y. Supp. 1093), entered July 11, 1904, which affirmed an order of Special Term dismissing the petition herein. William F. Quigley, for appellants. George W. Van Slyck, George Q. Collins, and Ronald K. Brown, for respondent trustees. W. A. Furrington, for respondent Alice M. Bodine.

PER CURIAM. Appeal dismissed, with costs to all parties appearing in this court by separate attorneys.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur.

BOSWORTH, Respondent, v. KINGHORN et al., Appellants. (Court of Appeals of New York. Nov. 15, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court

101, 81 N. Y. Supp. 800, entered May 20, 1904, modifying, and affirming as modified, a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term without a jury, and dismissing an appeal from an order denying a motion for a new trial. Henry B. Kinghorn and George Wilcox, for appellants. Edward R. Otheman, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, BARTLETT, HAIGHT, MARTIN, VANN, and WERNER, JJ., concur.

BROWN, Respondent, v. CITY OF FULTON, Appellant. (Court of Appeals of New York. Dec. 30, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (84 App. Div. 633, 82 N. Y. Supp. 1096), entered May 23, 1903, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial. Claude E. Guille, S. B. Mead, and William S. Hillick, for appellant. F. T. Cahill and W. H. Kenyon, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, BARTLETT, HAIGHT, MARTIN, and VANN, JJ., concur. O'BRIEN, J., not voting.

BROWNE, Respondent, v. NEW YORK CENT. & H. R. R. Co., Appellant. (Court of Appeals of New York. Oct. 28, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (87 App. Div. 203, 83 N. Y. Supp. 1028), entered October 7, 1903, affirming a judgment in favor of plaintiff entered upon a verdict. Alexander H. Cowie, for appellant. G. W. Driscoll, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and O'BRIEN, BARTLETT, HAIGHT, MARTIN, VANN, and WERNER, JJ., concur.

CHAMBERLAIN, Respondent, v. OLEAN ST. RY. CO., Appellant. (Court of Appeals of New York. Dec. 13, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (90 App. Div. 611, 85 N. Y. Supp. 1126), entered January 28, 1904, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial. Fred L. Eaton, for appellant. M. B. Jewell, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, MARTIN, and VANN, JJ., concur.

CITIZENS' PERMANENT SAVINGS & LOAN ASS'N, Appellant, v. RAMPE, Respondent. (Court of Appeals of New York. Dec. 30, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (79 App. Div. 644, 80 N. Y. Supp. 1131), entered January 15, 1903, affirming a judgment in favor of defendant entered upon a verdict and an order denying a motion for a new trial. Wilbur F. Osburn, for appellant. William M. Bates, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, VANN, and WERNER, JJ., concur. HAIGHT, J., absent.

IN RE CITY OF NEW YORK. (Court of Appeals of New York. Nov. 28, 1904.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (90 App. Div. 606, 85 N. Y. Supp. 1127), entered January 14, 1904, which affirmed an order of Special Term confirming the report of commissioners of estimate and assessment in proceedings to acquire title to certain lands required for the improvement of the water front in the city of New York. Henry B. Twombly, for appellant. John J. Delany, Corp. Counsel, Theodore Connolly, and Charles D. Olendorf, for respondent city of New York. Charles A. Peabody, for respondent William Waldorf Astor.

PER CURIAM. Order affirmed, with costs.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur.

CITY OF NEW YORK, Respondent, v. TRUSTEES OF SAILORS' SNUG HARBOR IN CITY OF NEW YORK, Appellant. (Court of Appeals of New York. Jan. 17, 1905.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (85 App. Div. 855, 83 N. Y. Supp. 442), entered July 27, 1903, in favor of plaintiff, upon the submission of a controversy under sections 1278-1281 of the Code of Civil Procedure. Lewis L. Delafeld, for appellant. John J. Delany, Corp. Counsel (Theodore Connolly, of counsel), for respondent.

PER CURIAM. Judgment affirmed, with costs, on opinion below.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, VANN, and WERNER, JJ., concur. HAIGHT, J., absent.

CONNORS, Respondent, v. GREAT NORTHERN ELEVATOR CO., Appellant. (Court of Appeals of New York. Dec. 13, 1904.) Appeal from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (90 App. Div. 811, 85 N. Y. Supp. 644), entered January 14, 1904, reversing a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term and granting a new trial. Frank Gibbons and Harry A. Talbot, for appellant. Daniel J. Hanley, for respondent.

PER CURIAM. Order affirmed, and judgment absolute ordered for plaintiff on the stipulation, with costs.

CULLEN, C. J., and O'BRIEN, BARTLETT, HAIGHT, MARTIN, and VANN, JJ., concur. GRAY, J., not voting.

COOPER et al., Respondents, v. MANHATTAN RY. CO., Appellant. (Court of Appeals of New York. Dec. 16, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (93 App. Div. 612, 87 N. Y. Supp. 1131), entered April 15, 1904, affirming a judgment in favor of plaintiffs entered upon a decision of the court on trial at Special Term. Sherrill Babcock, Julien T. Davies, and Charles A. Gardiner, for appellant. William G. Peckham, for respondents.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, MARTIN, and VANN, JJ., concur.

CROSBY, Respondent, v. SECURITY MUT. LIFE INS. CO., Appellant. (Court of Appeals of New York. Jan. 17, 1905.) Motions to dismiss and to withdraw an appeal from a judgment entered June 20, 1904, upon an order of

the Appellate Division of the Supreme Court in the Fourth Judicial Department (94 App. Div. 614, 88 N. Y. Supp. 1095), which affirmed an order of the court at a Trial Term denying a motion for a new trial after a verdict in favor of plaintiff. The motion to dismiss was made upon the grounds that at the time of the service of the notice of appeal the time in which to take such appeal had expired; that the judgment and order herein are not appealable except by permission, which has not been procured; and that the Court of Appeals has no jurisdiction to review the said judgment and order. The motion to withdraw was made upon the grounds that the judgment and order herein are not appealable and that the appeal was taken through inadvertence and mistake. Frank Rice, for appellant. Henry E. Miller, for respondent. No opinion. Motion to dismiss appeal denied, with \$10 costs. Motion to withdraw appeal granted, upon paying the costs already accrued and \$10 costs of motion.

OUDLIP, Respondent, v. NEW YORK EVENING JOURNAL PUB. CO., Appellant. (Court of Appeals of New York. Jan. 24, 1905.) No opinion. Motion for reargument denied, with \$10 costs. See 180 N. Y. 85, 72 N. E. 925.

CULVER, Respondent, v. CITY OF YONKERS, Appellant. (Court of Appeals of New York. Dec. 30, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (80 App. Div. 309, 80 N. Y. Supp. 1034), entered March 13, 1903, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term. Francis A. Winslow, for appellant. James M. Hunt, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur.

EHRENFRIED, Appellant, v. LACKAWANNA IRON & STEEL CO., Respondent. (Court of Appeals of New York. Dec. 16, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (89 App. Div. 130, 85 N. Y. Supp. 57), entered December 17, 1903, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term and an order denying a motion for a new trial. Thomas A. Sullivan, for appellant. Louis L. Babcock, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, MARTIN, and VANN, JJ., concur.

FARMERS' LOAN & TRUST CO. v. NEW YORK & N. B. CO. et al. (Court of Appeals of New York. Dec. 6, 1904.) Appeal by permission from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (95 App. Div. 622, 88 N. Y. Supp. 1099), entered June 17, 1904, which affirmed an order of Special Term denying a motion for leave to serve a supplemental answer and to bring in new parties defendant. The following questions were certified: "First. Were the moving defendants entitled, as a matter of law or of strict right, to make and serve a supplemental pleading, an answer herein, as applied for by them? Second. Were the moving defendants entitled, as a matter of law or of strict right, to bring in new parties defend-

ant, as applied for and asked by them?" Artemas H. Holmes and Nathaniel A. Elsberg, for appellants. James F. Horan and Thomas Thacher, for respondent.

PER CURIAM. Order affirmed, with costs. Questions certified answered in the negative.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur.

FARRELLY, Appellant, v. EMIGRANT INDUSTRIAL SAV. BANK et al., Respondents. (Court of Appeals of New York. Nov. 15, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (92 App. Div. 529, 87 N. Y. Supp. 54), entered April 28, 1904, which affirmed a judgment of Special Term dismissing the complaint. Edward F. Brown, for appellant. James J. Fitzgerald, for respondents.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, MARTIN, VANN, and WERNER, JJ., concur.

FLAGG, Respondent, v. FISK et al., Appellants. (Court of Appeals of New York. Nov. 15, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (87 App. Div. 631, 84 N. Y. Supp. 1125), entered November 16, 1903, affirming a judgment in favor of plaintiff, entered upon a verdict and an order denying a motion for a new trial. Henry B. Kinghorn and George Wilcox, for appellants. Ernest Hall and Mortimer Kennedy Flagg, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, BARTLETT, HAIGHT, MARTIN, VANN, and WERNER, JJ., concur.

FLAGG, Respondent, v. FISK et al., Appellants. (Court of Appeals of New York. Nov. 15, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (93 App. Div. 169, 87 N. Y. Supp. 530), entered April 18, 1904, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court. Henry B. Kinghorn and George Wilcox, for appellants. Ernest Hall and Mortimer Kennedy Flagg, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, BARTLETT, HAIGHT, MARTIN, VANN, and WERNER, JJ., concur.

FLOUR CITY NAT. BANK OF ROCHESTER, Respondent, v. SHIRE, Appellant. (Court of Appeals of New York. Nov. 15, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (88 App. Div. 401, 84 N. Y. Supp. 810), entered November 27, 1903, affirming a judgment in favor of plaintiff entered upon the report of a referee. Edward L. Jellinek, for appellant. James Breck Perkins, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, BARTLETT, HAIGHT, MARTIN, VANN, and WERNER, JJ., concur.

GALLENKAMP, Respondent, v. GARVIN MACH. CO., Appellant. (Court of Appeals of New York. Nov. 15, 1904.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (91 App. Div. 141, 86 N. Y. Supp. 378), entered February 13, 1904, which reversed a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term and granted a new trial. Franklin Pierce, for appellant. Alex. Rosenthal and Edmund Bittner, for respondent.

PER CURIAM. Order of Appellate Division reversed, and judgment of Trial Term affirmed, with costs, on dissenting opinion of **INGRAHAM, J.**, below.

CULLEN, C. J., and **GRAY, HAIGHT, MARTIN, VANN**, and **WERNER, JJ.**, concur. **BARTLETT, J.**, not voting.

In re GOSLIN. (Court of Appeals of New York. Dec. 6, 1904.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (95 App. Div. 407, 88 N. Y. Supp. 670), entered June 23, 1904, which affirmed an order of Special Term adjudging the appellant herein guilty of contempt of court and punishing him therefor. Isaac L. Miller, for appellant. William J. Lippmann, for respondent.

PER CURIAM. Order affirmed, with costs.

CULLEN, C. J., and **GRAY, O'BRIEN, BARTLETT, HAIGHT, VANN**, and **WERNER, JJ.**, concur.

GRIFFIN, Respondent, v. INTERURBAN ST. RY. CO., Appellant. SCUDDER v. SAME. (Court of Appeals of New York. Jan. 24, 1905.) Motion for reargument. See 179 N. Y. 438, 72 N. E. 513. *Harcourt Bull.*, for the motion. Henry A. Robinson, opposed.

PER CURIAM. The principal question presented by this case was the duty of the appellant to give transfers over one of its street railway lines in the city of New York to its other intersecting lines. The judgment of the Municipal Court awarded the respondent judgment for four penalties for failing to give such transfers. We affirmed the right of the plaintiff to recover, but limited his recovery to a single penalty. The respondent now moves for a reargument, and insists that by the reduction of the judgment he has been deprived of his property without due process of law. This claim is made on the theory that when the judgment was recovered the respondent was entitled to recover cumulative penalties, and that we have deprived him of his recovery by an arbitrary declaration that a recovery of cumulative penalties is against public policy. This singular contention is based on isolated sentences taken from the opinion of the learned judge who wrote in the case, which, even standing by themselves and dissevered from the context, warrant no such construction. As appears by the opinion the learned judge thought the case before us could not be distinguished from certain previous decisions of the court where cumulative penalties were allowed. But the majority of the court were of contrary view, and he yielded to their judgment. We thought, and still think, that the statute should not be so construed as to give cumulative penalties in actions of the character of the one before us, unless the legislative intent is expressed so clearly as to leave no room for misunderstanding. We also think this rule of construction is in harmony with the previous decisions of the court in *Sturgis v. Spofford*, 45 N. Y. 446, and *Fisher v. N. Y. C. & H. R. R. Co.*, 46 N. Y. 644. In the earlier of those cases Chief Judge Church said: "Prosecutions for aggregated penalties should not be encouraged. * * *

It is a wholesome rule not to allow a recovery for aggregated penalties, unless the language of the statute clearly requires it. Under this rule the party prosecuted will have an opportunity to desist from doing the act complained of, and if he does not he will knowingly incur all the hazards of repeated prosecutions." In *Suydam v. Smith*, 52 N. Y. 383, where the recovery of cumulative penalties was upheld, the statutory words imposing the penalty were "for each offense." We think that "every" is not always necessarily the synonym of "each." In *Grover v. Morris*, 73 N. Y. 473, the recovery was under an act which authorized a purchaser to recover double the amount paid by him in the purchase of any lottery tickets. It was held that he was entitled to recover the total amount paid, whether the purchase was made on one occasion or on several. This was a necessary construction of the statute, and the case was not strictly one of cumulative penalties. In the most recent decisions of this court, *Jones v. Rochester Gas & Electric Company*, 168 N. Y. 65, 60 N. E. 1044, and *Cox v. Paul*, 175 N. Y. 328, 67 N. E. 586, we have reiterated the doctrine of the *Sturgis* Case. The majority of the court, therefore, believe that the judgment rendered by it in this case was in harmony with the previous decisions of the court. The motion for reargument should be denied, with \$10 costs.

CULLEN, C. J., and **O'BRIEN, HAIGHT, VANN**, and **WERNER, JJ.**, concur. **BARTLETT, J.**, dissents. **GRAY, J.**, not sitting.

HEMSTREET, Respondent, v. GILBERT KNITTING CO., Appellant. (Court of Appeals of New York. Oct. 28, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (87 App. Div. 619, 83 N. Y. Supp. 1107), entered October 13, 1903, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial. F. G. Fincke, for appellant. James W. Rayhill, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and **O'BRIEN, BARTLETT, HAIGHT, MARTIN, VANN**, and **WERNER, JJ.**, concur.

HERBERT, Respondent, v. MUSICAL COURIER CO., Appellant. (Court of Appeals of New York. Dec. 30, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (86 App. Div. 627, 83 N. Y. Supp. 1107), entered July 29, 1903, modifying, and affirming as modified, a judgment in favor of plaintiff entered upon a verdict, and affirming an order denying a motion for a new trial. Gilbert Ray Hawes, for appellant. Thomas D. Adams, Arthur C. Palmer, and Nathan Burkan, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and **GRAY, O'BRIEN, BARTLETT, HAIGHT, MARTIN**, and **VANN, JJ.**, concur.

HERBERT, Respondent, v. MUSICAL COURIER CO., Appellant. (Court of Appeals of New York. Jan. 24, 1905.) No opinion. Motion for reargument denied, with \$10 costs. See 180 N. Y. —, ubi supra.

HERZOG, Appellant, v. MUNICIPAL ELECTRIC LIGHT CO., Respondent. (Court of Appeals of New York. Dec. 30, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial De-

partment (89 App. Div. 569, 85 N. Y. Supp. 712), entered January 15, 1904, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term. Louis Marshall and S. F. Kneeland, for appellant. Paul D. Cravath and William F. Sheehan, for respondent.

PER CURIAM. Judgment affirmed, with costs, on opinion below.

CULLEN, C. J., and GRAY, O'BRIEN, and HAIGHT, JJ., concur. BARTLETT, MARTIN, and VANN, JJ., dissent.

HOFFART, Appellant, v. TOWN OF WEST TURIN, Respondent. (Court of Appeals of New York. Dec. 16, 1904.) Appeal from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (90 App. Div. 348, 85 N. Y. Supp. 471), entered January 14, 1904, which reversed a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial, and granted a new trial. M. H. Powers and W. J. Powers, for appellant. C. S. Mereness and Harry W. Cox, for respondent.

PER CURIAM. Order affirmed, and judgment absolute ordered for defendant on the stipulation, with costs.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, MARTIN, and VANN, JJ., concur. HAIGHT, J., not voting.

In re HOLLISTER et al. (Court of Appeals of New York. Dec. 30, 1904.) Appeal from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (86 App. Div. 501, 89 N. Y. Supp. 518), entered August 5, 1904, which affirmed an order of Special Term denying an application to vacate an assessment for a local improvement. George D. Reed, John P. Bowman, and John F. Kinney, for appellants. William W. Webb, Corp. Counsel (B. B. Cunningham, of counsel), for respondent.

PER CURIAM. Order affirmed, with costs. BARTLETT, HAIGHT, MARTIN, and VANN, JJ., concur. CULLEN, C. J., and GRAY and O'BRIEN, JJ., dissent.

In re HOPKINS' WILL. (Court of Appeals of New York. Jan. 17, 1905.) Motion to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (93 App. Div. 618, 87 N. Y. Supp. 793), entered April 15, 1904, which affirmed an order of the Westchester county Surrogate's Court denying a motion of the appellant herein to vacate and set aside certain orders and to restore her letters testamentary as heretofore issued to her. The motion was made upon the ground that the appellant had waived and abandoned any right to have the appeal considered by the Court of Appeals by acts inconsistent with the claims set forth therein. Joseph W. Middlebrook, for the motion. Clarence S. Davison, Charles Blandy, and Andrew J. Shipman, opposed. No opinion. Motion granted, and appeal dismissed, with costs and \$10 costs of motion.

In re HUNT. (Court of Appeals of New York. Oct. 25, 1904.) Appeal by permission from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (84 App. Div. 159, 82 N. Y. Supp. 538), entered May 14, 1903, which affirmed an order of the Rensselaer county Surrogate's Court requiring the executrix herein to file a supplemental account. The following questions were certified: "(1) Does the will of Thomas Hunt, taken in connection with such extrinsic facts

as appear and may be properly considered, vest in the widow an absolute title to his real and personal estate? (2) Does the will of Thomas Hunt, taken in connection with such extrinsic facts, vest in the widow during her lifetime an unqualified power of disposition of both principal and income of his estate? (3) Does the income remaining unexpended at the death of the widow belong to testator's estate? (4) Has the respondent such an interest in the estate of the testator that he could institute these proceedings requiring Ruth Hunt to account as executrix of Thomas Hunt, deceased, under the provisions of section 2727 and section 2514, subd. 11, of the Code of Civil Procedure?" John H. Peck, for appellant. John B. Holmes, for respondents.

PER CURIAM. Order affirmed, with costs, on opinions below. First and second questions certified answered in the negative, fourth question answered in the affirmative, and third question not answered, because not passed upon by either court below.

CULLEN, C. J., and O'BRIEN, MARTIN, VANN, and WERNER, JJ., concur. GRAY and HAIGHT, JJ., absent.

HUNT, Appellant, v. OSBORN et al., Respondents. (Court of Appeals of New York. Dec. 6, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (86 App. Div. 464, 83 N. Y. Supp. 879), entered July 24, 1903, affirming a judgment in favor of the defendants entered upon the report of a referee. Henry W. Jessup and William D. Gaillard, for appellant. William B. Davenport, A. A. Gardner, and William G. Cooke, for respondents.

PER CURIAM. Judgment affirmed, with costs, on opinion below.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, and VANN, JJ., concur. WERNER, J., absent.

JACOBS v. EDELSON et al. (Court of Appeals of New York. Dec. 16, 1904.) Motion for leave to withdraw an appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (83 App. Div. 363, 82 N. Y. Supp. 270), entered July 13, 1903, reversing a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term and granting a new trial. The motion was made upon the ground that the reversal by the Appellate Division was upon the law and the facts, and therefore not appealable to the Court of Appeals. Jesse S. Epstein, for the motion. Herman Aaron, opposed.

PER CURIAM. Motion granted, upon payment within 10 days of all costs and disbursements in the Court of Appeals, including the argument fee and \$10 costs of this motion. On failure to make such payment within 10 days, the motion is denied, with \$10 costs.

JOHNSON v. COLE et al. (Court of Appeals of New York. Jan. 17, 1905.) Motion to amend remittitur so as to provide that the judgment appealed from and the interlocutory judgment entered upon the report of the referee be reversed, with costs to the appellants in all the courts to abide the event. See 178 N. Y. 364, 70 N. E. 873.

BARTLETT, J. The motion should be denied, without costs. The opinion as originally written gave costs to the appellants in all the courts to abide the event. Prior to handing down the decision the opinion was amended by striking out the words "to the appellants," but owing to an oversight these words were not stricken from the copy of the opinion sent to

the state reporter, and it was erroneously reported in 178 N. Y. 364, 70 N. E. 873, in its unamended form. Motion denied.

CULLEN, C. J., and O'BRIEN, HAIGHT, VANN, and WERNER, JJ., concur.

JOHNSTON et al., Appellants, v. HILTON, Respondent. (Court of Appeals of New York. Oct. 23, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (71 App. Div. 617, 76 N. Y. Supp. 1017), entered April 27, 1903, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term. Thorndike Saunders, for appellants. James F. McNaboe, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and O'BRIEN, BARTLETT, HAIGHT, MARTIN, VANN, and WERNER, JJ., concur.

JOHNSTON et al., Appellants, v. HILTON, Respondent. (Court of Appeals of New York. Nov. 22, 1904.) No opinion. Motion for reargument denied, with \$10 costs. See 179 N. Y. —, ubi supra.

In re KEHOE. (Court of Appeals of New York. Dec. 30, 1904.) Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (97 App. Div. 637, 90 N. Y. Supp. 1102), entered October 27, 1904, which affirmed an order of Special Term vacating and setting aside a determination of the board of elections of the city of New York refusing to receive and file petitioner's certificate of nomination as candidate of the Democratic party for the office of state senator for the Fifth senatorial district, and directing said board to receive and file said certificate. William N. Cohen and Frederick B. Woodruff, for appellant. Frederic R. Coudert and Luke D. Stapleton, for respondent.

PER CURIAM. Appeal dismissed, on authority of Matter of Norton, 153 N. Y. 130, 52 N. E. 723, without costs.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, MARTIN, and VANN, JJ., concur.

In re KELLOGG et al. (Court of Appeals of New York. Jan. 24, 1905.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (96 App. Div. 608, 88 N. Y. Supp. 1033), entered July 14, 1904, which reversed an order of Special Term modifying, by striking out a certain item, and, as modified, confirming, a report of a referee in favor of the petitioners, and, after reducing the allowance made by the said referee, affirmed his report. J. Stewart Ross, for appellant. Abram J. Rose and Alfred C. Petté, for respondents.

PER CURIAM. Order affirmed, with costs.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur.

KELLY et al., Appellants, v. CITY OF NEW YORK, Respondent. (Court of Appeals of New York. Dec. 6, 1904.) Appeal from a judgment, entered November 19, 1903, upon an order of the Appellate Division of the Supreme Court in the First Judicial Department (87 App. Div. 299, 84 N. Y. Supp. 349), overruling plaintiffs' exceptions, ordered to be heard in the first instance by the Appellate Division, and directing a dismissal of the complaint. Louis

Marshall, for appellants. John J. Delany, Corp. Counsel (Theodore Connolly, of counsel), for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, and VANN, JJ., concur. WERNER, J., absent.

KING, Appellant, v. SUN PRINTING & PUBLISHING CO., Respondent. (Court of Appeals of New York. Nov. 29, 1904.) Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the First Judicial Department (84 App. Div. 310, 82 N. Y. Supp. 787), entered June 22, 1903, which affirmed an interlocutory judgment of Special Term sustaining a demurrer to the complaint. The following question was certified: "Does the complaint state facts sufficient to constitute a cause of action?" Stillman F. Kneeland, for appellant. Franklin Bartlett, for respondent.

PER CURIAM. Order affirmed, with costs, and question certified answered in the negative.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur.

LENT, Appellant, v. FARNSWORTH, Respondent. (Court of Appeals of New York. Dec. 6, 1904.) Appeal from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (94 App. Div. 93, 87 N. Y. Supp. 1112), entered May 10, 1904, which reversed an order of Special Term denying a motion for an order directing the cancellation of record of a judgment in favor of plaintiff's intestate and against the defendant upon the ground of its discharge by a decree in bankruptcy, and granted such motion. Alfred W. Gray, for appellant. Nathaniel W. Norton, for respondent.

PER CURIAM. Order affirmed, with costs.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur.

In re LEVY et al. (Court of Appeals of New York. Nov. 29, 1904.) Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (91 App. Div. 483, 86 N. Y. Supp. 862), entered July 28, 1904, which affirmed a decree of the Kings county Surrogate's Court settling the accounts of the executors herein and charging the testator's real property with the payment of a certain legacy. W. C. Prime, H. H. Pierce, and William Lloyd Kitchel, for appellant. Joseph J. Corn, Edward Lasansky and Harrison B. Weil, for respondent.

PER CURIAM. Order affirmed, with costs.

CULLEN, C. J., and GRAY, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur. O'BRIEN, J., not voting.

In re LEVY et al. (Court of Appeals of New York. Jan. 17, 1905.) No opinion. Motion for reargument denied, with \$10 costs. See 179 N. Y. 603, ubi supra.

LEVY, Respondent, v. GROVE MILLS PA-PER CO., Appellant. (Court of Appeals of New York. Nov. 22, 1904.) Motion to dismiss an appeal from a judgment entered March 14, 1903, upon an order of the Appellate Division of the Supreme Court in the Second Judicial Department (80 App. Div. 884, 80 N. Y. Supp. 730), which sustained plaintiff's exceptions, ordered to be heard in the first instance by the

Appellate Division, and reversed an order of the trial court setting aside a verdict in favor of plaintiff and dismissing the complaint, and directing judgment upon the verdict. The motion was made upon the ground that the cause was not appealable to the Court of Appeals, being an appeal from a unanimous decision of the Appellate Division that there was evidence supporting a verdict not directed by the court, and no question of law being presented for review. Edward J. Collins, for the motion. Harold H. Bowman, opposed.

PER CURIAM. Motion granted, and appeal dismissed, with costs of appeal and \$10 costs of motion.

LONG ISLAND BOTTLERS' UNION, Appellant, v. S. LIEBMANN'S SONS BREWING CO., Respondent. (Court of Appeals of New York. Dec. 30, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (83 App. Div. 146, 82 N. Y. Supp. 561), entered June 8, 1903, affirming a judgment in favor of defendant entered upon a verdict directed by the court and an order denying a motion for a new trial. Charles M. Stafford, for appellant. Walter H. Liebmann, for respondent.

PER CURIAM. Judgment affirmed, with costs, on opinion below.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur.

In re LOWMAN, City Chamberlain. (Court of Appeals of New York. Nov. 29, 1904.) Appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (95 App. Div. 32, 88 N. Y. Supp. 533), entered May 9, 1904, which affirmed an order of Special Term directing the appellant herein to deliver the books and papers appertaining to the office of chamberlain of the city of Elmira to the petitioner. Frederick Collin, for appellant. Richard H. Thurston, for respondent.

PER CURIAM. Order affirmed, with costs.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur.

LYMAN, Respondent, v. STATE BANK OF RANDOLPH, Appellant, et al. (Court of Appeals of New York. Oct. 25, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (81 App. Div. 367, 80 N. Y. Supp. 901), entered March 21, 1903, affirming a judgment in favor of plaintiff entered upon the report of a referee. C. D. Davis, Alexander Wentworth, and W. S. Thrasher, for appellant. Frank W. Stevens, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and O'BRIEN, MARTIN VANN, and WERNER, JJ., concur. GRAY and HAIGHT, JJ., absent.

McCLELLAN, Respondent, v. BROOKLYN HEIGHTS R. CO., Appellant. (Court of Appeals of New York. Nov. 15, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (89 App. Div. 622, 85 N. Y. Supp. 1136), entered January 20, 1904, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial. I. R. Oeland and George D. Ye-

mans, for appellant. Samuel S. Whitehouse, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, MARTIN, VANN, and WERNER, JJ., concur.

McNULTY, Respondent, v. MT. MORRIS ELECTRIC LIGHT CO., Appellant. (Court of Appeals of New York. Dec. 30, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (87 App. Div. 633, 84 N. Y. Supp. 1135), entered November 30, 1903, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial. Samuel A. Beardsley and Henry J. Hemmens, for appellant. Frank M. Hardenbrook, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur.

MARSHALL, Appellant, v. UNITED STATES TRUST CO. OF NEW YORK et al., Respondents. (Court of Appeals of New York. Dec. 16, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (93 App. Div. 252, 87 N. Y. Supp. 747), entered April 27, 1904, upon an order reversing a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term, directing that the complaint be dismissed. John M. Harrington, for appellant. George L. Shearer and Edward W. Sheldon, for respondents.

PER CURIAM. Judgment of Appellate Division reversed, and that of Special Term affirmed, with costs in all courts, on opinion of SCOTT, J., in Special Term. 86 N. Y. Supp. 617.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, MARTIN, and VANN, JJ., concur. HAIGHT, J., dissents.

MILLER, Appellant, v. QUINCY, Respondent, et al. (Court of Appeals of New York. Dec. 6, 1904.) Motion to amend remittitur. See 179 N. Y. 294, 72 N. E. 116.

PER CURIAM. Motion granted, and remittitur amended, by adding to the ordinary part thereof the following words: "With leave to the demurring defendant to answer on payment of costs."

MINSHULL, Respondent, v. WASHBURN, Appellant, et al. (two cases). (Court of Appeals of New York. Dec. 30, 1904.) Appeals from judgments of the Appellate Division of the Supreme Court in the Second Judicial Department (89 App. Div. 633, 85 N. Y. Supp. 1138), entered February 17, 1904, affirming judgments in favor of plaintiffs entered upon verdicts and orders denying motions for new trials. David Thornton and Thornton Earle, for appellant Washburn. William J. Courtney, for respondents.

PER CURIAM. Judgments affirmed, with costs.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, MARTIN, and VANN, JJ., concur.

MONTESI, Respondent, v. PRESS PUB. CO., Appellant. (Court of Appeals of New York. Dec. 30, 1904.) Appeal from a judg-

ment of the Appellate Division of the Supreme Court in the Second Judicial Department (87 App. Div. 612, 83 N. Y. Supp. 1111), entered October 6, 1903, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial. John M. Bowers and James W. Gerard, for appellant. James C. Cropsey, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, MARTIN, and VANN, JJ., concur.

NELSON, Respondent, v. YOUNG, Appellant, et al. (Court of Appeals of New York. Dec. 30, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (91 App. Div. 457, 87 N. Y. Supp. 69), entered March 10, 1904, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial. Edwin A. Jones and Harford T. Marshall, for appellant. J. Edward Swanstrom and Conrad Saxe Keyes, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and O'BRIEN, BARTLETT, HAIGHT, and VANN, JJ., concur. GRAY, J., not voting. WERNER, J., absent.

PADDOCK, Appellant, v. LEWIS et al. Respondents. (Court of Appeals of New York. Nov. 15, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (59 App. Div. 430, 69 N. Y. Supp. 1), entered April 6, 1901, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term. D. Raymond Cobb, for appellant. Le Roy B. Williams, for respondents.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, MARTIN, VANN, and WERNER, JJ., concur.

PARR, Respondent, v. LODER, Appellant. (Court of Appeals of New York. Jan. 17, 1905.) Motion to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (97 App. Div. 218, 89 N. Y. Supp. 823), entered October 15, 1904, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial. The motion was made upon the ground that the appeal was unauthorized and the Court of Appeals had no jurisdiction to entertain the same. Ralph Earl Prime, Jr., for the motion. Joseph Middlebrook, opposed.

PER CURIAM. Motion granted, and appeal dismissed, with costs, upon the ground that the action, being one to recover damages for malicious prosecution, is for a personal injury, within the definition of subdivision 9 of section 3343 of the Code of Civil Procedure, and hence under subdivision 2 of section 191 no appeal lies to this court from a unanimous affirmance, unless permitted in the way provided for in the section. Ten dollars cost of motion.

PEOPLE v. BEEHLER et al. (Court of Appeals of New York. Nov. 15, 1904.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (92 App. Div. 622, 87 N. Y. Supp. 1143), made March 25, 1904, which affirmed a judgment of the Court of General Sessions of the

Peace in the city of New York, convicting defendants of the crime of selling lottery policies. William W. Cantwell, for appellant. William Travers Jerome, Dist. Atty. (Howard S. Gans, of counsel), for the People.

PER CURIAM. Judgment of conviction affirmed.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, MARTIN, VANN, and WERNER, JJ., concur.

PEOPLE, Respondent, v. BRUESCH, Appellant. (Court of Appeals of New York. Jan. 17, 1905.) Motion to dismiss an appeal from a judgment of the Court of General Sessions of the Peace in the county of New York, rendered May 20, 1904, upon a verdict convicting the defendant of the crime of murder in the first degree; also application by defendant that counsel be assigned to appear for him in the Court of Appeals. The motion was made upon the ground of a failure to prosecute the appeal. William Travers Jerome, Dist. Atty. (Robert S. Johnstone, of counsel), for the motion.

PER CURIAM. Prayer of appellant that Meyer Levy be designated as his counsel, to appear for him in this court, granted. Motion to dismiss appeal denied; appeal to be perfected in 60 days. In default thereof, the district attorney is at liberty to renew this motion.

PEOPLE, Respondent, v. ELLIOTT et al., Appellants. (Court of Appeals of New York. Oct. 25, 1904.) Appeal from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (90 App. Div. 611, 85 N. Y. Supp. 1140), entered January 19, 1904, which affirmed a judgment of the Monroe County Court entered upon a verdict convicting defendants of the crime of robbery in the third degree. George D. Forsyth, for appellants. Stephen J. Warren, Dist. Atty. (H. H. Widener and Robert Averill, of counsel), for the People.

PER CURIAM. Judgment of conviction affirmed.

CULLEN, C. J., and O'BRIEN, MARTIN, VANN, and WERNER, JJ., concur. GRAY and HAIGHT, JJ., absent.

PEOPLE, Respondent, v. HIBBE, Appellant. (Court of Appeals of New York. Dec. 13, 1904.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (94 App. Div. 620, 88 N. Y. Supp. 1112), entered June 1, 1904, which affirmed a judgment of the Court of General Sessions in the county of New York rendered upon a verdict convicting the defendant of the crime of manslaughter in the first degree. Lewis Stuyvesant Chanler, for appellant. William Travers Jerome, Dist. Atty. (Howard S. Gans, of counsel), for the People.

PER CURIAM. Judgment of conviction affirmed.

CULLEN, C. J., and GRAY, HAIGHT, MARTIN, and VANN, JJ., concur. O'BRIEN and BARTLETT, JJ., not voting.

PEOPLE, Respondent, v. MURPHY, Appellant. (Court of Appeals of New York. Nov. 15, 1904.) Appeal from a judgment entered April 19, 1904, upon an order of the Appellate Division of the Supreme Court in the Second Judicial Department (98 App. Div. 383, 87 N. Y. Supp. 786), which reversed a judgment of the Richmond County Court sustaining a demurrer to an indictment, and overruling such demurrer. Thomas C. Brown, for appellant. Edward Sidney Rawson, Dist. Atty. (Sidney F. Rawson, of counsel), for the People.

PER CURIAM. Judgment affirmed, on opinion below.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, VANN, and WERNER, JJ., concur. MARTIN, J., absent.

PEOPLE, Respondent, v. **ST. CLAIR**, Appellant. (Court of Appeals of New York. Oct. 25, 1904.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (90 App. Div. 239, 86 N. Y. Supp. 77), entered January 28, 1904, which affirmed a judgment of the Court of Special Sessions of the city of New York, convicting the defendant of a misdemeanor. James W. Osborne, Otto T. Hess, and William M. Wherry, Jr., for appellant. William Travers Jerome, Dist. Atty. (Howard S. Gans, of counsel), for the People.

PER CURIAM. Judgment of conviction reversed, and defendant discharged, on the authority of *People v. Waller*, 179 N. Y. 46, 71 N. E. 462.

CULLEN, C. J., and O'BRIEN, MARTIN, VANN, and WERNER, JJ., concur. GRAY and HAIGHT, JJ., absent.

PEOPLE, Appellant, v. **SLAUSON**, Respondent. (Court of Appeals of New York. Nov. 15, 1904.) Appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (85 App. Div. 166, 83 N. Y. Supp. 107), entered July 1, 1903, which reversed a judgment entered at a Trial Term upon a verdict convicting the defendant of the crime of sodomy. George Addington, Dist. Atty., for the People. William E. Woollard, for respondent.

PER CURIAM. Appeal dismissed, upon the ground that it does not appear from the order of reversal that it was not made upon the facts, or in the exercise of discretion, on the authority of *People v. Calabur*, 178 N. Y. 463, 71 N. E. 2.

CULLEN, C. J., and GRAY, BARTLETT, HAIGHT, MARTIN, VANN, and WERNER, JJ., concur.

PEOPLE, Respondent, v. **SUMMERFIELD**, Appellant. (Court of Appeals of New York. Dec. 13, 1904.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (96 App. Div. 636, 89 N. Y. Supp. 1113), entered July 18, 1904, which affirmed a judgment rendered at a Trial Term upon a verdict convicting the defendant of the crime of grand larceny in the first degree. David B. Hill and Max D. Steuer, for appellant. William Travers Jerome, Dist. Atty. (Robert C. Taylor, of counsel), for the People.

PER CURIAM. Judgment of conviction affirmed.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, MARTIN, and VANN, JJ., concur.

PEOPLE, Respondent, v. **VALENTINE** et al., Appellants. (Court of Appeals of New York. Dec. 16, 1904.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (90 App. Div. 606, 85 N. Y. Supp. 1140), entered January 12, 1904, which affirmed judgments of the Court of General Sessions in the county of New York rendered upon a verdict convicting the defendants of petit larceny. Asa Bird Gardiner and James F. O'Connor, for appellants. William

Travers Jerome, Dist. Atty. (Howard S. Gans, of counsel), for the People.

PER CURIAM. Judgment of conviction affirmed.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, MARTIN, and VANN, JJ., concur.

PEOPLE ex rel. **ADELPHI COLLEGE**, Appellant, v. **WELLS** et al., Board of Taxes and Assessments, Respondents. (Court of Appeals of New York. Jan. 24, 1905.) Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (97 App. Div. 312, 89 N. Y. Supp. 957), entered November 11, 1904, which affirmed an order of Special Term dismissing a writ of certiorari to review the proceedings of the defendants in assessing certain real estate for purposes of taxation. John A. Taylor, for appellant. John J. Delany, Corp. Counsel (George S. Coleman, of counsel), for respondents.

PER CURIAM. Order affirmed, with costs.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur.

PEOPLE ex rel. **BOYLE**, Appellant, v. **GREENE**, Police Com'r, Respondent. (Court of Appeals of New York. Dec. 6, 1904.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (87 App. Div. 421, 84 N. Y. Supp. 484), entered November 19, 1903, which reversed an order of Special Term granting a motion for a peremptory writ of mandamus to compel the defendant to grade the relator as detective sergeant in the police force of the city of New York, and denied such motion. Hyacinthe Ringrose, for appellant. John J. Delany, Corp. Counsel (Theodore Connolly and Terence Farley, of counsel), for respondent.

PER CURIAM. Order affirmed, with costs.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur.

PEOPLE ex rel. **BUCHANAN**, Appellant, v. **CANTINE**, Commissioner of Public Safety, Respondent. (Court of Appeals of New York. Nov. 29, 1904.) Appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (96 App. Div. 631, 89 N. Y. Supp. 1113), entered July 1, 1904, which dismissed a writ of certiorari to review the determination of the defendant in removing the relator from the office of sergeant of police. Charles H. F. Reilly, for appellant. Arthur L. Andrews, Corp. Counsel, for respondent.

PER CURIAM. Appeal dismissed, with costs.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur.

PEOPLE ex rel. **COOPER UNION FOR ADVANCEMENT OF SCIENCE AND ART**, Respondent, v. **WELLS** et al., Commissioners of Taxes and Assessments, Appellants. (Court of Appeals of New York. Jan. 24, 1905.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (90 N. Y. Supp. 1109), entered November 19, 1904, which affirmed an order of Special Term vacating an assessment for the purposes of taxation upon certain real estate belonging to the relator. John J. Delany, Corp. Counsel (George S. Coleman and Curtis A.

Peters, of counsel), for appellants. H. B. Closson, for respondent.

PER CURIAM. Order affirmed, with costs. CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur.

PEOPLE ex rel. DURAND-RUEL, Appellant, v. WELLS et al., Commissioners of Taxes and Assessments, Respondents. (Court of Appeals of New York. Dec. 6, 1904.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (92 App. Div. 622, 87 N. Y. Supp. 1144), entered April 5, 1904, which affirmed an order of Special Term confirming an assessment for taxation upon the capital of the relator, a non-resident, invested in business in this state. Frederic R. Coudert and Charles A. Conlon, for appellant. John J. Delany, Corp. Counsel (George S. Coleman and Curtis A. Peters, of counsel), for respondents.

PER CURIAM. Order affirmed, with costs. CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur.

PEOPLE ex rel. DWYER, Appellant, v. GREENE, Police Com'r, Respondent. (Court of Appeals of New York. Oct. 25, 1904.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (91 App. Div. 613, 86 N. Y. Supp. 1143) entered February 27, 1904, which affirmed the proceedings of the defendant in removing the relator from the position of patrolman on the police force of the city of New York. John R. Halsey, for appellant. John J. Delany, Corp. Counsel (Theodore Connolly and Terence Farley, of counsel), for respondent.

PER CURIAM. Order of Appellate Division and the determination of the commissioner reversed, and a new trial granted, costs to abide event, on the authority of People ex rel. Shiels v. Greene, 179 N. Y. 195, 71 N. E. 777.

CULLEN, C. J., and O'BRIEN, MARTIN, VANN, and WERNER, JJ., concur. GRAY and HAIGHT, JJ., absent.

PEOPLE ex rel. FISKE et al., Appellants, v. FEITNER et al., Commissioners of Taxes and Assessments, Respondents. (Court of Appeals of New York. Jan. 24, 1905.) Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (95 App. Div. 217, 88 N. Y. Supp. 694), entered June 17, 1904, which affirmed an order of Special Term dismissing a writ of certiorari to review the proceedings of the defendants in assessing certain property of the relators for the purpose of taxation. Dean Emery, Frederic R. Kellogg, and John Mason Knox, for appellants. John J. Delany, Corp. Counsel (George S. Coleman, of counsel), for respondents.

PER CURIAM. Order affirmed, with costs.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur.

PEOPLE ex rel. HART, Appellants, v. GOODRICH et al., Respondents. (Court of Appeals of New York. Dec. 30, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (92 App. Div. 445, 87 N. Y. Supp. 114), entered May 11, 1904, which affirmed a final judgment in favor of defendants entered upon a decision of the court at Special Term sustaining demurrers to the complaint and di-

recting that it be dismissed. Lewis E. Carr and Coleridge A. Hart, for appellant. Joseph A. Burr, Henry W. Goodrich, and Henry A. Monfort, for respondents.

PER CURIAM. Judgment affirmed, with costs, on the opinion of the Appellate Division and that of the Special Term.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, and VANN, JJ., concur. WERNER, J., absent.

PEOPLE ex rel. HILLMAN, Appellant, v. SCHOLER et al., Borough Coroners, Respondents. (Court of Appeals of New York. Nov. 29, 1904.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (94 App. Div. 282, 87 N. Y. Supp. 1122), entered June 15, 1904, which reversed a judgment entered upon a decision of the court at a Trial Term directing the issuance of a peremptory writ of mandamus to compel defendants to restore the relator to the office of chief clerk of the coroners' office of the borough of Manhattan. Ernest L. Crandall, for appellant. A. S. Gilbert and Julius M. Mayer, for respondents.

PER CURIAM. Order affirmed, with costs; no opinion.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur.

PEOPLE ex rel. LEWISOHN, Appellant, v. COURT OF GENERAL SESSIONS OF PEACE IN AND FOR NEW YORK COUNTY et al., Respondents. (Court of Appeals of New York. Nov. 15, 1904.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (96 App. Div. 201, 89 N. Y. Supp. 364), entered July 30, 1904, which dismissed a writ of certiorari and affirmed the proceedings of the defendants in punishing the relator for contempt of court in refusing to answer certain questions propounded to him by the grand jury of the county of New York. Alfred Lauterbach and P. J. Rooney, for appellant. William Travers Jerome, Dist. Atty. (Howard S. Gans, of counsel), for respondents.

PER CURIAM. Order affirmed.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, MARTIN, VANN, and WERNER, JJ., concur.

PEOPLE ex rel. MILSOM, Respondent, v. EAST BUFFALO LIVE STOCK ASS'N, Appellant. (Court of Appeals of New York. Nov. 29, 1904.) Appeal from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (88 App. Div. 619, 84 N. Y. Supp. 795), made November 17, 1903, which affirmed an order of Special Term granting a motion for a peremptory writ of mandamus to compel defendant to revoke an order made by it suspending the relator's decedent from membership in the defendant association. Henry W. Killen and V. H. Riordan, for appellant. H. J. Swift, for respondent.

PER CURIAM. Order affirmed, with costs.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur.

PEOPLE ex rel. ROBINSON, Appellant, v. STURGIS, Fire Com'r, Respondent. (Court of Appeals of New York. Dec. 6, 1904.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (90 App. Div. 606, 85 N. Y. Supp. 1143), entered January 15, 1904, which affirmed an order of Special Term denying a motion for

appellant to restore the relator to duty in the fire department of the city of New York. Anthony J. Griffin and William W. Goodrich, for appellant. John J. Delany, Corp. Counsel (Theodore Connolly and W. B. Crowell, of counsel), for respondent.

PER CURIAM. Appeal dismissed, with costs.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur.

PEOPLE ex rel. TOWN OF FREEBIE, Appellant, v. PRIEST et al., STATE TAX COM'RS, Respondents. (Court of Appeals of New York. Jan. 24, 1905.) Appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (90 App. Div. 520, 85 N. Y. Supp. 451), entered January 28, 1904, which confirmed a determination of the defendants dismissing the relator's appeal from a decision of the board of supervisors of Cortland county made in the equalization of assessments and the correction of the assessment rolls of the several tax districts of that county. Frank S. Black, J. Courtney, and T. E. Courtney, for appellant. O. M. Kellogg, for respondents.

PER CURIAM. Order affirmed, with costs.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, and WERNER, JJ., concur. HAIGHT and VANN, JJ., dissent.

PEOPLE ex rel. ZUHR, Appellant, v. GREENE, Police Com'r, Respondent. (Court of Appeals of New York. Dec. 6, 1904.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (96 App. Div. 625, 88 N. Y. Supp. 1114), entered June 15, 1904, which dismissed a writ of certiorari and affirmed the proceedings of the defendant in dismissing the relator from the police force of the city of New York. James W. Ridgway and Thomas Kelby, for appellant. John J. Delany, Corp. Counsel (Theodore Connolly and Thomas F. Noonan, of counsel), for respondent.

PER CURIAM. Order affirmed, with costs.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur.

PERSONS et al., Respondents, v. BROWN, Appellant, et al. (Court of Appeals of New York. Nov. 15, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (93 App. Div. 604, 86 N. Y. Supp. 1144), entered March 17, 1904, affirming a judgment in favor of plaintiffs entered upon the report of a referee. Charles J. Bissell and J. Bradley Tanner, for appellant. Norris Morey, for respondents.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, BARTLETT, MARTIN, VANN, and WERNER, JJ., concur. O'BRIEN, J., absent.

PFEIFER, Respondent, v. SUPREME LODGE OF BOHEMIAN SLAVONIAN BENEV. SOC. OF UNITED STATES, Appellant. (Court of Appeals of New York. Nov. 15, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (81 App. Div. 613, 86 N. Y. Supp. 1144), entered February 25, 1904, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court.

appellant. Paul Jones and Francis J. Nekarda, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, BARTLETT, HAIGHT, MARTIN, VANN, and WERNER, JJ., concur.

PHILIPS, Appellant, v. PHILIPS et al., Respondents. (Court of Appeals of New York. Nov. 15, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (77 App. Div. 113, 78 N. Y. Supp. 1001), entered December 15, 1902, affirming a judgment in favor of defendants entered upon a verdict directed by the court. George M. Curtis, for appellant. William J. Curtis, for respondents.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, BARTLETT, HAIGHT, MARTIN, VANN, and WERNER, JJ., concur.

PHOENIX et al. v. TRUSTEES OF COLUMBIA COLLEGE IN CITY OF NEW YORK et al. (Court of Appeals of New York. Nov. 15, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (87 App. Div. 438, 84 N. Y. Supp. 897), entered December 18, 1903, which affirmed a judgment construing the will of Stephen W. Phoenix, deceased, and settling the accounts of his executors and trustees, entered upon the report of a referee. William B. Hornblower, Charles A. Boston, Frederick Allie, G. S. Buck, Henry A. Forster, John A. Weekes, and Arthur D. Weekes, for appellants. Charles L. Jones, for respondents.

PER CURIAM. Judgment affirmed, with costs, on opinion below.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, MARTIN, VANN, and WERNER, JJ., concur.

In re QUICK. (Court of Appeals of New York. Nov. 29, 1904.) Appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (92 App. Div. 131, 87 N. Y. Supp. 316), entered March 22, 1904, which reversed an order of the Saratoga County Court discharging the petitioner from imprisonment. Edgar T. Brackett, for appellant. John L. Henning, for respondent.

PER CURIAM. Order affirmed, with costs.

CULLEN, C. J., and GRAY, O'BRIEN, HAIGHT, and WERNER, JJ., concur. BARTLETT and VANN, JJ., dissent.

In re RANDALL. (Court of Appeals of New York. Jan. 24, 1905.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (90 N. Y. Supp. 1111), entered December 5, 1904, which affirmed an order of Special Term punishing the appellant, Randall, for contempt. Willard Parker Butler, Sanford Robinson, and Julius S. Workum, for appellant. Frank E. Blackwell, for respondents.

PER CURIAM. Order affirmed, with costs.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur.

REDMOND, Appellant, v. CITY OF NEW YORK, Respondent. (Court of Appeals of New York. Oct. 25, 1904.) Appeal from a judgment of the Appellate Division of the Su-

preme Court in the First Judicial Department (92 App. Div. 622, 87 N. Y. Supp. 1147), entered April 14, 1904, affirming a judgment in favor of plaintiff for part of amount claimed, entered upon a verdict directed by the court. L. Ladin Kellogg and Alfred C. Petté, for appellant. John J. Delany, Corp. Counsel (Theodore Connolly and Terence Farley, of counsel), for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and O'BRIEN, HAIGHT, MARTIN, VANN, and WERNER, JJ., concur. BARTLETT, J., not voting.

RETTAGLIATA, Appellant, v. HAYWARD et al., Respondents. (Court of Appeals of New York, Nov. 15, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (87 App. Div. 617, 84 N. Y. Supp. 1142), entered January 14, 1904, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court at a Trial Term. Gilbert Ray Hawes and John E. Judge, for appellant. Joseph N. Tuttle, for respondents.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, BARTLETT, HAIGHT, MARTIN, VANN, and WERNER, JJ., concur.

On Rehearing.

CULLEN, C. J. In disposing of this case we did not overlook our decision in the case of *Gmaehle v. Rosenberg*, 178 N. Y. 147, 70 N. E. 411, where we held that the employers' liability act (chapter 600, p. 1748, Laws 1902) did not render it necessary that the employé should give the notice of the accident required by the statute where he sought to enforce only a common-law liability. In the present case we think any liability that may have accrued must be wholly based upon the statute. There was no defect in the method adopted of lowering the tank bottom by jackscrews, or, if there were such defect, it was not the proximate cause of the accident. The difficulty occurred when, in the course of lowering the bottom by these screws, the plate assumed a cant or slant. Thereupon Murphy, the foreman, sent the deceased to place blocks underneath the plate. Here, if at all, was the negligence of Murphy. The plan adopted by defendants did not contemplate the presence of any workmen beneath the tank bottom. Murphy was not the alter ego of the master, but merely a foreman or superintendent, for whose negligence, apart from any statute, the defendants—under a line of authorities in this court, of which *Loughlin v. State of N. Y.*, 105 N. Y. 159, 11 N. E. 371, may be cited as a sample—were not liable. The motion for a reargument should be denied, with \$10 costs. Motion denied.

GRAY, BARTLETT, HAIGHT, MARTIN, VANN, and WERNER, JJ., concur.

RHINEHART et al., Appellants, v. REDFIELD, Commissioner of Public Works, Respondent. (Court of Appeals of New York, Oct. 25, 1904.) Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (93 App. Div. 410, 87 N. Y. Supp. 789), entered April 15, 1904, which reversed an order of Special Term granting a motion for a peremptory writ of mandamus to compel defendant to grant a permit to the relator to open certain streets in the borough of Brooklyn. Jesse Stearns, for appellants. John J. Delany, Corp. Counsel (James D. Bell, of counsel), for respondent.

PER CURIAM. Order affirmed, with costs, on opinion below.

CULLEN, C. J., and O'BRIEN, MARTIN, VANN, and WERNER, JJ., concur. GRAY and HAIGHT, JJ., absent.

ROBINSON, Respondent, v. METROPOLITAN ST. RY. CO., Appellant. (Court of Appeals of New York, Nov. 15, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (91 App. Div. 158, 86 N. Y. Supp. 442), entered February 15, 1904, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial. Bayard H. Ames, Charles F. Brown, and Henry A. Robinson, for appellant. Edward A. Alexander and Jerome H. Buck, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and O'BRIEN, BARTLETT, MARTIN, VANN, and WERNER, JJ., concur. GRAY, J., not sitting.

ROOT, Respondent, v. LONDON GUARANTEE & ACCIDENT CO., Limited, Appellant. (Court of Appeals of New York, Jan. 17, 1905.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (92 App. Div. 578, 86 N. Y. Supp. 1055), entered March 17, 1904, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial. Frank Gibbons, for appellant. Edward M. Sheldon and Louis L. Babcock, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur.

ROSSEAU, Respondent, v. ROUSS, Appellant. (Court of Appeals of New York, Jan. 24, 1905.) No opinion. Motion for reargument denied, with \$10 costs. See 180 N. Y. 116, 72 N. E. 916.

In re RYER et al. (Court of Appeals of New York, Jan. 24, 1905.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (94 App. Div. 449, 88 N. Y. Supp. 52), entered May 27, 1904, which modified and affirmed as modified a decree of the New York county Surrogate's Court judicially settling the accounts of John B. Ryer, as executor of Ellen A. Wilkinson, deceased. William G. Mulligan, for appellant. Samuel Levy, James M. Fisk, and Emanuel Arnstein, for respondents.

PER CURIAM. Order affirmed, with costs.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur.

SAMMONS et al., Respondents, v. ITHACA ST. RY. CO., Appellant. (Court of Appeals of New York, Oct. 28, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Third Judicial Department (88 App. Div. 618, 84 N. Y. Supp. 1144), entered November 17, 1903, affirming a judgment in favor of plaintiffs entered upon a verdict and an order denying a motion for a new trial. S. D. Halliday, for appellant. F. F. McAllister and D. M. Dean, for respondents.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and O'BRIEN, BARTLETT, HAIGHT, MARTIN, VANN, and WERNER, JJ., concur.

SIEBERT, Appellant, v. MILBANK et al., Respondents. (Court of Appeals of New York. Jan. 24, 1905.) Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the First Judicial Department (95 App. Div. 566, 88 N. Y. Supp. 993), entered July 12, 1904, which reversed an interlocutory judgment of Special Term overruling a demurrer to the complaint and sustained such demurrer. The following question was certified: "Does the complaint state facts sufficient to constitute a cause of action?" Richard M. Martin, for appellant. Francis D. Pollak, for respondents.

PER CURIAM. Order affirmed, with costs, with leave to plaintiff to serve amended complaint within 20 days after service of notice, upon payment of such costs. Question certified answered in the negative.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur.

In re **SKINNER.** (Court of Appeals of New York. Dec. 18, 1904.) Appeal from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (81 App. Div. 449, 80 N. Y. Supp. 1067), made March 13, 1903, which reversed a decree of the Oswego county Surrogate's Court dismissing the petition herein. J. T. McCaffrey and F. E. Hamilton, for appellant. Edwin J. Mizen and D. P. Morehouse, for respondent.

PER CURIAM. Order affirmed, without costs, on the prevailing opinion below.

CULLEN, C. J., and GRAY, O'BRIEN, HAIGHT, and MARTIN, JJ., concur. **BARTLETT and VANN, JJ.,** dissent on the opinion of **ADAMS, P. J.,** below.

SMITH, Appellant, v. SMITH, Respondent. (Court of Appeals of New York. Oct. 25, 1904.) Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (97 App. Div. 629, 89 N. Y. Supp. 1116), entered July 28, 1904, which affirmed an order of Special Term denying a motion to have taxed as costs certain disbursements incurred in making service of the summons and complaint. Jacob Neu, for appellant. J. H. K. Blauvelt, for respondent.

PER CURIAM. Appeal dismissed, with costs.

CULLEN, C. J., and O'BRIEN, MARTIN, VANN, and WERNER, JJ., concur. **GRAY and HAIGHT, JJ.,** absent.

SMITH, Appellant, v. UTICA KNITTING CO., Respondent. (Court of Appeals of New York. Nov. 15, 1904.) Appeal from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (87 App. Div. 620, 84 N. Y. Supp. 1146), entered November 11, 1903, reversing a judgment in favor of plaintiff entered upon a verdict and granting a new trial. P. H. Fitzgerald and John F. Gaffney, for appellant. F. G. Fincke, for respondent.

PER CURIAM. Order affirmed, and judgment absolute ordered for defendant on the stipulation, with costs.

CULLEN, C. J., and GRAY, BARTLETT, HAIGHT, MARTIN, VANN, and WERNER, JJ., concur.

SPEAR, Appellant, v. AMERICAN SERVICE UNION, Respondent. (Court of Appeals of New York. Oct. 28, 1904.) Appeal from a judgment of the Appellate Division of the Su-

(76 App. Div. 624, 78 N. Y. Supp. 493), entered November 17, 1902, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term without a jury. William E. Warland, for appellant. Edward S. Peck, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and O'BRIEN, BARTLETT, HAIGHT, MARTIN, VANN, and WERNER, JJ., concur.

STEEFEL et al., Appellants, v. ROTHSCCHILD, Respondent. (Court of Appeals of New York. Nov. 29, 1904.) No opinion. Motion for reargument denied, with \$10 costs. See 179 N. Y. 273, 72 N. E. 112.

STEVENS v. MARCELLUS ELECTRIC R. CO. et al. (Court of Appeals of New York. Nov. 29, 1904.) Appeal from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (94 App. Div. 609, 87 N. Y. Supp. 1149), entered April 11, 1904, which affirmed an order of Special Term requiring the defendants' attorney to pay into court and return certain sums illegally collected by him. M. F. Dillon, for appellant. William B. Crowley, for respondents.

PER CURIAM. Appeal dismissed, with costs.

CULLEN, C. J., and GRAY, O'BRIEN, HAIGHT, and WERNER, JJ., concur. **BARTLETT and VANN, JJ.,** took no part.

STIRLING v. KELLEY et al. (Court of Appeals of New York. Oct. 28, 1904.) Appeal by permission from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (90 App. Div. 611, 85 N. Y. Supp. 1148), entered January 20, 1904, which affirmed an order of the court at a Trial Term denying a motion to set aside a verdict and for a new trial. The following question was certified: Did the court commit reversible error in the rulings made by it, and contained in the following quotations from the case and exceptions on this appeal: (1) "Q. You heard Mr. Higham testify that he heard your father say or testify upon that occasion that he owned the property. Is that true? Objection. Mr. Williams: I do not ask if Mr. Higham's statement was true, but if he owned the property. Objection. Sustained. Exception to defendants." (2) "Q. I now ask, who owned that property? Objection. Sustained. Exception to defendants. The Court: The witness is disqualified under section 829 of the Code." (3) "Q. Where did the money come from that bought that property? Objection. Sustained. That calls for a conclusion, as well as violates the section. Exception to defendant." Harry D. Williams, for appellant. August Becker, for respondent.

PER CURIAM. Order affirmed, with costs, and question certified answered in the negative.

CULLEN, C. J., and O'BRIEN, BARTLETT, HAIGHT, MARTIN, VANN, and WERNER, JJ., concur.

SUTTER, Respondent, v. NEW YORK CENT. & H. R. R. CO., Appellant. (Court of Appeals of New York. Dec. 13, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (88 App. Div. 620, 84 N. Y. Supp. 1148), entered December 2, 1903, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new

PER CURIAM. Judgment affirmed, with costs.

O'BRIEN, BARTLETT, MARTIN, and VANN, JJ., concur. CULLEN, C. J., and HAIGHT, J., dissent. GRAY, J., not sitting.

TAYLOR, Respondent, v. McCLYMONDS, Appellant. (Court of Appeals of New York. Dec. 16, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (92 App. Div. 613, 86 N. Y. Supp. 1148), entered March 15, 1904, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial. Walter I. McCoy, for appellant. Lewis L. Fawcett, for respondent.

PER CURIAM. Appeal dismissed, with costs.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur.

In re TRACY et al. (Court of Appeals of New York. Dec. 6, 1904.) Motion to amend remittitur. See 179 N. Y. 501, 72 N. E. 519.

PER CURIAM. Motion granted, so as to allow a bill of costs in the Court of Appeals and in the Appellate Division to Oliver D. Burden, as special guardian, and as to allowing a bill of costs to William S. Turner denied, without costs.

TRADERS' NAT. BANK OF ROCHESTER, Respondent, v. SHIRE, Appellant. (Court of Appeals of New York. Nov. 15, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (90 App. Div. 613, 86 N. Y. Supp. 1148), entered February 16, 1904, affirming a judgment in favor of plaintiff entered upon the report of a referee. Edward L. Jellinek, for appellant. James Breck Perkins, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, BARTLETT, HAIGHT, MARTIN, VANN, and WERNER, JJ., concur.

TREMPER, Respondent, v. ERIE R. CO., Appellant. (Court of Appeals of New York. Nov. 15, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (86 App. Div. 879, 83 N. Y. Supp. 733), entered August 4, 1903, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial. Henry Bacon and Joseph Merritt, for appellant. Frank Lybolt, for respondent.

PER CURIAM. Appeal dismissed, with costs.

CULLEN, C. J., and GRAY, BARTLETT, HAIGHT, MARTIN, and WERNER, JJ., concur. VANN, J., not sitting.

TURNER et al., Appellants, v. MATHER et al., Respondents. (Court of Appeals of New York. Oct. 28, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (86 App. Div. 172, 83 N. Y. Supp. 1013), entered July 23, 1903, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term. William Townsend, for appellants. Smith M. Lindsley,

PER CURIAM. Judgment affirmed, with costs, on opinion of MERWIN, J., below.

CULLEN, C. J., and O'BRIEN, BARTLETT, MARTIN, VANN, and WERNER, JJ., concur. HAIGHT, J., absent.

WELSBACH CO., Appellant, v. NORWICH GAS & ELECTRIC CO., Respondent. (Court of Appeals of New York. Jan. 24, 1905.) Appeal by permission from a judgment of the Appellate Division of the Supreme Court in the Third Judicial Department (96 App. Div. 52, 89 N. Y. Supp. 284), entered July 6, 1904, upon an order which reversed an order of Special Term overruling a demurrer to the complaint and an interlocutory judgment entered thereon in favor of plaintiff, and sustained such demurrer. The following questions were certified: "(1) Was the complaint demurrable upon the ground that it appears upon the face thereof that the plaintiff did not have legal capacity to sue? (2) Was the complaint demurrable on the ground that facts are not therein stated sufficient to constitute a cause of action?" James P. Hill and J. J. Bixby, for appellant. C. Tracey Stagg, for respondent.

PER CURIAM. Judgment affirmed, with costs. Both questions certified answered in the affirmative.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur.

WHITSON, Appellant, v. MAYOR, ETC., OF NEW YORK, Respondent. (Court of Appeals of New York. Oct. 25, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (87 App. Div. 631, 84 N. Y. Supp. 1150), entered November 19, 1903, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term. Henry W. Unger and Louis J. Vorhaus, for appellant. John J. Delany, Corp. Counsel (Theodore Connolly, of counsel), for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and O'BRIEN, BARTLETT, HAIGHT, MARTIN, VANN, and WERNER, JJ., concur.

WOLF, Respondent, v. DEVITT, Appellant. (Court of Appeals of New York. Oct. 25, 1904.) Appeal from a judgment entered May 18, 1903, upon an order of the Appellate Division of the Supreme Court in the Second Judicial Department (83 App. Div. 42, 82 N. Y. Supp. 189), which reversed an order of the court at a Trial Term setting aside a verdict in favor of plaintiff, and granting a new trial, and directed judgment in accordance with the verdict. John F. Brennan, for appellant. Emerich Kohn and Abraham Brekstone, for respondent.

PER CURIAM. Judgment affirmed, with costs.

GRAY, BARTLETT, MARTIN, CULLEN, and WERNER, JJ., concur. VANN, J., not voting.

In re WOLFE'S ESTATE. (Court of Appeals of New York. Nov. 29, 1904.) Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (89 App. Div. 849, 85 N. Y. Supp. 949), entered December 30, 1903, which reversed a decree of the Orange county Surrogate's Court assessing a transfer tax upon a certain legacy bequeathed by the will of Christopher Wolfe,

William Edmond Curtis, for respondents.
PER CURIAM. Order affirmed, with costs.
CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, VANN, and WEBNER, JJ., concur.

WOLFF, Appellant, v. CITY OF NEW YORK, Respondent. (Court of Appeals of New York. Oct. 25, 1904.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (92 App. Div. 439, 87 N. Y. Supp. 214), entered April 13, 1904, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term without a jury. George I. Woolley, for appellant. John J. Delany, Corp. Counsel (Theodore Connolly and Terence Farley, of counsel), for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and O'BRIEN, BARTLETT, HAIGHT, MARTIN, VANN, and WEBNER, JJ., concur.

CONSUMERS' GAS TRUST CO. v. MOORE. (No. 20,421.) (Supreme Court of Indiana. Nov. 4, 1904.) Appeal from Superior Court, Madison County; Henry C. Ryan, Judge. Action by Thaddeus M. Moore against the Consumers' Gas Trust Company. Plaintiff had judgment, and defendant appealed. Transferred from the Appellate Court under Burns' Ann. St. 1901, § 1337u (Acts 1901, p. 590). Reversed. Miller, Elam & Fessler, for appellant. Dee R. Jones, for appellee.

MONKE, J. The questions presented in this case are substantially the same as those decided in Consumers' Gas Trust Co. v. Howard, 71 N. E. 493, Consumers' Gas Trust Co. v. Worth, 71 N. E. 489, Consumers' Gas Trust Co. v. Ink, 71 N. E. 477, Consumers' Gas Trust Co. v. Crystal Window Glass Co., 70 N. E. 368, and Consumers' Gas Trust Co. v. Littler, 70 N. E. 363; and upon the authority of these cases the judgment in this case is reversed, with instructions to overrule the demurrer to answer.

DAILY, County Assessor, v. WASHINGTON NAT. BANK. (No. 20,301.) (Supreme Court of Indiana. Nov. 29, 1904.) Appeal from Circuit Court, Daviess County; H. Q. Houghton, Judge. In the matter of the petition of John Daily, county assessor, for an order against the Washington National Bank to show cause why the papers of William B. Meredith should not be inspected. From a judgment overruling a petition praying that an order previously entered granting the relief sought for be set aside, the bank appeals. Dismissed. Hastings, Allen & Hastings, Padgett & Padgett, and O'Neill & O'Neill, for appellant. Heffernan & Mattingly and Gardiner & Slimp, for appellee.

HADLEY, J. The record in this case is in precisely the same condition and involves the identical questions involved in Daily v. Washington National Bank (No. 20,800, decided Nov. 15, 1904), 72 N. E. 260, except that in this case the inquiry related to the tax list of one Meredith; and upon the authority of the former case this appeal is dismissed.

SOUTHERN INDIANA RY. CO. v. WALLACE. (No. 20,356.) (Supreme Court of Indiana. Nov. 29, 1904.) Appeal from Circuit Court, Orange County; T. B. Buskirk, Judge. Action by Oliver M. Wallace against the Southern Indiana Railway Company. A judgment was rendered in favor of plaintiff, and defendant appeals. Transferred from Appellate

72 N. E.—73 Rehearing denied.

§ 1237u. Affirmed. F. M. Trissal and Brooks & Brooks, for appellant. Matson & Gilles, for appellee.

GILLETT, J. This case presents the same law questions as were involved in Southern Indiana R. Co. v. McCarrell, decided by this court May 24, 1904, and reported in 71 N. E. 158. Upon the authority of that case the judgment of the court below in this cause is affirmed.

CINCINNATI, R. & M. R. R. v. CROWL et al. (No. 5,011.) (Appellate Court of Indiana, Division No. 1. Dec. 13, 1904.) Appeal from Circuit Court, Miami County; Joseph N. Tillett, Judge. Suit between the Cincinnati, Richmond & Muncie Railroad and Edith J. Crowl and others. From a judgment for the latter, the former appeals. Affirmed. Robbins & Starr and Loveland & Loveland, for appellant. J. T. Cox, E. T. Reasner, J. W. O'Hara, and Albert Ward, for appellees.

ROBINSON, P. J. The controlling questions in this appeal are the same as those in Cincinnati, etc., R. Co. v. Miller (No. 5,010, decided Dec. 15, 1904) 72 N. E. 827; and upon the authority of that case the judgment is affirmed.

HANCOCK v. DIAMOND PLATE GLASS CO. et al. (No. 4,682.) (Appellate Court of Indiana, Division No. 1. Dec. 16, 1904.) Appeal from Superior Court, Howard County; E. F. Harness, Judge. Action by William Hancock against the Diamond Plate Glass Company and others. From a judgment for defendants, plaintiff appeals. Reversed. B. C. Moon, for appellant. Bell & Purdum and Blackledge, Shirley & Wolf, for appellees.

ROBINSON, P. J. The rule announced by the Supreme Court in Hancock v. Diamond Plate Glass Company (Feb. 16, 1904) 162 Ind. 146, 70 N. E. 149, decides some of the questions presented by this appeal adversely to appellees; and upon the authority of that case the judgment is reversed, with instructions to grant a new trial.

WABASH VALLEY COAL CO. v. FIRST NAT. BANK OF WABASH. (No. 5,170.) (Appellate Court of Indiana, Division No. 2. Feb. 1, 1905.) Appeal from Circuit Court, Parke County; Howard Maxwell, Special Judge. Action by the First National Bank of Wabash, Ind., against the Wabash Valley Coal Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed. Geo. S. Baker, for appellant. Puett & McFadden and N. G. Todd, for appellee.

COMSTOCK, C. J. Appellee brought this action against appellant on a promissory note executed by appellant to one Max Richberg (who was president of the appellant corporation) and held by appellee by indorsement of said Richberg. Appellant pleaded payment, to which answer appellee replied by general denial. A trial by the court resulted in a judgment in favor of appellee for the amount claimed. It is contended by appellant that payment was made in full before the commencement of the suit to A. L. Kemper & Co., the duly authorized agent of appellee to collect the note. Whether the payment was made, and whether Kemper & Co. was the agent of appellee, are the only questions involved in this appeal. We have carefully examined the evidence. It does not conclusively show that Kemper & Co. was the agent of appellee at the date named, and the plea of payment is lacking in a preponderance. No useful purpose could be served by setting out the evidence or discussing it. It was sufficient to sustain the judgment, and the same is therefore affirmed.

Rehearing denied. Transfer to Supreme Court denied.
Superseded by opinion, 77 N. E. 413. Rehearing denied.

ADAMS et al. v. DOLLINGER et al. (No. 8,321.) (Supreme Court of Ohio. April 5, 1904.) Error to Circuit Court, Miami County. Davy & St. John, for plaintiffs in error. J. H. Marlin, H. H. Williams, and A. F. Broomhall, for defendants in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and SHAUCK and CREW, JJ., concur.

ÆTNA LIFE INS. CO. v. HANNER. (No. 8,181.) (Supreme Court of Ohio. June 14, 1904.) Error to Circuit Court, Lucas County. James, Beverstock & Donahay and James, Millard & Powell, for plaintiff in error. Kinney & Newton and G. W. Kinney, for defendant in error.

PER CURIAM. On rehearing. Former judgment (70 N. E. 1114) set aside. Judgments of the circuit court and of the common pleas reversed, and judgment for plaintiff in error on the undisputed facts.

DAVIS, SHAUCK, PRICE, CREW, and SUMMERS, JJ., concur. **SPEAR, C. J.,** dissents on the ground stated in No. 8,180. 72 N. E. 1162.

ALEXANDER v. KEARSLEY et al. (No. 8,455.) (Supreme Court of Ohio. March 15, 1904.) Error to Circuit Court, Crawford County. Finley & Gallinger, for plaintiff in error. Harris & Sears and S. W. Bennett, for defendants in error.

PER CURIAM. Judgment affirmed, on grounds stated in journal entry.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, CREW, and SUMMERS, JJ., concur.

ANDERTON FRUIT CO. v. THACKER FRUIT CO. (No. 8,216.) (Supreme Court of Ohio. April 12, 1904.) Error to Circuit Court, Montgomery County. Wright & Ozias, for plaintiff in error. Rowe & Shuey, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, and CREW, JJ., concur. **SUMMERS, J.,** not sitting.

BACH v. GOFF. (No. 8,916.) (Supreme Court of Ohio. June 14, 1904.) Error to Circuit Court, Cuyahoga County. Pinney & Warner, for plaintiff in error. Kline, Carr, Tolles & Goff, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and SHAUCK, PRICE, CREW, and SUMMERS, JJ., concur.

BALTIMORE & O. R. CO. v. HOTTMAN. (No. 8,492.) (Supreme Court of Ohio. April 28, 1904.) Error to Circuit Court, Knox County. Waight & Moore and J. H. Collins, for plaintiff in error. C. M. Cist, F. V. Owen, and B. W. Cist, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and SHAUCK, PRICE, CREW, and SUMMERS, JJ., concur.

BALTIMORE & O. R. CO. v. STEWART. (No. 8,189.) (Supreme Court of Ohio. April 5, 1904.) Error to Circuit Court, Fayette County. J. H. Collins and H. B. Maynard, for plaintiff in error. H. Jones, for defendant in error.

PER CURIAM. Judgment reversed, and cause remanded. Grounds stated in journal entry.

DAVIS, SHAUCK, PRICE, and CREW, JJ., concur. **SUMMERS, J.,** not sitting.

BANK v. AKRON ST. RY. CO. et al. (No. 8,261.) (Supreme Court of Ohio. Feb. 16, 1904.) Error to Circuit Court, Summit County. Slabaugh & Seiberling, for plaintiff in error. Musser & Kohler, N. Morse, and Rogers, Rowley, Bradley & Rockwell, for defendants in error.

PER CURIAM. Judgment affirmed.

BURKET, C. J., and SPEAR, DAVIS, SHAUCK, and CREW, JJ., concur.

BARRETT v. SIMONS. (No. 8,079.) (Supreme Court of Ohio. March 22, 1904.) Error to Circuit Court, Franklin County. E. L. Hy-neman, for plaintiff in error. J. L. Davies, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, and CREW, JJ., concur. **SUMMERS, J.,** not sitting.

BEVITT v. DIEHL. (No. 8,826.) (Supreme Court of Ohio. May 3, 1904.) Error to Circuit Court, Clark County. D. F. Reinoehl, for plaintiff in error. G. S. Dial and Keifer & Keifer, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and SHAUCK and CREW, JJ., concur.

BIDDISON v. LUCHS. (No. 8,428.) (Supreme Court of Ohio. Feb. 16, 1904.) Error to Circuit Court, Washington County. Lewis & Sayre, for plaintiff in error. Way & Hancock and A. D. Follett, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, CREW, and SUMMERS, JJ., concur.

BIG VEIN COAL CO. v. WILLIAMS et al. (No. 8,404.) (Supreme Court of Ohio. June 21, 1904.) Error to Circuit Court, Columbiana County. Billingsley, Clark & Deford, for plaintiff in error. J. G. Moore & Hays, Potts & Wells, and Merrick & Williams, for defendants in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, and SUMMERS, JJ., concur.

BLAKESLEY v. SHAFER. (No. 8,273.) (Supreme Court of Ohio. April 5, 1904.) Error to Circuit Court, Hancock County. Phelps & David and F. Franks, for plaintiff in error. G. F. Pendleton and M. C. Shafer, for defendant in error.

PER CURIAM. Judgment affirmed.

DAVIS, PRICE, and SUMMERS, JJ., concur.

BODE v. RUEHRWEIN et al. (No. 8,265.) (Supreme Court of Ohio. May 3, 1904.) Error to Circuit Court, Hamilton County. A. H. Bode, for plaintiff in error. Stephens & Lincoln, for defendants in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and SHAUCK and CREW, JJ., concur.

BODE v. RUEHRWEIN et al. (No. 8,266.) (Supreme Court of Ohio. May 3, 1904.) Error to Circuit Court, Hamilton County. A. H. Bode, for plaintiff in error. Stephens & Lincoln, for defendants in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and SHAUCK and CREW, JJ., concur.

BOWERS v. STATE ex rel. LANCASTER. (No. 8,727.) (Supreme Court of Ohio. Feb. 16, 1904.) Error to Circuit Court, Fairfield County. J. W. Miller, C. D. Martin, and M. A. Daugherty, for plaintiff in error. A. W. Mitchoff, C. W. McCleery, and G. E. Martin, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, and CREW, JJ., concur.

BRATTEN et al. v. SEWALL et al. (No. 8,364.) (Supreme Court of Ohio. May 24, 1904.) Error to Circuit Court, Williams County. John M. Killits, for plaintiffs in error. Bowersox & Starr and O. A. Seiders, for defendants in error.

PER CURIAM. Judgment affirmed.

DAVIS, SHAUCK, PRICE, CREW, and SUMMERS, JJ., concur.

BRIGHT et al. v. CRONIN et al. (No. 8,319.) (Supreme Court of Ohio. May 10, 1904.) Error to Circuit Court, Monroe County. D. S. Spriggs and G. G. Jennings, for plaintiffs in error. T. A. Jeffers, Hoessler & Hoessler, F. W. Ketterer, A. J. Pearson, and W. E. Mallory, for defendants in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, CREW, and SUMMERS, JJ., concur.

BROWN et al. v. CLARK et al. (No. 8,086.) (Supreme Court of Ohio. March 29, 1904.) Error to Circuit Court, Franklin County. J. C. Nicholson and G. D. Jones, for plaintiffs in error. G. F. Castle, for defendants in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, and CREW, JJ., concur. SUMMERS, J., not sitting.

BRUMFIELD v. STRONG. (No. 8,372.) (Supreme Court of Ohio. June 7, 1904.) Error to Circuit Court, Richland County. Brucker & Cummins, for plaintiff in error. Jenner & Weldon, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, CREW, and SUMMERS, JJ., concur.

BUCKEYE STAVE CO. v. SMITH. (No. 8,484.) (Supreme Court of Ohio. March 22, 1904.) Error to Circuit Court, Wood County. Troup & Truesdale, for plaintiff in error. Baldwin & Harrington, for defendant in error.

PER CURIAM. Judgment affirmed. Grounds stated in journal entry.

SPEAR, C. J., and PRICE, CREW, and SUMMERS, JJ., concur.

BUCKLES v. CINCINNATI, ETC., RY. CO. (No. 8,288.) (Supreme Court of Ohio. May 24, 1904.) Error to Circuit Court, Miami County.

man & Campbell, for plaintiff in error. R. D. Marshall, A. McL. Marshall, and A. F. Broomhall, for defendant in error.

PER CURIAM. Final judgment for defendant in error.

DAVIS, SHAUCK, PRICE and CREW, JJ., concur. SPEAR, C. J., and SUMMERS, J., not sitting.

CHIPPEWA CO. v. TOWNSEND et al. (No. 8,340.) (Supreme Court of Ohio. May 10, 1904.) Error to Circuit Court, Medina County. Henderson & Quail and Lamson & Heath, for plaintiff in error. Elliott & Elliott and A. T. Hills, for defendants in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, CREW, and SUMMERS, JJ., concur.

CINCINNATI LEAF TOBACCO WAREHOUSE v. LOUDON. (No. 8,042.) (Supreme Court of Ohio. March 22, 1904.) Error to Circuit Court, Hamilton County. Galvin & Galvin, for plaintiff in error. William W. Prather, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, and CREW, JJ., concur. SUMMERS, J., not sitting.

CINCINNATI ST. RY. CO. v. WICHMANN. (No. 8,089.) (Supreme Court of Ohio. March 22, 1904.) Error to Circuit Court, Clermont County. Foraker, Outcalt, Granger & Prior, Davis & Woodleaf, and Frazier & Hicks, for plaintiff in error. C. L. Swain, H. L. Nichols, and G. B. Okey, for defendant in error.

PER CURIAM. Judgment reversed, and cause remanded. Grounds stated in journal entry.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, CREW, and SUMMERS, JJ., concur.

CINCINNATI & E. ELECTRIC RY. CO. et al. v. BRUCKER. (No. 8,665.) (Supreme Court of Ohio. April 19, 1904.) Error to Circuit Court, Hamilton County. Kinkead & Ellis and W. A. Hicks, for plaintiffs in error. O. K. Jones and Goebel & Bettinger, for defendant in error.

PER CURIAM. Judgment affirmed, on authority of Pittsburgh Coal Co. v. Y. & O. Coal Co. et al., 68 Ohio St. 278, 67 N. E. 485.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, and SUMMERS, JJ., concur.

CITIZENS' ELECTRIC RY., ETC., CO. v. BELL. (No. 8,278.) (Supreme Court of Ohio. May 3, 1904.) Error to Circuit Court, Richland County. Cummings, McBride & Wolfe, for plaintiff in error. Douglass & Mengert, for defendant in error.

PER CURIAM. Judgment affirmed.

DAVIS, PRICE, and SUMMERS, JJ., concur.

CITY OF CINCINNATI v. HERRMANN et al. COM'RS. (No. 8,825.) (Supreme Court of Ohio. April 12, 1904.) Error to Circuit Court, Hamilton County. C. J. Hunt, City Sol., for plaintiff in error. J. B. Frenkel and J. W. Warington, for defendants in error.

PER CURIAM. Judgment affirmed. Grounds stated in journal entry.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, CREW, and SUMMERS, JJ., concur.

CITY OF CINCINNATI v. TRUSTEES OF CINCINNATI SOUTHERN RY. et al. (No. 8,784.) (Supreme Court of Ohio. April 26, 1904.) Error to Superior Court of Cincinnati. Charles J. Hunt, City Sol., and George K. Nash, for plaintiff in error. Harmon, Colston, Goldsmith & Hoadly and J. R. Saylor, for defendants in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, CREW, and SUMMERS, JJ., concur.

CITY OF CINCINNATI v. TRUSTEES OF CINCINNATI SOUTHERN RY. et al. (No. 8,823.) (Supreme Court of Ohio. April 26, 1904.) Error to Superior Court of Cincinnati. Charles J. Hunt, City Sol., and George K. Nash, for plaintiff in error. Harmon, Colston, Goldsmith & Hoadly and J. R. Saylor, for defendants in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, CREW, and SUMMERS, JJ., concur.

CITY OF DAYTON v. NULL. (No. 8,646.) (Supreme Court of Ohio. April 26, 1904.) Error to Circuit Court, Montgomery County. Mr. Mathews, City Sol., and P. G. Burnham and W. D. Cline, Asst. Sols., for plaintiff in error. Sprigg & Fitzgerald and McMahon & McMahon, for defendant in error.

PER CURIAM. Judgment affirmed.

SHAUCK, PRICE, and CREW, JJ., concur. SUMMERS, J., not sitting.

CITY OF DAYTON et al. v. STATE ex rel. COTTERMAN. (No. 8,142.) (Supreme Court of Ohio. March 1, 1904.) Error to Circuit Court, Montgomery County. E. P. Mathews, for plaintiffs in error. McMahon & McMahon, for defendants in error.

PER CURIAM. Judgment reversed, and judgment for plaintiffs in error.

SPEAR, C. J., and DAVIS, SHAUCK, and CREW, JJ., concur. SUMMERS, J., not sitting.

CITY OF FINDLAY v. FINDLAY HOME TELEPHONE CO. et al. (No. 8,429.) (Supreme Court of Ohio. June 14, 1904.) Error to Circuit Court, Hancock County. Reed Metzler, for plaintiff in error. John Poe, W. L. Cary, Jr., and Blandin, Rice & Ginn, for defendants in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, CREW, and SUMMERS, JJ., concur.

CITY OF NORWALK v. GILSON. (No. 8,067.) (Supreme Court of Ohio. March 29, 1904.) Error to Circuit Court, Huron County. E. G. Martin and C. P. & L. W. Wickham, for plaintiff in error. Andrews & Andrews, for defendant in error.

PER CURIAM. Judgment affirmed.

DAVIS, SHAUCK, PRICE, CREW, and SUMMERS, JJ., concur.

CITY OF YOUNGSTOWN v. McNALLY et al. (No. 8,039.) (Supreme Court of Ohio. March 15, 1904.) Error to Circuit Court, Mahoning County. S. S. Conroy, for plaintiff in error. M. A. Norris, S. L. Clark, W. J. Lawthers, and L. B. Miller, for defendants in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, PRICE, CREW, and SUMMERS, JJ., concur.

CITY RY. CO. OF DAYTON et al. v. ENSLIN. (No. 8,256.) (Supreme Court of Ohio. May 3, 1904.) Error to Circuit Court, Allen County. McMahon & McMahon, Motter, Mackenzie & Weadock, R. D. Marshall, I. R. Longworth, and A. McL. Marshall, for plaintiffs in error. Horace A. Reeve, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and SHAUCK, CREW, and SUMMERS, JJ., concur. PRICE, J., not sitting.

CLEVELAND, C. C. & ST. L. RY. CO. v. VILLAGE OF CAREY. (No. 8,392.) (Supreme Court of Ohio. June 21, 1904.) Error to Circuit Court, Wyandot County. L. J. Hackney, J. T. Dye, and Carter & Goodrich, for plaintiff in error. Carey & Parker, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and PRICE, CREW, and SUMMERS, JJ., concur.

CLEVELAND, ETC., RY. CO. v. WENZ. (No. 8,634.) (Supreme Court of Ohio. March 22, 1904.) Error to Circuit Court, Tuscarawas County. J. M. Lessick and Healea & Healea, for plaintiff in error. J. A. Hostettler and Richards & McCullough, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and SHAUCK, PRICE, CREW, and SUMMERS, JJ., concur.

CLEVELAND & M. RY. CO. v. BENNETT. (No. 8,281.) (Supreme Court of Ohio. March 29, 1904.) Error to Circuit Court, Guernsey County. Mathews, Heade & Mathews, for plaintiff in error. J. B. Ferguson, for defendant in error.

PER CURIAM. Judgment reversed, and judgment for plaintiff in error on special findings.

DAVIS, SHAUCK, PRICE, CREW, and SUMMERS, JJ., concur.

COLUMBUS HOTEL CO. v. SAITER. (No. 8,170.) (Supreme Court of Ohio. April 5, 1904.) Error to Circuit Court, Franklin County. T. M. Steele and D. B. Sharp, for plaintiff in error. J. W. Mooney, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS and SHAUCK, JJ., concur. SUMMERS, J., not sitting.

COMMERCIAL NAT. BANK v. WHEELER et al. (No. 8,387.) (Supreme Court of Ohio. April 12, 1904.) Error to Circuit Court, Franklin County. F. F. D. Albery, for plaintiff in error. Bargar & Bargar and J. T. Holmes, Jr., for defendants in error.

PER CURIAM. Judgment affirmed.

DAVIS, PRICE, and CREW, JJ., concur. SUMMERS, J., not sitting.

CORNELL v. GEESAMAN. (No. 8,339.) (Supreme Court of Ohio. May 3, 1904.) Error to Circuit Court, Wayne County. W. F. Kean and L. D. Cornell, for plaintiff in error. McClure & Smyser, for defendant in error.

PER CURIAM. Judgment affirmed.

DAVIS, PRICE, and SUMMERS, JJ., concur.

COWLEY et al. v. INNIS et al. (No. 8,050.) (Supreme Court of Ohio. March 22, 1904.) Error to Circuit Court, Franklin County. Samuel Hambleton, for plaintiffs in error. J. J. Stoddard and L. H. Innis, for defendants in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS and PRICE, JJ., concur. SUMMERS, J., not sitting.

CURY v. GRAND LODGE A. O. U. W. et al. (No. 8,208.) (Supreme Court of Ohio. April 12, 1904.) Error to Circuit Court, Jackson County. E. B. Bingham and Kelley & Follett, for plaintiff in error. E. C. Powell, for defendants in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and SHAUCK, PRICE, CREW, and SUMMERS, JJ., concur.

DAGES, ANDREWS & CO. v. GROVE. (No. 8,091.) (Supreme Court of Ohio. March 22, 1904.) Error to Circuit Court, Fayette County. T. E. Powell, for plaintiff in error. Van Deman & Chaffin, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and SHAUCK and CREW, JJ., concur.

DAVENPORT v. GLOBE IRON WORKS CO. (No. 8,539.) (Supreme Court of Ohio. March 8, 1904.) Error to Circuit Court, Cuyahoga County. Edmund Hitchens and Skiles & Skiles, for plaintiff in error. E. K. Wilcox, for defendant in error.

PER CURIAM. Judgment affirmed.

DAVIS, SHAUCK, PRICE, CREW, and SUMMERS, JJ., concur.

DAVIDSON v. YOUNG. (No. 8,400.) (Supreme Court of Ohio. May 10, 1904.) Error to Circuit Court, Hamilton County. W. J. Davidson, for plaintiff in error. Arnold Speiser and Schorr & Wesselmann, for defendant in error.

PER CURIAM. Judgment affirmed.

DAVIS, PRICE, and SUMMERS, JJ., concur.

DONOGH v. WILLIAMS et al. (No. 8,272.) (Supreme Court of Ohio. March 22, 1904.) Error to Circuit Court, Hamilton County. Campbell & Glendening, for plaintiff in error. D. T. Wright, N. Wright, and E. H. Williams, pro se. J. James, N. Wright, and L. M. Mongan, for defendant in error Bradford.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and SHAUCK and SUMMERS, JJ., concur.

DOYLE v. BALTIMORE & O. RY. CO. (No. 4,929.) (Supreme Court of Ohio. June 14, 1904.) Error to Circuit Court, Franklin County. S. N. Owen, for plaintiff in error. J. H. Collins, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and SHAUCK and CREW, JJ., concur. SUMMERS, J., not sitting.

DRAKE et al. v. STATE ex rel. SHEETS, Atty. Gen. (No. 8,324.) (Supreme Court of Ohio. June 14, 1904.) Error to Circuit Court, Union County. W. T. Hoopes, G. B. Okey, and E. L. Hyneman, for plaintiffs in error. J. M.

Sheets, Atty. Gen., and J. L. Cameron, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, CREW, and SUMMERS, JJ., concur.

DROTT v. KOCH. (No. 8,011.) (Supreme Court of Ohio. March 1, 1904.) Error to Circuit Court, Hamilton County. S. T. Crawford, for plaintiff in error. Goebel & Bettinger, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS and CREW, JJ., concur.

DULING v. DULING et al. (No. 8,423.) (Supreme Court of Ohio. June 30, 1904.) Error to Circuit Court, Putnam County. George Fritz, for plaintiff in error. J. S. Ogan, for defendant in error.

PER CURIAM. Cause dismissed for non-compliance with section 1 of rule 2; the brief of plaintiff in error not containing a copy of the statute sought to have construed, and a construction of which is necessarily a determination of the case.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, and SUMMERS, JJ., concur.

ELLIS v. BOARD OF EDUCATION OF VILLAGE OF NEWCOMERSTOWN. (No. 8,376.) (Supreme Court of Ohio. June 7, 1904.) Error to Circuit Court, Tuscarawas County. Bowers & Buchanan, for plaintiff in error. E. B. Lindsay and Wilkin & Wilkin, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, CREW, and SUMMERS, JJ., concur.

ERNST et al. v. REIGER et al. (No. 8,332.) (Supreme Court of Ohio. May 3, 1904.) Error to Circuit Court, Putnam County. Bailey & Bailey, for plaintiffs in error. H. A. Reeve and J. F. Lindemann, for defendants in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, CREW, and SUMMERS, JJ., concur.

EUREKA FIRE, ETC., INS. CO. v. BALDWIN. (No. 8,072.) (Supreme Court of Ohio. March 22, 1904.) Error to Circuit Court, Cuyahoga County. Roger M. Lea, for plaintiff in error. J. F. Herrick and R. O. Hartshorne, for defendant in error.

PER CURIAM. Judgment reversed. Grounds stated in journal entry.

DAVIS, SHAUCK, CREW, and SUMMERS, JJ., concur.

FARMERS' MILLING, ETC., CO. v. OSBORN BANK et al. (No. 8,087.) (Supreme Court of Ohio. March 22, 1904.) Error to Circuit Court, Greene County. D. F. Reineohl and J. Johnson, Jr., for plaintiffs in error. R. H. Swadner and C. C. Shearer, for defendants in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, and CREW, JJ., concur.

GALBREATH v. COOPER. (No. 8,323.) (Supreme Court of Ohio. May 3, 1904.) Error to Circuit Court, Brown County. G. Bambach

PER CURIAM. Judgment affirmed.
SPEAR, C. J., and SHAUCK and CREW, JJ., concur.

GENERAL SYNOD OF EVANGELICAL LUTHERAN CHURCH et al. v. CULLER et al. (No. 8,277.) (Supreme Court of Ohio. May 3, 1904.) Error to Circuit Court, Ashland County. F. C. Semple, J. L. Zimmerman, and Cummings, McBride & Wolfe, for plaintiffs in error. H. D. Culler and McGray & McGray, for defendants in error.

PER CURIAM. Judgment affirmed; alleged misconduct of counsel not being properly brought into the record.

SHAUCK, PRICE, and CREW, JJ., concur.

GERMAN MUT. INS. CO. v. GIBSON. (No. 8,471.) (Supreme Court of Ohio. March 15, 1904.) Error to Superior Court of Cincinnati. Saylor & Saylor, for plaintiff in error. Ampt, Ireton, Collins & Schoenle, Co. Sols., E. Barton, and A. B. Benedict, for defendant in error.

PER CURIAM. Judgment affirmed.

DAVIS, SHAUCK, PRICE, CREW, and SUMMERS, JJ., concur.

GOMPFF et al. v. WOLFINGER et al. (No. 8,055.) (Supreme Court of Ohio. Feb. 23, 1904.) Error to Circuit Court, Marion County. Crissinger & Guthery, for plaintiffs in error. J. F. McNeal & Sons and Scofield, Durfee & Scofield, for defendants in error.

PER CURIAM. Judgment reversed, and judgment for plaintiffs in error on the facts found by the circuit court.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, CREW, and SUMMERS, JJ., concur.

GRAFF et al. v. MEGRUE et al. (No. 8,080.) (Supreme Court of Ohio. March 1, 1904.) Error to Circuit Court, Hamilton County. W. W. Symmes, for plaintiffs in error. Paxton & Warrington and W. T. Porter, for defendants in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS and CREW, JJ., concur.

GROVER v. GROVER. (No. 8,834.) (Supreme Court of Ohio. March 29, 1904.) Error to Circuit Court, Sandusky County. B. Meek and Hunt & De Ran, for plaintiff in error. Finch & Dewey, for defendant in error.

PER CURIAM. Judgment affirmed.

DAVIS, PRICE, and SUMMERS, JJ., concur.

GROVES et al. v. O'BRIEN. (No. 8,349.) (Supreme Court of Ohio. May 24, 1904.) Error to Circuit Court, Fayette County. F. A. Chaffin, for plaintiffs in error. H. H. Sanderson, for defendant in error.

PER CURIAM. Judgment reversed as per journal entry.

DAVIS, SHAUCK, PRICE, and CREW, JJ., concur. SPEAR, C. J., and SUMMERS, J., not sitting.

GROVES v. SELSOR. (No. 8,373.) (Supreme Court of Ohio. March 29, 1904.) Error to Circuit Court, Fayette County. Van Deman

PER CURIAM. Judgment affirmed.
DAVIS, SHAUCK, and CREW, JJ., concur.
SUMMERS, J., not sitting.

GROVES v. SELSOR et al. (No. 8,330.) (Supreme Court of Ohio. March 29, 1904.) Error to Circuit Court, Fayette County. J. N. Van Deman, for plaintiff in error. H. Jones, for defendants in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, and CREW, JJ., concur. SUMMERS, J., not sitting.

HALLADAY et al. v. STATE. (No. 8,202.) (Supreme Court of Ohio. April 5, 1904.) Error to Circuit Court, Erie County. King & Guerin, for plaintiffs in error. R. H. Williams, for the State.

PER CURIAM. Judgment affirmed.

SHAUCK, PRICE, and CREW, JJ., concur.

HALLETT v. REED. (No. 8,342.) (Supreme Court of Ohio. April 26, 1904.) Error to Circuit Court, Fulton County. C. C. Handy, for plaintiff in error. C. W. Everett and Troup & Truesdale, for defendant in error.

PER CURIAM. Judgment affirmed.

DAVIS, PRICE, and SUMMERS, JJ., concur.

HALLEY et al. v. HENGSTLER et al. (No. 8,104.) (Supreme Court of Ohio. March 29, 1904.) Error to Circuit Court, Auglaize County. Winn & Hay and Goeke, Hoskins & Musser, for plaintiffs in error. Stueve & Connaughton, for defendants in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, and SUMMERS, JJ., concur.

HAMBLIN v. HORTON et al. (No. 8,420.) (Supreme Court of Ohio. June 14, 1904.) Error to Circuit Court, Meigs County. C. E. Peoples and C. T. Lewis, for plaintiff in error. J. P. Bradbury, for defendants in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and SHAUCK and CREW, JJ., concur.

HAMLET OF ARLINGTON HEIGHTS v. ANDERSON et al. (No. 8,027.) (Supreme Court of Ohio. Feb. 23, 1904.) Error to Circuit Court, Hamilton County. Gorman & Thompson, for plaintiff in error. Wm. Worthington, for defendants in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, PRICE, CREW, and SUMMERS, JJ., concur.

HANNUM v. McGAFFIC. (No. 8,275.) (Supreme Court of Ohio. May 3, 1904.) Error to Circuit Court, Columbiana County. P. M. Smith and W. F. Lones, for plaintiff in error. L. C. Moore and J. G. Moore, for defendant in error.

PER CURIAM. Judgment affirmed.

DAVIS, PRICE, and SUMMERS, JJ., concur.

HARDIN COUNTY TREASURER et al. v. CHILDS. (No. 8,489.) (Supreme Court of Ohio. April 26, 1904.) Error to Circuit Court,

Hardin County. T. C. Mahon and Smick & Hodge, for plaintiffs in error. Stillings & Stillings and P. M. Crow, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE and CREW, JJ., concur.

HARDIN COUNTY TREASURER et al. v. GILL. (No. 8,487.) (Supreme Court of Ohio. April 26, 1904.) Error to Circuit Court, Hardin County. T. C. Mahon and Smick & Hodge, for plaintiffs in error. Stillings & Stillings and P. M. Crow, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, and CREW, JJ., concur.

HARDIN COUNTY TREASURER et al. v. PUGSLEY. (No. 8,488.) (Supreme Court of Ohio. April 26, 1904.) Error to Circuit Court, Hardin County. T. C. Mahon and Smick & Hodge, for plaintiffs in error. Stillings & Stillings and P. M. Crow, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, and CREW, JJ., concur.

HARLAN et al. v. BOARD OF EDUCATION OF CHESTER TP. et al. (No. 8,279.) (Supreme Court of Ohio. June 21, 1904.) Error to Circuit Court, Clinton County. A. E. Clevenger, P. Smith, and Thorpe & Miller, for plaintiffs in error. Smith & Clevenger, for defendants in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, CREW, and SUMMERS, JJ., concur.

HART v. WOODLAND AVE. SAVINGS & LOAN CO. (No. 8,442.) (Supreme Court of Ohio. May 24, 1904.) Error to Circuit Court, Cuyahoga County. James F. Wilson, for plaintiff in error. J. F. Walsh and Squire, Sanders & Dempsey, for defendant in error.

PER CURIAM. Judgment affirmed.

DAVIS, PRICE, and SUMMERS, JJ., concur.

HEINTZ et al. v. CAMERON et al. (No. 8,573.) (Supreme Court of Ohio. May 10, 1904.) Error to Circuit Court, Hamilton County. Outcalt & Foraker and C. W. Baker, for plaintiffs in error. J. E. Todd, W. Cushing, Dyer, Williams & Stouffer, Ampt, Ireton, Collins & Schoenle, and A. B. Benedict, for defendants in error.

PER CURIAM. Judgment affirmed.

SHAUCK, PRICE, and SUMMERS, JJ., concur.

HELLWARTH v. LE BLOND et al. (No. 8,124.) (Supreme Court of Ohio. April 5, 1904.) Error to Circuit Court, Mercer County. Marsh & Loree, for plaintiff in error. F. O. Le Blond and R. B. Landfair, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, CREW, and SUMMERS, JJ., concur.

HENLINE v. JACKSON et al. (No. 8,252.) (Supreme Court of Ohio. March 22, 1904.) Error to Circuit Court, Hancock County. Poe & Poe, for plaintiff in error. Phelps & David

and Blackford & Blackford, for defendants in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, CREW, and SUMMERS, JJ., concur.

HERRICK et al. v. KINSEY. (No. 8,289.) (Supreme Court of Ohio. May 10, 1904.) Error to Circuit Court, Sandusky County. C. P. & L. W. Wickham and Hunt & De Ran, for plaintiffs in error. Love & Culbert and Kinney & O'Farrell, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, CREW, and SUMMERS, JJ., concur.

HERTER v. SMITH. (No. 8,274.) (Supreme Court of Ohio. May 3, 1904.) Error to Circuit Court, Columbiana County. P. M. Smith and W. F. Lones, for plaintiff in error. L. C. Moore and W. S. Potts, for defendant in error.

PER CURIAM. Judgment affirmed.

DAVIS, PRICE, and SUMMERS, JJ., concur.

HINDE & DAUCH PAPER CO. v. GINGERY. (No. 8,107.) (Supreme Court of Ohio. April 5, 1904.) Error to Circuit Court, Allen County. Wheeler & Bentley, for plaintiff in error. Richie, Leland & Roby, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, CREW, and SUMMERS, JJ., concur.

HITCHCOCK v. HITCHCOCK et al. (No. 8,313.) (Supreme Court of Ohio. May 3, 1904.) Error to Circuit Court, Putnam County. Bailey & Bailey, for plaintiff in error. G. B. Killen and Leasure & Powell, for defendants in error.

PER CURIAM. Judgment affirmed.

DAVIS, PRICE, and SUMMERS, JJ., concur.

HOFF et al. v. COMMONS et al. (No. 8,017.) (Supreme Court of Ohio. March 1, 1904.) Error to Circuit Court, Darke County. Robeson & Yount, for plaintiffs in error. J. C. Clark and M. B. Trainor, for defendants in error.

PER CURIAM. Judgment affirmed.

DAVIS, PRICE, and CREW, JJ., concur.

HOLCOMB et al. v. DAEHLER. (No. 8,295.) (Supreme Court of Ohio. March 29, 1904.) Error to Circuit Court, Scioto County. A. T. Holcomb, D. Livingstone, and E. G. Miller, for plaintiffs in error. Bannon & Bannon, for defendant in error.

PER CURIAM. Judgment vacated, and cause remanded, with directions to consider bill of exceptions.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, CREW, and SUMMERS, JJ., concur.

HOSKINS v. WEST et al. (No. 8,353.) (Supreme Court of Ohio. May 17, 1904.) Error to Circuit Court, Ashtabula County. H. E. Starkey, for plaintiff in error. Parker & Soules, for defendants in error.

PER CURIAM. Judgment affirmed.

DAVIS, SHAUCK, PRICE, CREW, and SUMMERS, JJ., concur.

HOUSEHOLDER et al. v. HOUSEHOLDER et al. (No. 8,127.) (Supreme Court of Ohio. April 5, 1904.) Error to Circuit Court, Perry County. John Ferguson and J. E. Powell, for plaintiffs in error. H. D. Cochran, Donahue & Spencer, and W. E. Finck, for defendants in error.

PER CURIAM. Judgment affirmed.

DAVIS, SHAUCK, PRICE, and CREW, JJ., concur

HOWARD v. UMSTEAD. (No. 8,043.) (Supreme Court of Ohio. March 15, 1904.) Error to Circuit Court, Stark County. Charles C. Bow, for plaintiff in error. Taylor & Stewart, for defendant in error.

PER CURIAM. Judgment affirmed.

DAVIS, SHAUCK, PRICE, CREW, and SUMMERS, JJ., concur.

HOWE v. STATE ex rel. CARLTON. (No. 8,232.) (Supreme Court of Ohio. April 12, 1904.) Error to Circuit Court, Miami County. Long & Kyle, for plaintiff in error. J. H. Marlin, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, and CREW, JJ., concur. SUMMERS, J., not sitting.

HUBER v. SAHM. (No. 8,034.) (Supreme Court of Ohio. March 8, 1904.) Error to Circuit Court, Hamilton County. D. F. Cash, for plaintiff in error. O. J. McDiarmid and Ernst Rehm, for defendant in error.

PER CURIAM. Judgment affirmed, on authority of *McGinness v. Catholic Benevolent Legion*, 59 Ohio St. 531, 53 N. E. 54.

DAVIS, PRICE, and CREW, JJ., concur.

HUDDLESTON v. LONG. (No. 8,301.) (Supreme Court of Ohio. April 19, 1904.) Error to Circuit Court, Darke County. S. V. Hartman and D. W. Younker, for plaintiff in error. J. M. Hoel and A. C. Robeson, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and SHAUCK and CREW, JJ., concur.

HUMPHREY POP CORN CO. v. JOHNSON. (No. 8,263.) (Supreme Court of Ohio. May 3, 1904.) Error to Circuit Court, Cuyahoga County. Smith & Taft, for plaintiff in error. A. H. Martin, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and SHAUCK and CREW, JJ., concur.

HUNT v. VANNIMAN. (No. 8,432.) (Supreme Court of Ohio. June 14, 1904.) Error to Circuit Court, Greene County. W. A. Paxson, C. S. Perkins, and M. J. Hartley, for plaintiff in error. W. S. Howard and M. R. Snodgrass, for defendant in error.

PER CURIAM. Judgment affirmed.

DAVIS, SHAUCK, and CREW, JJ., concur. SUMMERS, J., not sitting.

HUSKE v. BOARD OF COM'RS OF JACKSON COUNTY. (No. 8,395.) (Supreme Court of Ohio. June 21, 1904.) Error to Circuit Court, Jackson County. Hogan, McFarland &

Sparks, for plaintiff in error. A. E. Jacobs, for defendant in error.

PER CURIAM. Judgment affirmed.

SHAUCK, PRICE, and CREW, JJ., concur.

HUTSON COAL CO. v. BARBER. (No. 8,389.) (Supreme Court of Ohio. June 21, 1904.) Error to Circuit Court, Portage County. T. H. Johnson and W. J. Beckley, for plaintiff in error. L. F. Hunter and I. T. Siddall, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and PRICE and CREW, JJ., concur.

JONES et al. v. ATWATER et al. (No. 8,019.) (Supreme Court of Ohio. Feb. 16, 1904.) Error to Circuit Court, Cuyahoga County. Foran, McTighe & Baker, for plaintiffs in error. C. W. Fuller, Chas. F. Morgan, and Henry & Couse, for defendants in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, and CREW, JJ., concur.

J. WELLER CO. v. GORDON et al. (No. 8,398.) (Supreme Court of Ohio. May 10, 1904.) Error to Circuit Court, Ottawa County. C. H. Graves and S. Stahl, for plaintiff in error. W. Gordon and M. Kelly, for defendants in error.

PER CURIAM. Judgment affirmed.

DAVIS, PRICE, and SUMMERS, JJ., concur.

KANAGE v. NORRIS. (No. 8,292.) (Supreme Court of Ohio. May 24, 1904.) Error to Circuit Court, Richland County. H. T. Manner and J. P. Seward, for plaintiff in error. O. M. Farber and Donnell & Marriott, for defendant in error.

PER CURIAM. Judgment affirmed.

DAVIS, SHAUCK, PRICE, CREW, and SUMMERS, JJ., concur. SPEAR, C. J., not sitting.

KELLER v. GROVES. (No. 8,310.) (Supreme Court of Ohio. May 10, 1904.) Error to Circuit Court, Tuscarawas County. S. Robinson and F. S. Romig, for plaintiff in error. Lindsay & Murphy, for defendant in error.

PER CURIAM. Judgment affirmed.

DAVIS, SHAUCK, PRICE, and CREW, JJ., concur.

KESSLER v. AXTELL et al. (No. 8,282.) (Supreme Court of Ohio. May 24, 1904.) Error to Circuit Court, Miami County. Gilbert, Shipman & Campbell, for plaintiff in error. W. S. Kessler and H. H. Williams, for defendant in error.

PER CURIAM. Judgment affirmed.

DAVIS, SHAUCK, PRICE, and CREW, JJ., concur. SPEAR, C. J., and SUMMERS, J., not sitting.

KIRKBRIDE v. KIRKBRIDE. (No. 8,231.) (Supreme Court of Ohio. April 12, 1904.) Error to Circuit Court, Hancock County. J. E. Priddy and Phelps & David, for plaintiff in error. J. N. Doty, Finebrock & Garver, and E. L. Bogue, for defendant in error.

PER CURIAM. Judgment reversed, and cause remanded. Grounds stated in journal entry.

SPEAR, C. J., and SHAUCK, CREW, and SUMMERS, JJ., concur.

KULUEKE v. P. R. MITCHELL CO. (No. 8,357.) (Supreme Court of Ohio. May 24, 1904.) Error to Circuit Court, Hamilton County. R. E. Werner and E. Rehm, for plaintiff in error. E. W. Strong and H. Jenney, for defendant in error.

PER CURIAM. Judgment affirmed.

DAVIS, SHAUCK, PRICE, CREW, and SUMMERS, JJ., concur. **SPEAR, C. J.,** not sitting.

LAKE SHORE & M. S. RY. CO. v. CITY OF TOLEDO et al. (No. 8,269.) (Supreme Court of Ohio. Feb. 23, 1904.) Error to Circuit Court, Lucas County. E. D. Potter, for plaintiff in error. P. A. MacGahan, for defendants in error.

PER CURIAM. Judgment reversed, and judgment for plaintiff in error.

SPEAR, C. J., and **DAVIS, SHAUCK, and CREW, JJ.,** concur.

LAKE SHORE & M. S. RY. CO. v. HEIDER. (No. 8,270.) (Supreme Court of Ohio March 15, 1904.) Error to Circuit Court, Sandusky County. E. D. Potter, G. C. Dreene, and F. J. Jerome, for plaintiff in error. Jesse Vickery, for defendant in error.

PER CURIAM. Judgment of the circuit court reversed, and judgment of the common pleas affirmed.

SPEAR, C. J., and **DAVIS, SHAUCK, PRICE, CREW, and SUMMERS, JJ.,** concur.

LEHMAN et al. v. SIBLEY et al. (No. 8,085.) (Supreme Court of Ohio. March 22, 1904.) Error to Circuit Court, Scioto County. T. C. Anderson, for plaintiffs in error. O. W. Newman and J. W. Bannon, for defendants in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and **DAVIS, SHAUCK, and SUMMERS, JJ.,** concur.

LIMA ELECTRIC RY. CO. v. SHERMAN. (No. 8,206.) (Supreme Court of Ohio. April 5, 1904.) Error to Circuit Court, Allen County. Richie & Richie and Cable & Parmenter, for plaintiff in error. Bidenour & Halfhill, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and **DAVIS, SHAUCK, PRICE, CREW, and SUMMERS, JJ.,** concur.

LINTHWAITE v. CITY OF COLUMBUS et al. (No. 8,359.) (Supreme Court of Ohio. May 24, 1904.) Error to Circuit Court, Franklin County. R. H. Platt, E. L. Taylor, and J. H. Collins, for plaintiff in error. Merrick & Williams, for defendants in error.

PER CURIAM. Judgment affirmed.

DAVIS, SHAUCK, and CREW, JJ., concur. **SPEAR, C. J.,** and **SUMMERS, J.,** not sitting.

LOVELAND v. STATE. (No. 8,817.) (Supreme Court of Ohio. June 23, 1904.) Error to Circuit Court, Franklin County. G. H. Bargar and John J. Chester, for plaintiff in error. E. L. Taylor, Jr., Pros. Atty., A. T. Seymour, K. T. Webber, and W. E. King, Asst. Pros. Attys., for the State.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and **DAVIS, SHAUCK, and PRICE, JJ.,** concur. **SUMMERS, J.,** not sitting.

LYON et al. v. FRENCH et al. (No. 8,227.) (Supreme Court of Ohio. April 12, 1904.) Error to Circuit Court, Morrow County. Harlan & Wood, for plaintiffs in error. L. K. Powell, for defendants in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and **DAVIS, SHAUCK, PRICE, and CREW, JJ.,** concur.

McARTOR v. WILLIAMS et al. (No. 8,329.) (Supreme Court of Ohio. May 24, 1904.) Error to Circuit Court, Perry County. Crossan & Binckley, for plaintiff in error. Donahue & Spencer, for defendants in error.

PER CURIAM. Judgment affirmed.

DAVIS, SHAUCK, PRICE, CREW, and SUMMERS, JJ., concur. **SPEAR, C. J.,** not sitting.

McARTOR v. WILLIAMS et al. (No. 8,330.) (Supreme Court of Ohio. May 24, 1904.) Error to Circuit Court, Perry County. Crossan & Binckley, for plaintiff in error. Donahue & Spencer, for defendants in error.

PER CURIAM. Judgment affirmed.

DAVIS, SHAUCK, PRICE, CREW, and SUMMERS, JJ., concur. **SPEAR, C. J.,** not sitting.

McBETH v. NEU. (No. 8,280.) (Supreme Court of Ohio. May 3, 1904.) Error to Circuit Court, Brown County. R. L. Fite, for plaintiff in error. J. R. Moore, for defendant in error.

PER CURIAM. Judgment affirmed.

DAVIS, PRICE, and SUMMERS, JJ., concur.

McCORMICK v. DUNKER et al. (No. 8,399.) (Supreme Court of Ohio. May 10, 1904.) Error to Circuit Court, Hamilton County. Cohen & Mack, for plaintiff in error. W. W. Bellew and Herman Merrell, for defendants in error.

PER CURIAM. Judgment affirmed.

DAVIS, PRICE, and SUMMERS, JJ., concur.

MAHONING VAL. RY. CO. v. VAN ALSTINE. (No. 8,285.) (Supreme Court of Ohio. April 19, 1904.) Error to Circuit Court, Mahoning County. Arrel, McVey & Robinson, for plaintiff in error. Murray & Koonce, for defendant in error.

PER CURIAM. Judgment affirmed.

DAVIS, PRICE, and SUMMERS, JJ., concur.

MANN v. MANN et al. (No. 8,320.) (Supreme Court of Ohio. April 19, 1904.) Error to Circuit Court, Miami County. Gottschall & Limbert, Ira Crawford and W. S. McConaughy, for plaintiff in error. M. K. Gantz, for defendants in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and **SHAUCK and CREW, JJ.,** concur.

MARVIN v. TROUT. (No. 8,416.) (Supreme Court of Ohio. March 15, 1904.) Error to Circuit Court, Hancock County. G. H. Phelps, A. Graber, J. A. Bope, and G. F. Pen-

defendant in error.

PER CURIAM. Judgment affirmed.
SPEAR, C. J., and DAVIS, SHAUCK,
PRICE, CREW, and SUMMERS, JJ., concur.

MARVIN v. TROUT. (No. 8,417.) (Supreme Court of Ohio. March 15, 1904.) Error to Circuit Court, Hancock County. G. F. Pendleton, G. H. Phelps, A. Graber, and J. A. Bepe, for plaintiff in error. Poe & Poe, for defendant in error.

PER CURIAM. Judgment affirmed.
SPEAR, C. J., and DAVIS, SHAUCK,
PRICE, CREW, and SUMMERS, JJ., concur.

MATTHEWS, CITY SOL. v. SOUTHERN OHIO TRACTION CO. (No. 8,354.) (Supreme Court of Ohio. March 15, 1904.) Error to Circuit Court, Montgomery County. E. P. Matthews, City Sol., P. G. Burnham, and W. D. Cline, Asst. Sols., for plaintiff in error. McMahon & McMahon, for defendant in error.

PER CURIAM. Judgment affirmed.
DAVIS, SHAUCK, PRICE, and CREW,
JJ., concur. SUMMERS, J., not sitting.

METZGAR v. DUNLAP. (No. 8,257.) (Supreme Court of Ohio. April 19, 1904.) Error to Circuit Court, Erie County. H. L. Peeke, for plaintiff in error. King & Guerin, for defendant in error.

PER CURIAM. Judgment affirmed.
DAVIS, PRICE, and SUMMERS, JJ., concur.

MILLER v. BOARD OF DIRECTORS et al. (No. 8,100.) (Supreme Court of Ohio. March 29, 1904.) Error to Circuit Court, Greene County. J. A. Cook, for plaintiff in error. T. L. Magruder and Marcus Shoup, for defendants in error.

PER CURIAM. Judgment affirmed.
SPEAR, C. J., and DAVIS, SHAUCK,
PRICE, and CREW, JJ., concur. SUMMERS, J., not sitting.

MILNER & CO. v. BLICKLEY. (No. 8,171.) (Supreme Court of Ohio. March 1, 1904.) Error to Circuit Court, Lucas County. Doyle & Lewis and J. W. Schaufelberger, for plaintiff in error. Southard & Southard, for defendant in error.

PER CURIAM. Judgment of the circuit court reversed, and judgment of the common pleas affirmed.

DAVIS, SHAUCK, PRICE, CREW, and SUMMERS, JJ., concur.

MORRIS & GUILD CO. v. TOUVELLE. (No. 8,560.) (Supreme Court of Ohio. March 15, 1904.) Error to Circuit Court, Guernsey County. Fred L. Rosemond, for plaintiff in error. Robert T. Scott, for defendant in error.

PER CURIAM. Judgment reversed, and judgment for plaintiff in error, for reason shown in journal entry.

DAVIS, SHAUCK, CREW, and SUMMERS, JJ., concur.

MORTGAGE LOAN CO. v. RATTERMAN. (No. 8,365.) (Supreme Court of Ohio. June 28, 1904.) Error to Circuit Court, Hamilton County. George W. Cormany and Schwab &

for defendant in error.

PER CURIAM. Judgment affirmed.
SPEAR, C. J., and DAVIS and PRICE, JJ., concur.

(70 Ohio St. 504)
NATIONAL LIFE INS. CO. v. HANNER (No. 8,180.) (Supreme Court of Ohio. June 14, 1904.) Error to Circuit Court, Lucas County. Doyle & Lewis, for plaintiff in error. Kinney & Newton and G. W. Kinney, for defendant in error.

PER CURIAM. On rehearing. Former judgment (70 N. E. 1126) set aside. Judgments of the circuit court and of the common pleas reversed, and judgment for plaintiff in error on undisputed facts.

DAVIS, SHAUCK, PRICE, CREW, and SUMMERS, JJ., concur. SPEAR, C. J., dissents, on the ground that the rendition of judgment for plaintiff in error results in a denial of the constitutional right of trial by jury, as it substitutes the judgment of five men selected to pass upon questions of law for the judgment of twenty-four men (two juries), selected especially for the determination of questions of fact, supplemented by two judges of the common pleas and of three judges of the circuit court, all of whom are also selected for the duty of determining questions of fact.

NEWARK PUB. CO. et al. v. DONOVAN. (No. 8,029.) (Supreme Court of Ohio. March 1, 1904.) Error to Circuit Court, Franklin County. S. L. James and W. H. English, for plaintiffs in error. J. R. Davies, for defendant in error.

PER CURIAM. Judgment affirmed.
SPEAR, C. J., and SHAUCK, PRICE, and CREW, JJ., concur. SUMMERS, J., not sitting.

NICOLA BROS. CO. v. QUEEN CITY BOX CO. (No. 8,476.) (Supreme Court of Ohio. May 24, 1904.) Error to Superior Court of Cincinnati. C. W. Baker, for plaintiff in error. Mr. Bonham and Coffey, Mallen, Mills & Vorderberg, for defendant in error.

PER CURIAM. Judgment affirmed.
DAVIS, PRICE, and SUMMERS, JJ., concur.

NIGH LUMBER CO. v. McKEE. (No. 8,243.) (Supreme Court of Ohio. March 1, 1904.) Error to Circuit Court, Lawrence County. J. L. Anderson and L. R. Andrews, for plaintiff in error. Corn & Thompson, for defendant in error.

PER CURIAM. Judgment affirmed.
SPEAR, C. J., and PRICE, and SUMMERS, JJ., concur.

NORFOLK & W. RY. CO. v. LOGEE et al. (No. 8,464.) (Supreme Court of Ohio. April 26, 1904.) Error to Circuit Court, Lucas County. E. D. Potter, A. L. Smith, and J. I. Doran, for plaintiff in error. C. O. Hunter, King & Tracy, O. S. Brumback, and C. A. Thatcher, for defendants in error.

PER CURIAM. Judgment as to plaintiff in error and as to defendant in error the Hocking Railway Company affirmed.

SPEAR, C. J., and PRICE and CREW, JJ., concur as to plaintiff in error. SPEAR, C. J., and SHAUCK, PRICE, CREW, and SUMMERS, JJ., concur as to defendant in error.

NOVAK v. AMERICAN WASHBOARD CO. (No. 8,457.) (Supreme Court of Ohio. May 24, 1904.) Error to Circuit Court, Cuyahoga County. Blandin, Rice & Ginn, for plaintiff in error. Ford, Snyder, Henry & McGraw, for defendant in error.

PER CURIAM. Judgment affirmed.
DAVIS, PRICE, and SUMMERS, JJ., concur.

O'DELL v. STRADER et al. (No. 8,245.) (Supreme Court of Ohio. May 3, 1904.) Error to Circuit Court, Hamilton County. Shay & Cogan, for plaintiff in error. Kelley & Hauck, for defendants in error.

PER CURIAM. Judgment affirmed.
SPEAR, C. J., and SHAUCK and CREW, JJ., concur.

PARKINSON et al. v. PARKINSON et al. (No. 8,381.) (Supreme Court of Ohio. June 7, 1904.) Error to Circuit Court, Jefferson County. W. S. McCauslen and Dio Rogers, for plaintiffs in error. J. A. Kithcart and D. A. Hollingsworth, for defendants in error.

PER CURIAM. Judgment affirmed.
DAVIS, PRICE, and CREW, JJ., concur.

PECK-HAMMOND CO. v. EVANS. (No. 8,418.) (Supreme Court of Ohio. May 17, 1904.) Error to Circuit Court, Hamilton County. Heron, Gatch & Herron and S. M. Withrow, for plaintiff in error. Harmon, Colston, Goldsmith & Hoadly, for defendant in error.

PER CURIAM. Judgment of the circuit court reversed, and that of the common pleas affirmed.

SPEAR, C. J., and SHAUCK, PRICE, CREW, and SUMMERS, JJ., concur.

PENNSYLVANIA CO. v. McELROY. (No. 8,347.) (Supreme Court of Ohio. May 17, 1904.) Error to Circuit Court, Tuscarawas County. Healea & Healea, for plaintiff in error. E. E. Lindsay, for defendant in error.

PER CURIAM. Judgment affirmed.
DAVIS, SHAUCK, PRICE, CREW, and SUMMERS, JJ., concur.

PITTSBURG, etc., RY. CO. v. BROCK. (No. 8,599.) (Supreme Court of Ohio. March 22, 1904.) Error to Circuit Court, Tuscarawas County. Dunbar & Sweeney and T. D. Healea, for plaintiff in error. T. H. Loller and D. A. Hollingsworth, for defendant in error.

PER CURIAM. Judgment of the circuit court reversed, and judgment of the common pleas affirmed.

DAVIS, SHAUCK, PRICE, CREW, and SUMMERS, JJ., concur.

PENNSYLVANIA, etc., RY. CO. v. JACOBY et al. (No. 8,209.) (Supreme Court of Ohio. March 1, 1904.) Error to Circuit Court, Clark County. Charles Darlington, for plaintiff in error. Bowman & Bowman, for defendants in error.

PER CURIAM. Judgment of the circuit court reversed, and judgment of the common pleas affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, and CREW, JJ., concur. **SUMMERS, J.,** not sitting.

PITTSBURG & C. PACKET LINE v. WALL. (No. 8,422.) (Supreme Court of Ohio. March 15, 1904.) Error to Circuit Court, Gallia County. H. C. Johnson and R. J. Mauck, for plaintiff in error. R. M. Switzer and C. W. White, for defendant in error.

PER CURIAM. Judgment reversed, and cause remanded. Grounds stated in the journal entry.

SPEAR, C. J., and DAVIS, SHAUCK, and CREW, JJ., concur.

PORTER v. CLOTTS et al. (No. 8,308.) (Supreme Court of Ohio. May 24, 1904.) Error to Circuit Court, Franklin County. J. T. Holmes, Jr., for plaintiff in error. D. Clotts, for defendants in error.

PER CURIAM. Judgment affirmed.
DAVIS, SHAUCK, PRICE, and CREW, JJ., concur. **SPEAR, C. J., and SUMMERS, J.,** not sitting.

PORTSMOUTH ST. RY., etc., CO. v. RUSSELL. (No. 8,587.) (Supreme Court of Ohio. March 22, 1904.) Error to Circuit Court, Scioto County. T. E. Anderson and A. T. Holcomb, for plaintiff in error. Noah J. Dever, for defendant in error.

PER CURIAM. Judgment vacated, and cause remanded to the circuit court, with direction to consider the bill of exceptions as to the weight of the evidence.

DAVIS, SHAUCK, PRICE, CREW, and SUMMERS, JJ., concur.

POWELL v. GALLAGHER. (No. 8,286.) (Supreme Court of Ohio. April 19, 1904.) Error to Circuit Court, Mahoning County. Arrel, McVey & Robinson, for plaintiff in error. Murray & Koonce and McNamara, Jr., for defendant in error.

PER CURIAM. Judgment affirmed.
DAVIS, PRICE, and SUMMERS, JJ., concur.

RAYMER v. GENDRON. (No. 8,191.) (Supreme Court of Ohio. June 7, 1904.) Error to Circuit Court, Lucas County. O. S. Brumback and C. A. Thatcher, for plaintiff in error. Smith & Baker, for defendant in error.

PER CURIAM. Former judgment adhered to.
DAVIS, CREW, and SUMMERS, JJ., concur. **SPEAR, C. J., and SHAUCK and PRICE, JJ.,** dissent.

REINHARD v. RECTOR. (No. 8,071.) (Supreme Court of Ohio. March 22, 1904.) Error to Circuit Court, Franklin County. Abernathy & Folsom and J. E. Sater, for plaintiff in error. Pugh & Pugh, for defendant in error.

PER CURIAM. Judgment affirmed.
SPEAR, C. J., and DAVIS, SHAUCK, PRICE, and CREW, JJ., concur. **SUMMERS, J.,** not sitting.

RICE v. JAKUBOVSKY. (No. 8,177.) (Supreme Court of Ohio. April 5, 1904.) Error to Circuit Court, Cuyahoga County. James F. Wilson, for plaintiff in error. J. W. Sykora, for defendant in error.

PER CURIAM. Judgment affirmed.
DAVIS, SHAUCK, PRICE, and SUMMERS, JJ., concur.

RICHMOND v. KELLY. (No. 8,216.) (Supreme Court of Ohio. May 3, 1904.) Error to Circuit Court, Van Wert County. H. C. Glenn, for plaintiff in error. H. G. Richie, for defendant in error.

PER CURIAM. Judgment affirmed.

DAVIS, PRICE, and SUMMERS, JJ., concur.

ROBERTSON v. BANK OF PIQUA. (No. 8,322.) (Supreme Court of Ohio. April 5, 1904.) Error to Circuit Court, Miami County. A. W. De Weese and A. F. Broomhall, for plaintiff in error. Long & Kyle and McMahon & McMahon, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and SHAUCK and CREW, JJ., concur.

SAUNDERS et al. v. STATE. (No. 8,178.) (Supreme Court of Ohio. April 5, 1904.) Error to Circuit Court, Gallia County. R. M. Switzer and E. D. Davis, for plaintiffs in error. J. H. Thomas, Pros. Atty., and J. M. Sheets, Atty. Gen., for the State.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, CREW, and SUMMERS, JJ., concur.

SCHRADIN v. SCHRADIN. (No. 8,344.) (Supreme Court of Ohio. May 10, 1904.) Error to Circuit Court, Hamilton County. Jerome D. Creed, for plaintiff in error. Louis G. Hummel, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, CREW, and SUMMERS, JJ., concur.

SHANLEY v. ESPY et al. (No. 8,414.) (Supreme Court of Ohio. March 22, 1904.) Error to Circuit Court, Champaign County. West & West and Waite & Deaton, for plaintiff in error. F. A. Zimmer, T. J. Frank, and J. W. Flaughter, for defendants in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, and CREW, JJ., concur. SUMMERS, J., not sitting.

SHAW v. GINN et al. (No. 8,362.) (Supreme Court of Ohio. March 8, 1904.) Error to Circuit Court, Cuyahoga County. Walter C. Ong, for plaintiff in error. Ford, Snyder, Henry & McGraw, for defendants in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, CREW, and SUMMERS, JJ., concur.

SHELBY COUNTY COM'RS et al. v. GROSS et al. (No. 8,303.) (Supreme Court of Ohio. March 1, 1904.) Error to Circuit Court, Shelby County. Goeke & Hoskins, H. W. Robinson, and J. D. Barnes, for plaintiffs in error. Samuel H. West, for defendants in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, and CREW, JJ., concur. SUMMERS, J., not sitting.

SHEROK v. KNAPP. (No. 8,328.) (Supreme Court of Ohio. April 26, 1904.) Error to Circuit Court, Sandusky County. Jesse

Vickery and Richards & Heener, for defendant in error.

PER CURIAM. Judgment affirmed.

DAVIS, PRICE, and SUMMERS, JJ., concur.

SHIELDS v. GIBSON. (No. 8,397.) (Supreme Court of Ohio. Feb. 16, 1904.) Error to Circuit Court, Hamilton County. Richards, Baer & Richards and W. M. Ampt, for plaintiff in error. Ampt, Ireton, Collins & Schoenle, for defendant in error.

PER CURIAM. Judgment affirmed.

DAVIS, SHAUCK, PRICE, and CREW, JJ., concur.

SIBSON v. WILLIAMS et al. (No. 8,402.) (Supreme Court of Ohio. June 21, 1904.) Error to Circuit Court, Trumbull County. E. E. Roberts and R. Sibson, for plaintiff in error. Johnston & Calvin, for defendants in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and SHAUCK, PRICE, and SUMMERS, JJ., concur.

SLACK v. SMITH et al. (No. 8,421.) (Supreme Court of Ohio. June 7, 1904.) Error to Circuit Court, Hancock County. H. F. Burket and Brewer, Cook & McGowan, for plaintiff in error. Blackford & Blackford, for defendants in error.

PER CURIAM. Judgment reversed, and cause remanded. Grounds stated in journal entry.

SPEAR, C. J., and SHAUCK, PRICE, CREW, and SUMMERS, JJ., concur.

SOUTHARD et al. v. STONE. (No. 8,220.) (Supreme Court of Ohio. April 12, 1904.) Error to Circuit Court, Darke County. G. W. Porter, S. V. Hartman, and J. G. O'Donnell, for plaintiffs in error. Shockney & Shockney and Teegarden & Harrison, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, and CREW, JJ., concur. SUMMERS, J., not sitting.

STALKER v. STALKER. (No. 8,226.) (Supreme Court of Ohio. April 12, 1904.) Error to Circuit Court, Lucas County. Hamilton & Kirby and H. Van Campen, Jr., for plaintiff in error. Marshall & Fraser, for defendants in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, CREW, and SUMMERS, JJ., concur.

STATE v. BERBERICH. (No. 8,059.) (Supreme Court of Ohio. March 22, 1904.) Exceptions from Court of Common Pleas, Hamilton County. O. J. Renner, for the State. E. M. Ballard, for defendant.

PER CURIAM. Exceptions sustained, on authority of State v. Ehinger, 67 Ohio St. 51, 65 N. E. 148, and State v. Arata, 69 Ohio St. 211, 68 N. E. 1048. The sum of \$25 is allowed as a fee to Edward M. Ballard, Esq., appointed to argue against the exceptions, to be paid from the treasury of Hamilton county.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, CREW, and SUMMERS, JJ., concur.

STATE v. BORGER. (No. 8,854.) (Supreme Court of Ohio. June 14, 1904.) Error to Circuit Court, Franklin County. W. H. Ellis, Atty. Gen., and S. W. Bennett, for the State. F. A. Davis and G. B. Okey, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and SHAUCK, PRICE, and CREW, JJ., concur. SUMMERS, J., not sitting.

STATE v. BROOKMAN. (No. 8,081.) (Supreme Court of Ohio. March 1, 1904.) Error from Court of Common Pleas, Columbiana County. Exceptions by prosecuting attorney of Columbiana County. J. H. Brookes, for plaintiff in error. Billingsley, Taylor & Clark, for defendant in error.

PER CURIAM. Exceptions overruled, on authority of *Railway Co. v. Schafer*, 65 Ohio St. 414, 62 N. E. 1036, 87 Am. St. Rep. 628; and of *Cleveland v. Construction Co.*, 67 Ohio St. 197, 65 N. E. 885, 59 L. R. A. 775, 93 Am. St. Rep. 670.

SPEAR, C. J., and DAVIS, SHAUCK, CREW, and SUMMERS, JJ., concur.

STATE v. CLEVELAND, ETC., RY. CO. (No. 8,294.) (Supreme Court of Ohio. June 14, 1904.) Error to Circuit Court, Franklin County. J. M. Sheets, Atty. Gen., and S. W. Bennett, for the State. J. T. Dye and W. O. Bayliss, for defendant in error.

PER CURIAM. Judgment affirmed.

DAVIS, SHAUCK, PRICE, and CREW, JJ., concur. SUMMERS, J., not sitting.

STATE v. GREEN. (No. 8,300.) (Supreme Court of Ohio. May 10, 1904.) Error to Circuit Court, Erie County. R. H. Williams, for plaintiff in error. Sherman Culp and H. L. Peeke, for defendant in error.

PER CURIAM. Judgment affirmed.

DAVIS, SHAUCK, PRICE, and SUMMERS, JJ., concur.

STATE v. PURTIL. (No. 8,101.) (Supreme Court of Ohio. April 28, 1904.) Exceptions from Court of Common Pleas, Lucas County. W. G. Ulery and J. S. Martin, for the State. Hamilton & Kirby, for defendant.

PER CURIAM. Exceptions sustained, on authority of *Huling v. State*, 17 Ohio St. 583.

SPEAR, C. J., and SHAUCK, PRICE, and CREW, JJ., concur.

STATE v. SICKING. (No. 8,060.) (Supreme Court of Ohio. March 22, 1904.) Exceptions from Court of Common Pleas, Hamilton County. O. J. Renner, for the State. E. M. Ballard, for defendant.

PER CURIAM. Exceptions sustained, on authority of *State v. Ehinger*, 67 Ohio St. 51, 65 N. E. 148, and *State v. Arata*, 69 Ohio St. 211, 68 N. E. 1046. The sum of \$25 is allowed as a fee to Edward M. Ballard, Esq., appointed to argue against the exceptions, to be paid from the treasury of Hamilton County.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, CREW, and SUMMERS, JJ., concur.

STATE v. SOUTHERN OHIO TRACTION CO. (No. 8,229.) (Supreme Court of Ohio. Feb. 16, 1904.) Error to Circuit Court, Montgomery County. J. M. Sheets, Atty. Gen., G.

H. Jones, Asst. Atty. Gen., S. W. Bennett, and Craighead & Craighead, for the State. McMahon & McMahon and W. C. Sheppard, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and SHAUCK, PRICE, and CREW, JJ., concur.

STATE ex rel. CRAPO v. PARKER. (No. 8,656.) (Supreme Court of Ohio. June 21, 1904.) Error to Circuit Court, Lucas County. C. F. Watts, H. A. Merrill, and W. H. A. Read, for plaintiff in error. W. G. Ulery and J. S. Martin, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, CREW, and SUMMERS, JJ., concur.

STATE ex rel. TAYLOR, Pros. Atty., v. ROCKWELL et al. (No. 8,781.) (Supreme Court of Ohio. March 15, 1904.) Error to Circuit Court, Ashtabula County. C. L. Taylor, Pros. Atty., Herbert Williams, and W. M. Ampt, for plaintiff in error. R. W. Calvin, C. L. Taylor, Ampt, Ireton, Collins & Schoenle, J. M. Sheets, and James M. & Walter F. Brown, for defendants in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, CREW, and SUMMERS, JJ., concur.

STATE ex rel. WILSON v. GIBSON et al. (No. 8,737.) (Supreme Court of Ohio. Feb. 16, 1904.) Error to Superior Court of Cincinnati. Ampt, Ireton, Collins & Schoenle, Co. Sols., for plaintiff in error. Frank F. Dinmore, for defendants in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, CREW, and SUMMERS, JJ., concur.

STEAGALL v. DANIELS. (No. 8,345.) (Supreme Court of Ohio. May 3, 1904.) Error to Circuit Court, Pike County. N. J. Dever, for plaintiff in error. Eylar & Douglas, for defendant in error.

PER CURIAM. Judgment affirmed.

DAVIS, PRICE, and SUMMERS, JJ., concur.

TEASEL et al. v. WEST HURON SPORTING CLUB. (No. 8,409.) (Supreme Court of Ohio. June 7, 1904.) Error to Circuit Court, Erie County. J. F. McCrystal and G. A. True, for plaintiffs in error. King & Guerin and M. Kelly, for defendant in error.

PER CURIAM. Judgment affirmed.

DAVIS, PRICE, and CREW, JJ., concur.

THOMAS v. MCCLURE & SMYSER et al. (No. 8,054.) (Supreme Court of Ohio. March 22, 1904.) Error to Circuit Court, Wayne County. O. W. Aldrich, John Moore, and A. J. Thomas, for plaintiff in error. McClure & Smyser, for defendants in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, CREW, and SUMMERS, JJ., concur.

TOLEDO RY. & TERMINAL CO. v. HAYES et al. (No. 8,064.) (Supreme Court of Ohio. Feb. 23, 1904.) Error to Circuit Court, Wood County. King & Tracy, Baldwin & Harring-

ton, and J. O. Troup, for plaintiff in error. B. A. Hayes, for defendants in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and CREW and SUMMERS, JJ., concur.

TRAVELERS' INS. CO. OF HARTFORD, CONN., v. BRIGHT. (No. 8,360.) (Supreme Court of Ohio. May 24, 1904.) Error to Circuit Court, Lucas County. Doyle & Lewis and J. W. Schaufelberger, for plaintiff in error. A. L. Smith, D. L. Beall, and C. E. Longwell, for defendant in error.

PER CURIAM. Judgment affirmed.

DAVIS, SHAUCK, PRICE, CREW, and SUMMERS, JJ., concur. SPEAR, C. J., not sitting.

TRUSTEES OF WILLIAMSBURG TP. v. STATE ex rel. MURPHY. (No. 8,567.) (Supreme Court of Ohio. June 7, 1904.) Error to Circuit Court, Clermont County. J. S. Davidson and H. L. Britton, for plaintiff in error. G. W. Hulick, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, CREW, and SUMMERS, JJ., concur.

UNCAPHER et al. v. UNCAPHER et al. (No. 8,407.) (Supreme Court of Ohio. June 21, 1904.) Error to Circuit Court, Marion County. J. F. McNeal & Sons, for plaintiffs in error. Scofield, Durfee & Scofield and Crisinger & Guthery, for defendants in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, and SUMMERS, JJ., concur.

VAN DE BOE, HAGER & CO. et al. v. KUNDTZ. (No. 8,333.) (Supreme Court of Ohio. May 3, 1904.) Error to Circuit Court, Cuyahoga County. Smith & Taft, for plaintiffs in error. H. G. Schaibly, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and SHAUCK and CREW, JJ., concur.

VILLAGE OF DOYLESTOWN et al. v. CAMERON et al. (No. 8,512.) (Supreme Court of Ohio. April 19, 1904.) Error to Circuit Court, Wayne County. F. Taggart, J. B. Meech, and Booth, Keating & Peters, for plaintiffs in error. M. L. Smyser, for defendants in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and SHAUCK and SUMMERS, JJ., concur.

VILLAGE OF HURON v. BARTZEN. (No. 8,120.) (Supreme Court of Ohio. April 5, 1904.) Error to Circuit Court, Erie County. J. F. McCrystal and John Ray, for plaintiff in error. Kelly & Merrill and L. H. Goodwin, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, CREW, and SUMMERS, JJ., concur.

VILLAGE OF NORWOOD et al. v. BUNDY. (No. 8,424.) (Supreme Court of Ohio. June 30, 1904.) Error to Circuit Court, Hamilton County. Wm. R. Collins and Oliver O. Bailey, City

Sol., for plaintiff in error. Clifford Woods and David Davis, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and PRICE and CREW, JJ., concur.

VILLAGE OF NORWOOD et al. v. FRIDMAN. (No. 8,331.) (Supreme Court of Ohio. March 1, 1904.) Error to Circuit Court, Hamilton County. W. R. Collins and Ampt, Ireton & Collins, for plaintiffs in error. Dempsey & Fridman, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, CREW, and SUMMERS, JJ., concur.

WADE v. STATE. (No. 8,721.) (Supreme Court of Ohio. April 5, 1904.) Error to Circuit Court, Lucas County. Whitlock & Milroy, for plaintiff in error. W. G. Ulery and J. S. Martin, for the State.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and SHAUCK and PRICE, JJ., concur.

WADE v. STATE. (No. 8,724.) (Supreme Court of Ohio. April 5, 1904.) Error to Circuit Court, Lucas County. Whitlock & Milroy, for plaintiff in error. W. G. Ulery and J. S. Martin, for the State.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and SHAUCK and PRICE, JJ., concur.

WADSWORTH v. CLEVELAND ELECTRIC RY. CO. (No. 8,537.) (Supreme Court of Ohio. March 1, 1904.) Error to Circuit Court, Cuyahoga County. W. H. Boyd, J. W. Taylor, and T. H. Garry, for plaintiff in error. Squire, Sanders & Dempsey, for defendant in error.

PER CURIAM. Judgment affirmed.

DAVIS, SHAUCK, PRICE, CREW, and SUMMERS, JJ., concur.

WALKER v. PABST BREWING CO. (No. 8,350.) (Supreme Court of Ohio. May 17, 1904.) Error to Circuit Court, Hamilton County. E. N. & B. D. Huggins, for plaintiff in error. Cohen & Mack, for defendant in error.

PER CURIAM. Judgment affirmed.

DAVIS, SHAUCK, PRICE, CREW, and SUMMERS, JJ., concur.

WATKINS v. KITTREDGE. (No. 8,401.) (Supreme Court of Ohio. June 21, 1904.) Error to Circuit Court, Hamilton County. W. J. Davidson, for plaintiff in error. D. V. Sutphin, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, and SUMMERS, JJ., concur.

WERNER v. CITY OF CINCINNATI. (No. 8,117.) (Supreme Court of Ohio. April 5, 1904.) Error to Circuit Court, Hamilton County. Galvin & Bauer, for plaintiff in error. C. J. Hunt and J. V. Campbell, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, CREW, and SUMMERS, JJ., concur.

WHEELING & L. E. R. CO. v. SUHRWIAR. (No. 8,509.) (Supreme Court of Ohio. March 1, 1904.) Error to Circuit Court, Lucas County. Squire, Sanders & Dempsey and C. A. Seiders, for plaintiff in error. Seney & Johnson, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, CREW, and SUMMERS, JJ., concur.

WHISTLER v. COWAN et al. (No. 8,412.) (Supreme Court of Ohio. June 30, 1904.) Error to Circuit Court, Richland County. Douglas & Mengert and Vivan Abernethy, for plaintiff in error. Cummings, McBride & Wolfe, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, and SUMMERS, JJ., concur.

WILLIAMS et al. v. JONES et al. (No. 8,200.) (Supreme Court of Ohio. April 5, 1904.) Error to Circuit Court, Jackson County. E. C. Powell and L. T. Williams, for plaintiffs in error. S. E. White and J. M. McGillivray, for defendants in error.

PER CURIAM. Judgment reversed, and judgment for plaintiff in error.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, CREW, and SUMMERS, JJ., concur.

WOODROW v. BARTLES & CO. (No. 8,363.) (Supreme Court of Ohio. April 12, 1904.) Error to Circuit Court, Jackson County. McGhee & Willis and Hogan, McFarland & Sparks, for plaintiff in error. R. H. Jones, J. M. McGillivray, and R. L. Grimes, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, PRICE and CREW, JJ., concur.

WULFCKOETTER v. KOHNKEN. (No. 8,398.) (Supreme Court of Ohio. June 7, 1904.) Error to Circuit Court, Hamilton Coun-

ty. O. W. Kuhn, for defendant in error.

PER CURIAM. Judgment vacated and cause remanded. Grounds stated in journal entry.

SPEAR, C. J., and DAVIS, PRICE, and CREW, JJ., concur.

YOUNG v. SPRINGFIELD PUB. CO. (No. 8,327.) (Supreme Court of Ohio. May 8, 1904.) Error to Circuit Court, Clark County. D. F. Reineohl, for plaintiff in error. Hagan & Kunkle and Bowman & Bowman, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and SHAUCK and CREW, JJ., concur.

YOUNG et al. v. VAN TUYL. (No. 8,018.) (Supreme Court of Ohio. March 8, 1904.) Error to Circuit Court, Lucas County. Doyle & Lewis and B. F. Brough, for plaintiffs in error. C. E. Longwell, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, PRICE, and SUMMERS, JJ., concur.

ZANESVILLE COAL CO. v. SOWERS. (No. 8,084.) (Supreme Court of Ohio. March 22, 1904.) Error to Circuit Court, Perry County. Donahue & Spencer and T. D. Price, for plaintiff in error. J. T. Pyle, H. D. Cochran, and L. A. Tussing, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and DAVIS, SHAUCK, PRICE, CREW, and SUMMERS, JJ., concur.

ZARTMAN & WILLIS et al. v. DOREMUS. (No. 8,377.) (Supreme Court of Ohio. April 5, 1904.) Error to Circuit Court, Franklin County. W. T. McClure, Crum, Raymond & Hedges, J. C. Nicholson, and Arnold, Morton & McCoy, for plaintiffs in error. L. L. Rankin and F. O. Rector, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEAR, C. J., and SHAUCK and CREW, JJ., concur.

